

## **NEBRASKA PROBATION REVOCATION - A PRIMER<sup>1</sup>** **(2007 Revision)**

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The law of probation revocation developed rapidly over the eighteen years preceding this article's 1989 appearance. While its development has slowed substantially since then, it continues to evolve. The overall field of Nebraska probation revocation remains essentially unchanged from the way it was in 1989 when this article first appeared. The case law has neither burgeoned dramatically nor altered the scenery in major ways, although, it has added a few refinements. But important procedural and substantive wrinkles have appeared through 2003 statutory amendments to the steps probation officers must take in responding to probationers' violations of the conditions of their probation sentences.<sup>2</sup> Less important changes appear in the county attorneys' and trial courts' responses.

Probation remains a sentence under which a person found guilty of a crime or adjudicated delinquent or in need of special supervision is released subject to court imposed conditions and subject to supervision.<sup>3</sup> A probation sentence remains a final order for purposes of appeal.<sup>4</sup> However, upon proof of a violation of probation, the sentencing court may revoke the "final" probation sentence and impose a new sentence within the statutory limits or may decline to revoke probation and modify the terms of the probation sentence as originally imposed.<sup>5</sup> Probation revocation proceedings occupy a procedural class of their own with elements of both criminal and civil procedure. Even though probation revocation cannot occur without a precedent criminal proceeding and even though a new sentencing proceeding following a probation revocation is considered a critical stage of the precedent criminal case, the probation revocation proceeding itself is not considered to be a stage of the precedent criminal case.

The basic rules governing probation revocations in Nebraska were developed by the Nebraska Legislature, the United States Supreme Court, the United States Eighth Circuit Court of Appeals, and the Nebraska Supreme Court, each body acting independently, as is the nature of our system, and sometimes adopting inconsistent approaches. The roles played by the United States Supreme Court and the Eighth Circuit Court of Appeals have faded substantially since 1989.<sup>6</sup> But the Nebraska Court of Appeals, which came into existence only in 1992, now plays a major role. In 1989 there was no other single reference work for discovering the esoteric rules relating to probation revocation in the state courts of Nebraska nor is there one in 2007. Hopefully, this article filled that void over the last eighteen years and will do so again for a reasonable length of time.

Probation revocation is a narrow, specialized type of proceeding. Defense counsel are frequently thrust into probation revocation defense by court appointment. The area does not generate a great deal of fee activity. The income incentive for most lawyers to devote the necessary time to finding and synthesizing the law of probation revocation is not high. Yet, most alleged probation violators face imprisonment on revocation. The stakes are high for them.

Actual probation violators are people who generally have put themselves on the fast track to correctional facilities. Once there, they have nothing to lose by filing liability claims against their former defense counsel.

Following the constitutional *Morrissey-Gagnon* rules and Nebraska statutes is not optional and the failure to do so can affect negatively both any revocation proceedings and later criminal proceedings as well, as *State v. Pawling*<sup>7</sup> demonstrates. The purpose of this article is to provide to the bench, bar and probation officers a probation revocation primer with the dual goals of improving the quality of probation revocation representation (on both sides), as well as the quality of judicial probation revocation procedures and decision making, and offering a convenient basic reference on the law of probation revocation in Nebraska courts. This revised article will discuss the statutory framework for probation revocation actions as it existed in 1989 and as it exists now, the pre-1971 Nebraska case law, the revolution in probation revocation law resulting from the United States Supreme Court's decision in *Gagnon v. Scarpelli*,<sup>8</sup> and the post-*Gagnon* decisions of the United States Supreme Court, the Eighth Circuit Court of Appeals, the Nebraska Supreme Court and the Nebraska Court of Appeals. This article examines developments relating to each component of the probation revocation process.

## STATUTORY FRAMEWORK

Few appellate cases have been decided since the 2003 amendments in revocation procedure and none of them have dealt with the changes in probation officers' responses to probationers' violations. As a result, the pre-2003 statutory framework remains an essential component of the overall picture. Overwhelmingly, the presently existing body of Nebraska case law relates to the pre-2003 statutory framework, but still provides critical appellate court guidance in applying the post-2003 statutory procedures. Thus, probation revocation actors, especially probation officers, must know and understand the way it was pre-2003 along with the way it is post-2003.

The legislature adopted the Nebraska Probation Administration Act<sup>9</sup> creating the state-wide probation system and the statutory framework for probation and probation revocation in 1971. The part of the Act dealing with probation and probation revocation was based on the ABA Standards Relating to Criminal Justice, Probation, adopted by the ABA in 1970.<sup>10</sup> Under the Act, probation became a sentence in itself.<sup>11</sup> There had been no prior Nebraska statutory rules relating to probation revocation. The Probation Act predated the decision in *Gagnon v. Scarpelli* by two years. The Nebraska Legislature was ahead of the U.S. Supreme Court, but it did not foresee the detailed rules the Court would adopt. By comparison with the present rules, the Act was not comprehensive even though it was state of the art in 1971.

Under the 1971 Act, probation officers were given considerable discretion when they become aware that one of their probationers had violated a condition of probation. If a probation officer had reasonable cause<sup>12</sup> to believe a probationer had violated or was about to violate a condition of probation and that the probationer would neither attempt to flee the jurisdiction nor place lives or property in danger, the probation officer was required to file a violation report with

the sentencing court with a copy to the county attorney of the county in which probation was imposed. The court then, on the basis of the report or on such additional investigation as the court deemed necessary, (1) suspended any further proceedings, (2) instructed the probation officer to handle the violation informally without instituting formal revocation proceedings, or, (3) referred the violation to the county attorney for appropriate action.<sup>13</sup>

If a probation officer had reasonable cause to believe a probationer had violated or was about to violate a probation condition and that the probationer would attempt to flee the jurisdiction or would endanger lives or property, then the probation officer was required to arrest the probationer without a warrant.<sup>14</sup> Immediately after an arrest and detention of a probationer, the probation officer was required to notify the county attorney of the proper county and submit a written report of the reason for the arrest. The county attorney then had discretion to either order the probationer's release or to file with the sentencing court either a motion or information to revoke probation.<sup>15</sup>

The legislature amended the Act in 2003 in a manner that enhanced the ability of probation officers to deal with offender non-compliance without court involvement and simultaneously increasing yet restricting within objective limits probation officers' supervisory discretion. The 2003 amendments directly altered the approach to responses to probationers' violations of probation. A classification of types of probation violations now determines the probation officers' permissible or required response range. We now have a class of probation violations denominated non-criminal violations and a class denominated substance abuse violations.

The class of non-criminal violations includes those probationer's activities or behaviors which create the opportunity for re-offending or diminish the effectiveness of probation supervision resulting in a violation of an original condition of probation, and specifically include moving traffic violations; failure to report to his or her probation officer; leaving the jurisdiction of the court or leaving the state without the permission of the court or his or her probation officer; failure to work regularly or attend training or school; failure to notify his or her probation officer of changes of address or employment; frequenting places where controlled substances are illegally sold, used, distributed, or administered; failure to perform community service as directed; and, failure to pay fines, court costs, restitution, or any fees imposed.<sup>16</sup>

The absence of a definition of moving traffic violations as meant in § 29-2266(1)(b)(i) leaves a gaping potential loophole for arguments. Is operating a motor vehicle without proof of insurance or financial responsibility only a moving traffic violation, or, is it a Class II misdemeanor? Is a DUI only a moving traffic violation, or, is it anywhere from a Class W misdemeanor to a felony? What about operating a motor vehicle in an effort to avoid arrest, either a Class I misdemeanor or a felony? Then of course, there's motor vehicle manslaughter? A Lexis search for "moving+traffic+violation" produced only three hits: the refusal to submit to preliminary breath test statute,<sup>17</sup> the refusal to submit to chemical test statute,<sup>18</sup> and § 29-2266, none of which define the term, nor, apparently, does any other Nebraska statute. The statutes do define traffic infraction as the violation of any provision of the Nebraska Rules of the Road or of

any law, ordinance, order, rule, or regulation regulating traffic which is not otherwise declared to be a misdemeanor or a felony.<sup>19</sup> Thus, we have yet another legislative invitation to exercise interstitial judicial law making lying before us.

The class, substance abuse violation, describes those probationer's activities or behaviors associated with the use of chemical substances or related treatment services resulting in a violation of an original condition of probation and specifically includes a positive breath test for the consumption of alcohol, if the offender is required to refrain from alcohol consumption; a positive urinalysis for the illegal use of drugs; failure to report for alcohol testing or drug testing; and, failure to appear for or complete substance abuse or mental health treatment evaluations or inpatient or outpatient treatment.

A probation officer who develops reasonable cause to believe that a probationer has committed or is about to commit a substance abuse violation or noncriminal violation while on probation, but that the probationer will not attempt to leave the jurisdiction and will not place lives or property in danger, has a range of two alternative responses. Under § 29-2266 (2)(a), the probation officer may impose one or more administrative sanctions with the approval of his or her chief probation officer or such chief's designee.<sup>20</sup> If the probation officer and superior decide to impose administrative sanctions, then, the statute provides the probationer shall acknowledge in writing the nature of the violation and agree upon the administrative sanction. But, the probationer has the right to decline to acknowledge the violation; and if he or she declines to acknowledge the violation, then, the probation officer shall pursue the second alternative:<sup>21</sup> submit a written report to the sentencing court, with a copy to the county attorney of the county where probation was imposed, outlining the nature of the probation violation and request that formal revocation proceedings be instituted against the probationer.<sup>22</sup> The report filed with the sentencing court no longer requires that the court decide whether action of some sort should be taken; it's only an informational filing now. Under either alternative, the probation officer must submit a copy of the report to the county attorney of the county where probation was imposed.<sup>23</sup>

Under § 29-2266(1)(a), the administrative sanctions a probation officer who develops reasonable cause to believe that a probationer has committed or is about to commit a substance abuse violation or noncriminal violation while on probation, but that the probationer will not attempt to leave the jurisdiction and will not place lives or property in danger, means additional probation requirements imposed upon a probationer by his or her probation officer, with the full knowledge and consent of the probationer, designed to hold the probationer accountable for substance abuse or noncriminal violations of conditions of probation. Those additional requirements may include: counseling or reprimand by the probation officer; increased supervision contact requirements; increased substance abuse testing; referral for substance abuse or mental health evaluation or other specialized assessment, counseling, or treatment; imposition of a designated curfew for a period not to exceed thirty days; community service for a specified number of hours under the community service statutes;<sup>24</sup> travel restrictions to stay within his or her county of residence or employment unless otherwise permitted by the supervising probation officer; and, restructuring court-imposed financial obligations to mitigate their effect on the probationer.

While this list of rather interesting delegated judicial power to a non-judicial state officer has not been tested in the courts, at least, not at the appellate levels, the supreme court's approval of probation system policies is required. A good set of observations support the delegation of administrative sanction powers to probation officers. Just as with the exercise of parental powers, the nearly immediate, or at least very prompt, imposition of sanctions for minor unacceptable behaviors possesses value all by itself. The delays inherent in judicial imposition of sanctions for probationers' minor misbehaviors substantially reduce the value of the sanctions. Timeliness holds the key. Further, with this increase in probation officers' supervisory power probationers can no longer reduce the value of their supervision as easily. Some of the value of supervision inheres in the ability to impose swift and certain consequences for minor misbehaviors. Running every violation through the court system for judicial imposition of sanctions loses the opportunity for swift and effective reinforcement of law-abiding behavior and effective reinforcement of the courts' goal of behavior modification through probation sentencing. As long as probation officers remain part of the judicial system itself, probation officers act as an arm of the court at the point in the probation process where it matters the most for many probation violators, a place where judges cannot go.

The 2003 legislation also gave the state probation system administrator the authority to adopt rules for the implementation of the new classification-based violation response approach.<sup>25</sup> The administrator has done so.<sup>26</sup> The administrator's policy on offender non-compliance responses adopts an objective, evidence-based matrix system probation officers must use in determining the level of response to apply in any given case. In that system, the severity level assigned to any given type of non-compliance factors into the eventual response plan, making the definition of moving traffic violations discussed above that much more important to appropriate application of the new approach to offender non-compliance. The administrator assigned the commission of traffic infractions, not moving traffic violations, a low level of severity position. The administrator's choice of traffic infractions fits into the existing statutory scheme so as to exclude misdemeanor and felony offenses from treatment as low severity offender non-compliance. Perhaps the administrator has saved us from the legislature in this instance.

A probation officer who develops reasonable cause to believe that a probationer has violated or is about to violate a condition of probation other than a substance abuse violation or noncriminal violation and that the probationer will not attempt to leave the jurisdiction and will not place lives or property in danger shall submit a written report to the sentencing court, with a copy to the county attorney of the county where probation was imposed, outlining the nature of the probation violation.<sup>27</sup> For emphasis, I repeat, the report filed with the sentencing court no longer requires that the court decide whether action of some sort should be taken; it's only an informational filing now.

A probation officer who develops reasonable cause to believe that a probationer has violated or is about to violate a condition of his or her probation and that the probationer will attempt to leave the jurisdiction or will place lives or property in danger, shall arrest the probationer without a warrant and may call on any peace officer for assistance. Whenever a probationer is arrested, with or without a warrant, he or she shall be detained in a jail or other

detention facility.<sup>28</sup> Immediately after arrest and detention pursuant to § 29-2266 (4), the probation officer must notify the county attorney of the county where probation was imposed and submit a written report of the reason for such arrest and of any violation of probation. The decision making then falls to the county attorney, who, after prompt consideration of such a written report, must either, order the probationer's release from confinement, or, file with the sentencing court a motion or information to revoke the probation.<sup>29</sup>

Initially, when these 2003 provisions took effect, at least some county attorneys worried about the propriety of a county attorney deciding whether an alleged probation violator should be released or should become the subject of revocation proceedings. Apparently, they didn't realize the Act has contained those powers since 1971. But, even though no court at the appellate levels has spoken yet on the propriety of that delegation of power to county attorneys, one reasonably can posit those decisions resemble the county attorneys' initial charging decisions sufficiently as to pose no problem. Further, the change in the locus of that decision making authority also removed the courts from their earlier sticky spot right in the middle of prosecutorial decision making.

The 2003 amendments also reposed an overriding discretion in county attorneys. Recall, even when dealing with non-criminal and substance abuse violations handled by the administrative sanction approach, the probation officer must report the violation to the appropriate county attorney.<sup>30</sup> Neb. Rev. Stat. § 29-2266(6) (Lexis 2007), provides that whenever a county attorney receives a report from a probation officer that a probationer has violated a condition of probation, the county attorney may file a motion or information to revoke probation.

Assume a county attorney files a motion to revoke. There was, and still is, except in juvenile cases, no statutory requirement that a preliminary hearing be accorded to persons accused of probation violations. However, the Act did and does require a prompt consideration of the alleged violations by the sentencing court whenever a county attorney files a motion or information to revoke.<sup>31</sup> The sentencing court may not revoke probation nor increase the requirements imposed on the probationer unless a violation is proved by clear and convincing evidence at a hearing preceded by proper notice.<sup>32</sup> Prior to the hearing the accused probationer is entitled to receive a copy of the motion or information or written notice of the grounds on which the motion or information is based prior to the hearing. At the hearing, the adult probationer has the statutory rights: to hear and controvert the adverse evidence, to offer defense evidence, and to be represented by counsel.<sup>33</sup>

If the court finds a violation of probation has been committed, it has several dispositional options open to it. The court may revoke probation and impose a new sentence within the range permitted on the underlying conviction. If the court finds a violation has been committed, but believes revocation would be inappropriate, then the court may reprimand and warn the probationer or order intensified supervision and reporting or impose additional probation conditions or extend the term of the probation or any combination of these options.<sup>34</sup> If the court believes revocation is warranted, then, the court must impose a new sentence.

The Probation Act, even after the 2003 amendments, does not deal with a number of issues, some of which have been resolved by case law decided after the Act was adopted or by later statutes and some of which can be resolved only by analogizing from law governing other matters because the appellate courts have not had the opportunity to teach us what to do. The Act does not address preliminary hearings, rights advisories, confrontation and cross-examination, appointed counsel for indigents, appeals, or applicability of the rules of evidence, but all of these areas have been clarified by subsequent case law, or, with respect to evidence, by the Nebraska Evidence Rules<sup>35</sup> and case law. At least two other areas not addressed in the Act still have not been clarified by later judicial or legislative action: probation violation arrest warrants and the granting or denial of bail to alleged probation violators in custody.

Warrantless arrests of alleged probation violators by their probation officers have not been the normal practice with lower risk traditional supervision probationers nor in less populous rural areas. However, with the increased use of probation sentencing of higher risk probationers resulting from the development of intensive supervision probation and community corrections, warrantless arrests of alleged violators have been increasing. The same phenomenon has become true in more populous areas.<sup>36</sup>

Usually, in the lower risk traditional supervision arena, probation officers file informational violation reports with the sentencing courts, county attorneys file motions to revoke and the courts set appearance dates on the motions to revoke and someone, prosecutors or courts, send notices or orders to appear to the alleged violators. Most alleged violators appear voluntarily in response to the notice to appear. But some fail to appear after notice. Some do not receive the notices or orders to appear. Some have absconded (which is usually one of the bases for the violation reports in their cases) prior to the issuance of the notice or order to appear. Some flee after notice. Obtaining the appearance of uncooperative alleged probation violators poses at least a conceptual problem. The usual device is the issuance of arrest warrants. But, upon what authority are arrest warrants issued in such cases?

The only reference in the Act to arrest with a warrant appears in the statutory provision: "Whenever a probationer is arrested, with or without a warrant, [the arrested probationer] shall be detained in a jail or other detention facility."<sup>37</sup> The statute implies that probation violation arrest warrants may be issued, but nowhere in the Probation Administration Act does a clear provision authorizing arrest warrants or defining the bases for their issuance appear. The statutes specifically dealing with the issuance of arrest warrants do not mention warrants for alleged probation violations either.<sup>38</sup> No direct statutory provision exists authorizing the issuance of probation violation arrest warrants by courts. The State Parole Administrator may issue arrest warrants for alleged parole or probation violators when instructed to do so by the Parole Board or a district judge.<sup>39</sup> However, a number of points can be argued to legitimate the issuance of probation violation arrest warrants.

Probation officers have the authority to arrest without warrant any probationer the officer has reasonable cause to believe has violated or is about to violate probation and will attempt to

flee or will endanger lives or property. Probation officers must have arrest powers to assure the public that its interest in community safety is pursued after judgment as well as before judgment. As long as probation officers remain members of the judicial branch, they appropriately can be seen as state officers acting as an arm of the courts in ensuring public safety by implementing the decisions of the courts. If a non-law enforcement, state officer, that is, a probation officer, has warrantless arrest authority, a sentencing court logically should have authority to issue arrest warrants on at least the same grounds. This point is buttressed by the indirect statutory reference to warrants noted earlier and is buttressed even further in the probation system policies manual.

As part of the response to offender non-compliance rules, the administrator adopted a set of procedures relating to probation officer warrantless arrests.<sup>40</sup> The procedures obviously were designed to comply with the United States Supreme Court's post-warrantless-arrest-prompt-probable-cause-determination decision, *County of Riverside, California v. McLaughlin*,<sup>41</sup> which, strictly speaking applied only to new offense arrests, not to probation violation arrests. The administrator probably acted in this area out of an abundance of caution. The step between the two arrest contexts seems fairly easy for a court to make. A warrantless arrest followed by continued detention remains a warrantless arrest followed by continued detention regardless of whether it was for a new offense or for a probation violation.

*Riverside*<sup>42</sup> dealt with warrantless arrests followed by detentions of varying lengths before the arrestees were brought before examining magistrates for probable cause determinations. The key here lies in the warrantless arrests. Warrantless arrests necessarily occur without preceding judicial determinations of probable cause.

In *Riverside*, the United States Supreme Court imposed a presumptively permissible 48 hour time limit for the prosecution to seek and obtain judicial determinations of the existence of probable cause to justify the warrantless arrests and ensuing detentions, with room to seek approval of extraordinary causes for delay beyond the 48 hour presumptively permissible period (weekends and court holidays not included as acceptable extraordinary causes), with the post-48 hour burden of proof placed upon the prosecution. *Riverside* imposed no 48 hour time limit from warrantless felony arrests to arraignments, despite some language to that effect in various writings.<sup>43</sup>

*Riverside* did not even impose a 48 hour time limit from warrantless arrests to any kind of in-court hearings, despite some language to that effect in various other writings. *Riverside* simply defined "prompt" when applied to post-arrest judicial determinations of probable cause to justify warrantless arrests and ensuing detentions as required by *Riverside*'s antecedent, *Gerstein v. Pugh*.

The core problem resolved by *Riverside* and *Gerstein* lay in the practice of arresting people without pre-arrest judicial determinations of probable cause followed by the failure to make post-arrest determinations of probable cause "promptly" after the arrests. The pre-arrest judicial determinations of probable cause made before issuance of arrest warrants removes that core problem before it ever arises. The Court sought to provide a prompt post-arrest equivalent

of a pre-arrest determination of probable cause, nothing more.

The Ninth Circuit, geographically the source of *Riverside*, has provided some clarification in this area. In *United States v. Van Poyck*,<sup>44</sup> a federal bank robbery case in which the defendant was arrested on a Friday afternoon by state police on a federal arrest warrant and held over the weekend before making an initial appearance on the following Monday morning in the federal magistrate's court, Van Poyck made incriminating statements on the way to the appearance and then sought suppression of those statements claiming the weekend was an unreasonable delay.

The court of appeals provided this guidance:

Other Circuits have explicitly found weekend delays reasonable when due to the unavailability of a magistrate. See *United States v. Mendoza*, 473 F.2d 697, 702 (5th Cir.1973) (finding delay between Saturday morning arrest and Monday morning arraignment reasonable); *Gregory v. United States*, 364 F.2d 210, 212 (10th Cir.), cert. denied, 385 U.S. 962, 87 S.Ct. 405, 17 L.Ed.2d 307 (1966) (finding delay between Friday night arrest and Monday morning arraignment reasonable); *United States v. Collins*, 349 F.2d 296, 298 (6th Cir.1965) (same).

The result reached in all these cases is dictated by *the complex procedures needed to arraign a defendant. An arraignment requires court personnel to randomly select a judge, requires pretrial services to process the defendant, and often requires an interpreter; this is simply not a task that can be performed in a magistrate's living room.* [FN6] (italics mine). We therefore now explicitly hold what has been implicitly understood all along: An overnight or weekend delay in arraignment due to the unavailability of a magistrate does not by itself render the delay unreasonable. . . .

FN6. This distinguishes this situation from the determination of probable cause which must be made within 48 hours (including weekends) of a warrantless arrest under *County of Riverside v. McLaughlin*, 500 U.S. 44, 56, 111 S.Ct. 1661, 1669, 114 L.Ed.2d 49 (1991). *Such probable cause determinations can be made solely on the basis of written affidavits and do not require the services of any personnel beyond the judicial officer.* (italics mine). Moreover, the concerns that animated the [*Riverside*] decision--*the special harm of detaining a person without a prior determination of whether detention is supported by probable cause--are not implicated in this case because Van Poyck was arrested pursuant to a warrant.* (italics mine).<sup>45</sup>

Developing procedures to satisfy the *Gerstein-Riverside* doctrines in the probation violation context provided a way to avoid problems before they arise.

Returning to the problem of a source for the issuance of probation violation arrest warrants, if an alleged probation violator with notice fails to appear for revocation proceedings, the violator potentially has also committed a criminal contempt by the failure to appear.<sup>46</sup> Criminal contempt is punishable by fine, imprisonment or both.<sup>47</sup> Criminal contempt, therefore, constitutes an offense as defined by the Nebraska Criminal Code.<sup>48</sup> County and district judges and clerk magistrates have the power to issue warrants for the arrest of any person charged with a criminal offense<sup>49</sup> and have a duty to issue a warrant upon the filing of a complaint “charging the commission of an offense against the laws of this state” supported by a showing of probable cause to believe the offense charged has been committed.<sup>50</sup> This point does not apply with equal force to alleged probation violators without notice or with respect to whom notice or the lack of notice cannot be shown.

However, uncooperative alleged probation violators, convicts by definition, cannot be allowed to thwart the orderly administration of justice by their failure to appear for revocation proceedings. Thus, authority for the issuance of probation violation warrants (especially if based on contempt) can be supported by an interesting mixture of inherent authority,<sup>51</sup> extrapolation from the indirect statutory reference to warrants, plus the warrantless authority of probation officers, creative use of the definition of “offense” under the criminal code, and the probation system’s policies manual. Obviously, a direct, clear legislative grant of authority to issue probation violation arrest warrants would be desirable.<sup>52</sup>

The authority to grant bail to arrested alleged probation violators has even less support than the authority to issue warrants. The constitutional provisions relating to bail do not apply to alleged probation violations.<sup>53</sup> There is no statutory authority for release on bail. The bail statutes deal with prejudgment release<sup>54</sup> and release on bail pending appeal.<sup>55</sup> The Nebraska Supreme Court and Nebraska Court of Appeals have not been presented with a case raising the issue of a trial court's authority to release an alleged probation violator on bail pending revocation proceedings. However, the supreme court has decided a case dealing with release on bail pending appeal in a *habeas corpus* action challenging extradition.<sup>56</sup> In the *Jensen* case, the court said:

Modern notions of due process and fundamental fairness demand that a citizen should not arbitrarily be denied bail solely because there is no statute specifically authorizing the granting of bail... The inherent power of a court may be exercised as to bail although it is not specifically vested by statute.<sup>57</sup>

Thus, by analogy, alleged probation violators can be released on bail based upon the inherent power of the court.<sup>58</sup>

The 1971 Act was adopted before the United States Supreme Court revamped probation revocation law at the constitutional level. The Nebraska Legislature's attempt to regulate the

field by adopting the Act represented the state of the art of the day.<sup>59</sup> The Nebraska Legislature still has not amended the Act to reflect later judicial developments for the most part,<sup>60</sup> but it need not, since constitutional rules apply no matter what the state's statutes might say. The Nebraska Legislature's power in the area of probation revocation has been sharply curtailed by the United States Supreme Court's adoption of a constitutional blueprint for probation revocation proceedings. The Court effectively has preempted the field.

### THE GAGNON REVOLUTION<sup>61</sup>

In 1932, the United States Supreme Court adopted the rule that probation revocation proceedings under the federal probation statutes only needed to be conducted fairly. Notice of specific charges of probation violations was not required. Evidentiary hearings were not necessary. Summary revocation hearings were sufficient.<sup>62</sup> However, by 1973, the Court's concepts of fairness in all procedural matters had gone through an almost amazing metamorphosis, the nature of which is well known to constitutional scholars. It should have been predictable that the Court would transport its general fundamental fairness due process analysis into the area of probation revocation if someone asked it to do so. The Court did just that in *Gagnon v. Scarpelli*.<sup>63</sup> In order to appreciate fully the effect of *Gagnon* in Nebraska, a quick look at the state of pre-*Gagnon*, judicially developed Nebraska probation revocation rules is useful. In addition, the Court took some clear, pre-*Gagnon* steps in the direction of revolutionizing the law of probation revocation that merit brief examination.

The Nebraska Supreme Court had developed a set of procedural rules relating to probation revocation long before the *Gagnon* decision was announced. The granting and the revocation of probation were matters left to the discretion of the trial courts. The procedures to follow were also left to the discretion of the trial courts.<sup>64</sup> As late as 1967, the Nebraska Supreme Court took the position:

It is sufficient if it appears that probationer was afforded a fair and impartial hearing, that reasonable grounds for revocation of probation existed, and that there was not an abuse of the discretionary powers vested in the court.<sup>65</sup>

Further, an indigent Nebraska probationer was not entitled to appointed counsel for revocation proceedings. The right of a probationer to even an informal hearing was considered a matter of statutory right only. The court saw no constitutional right to revocation hearings.<sup>66</sup> The court accepted the characterization of probation as an act of grace controlled by the old right/privilege distinction.<sup>67</sup> From that viewpoint, the probationer's interest in continued conditional liberty was irrelevant.

The Nebraska Supreme Court announced its decision in *State v. Holiday*<sup>68</sup> on November 3, 1967. Ten days later, the United States Supreme Court announced its decision in *Mempa v. Rhay* and *Walkling v. Washington State Board of Prison Terms and Paroles*.<sup>69</sup> *Mempa* and *Walkling* were each convicted of felonies and placed on probation with sentencing deferred. Each was subjected to later revocation proceedings and sentenced. *Mempa* had been represented

by appointed counsel when his initial guilty plea was accepted. Walkling had retained counsel when he tendered his guilty plea. However, at the revocation and sentencing, Mempa was not represented. The trial court did not inquire of Mempa about whether he desired appointed counsel nor about the attorney appointed for him earlier. Walkling appeared at the revocation without his attorney, whom he claimed to have retained for the revocation, but who did not appear. The trial court went ahead anyway, revoked Walkling's probation and sentenced him. The record did not show whether Walkling requested appointed counsel, but had he requested appointed counsel, the request would have been denied. The Court noted its earlier decisions stood for the proposition that counsel must be appointed for indigents at every stage of criminal proceedings at which substantial rights of the criminally accused may be affected. Sentencing is such a stage. The Court then held that whether the proceedings involved were called probation revocations or sentencings, counsel must be afforded.<sup>70</sup>

Back in Nebraska, counsel in the *Holiday* case moved for rehearing. The Nebraska Supreme Court issued its supplemental opinion on December 29, 1967.<sup>71</sup> The court withdrew the part of its *Holiday I* decision that was in conflict with *Mempa* and held that *Holiday's* request for appointed counsel for his revocation proceeding should have been granted. In effect, the court held indigent alleged probation violators are entitled to appointed counsel for revocation proceedings. The court did not limit its holding to cases in which sentence had not been pronounced before the imposition of probation. Of course, at that time, Nebraska courts did not impose sentence before placing defendants on probation.<sup>72</sup> The *Holiday II* holding, therefore, is limited to that circumstance. But, logically, *Holiday II* should apply under the present system also. A revocation of probation under the present system should result in the imposition of a new sentence as a matter of course.

Questions relating to the sufficiency of the pleadings also were resolved before the federal intrusion into state probation revocation proceedings. With respect to the precision of the charging document used to initiate a probation revocation proceeding, the court held that technical formality and precision of the charge are not prerequisites to "judicial investigation of whether . . . defendant has observed the conditions of his probation."<sup>73</sup> However, the probationer is entitled to a statement of the facts revealing a violation of probation.<sup>74</sup>

In *State v. Ward*,<sup>75</sup> the probationer claimed the charging document was insufficient to invoke the court's jurisdiction because the information did not show on its face the alleged violation occurred during the probation term. The court noted the information described the conduct constituting the alleged violation and held it was sufficient despite the technical deficiency. Further, in *Young v. State*,<sup>76</sup> the court held it was not error to fail to list the state's witnesses on the probation violation charging document.

The Nebraska Supreme Court also established the identity of the substantive issues involved in probation revocations before the revolution. In *Young*, the court identified the two questions presented at revocation proceedings.

First, --is there probative evidence 'showing a violation of probationary

conditions'? If not, then that disposes of the matter . . . If there is a finding of a violation of the probationary order, then the second question arises . . . shall probation be continued.<sup>77</sup>

It is interesting to note the court posited the second question as whether the probation shall be continued as opposed to the more negative question of whether probation shall be revoked. Whether the court meant anything should be inferred from its choice of language remains unknown and unknowable.

The definition of the ultimate issues presented in revocation proceedings establishes the nature of the evidence admissible at revocation hearings. That is, any evidence relevant to either ultimate issue should generally be admissible even if not relevant to both ultimate issues.<sup>78</sup> The statutory rules of evidence do not apply to probation revocation proceedings,<sup>79</sup> but there must be some limit to what courts must and can listen to in revocation hearings. Relevance is a reasonable limiting device and can be applied as a matter of inherent power. Of course, due process must be afforded at revocation hearings. To that end, the rules of evidence can be used as a guide in determining the type of evidence that satisfies due process requirements.<sup>80</sup>

The combination of the Probation Act of 1971 and the Nebraska case law already discussed forms the background for examining the revolutionary federal intrusion into state probation revocation procedures that came in 1973. As noted earlier, the *Mempa* decision was the first shot in the revolution. The Court did not jump directly from *Mempa* into probation revocation. It tackled state parole revocation procedure first. In *Morrissey v. Brewer*,<sup>81</sup> both the parolees involved were arrested and returned to the Iowa penitentiary at the request of their parole officers without a hearing before the re-commitments. If they were given hearings at all, the hearings were held at least a month after the arrests. In *Morrissey*, the Court held that the due process clause of the fourteenth amendment required at a minimum a system of hearings before revocation of parole. The Court found parolees have a constitutionally protectible interest in their continued conditional liberty. Likewise, the Court found the states have an interest in prompt processing of parole violation matters. The Court balanced the respective interests and arrived at the conclusion that informal proceedings would adequately protect the interests of all concerned parties.

Noting, but apparently not appreciating, the limits on its power to create procedural rules for state systems,<sup>82</sup> the Court adopted a detailed set of "minimum requirements of due process,"<sup>83</sup> including both a preliminary hearing and a formal revocation hearing. The hearings are to be held before independent hearing officers who, constitutionally, need not be judicial officers or lawyers.

With respect to the preliminary hearing . . . , the parolee should be given notice that the hearing will take place and that its purpose is to determine whether there is probable cause to believe he has committed a parole violation. The notice should state what parole violations have been alleged. At the hearing the parolee may appear and speak in his own behalf; he may bring letters, documents, or

individuals who can give relevant information to the hearing officer. On request of the parolee, [any] person who has given adverse information on which parole revocation is to be based is to be made available for questioning in his presence. However, if the hearing officer determines that an informant would be subjected to risk of harm if his identity were disclosed, he need not be subjected to confrontation and cross-examination.

The hearing officer shall have the duty of making a summary, or digest, of what occurs at the hearing in terms of the responses of the parolee and the substance of the documents or evidence given in support of parole revocation and of the parolee's position. Based on the information before him, the officer should determine whether there is probable cause to hold the parolee for . . . revocation.<sup>84</sup>

The Court did not indicate whether the preliminary hearing would be a minimum requirement in all cases nor whether it could be waived nor whether it was intended to be a requirement only when the accused parolee was taken into custody. However, the Court did indicate that, with respect to the final hearing, the hearing only needed to be accorded to parolees who wanted a final hearing.<sup>85</sup> Therefore, it is reasonable to conclude that a preliminary hearing can be waived. Whether an express waiver is required, or whether the failure to request a preliminary hearing operates as a waiver, remains undecided in the Court's decisions.

The purpose of the final hearing is to determine any contested factual issues and to consider "whether the facts as determined warrant revocation."<sup>86</sup> At the final hearing, accused parolees must be given an opportunity to be heard and to show, if possible, that they have not violated their paroles, or, if they have, that mitigating circumstances suggest the violations do not warrant revocation. Further, the final hearing must be offered within a reasonable time after an accused parolee is taken into custody. The Court said a lapse of two months "would not appear to be unreasonable."<sup>87</sup>

With respect to the final hearing, the minimum requirements of due process include:

(a) written notice of the claimed violations . . . (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.<sup>88</sup>

Despite the detailed statement of the minimum requirements, the Court emphasized its position that the final hearing should not be equated with a criminal trial. The procedure should be flexible enough to admit evidence including letters, affidavits, and other material that would be inadmissible in a criminal trial.<sup>89</sup> *Morrissey* revolutionized the law of parole revocation.

One year later, *Gagnon v. Scarpelli*<sup>90</sup> revolutionized the law of probation revocation. Scarpelli pleaded guilty to a charge of robbery and was sentenced to 15 years' imprisonment. However, execution of the sentence was suspended and Scarpelli was placed on probation. Two months later, in another state under interstate compact supervision, he was caught in the act of committing a burglary. The agency having jurisdiction over Scarpelli, the Wisconsin Department of Public Welfare, revoked Scarpelli's probation without a hearing and without counsel.<sup>91</sup> The Court characterized probation revocation as not a part of a criminal prosecution, but noted that it can result in a loss of liberty. As a result, due process is required in probation revocation proceedings. The Court adopted the *Morrissey* rules for probation revocation cases without even restating or rewording the rules to fit the different context.

In *Gagnon*, the Court also chose to take up the issue of whether due process requires the appointment of counsel for requesting indigents accused of probation violations. The constitutional right to counsel does not apply, because the proceeding is not part of the criminal prosecution. The Court declined to adopt a bright line rule for the appointment of counsel. Instead, the Court adopted a case by case rule.

Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation . . . or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present. In passing on a request . . . the responsible agency also should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself. In every case in which a request for counsel at a preliminary or final hearing is refused, the grounds for refusal should be stated succinctly in the record.<sup>92</sup>

*Gagnon* created an incongruous, although only academic, result with respect to the right to counsel. In cases in which a re-sentencing follows upon probation revocation, an indigent defendant could be denied appointed counsel at the revocation proceeding, but would be entitled under *Mempa*<sup>93</sup> to appointed counsel for the re-sentencing. The re-sentencing could not occur without the revocation. The revocation proceeding logically should be, but is not, considered a critical stage of the proceedings because of the fiction that probation revocation proceedings are not part of the underlying criminal case. The Nebraska Supreme Court may have resolved the incongruity in *Holiday II* for Nebraska revocations, if *Holiday II* is read expansively, as it should be.

Both *Morrissey* and *Gagnon* were appeals from revocations conducted by administrative agencies, not by courts. *Mempa* was an appeal from a revocation by a court. Strictly speaking, *Gagnon* should not apply in Nebraska. If held to apply, as it has been,<sup>94</sup> there is justification to support the proposition that *Gagnon* can be distinguished. It should also be remembered that

*Gagnon* sets the constitutional floor below which the states may not go. The states remain free to adopt higher independent standards. The Nebraska Supreme Court has adopted some higher independent standards which will be explored below.

The adoption of a new legal doctrine normally generates a new wave of further litigation exploring all facets of the new doctrine, creating refinements, clarifications, and further explication. The adoption of the *Morrissey-Gagnon* rules has been no exception to the normal course. The United States Supreme Court, Eighth Circuit Court of Appeals, Nebraska Supreme Court and the Nebraska Court of Appeals have all been called upon to develop the *Morrissey-Gagnon* doctrine and have done so. Those areas of the doctrine that have been developed further remain to be examined. The remainder of this article will be directed to that end. The doctrine will be broken into such components as have been developed further and examined separately.

## **THE PRELIMINARY HEARING**

### **Nature of the Hearing**

The label "preliminary hearing," as used in criminal procedure, describes a number of different types of hearings. There are: preliminary hearings required by *Gerstein v. Pugh*<sup>95</sup> dealing with pretrial detentions; preliminary hearings held to determine whether felony defendants should be held for trial; and, preliminary hearings in probation revocation proceedings, to list only three types of preliminary hearings. It is important for all participants to have a clear conceptual grasp of the type of preliminary hearing involved in probation revocations. A good way to attain conceptual clarity is to contrast the *Gerstein* preliminary hearing with the *Gagnon* preliminary hearing.

In *Gerstein*, the Court did just that. *Gerstein* dealt with the rights of persons arrested without warrants on informations filed by the prosecutor. The decision applied only to persons subjected to restraints on their liberty beyond the condition that they appear for trial.<sup>96</sup> The issue at a *Gerstein* hearing is whether there is probable cause for detaining the arrestee pending further proceedings. "This issue can be determined reliably without an adversary hearing. The standard is the same as that for arrest."<sup>97</sup> The hearing is to be non-adversary.<sup>98</sup> There is no right to appointed counsel at the hearing because it is not a critical stage of the case.<sup>99</sup>

In contrast, the *Gagnon* preliminary hearing is adversarial with a limited right to counsel, limited right to confrontation, and a right to present live testimony. Further, the *Gagnon* preliminary hearing, "more than the probable cause determination required by the Fourth Amendment, serves the purpose of gathering and preserving live testimony, since the final revocation hearing frequently is held at some distance from the place where the violation occurred."<sup>100</sup>

Thus, the United States Supreme Court requires more to deprive convicts of their conditional liberty than it requires to deprive presumptively innocent accused persons of their complete liberty in order to ease the process of discovery and perpetuation of testimony in an

indeterminate number of cases for an indeterminate number of convicts.<sup>101</sup> That result appears to be more than academically incongruous, even indefensible, but the Court apparently did not notice then and still has not noticed.

Nebraska preliminary hearings in revocation cases, at least those held in courts on the record with counsel, share more kinship with Nebraska felony preliminary hearings than they do with *Gerstein* preliminary hearings. As a result, Nebraska preliminary hearings in revocation cases supply the opportunity for defense counsel to develop an appropriate approach to the final hearing. Defense counsel may be able to expose weaknesses in the prosecution's case through effective cross-examination leading to a refusal to hold the accused probationer for final hearing. Counsel may be able to develop information for later impeachment use at the final hearing. Favorable testimony of witnesses who may fail to appear at the final hearing can be preserved (assuming such witnesses appear at the preliminary hearing). The essence of the prosecutor's case can be discovered. Mitigating information may be uncovered.<sup>102</sup> The opportunity to pursue these possibilities can make insisting on a preliminary hearing a worthwhile effort for the defense, especially if the alleged violation is not a new criminal conviction.

### **The Preliminary Hearing Requirement**

Federal practice and Nebraska practice differ on the question of when a preliminary hearing is required. The federal rule requires a preliminary hearing whenever a probationer is held in custody on a charge of probation violation.<sup>103</sup> The rule is based in part on the Eighth Circuit decision in *United States v. Strada*.<sup>104</sup> In *Strada*, the court held that preliminary hearings are only required in cases in which the probationers are taken into custody and deprived of their conditional freedom.<sup>105</sup> *Strada* was not taken into custody until after his revocation hearing. He appeared voluntarily.<sup>106</sup> Likewise, the federal rule does not require a preliminary hearing for accused probationers who appear in response to show cause orders, or who were in custody pursuant to a new charge, or who were in custody pursuant to conviction of a later charge, or who were arrested on the probation violation charge but obtained their release on bond or otherwise.<sup>107</sup> The federal rule is simple and clear. The Nebraska case law is neither simple nor entirely clear. The Probation Act remains silent.

A basic knowledge of the Nebraska Supreme Court's rules relating to felony preliminary hearings seems essential to understanding its decisions on the requirement of probation revocation preliminary hearings, as well as keeping the two types of hearings conceptually separate. The right to a preliminary hearing on felony charges is a statutory right.<sup>108</sup> An information charging a felony may not be filed in the district court until a preliminary hearing has been held or waived.<sup>109</sup> But, if a felony information is filed without a precedent preliminary hearing, the accused must object before tendering a plea to the general issue. In the absence of a timely objection to the failure to afford the accused a preliminary hearing, the objection is deemed waived.<sup>110</sup> The failure to conduct a preliminary hearing is not a jurisdictional defect.<sup>111</sup> A felony defendant who appears with counsel and goes to trial is deemed to have waived arraignment and to have pleaded not guilty by such conduct.<sup>112</sup> As a corollary of the rule that a preliminary hearing must be held or waived before the filing of a felony information, the rule is

that any prosecutor initiated amendment in the charges filed after preliminary hearing must not change the nature of the charges unless the accused is granted a new preliminary hearing. But no new preliminary hearing is required if the amended charge includes some of the elements of the original charge without the addition of any element irrelevant to the original charge.<sup>113</sup> Finally, even if the evidence presented at a felony preliminary hearing was not sufficient, the error is deemed cured if the evidence presented at trial sufficed to permit a finding of guilt beyond a reasonable doubt.<sup>114</sup> The Nebraska Supreme Court has transported some, but not all, of its felony preliminary hearing rules to the area of probation revocation preliminary hearings.

In *State v. Ferree*,<sup>115</sup> during the day after the probation revocation preliminary hearing was held, the trial court allowed the prosecution to amend its "complaint"<sup>116</sup> to allege new and different probation violations. Ferree appeared for the final hearing with counsel, apparently did not request a new preliminary hearing, apparently did not object to the newly alleged violations being heard, may or may not have denied the newly alleged violations, went to final hearing and was found to have violated his probation as alleged. On appeal, the supreme court did not discuss the sufficiency of the evidence presented at the final hearing.<sup>117</sup> It did find the "complaint" on which the preliminary hearing was held alleged a violation not supported by the evidence adduced at the preliminary hearing.<sup>118</sup> The supreme court reversed and remanded the case to the district court with directions to conduct a new preliminary hearing, because the amended "complaint" alleged violations of a different nature and identity than did the original pleading on which the preliminary hearing had been held. The evidence adduced at the preliminary hearing did not relate to the newly alleged violations. Therefore, the court ruled the accused probationer had not been afforded due process.

The *Ferree* decision was consistent with the court's precedents relating to amended felony charges filed after felony preliminary hearings. The *Morrissey-Gagnon* rules did not deal with the factual circumstances presented in *Ferree*. But the Nebraska Supreme Court decided *Ferree* on a combination of prior analogous state procedural rulings and due process.<sup>119</sup> The *Ferree* decision can be considered to have adopted an independent state standard, but is not entirely clear on the point. The supreme court did not need to determine whether Ferree was given adequate notice, but had Ferree raised the issue of notice as it related to his preliminary hearing, it is apparent he was denied the type of notice *Morrissey-Gagnon* seemed to require before preliminary hearing<sup>120</sup> by the filing of amended allegations after preliminary hearing.

The supreme court's decision on the question of whether Ferree waived a new preliminary hearing by not requesting one was not consistent with the court's felony preliminary hearing precedents. Applying the rule that a waiver of important federal rights cannot be presumed from a silent record to the question of waiver of preliminary hearing by proceeding to final hearing with counsel without requesting a new preliminary hearing is a matter of federal constitutional law.<sup>121</sup> The right to a felony preliminary hearing is a state statutory right in Nebraska. The right to a probation revocation preliminary hearing is a federal constitutional right. The different treatment of waivers of the different types of preliminary hearing stems from the different sources of the rights involved. Counsel should address the sources of whatever rights they wish to advocate on their clients' behalf in probation revocations, because the

Nebraska Supreme Court applies to probation revocations rights derived from both state law and federal constitutional law.

It is clear following *Ferree*, that, in Nebraska, a probation revocation preliminary hearing may be waived but only if the waiver is an affirmative waiver on the record.<sup>122</sup> It seems that preliminary hearings are required for all alleged probation violators in Nebraska, unless proper waivers are obtained. Therefore, counsel for both parties, as well as the courts, should take care to create a proper record of knowing, voluntary, and intelligent<sup>123</sup> waivers of preliminary hearing whenever alleged probation violators choose to waive preliminary hearings.<sup>124</sup>

### **Preliminary Hearing Venue**

The *Morrissey-Gagnon* rules require the preliminary hearing to be held at or reasonably near the place of the arrest.<sup>125</sup> The Court did not say what arrest it meant,<sup>126</sup> but it is reasonable to assume it meant the probation violation arrest. The Court had in mind interstate supervision cases. The ability of the accused to collect evidence would be hampered seriously if the accused probationer could not take steps to develop the evidence until after removal to the state of the sentencing court in the interstate context. The Court also may have been concerned that accused probation violators would be imprisoned and remain there without bail after commencement of revocation proceedings, a likely fact of life for many accused parole violators, but not necessarily for many accused probation violators.<sup>127</sup> The logistical problems faced by accused probationers in an intrastate context are far less severe.

In Nebraska, the place of the arrest for purposes of selecting the proper preliminary hearing venue means the place of the probation violation arrest when that arrest occurs in Nebraska even though the violation was committed in another state. Gerson Merrill Kartman, while on probation in Nebraska, committed a new crime in Oklahoma. Committing the new crime was a violation of his probation. Kartman was arrested for that violation while physically present in Nebraska. On appeal, Kartman challenged the sufficiency of the preliminary hearing. The Nebraska Supreme Court did not specify the grounds of Kartman's challenge in its opinion. The court simply stated it found no prejudice to Kartman "in any of the proceedings related to the preliminary hearing."<sup>128</sup>

In its opinion in Kartman's subsequent federal *habeas* action, the United States District Court discussed the challenge in detail. Among other things, Kartman claimed that since the offense for which the state sought revocation was committed in Oklahoma, the preliminary hearing should have been held in Oklahoma, not in Nebraska. However, since Kartman was arrested in Nebraska on the probation violation, the federal district court held the preliminary hearing in Nebraska was held reasonably near the place of the arrest.<sup>129</sup> Had Kartman been arrested for the probation violation in Oklahoma, the *Morrissey-Gagnon* rules would have required that the preliminary hearing be held in Oklahoma.

*Morrissey* did not address specifically the situation of intrastate revocation proceedings. *Gagnon* did, but made no change in the reasonably-near-the-place-of-the-arrest-or-violation

requirement. The Nebraska Supreme Court has dealt with the proper venue for the preliminary hearing in a case in which the probationer was arrested in a county other than the county of the sentencing court. In *State v. Ferree*,<sup>130</sup> Ferree was arrested for violation of a Holt County District Court probation sentence in Lancaster County where he was serving a penitentiary sentence in a separate case. He was returned to Holt County. The preliminary hearing was held there. The supreme court found no infirmity in holding the preliminary hearing in Holt County instead of Lancaster County, because Ferree already was incarcerated at the time of the probation violation arrest and because all of the records relating to his probation were in the possession of the Holt County District Court.

No cases have as yet reached the Nebraska Supreme Court in which the violator was not arrested on the probation violation, the violation was committed in a county not the county of the sentencing court, the preliminary hearing was held in the sentencing court's county, and the violator challenged the preliminary hearing venue. Preliminary hearings are usually waived, so the absence of such a case is not surprising. The *Morrissey-Gagnon* rules do not indicate who should conduct the preliminary hearing when the proper venue is not in the county or even located within the judicial district of the sentencing court. Such cases as the hypothetical described above present difficult, or at least interesting, logistical questions in terms of the proper agency or body to hold the preliminary hearings and their jurisdiction to do so. How does the Lancaster County Court obtain jurisdiction over a Seward County Court probation revocation proceeding? Even if probation supervision is transferred from Seward County to Lancaster County, the Seward County Court's jurisdiction over revocation proceedings is not transferred. If an agency other than a court conducts the preliminary hearing, how does that non-judicial agency obtain jurisdiction? Does the United States Supreme Court have the authority to grant jurisdiction over probation revocation proceedings to agencies other than the sentencing court?

Venue and subject matter jurisdiction properly are matters for legislative determination because of the need to deal with the sorts of logistical questions just posed. Case by case resolution of such problems is simply not appropriate. However, the Court injected itself into these problems by constitutionally requiring that a probation violation preliminary hearing be held at or reasonably near the place of the arrest or violation. Despite the United States Supreme Court's intrusion into state legislative matters on the federal constitutional level, it would seem that the Nebraska Legislature could act on venue and subject matter jurisdiction questions, as long as the Nebraska Legislature honors the reasonably-near constitutional rule. Further, in the intrastate context, the decision of a state legislature on the question of what is reasonably near ought to be entitled to respect as a determination of a coordinate branch of state government in a federal system.

### **Identity of the Hearing Officer**

Under the *Morrissey-Gagnon* rules, nearly anyone not directly involved in the case can serve as the preliminary hearing officer. Preliminary hearing officers need not be judicial officers nor even lawyers. The Court restrained itself in establishing a minimum rule on this point. The Nebraska Supreme Court adhered to this part of the rules in *State v. Calder*.<sup>131</sup> The

deputy clerk of the district court heard Calder's preliminary hearing. Nothing in the record suggested the deputy clerk was involved in anything relating to Calder or his probation nor that she was subject to anyone's influence relating to the case. The supreme court approved of the use of court clerks as preliminary hearing officers, as long as they are not involved in the cases they are assigned to hear. The use of clerk magistrates as preliminary hearing officers in the county courts should also be acceptable.<sup>132</sup> Apart from the consideration of failing to make the most beneficial allocation of judicial time, nothing should prevent the sentencing judges themselves from conducting the preliminary hearings in probation revocations. The sentencing judges themselves generally do not become involved in the supervision nor in the decision to seek revocation nor obtain information about the cases outside of the context of their judicial duties.<sup>133</sup>

Using a probation officer not involved in supervising the case or even the chief district probation officer of the district in which revocation is pending as the preliminary hearing officer does not seem sufficient to impart to the proceeding an unimpeachable aura of impartiality on the part of the fact finder,<sup>134</sup> especially if the hearing officer was a chief who helped make the decision on sanctions, but would seem allowable under the present form of the *Morrissey-Gagnon* rules. Whether this practice could withstand analysis at the appellate level remains to be seen. The proper case has not reached the appellate level yet.

### **Preliminary Hearing Officer Reports**

Under the *Morrissey-Gagnon* rules, the preliminary hearing officer has a duty to prepare a summary or digest of the hearing in terms of stating the substance of the evidence supporting revocation, the alleged violator's responses, and the alleged violator's position with respect to revocation. In addition, the hearing officer should make a finding of the existence or non-existence of probable cause to hold the alleged violator for final hearing. If the hearing officer finds probable cause exists, that finding is sufficient to detain the alleged violator. Yet, formal findings of fact and conclusions of law are not required, because the result of the preliminary hearing is not a final determination. The Court said the utility of the written exercise lies in its potential for reducing the risk of error.<sup>135</sup> But, strict compliance with the hearing officer report requirement may not be necessary in all cases.

The Eighth Circuit Court of Appeals considered the sufficiency of the hearing officer's report in *Kartman v. Parratt*.<sup>136</sup> The hearing officer's report did not set forth the hearing officer's reasoning nor summarize the evidence presented nor report the responses of the probationer. The hearing officer did make a specific finding of probable cause. The court of appeals noted that Kartman had counsel and his preliminary hearing was recorded. A transcription of the proceedings easily could have been obtained. The court of appeals was unable to perceive any prejudice to Kartman from the formal deficiencies of the hearing officer's report.<sup>137</sup>

A verbatim transcription of the preliminary hearing, as a matter of common sense, obviously would be more useful to counsel and the alleged violator than would a report summarizing the substance of the evidence and the probationer's responses. The report would be most useful only

in those systems where the preliminary hearing is not recorded. Where the finding is nothing more than probable cause to require a final hearing, the utility of the hearing officer's report is quite low, except to an appellate tribunal seeking ways to lighten its own workload. Requiring a written report from the preliminary hearing officer as the Court did in *Morrissey-Gagnon* as a matter of minimum due process does not materially assist accused probationers in systems where the proceedings are recorded. The real benefit of the written report is a benefit to the appellate court and to no one else. The Court at least could have been candid about its reason for requiring a preliminary hearing officer report.

For the probationer, the truly high stakes are on the line at the final hearing, not at the preliminary hearing. However, the supervising probation officer who made the decision to seek revocation has high stakes on the line at the preliminary hearing stage. If the preliminary hearing evidence fails to establish probable cause, the relationship between the supervising probation officer and the probationer suffers a dramatic change. Effectiveness in supervision by that officer from that point forward predictably will be diminished. The decision to seek revocation must be made with care and based on sufficient evidence.

Further, as long as there is no change in the alleged violations after the preliminary hearing and the evidence at the final hearing is sufficient to prove the alleged violations were committed and that revocation is warranted, the sufficiency of the evidence at the preliminary hearing logically becomes irrelevant. Nevertheless, the Court's approach to the sufficiency of the evidence at the preliminary hearing and the sufficiency of the preliminary hearing officer's report provide defense counsel and probation violators with ammunition to seek reversals despite the merits of the case made at the final hearing.<sup>138</sup>

## **THE FINAL HEARING**

### **Nature of the Final Hearing**

An alleged violator must be given the opportunity to have a final hearing, if the alleged violator wants a hearing, prior to the final decision on revocation under the *Morrissey-Gagnon* rules.<sup>139</sup> The final hearing must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation of probation. The alleged violator must be given the opportunity to be heard and to attempt to show that no violation was committed, or, if the probationer did commit a violation or violations, that there were sufficient mitigating circumstances to excuse the violation/s and to militate against revocation.<sup>140</sup> Despite its adoption of a detailed set of procedural rules, the Court claimed it did not intend to create an inflexible structure.<sup>141</sup> The Court said it did not intend to equate the final revocation hearing with a criminal prosecution.<sup>142</sup> It did exclude from revocation hearings such tactics as attempts to re-litigate issues determined by other fora, such as new criminal convictions. It considered the final hearing to be a narrow inquiry.<sup>143</sup>

The nature of the questions to be determined at the final hearing requires some flexibility, especially in the area of admissible evidence. The first question generally is a straightforward,

retrospective question of fact: has the probationer violated one or more conditions of probation?<sup>144</sup> Counsel and courts habitually deal with questions of historical fact. However, the first question can develop a certain degree of fuzziness, say, in a situation in which a probationer's alleged violation consists something like the purchase of an unauthorized, one-way airline ticket which the probationer detects and prevents from becoming an unauthorized trip outside the jurisdiction by arresting the probationer outside the airport entrance.

The second question, which conceptually only arises if a violation is proved, is a prospective question of prediction: can this probation violator successfully continue on probation, or, is a less rehabilitative, more punitive disposition necessary? Put even more acutely, given this probation violator's new misbehaviors and considering the nature of the convicted misbehaviors resulting in the initial probation sentence, can the court continue effectively protecting society through further rehabilitative efforts, or, has incapacitation become a more preferable disposition? The more acute formulation recognizes the role of probation supervision ranges far beyond mere compliance monitoring; it's a matter of seeking criminal behavior change.

The *Morrissey-Gagnon* Court couched the second question in terms of whether the individual is able to live in society without committing antisocial acts?<sup>145</sup> The Court's formulation seems more applicable to felony probationers than to most misdemeanor probationers, depending on one's meaning of the term antisocial. However, protection of society is also a basic issue with reference to a number of misdemeanors.<sup>146</sup> Prediction innately is a discretionary matter, even though predictions in probation revocations must be based on facts.

In practice, the two questions can be, and probably should be, dealt with separately in any case. Evidence relevant to both questions can be, and frequently is, presented in a single hearing. Disposing of the matter in a single final hearing precludes obtaining pre-sentence report updates. That limits the sentence relevant information available to the court. At any rate, counsel for both parties should make the effort to offer evidence relevant to both questions whenever available. The revocation court may not be inclined to revoke on proof of just any violation.

### **Violations Warranting Revocation**

The question of what types of violations warrant revocation is not subject to a single answer. The Nebraska Supreme Court and the Eighth Circuit Court of Appeals have adopted divergent positions on the question. In *State v. Clark*,<sup>147</sup> the probationer's only proved violation was a failure to report to the probation officer one month (he was late reporting the preceding month). The trial court revoked Clark's probation. The supreme court affirmed, holding: "It is clear that . . . a single violation of probation can support revocation."<sup>148</sup>

In *United States v. Reed*,<sup>149</sup> the probationer failed to report repeatedly, failed to give notice of an address change, failed to find employment, and failed to make restitution. The district court injected the restitution issue on its own motion. The Eighth Circuit vacated the revocation and remanded for further proceedings, noting:

The decision to revoke probation should not merely be a reflexive reaction to an accumulation of technical violations of the conditions imposed upon the offender . . . Rather, probation should be revoked only in those instances in which the offender's behavior demonstrates that he or she 'cannot be counted on to avoid antisocial activity.' The decision to revoke [Reed's] probation was based not on commission of a new crime or other egregiously antisocial behavior, but merely on Reed's failure to report, to give notice of an address change, to find employment, and to make restitution.<sup>150</sup>

If probation should not be revoked for violations like Reed's violations, one must wonder why such conditions would be included in the probation sentence at all? The court of appeals did not address this question in its opinion, but the inescapable inference from the court's choice of language is that a complete lack of cooperation is not grounds for revocation. Apparently, only a law violation or some injury to others warrants revocation in the view of the Eighth Circuit's *Reed* panel.

A large number of offenders are in need of structure and stability in their lives. Their lack of structure and stability is one of the factors leading to the lifestyle that got them sentenced to probation. Probation sentences for such people are designed, in part, to impose structure and stability in the hopes that the imposition will teach them the benefits of a different lifestyle.<sup>151</sup> Conditions of probation of the sort that Reed violated are directed at that purpose, and, additionally, at the goal of monitoring the probationer's progress or lack of progress in making positive changes in their prior antisocial attitudes and behaviors. The Eighth Circuit *Reed* panel's view ignored this aspect of the purpose of probation sentences.

A probationer who refuses repeatedly to abide by such rehabilitative conditions may not be amenable to rehabilitation. Such a probationer not only demonstrates an unwillingness to make efforts toward rehabilitation, but also interferes with effective probation supervision. Recall, effective probation supervision seeks to change criminal behavior, reduce recidivism, and create safer communities. Courts clinging to the *Reed* panel's view fail to support efforts toward reaching the positive goals of probation sentencing and the offender community will spread that word quickly.

But, the Eighth Circuit has not been consistent in its decisions on whether the violations involved warranted revocation. In *United States v. Smallwood*,<sup>152</sup> the probationer's failures to report to the probation office and to report his current address, after an earlier attempt to revoke his probation for his failures to report to the probation office and to reside with his father, were considered sufficient violations to warrant revocation. In *United States v. Goeller*,<sup>153</sup> the probationer's failures to submit monthly report forms, to report changes of address, to participate in a psychological evaluation, and to keep his counseling appointments were deemed sufficient cause to revoke. In *United States v. Burkhalter*,<sup>154</sup> the probationer's poor performance and poor attendance in a required vocational training program and his failure to abide by his halfway house's rules were deemed adequate cause to revoke his probation after only three months on

probation. The court believed Burkhalter had shown a pervasive unwillingness to follow a rehabilitation program, justifying revocation even though he had not endangered society by his violations.<sup>155</sup> However, in dictum in *United States v. Rodgers*,<sup>156</sup> the court of appeals indicated the probationer's failures to report his change of employment, change of address, and repeated failures to report to the probation office were not sufficient violations to warrant revocation without some form of recorded explicit consideration of lesser sanctions by the trial court.

All four of these Eighth Circuit decisions were three judge panel decisions. The panels' composition was different in each case.<sup>157</sup> *Smallwood* predated *Reed*, but *Reed* was cited by the *Burkhalter* and *Rodgers* panels. *Smallwood* was cited by the *Rodgers* panel. *Burkhalter* was cited by the *Goeller* panel. The Eighth Circuit has not adopted a definitive stance on what violations warrant revocation. The inconsistency in its decisions on the point may result from a preference for deciding each case on its unique circumstances, or, as a by-product of appellate decision making by variable membership panels.

On a somewhat related question that I deal with later, the Nebraska Court of Appeals clarified that a new criminal conviction, even though not yet final and even if pending on appeal, may be used as proof that a probationer has violated the conditions of his or her probation.<sup>158</sup>

### **Sufficiency of Notice and Motion/Information**

Fidelity to the fiction that probation revocation is not part of a criminal prosecution requires that only minimal notice of the alleged violations must be given to alleged violators. But the notice given must still be fair notice in order to satisfy due process. "Notice" has several uses in legal language; here, it refers to the ability of the language used in describing the alleged violations to tell the alleged violator how he or she allegedly violated the conditions of his or her probation. What constitutes fair notice is the problem. Even in criminal prosecutions, charges couched in the statutory language, which is generally not fact specific and is somewhat vague, are sufficient if they are specific enough to enable a criminal defendant to prepare a defense and to plead the judgment in bar. Alleged probation violations should not be required to be more specific than criminal charges. However, an idea that a notice separate from the motion or information to revoke is required has led to challenges, as well as the question of sufficient specificity of the allegations. The appellate courts have taken a practical approach to such issues so far.

In *State v. Kartman*,<sup>159</sup> no issue was raised on direct appeal with respect to the sufficiency of the notice given to Kartman. However, in the federal *habeas* action Kartman did attack the sufficiency of one allegation in the information and notice. The court ruled the allegation charging that Kartman had failed to comply with the terms of his probation and had not demonstrated a good faith effort to rehabilitate himself was not sufficiently specific, but the error was harmless because one of the proved allegations was specific enough.<sup>160</sup> The court held that where a motion to revoke includes more than one count, the vagueness of one count "could well not render the entire proceeding unconstitutional when the other counts are sufficiently specific and the judge's findings of fact as per the specific counts are supported by the evidence."<sup>161</sup>

On appeal in the *habeas* action, Kartman claimed the notice of final hearing was improper because he did not receive a copy of the preliminary hearing officer's report until the day of the final hearing or other written notice of the final hearing after the preliminary hearing. The Eighth Circuit noted that *Morrissey* required that written notice of the claimed violations must be given prior to the final hearing. The notice given to Kartman was a written notice of preliminary hearing. The court held the notice satisfied due process because the grounds for violation remained unchanged following the preliminary hearing.<sup>162</sup> The holding implies that where there is a change in the alleged grounds for violation that a new notice is required to be given to the probationer.<sup>163</sup> While the court of appeals affirmed, it took the opportunity to note the charge failed to apprise the probationer of the conditions of probation which he was alleged to have violated and of the dates and events supporting the charge.<sup>164</sup>

In *State v. Calder*,<sup>165</sup> the notice was deficient in not setting forth the facts alleged to constitute violations. However, the probationer acknowledged before the district judge in open court that he was familiar with the contents of the motion to revoke. The motion did state sufficient facts. Further, the district judge advised the probationer at the initial appearance on the motion to revoke of the nature of the allegations. The Nebraska Supreme Court concluded that Calder had actual notice of the allegations of the motion. Therefore, the deficiency of the notice of preliminary hearing was not prejudicial. Analogizing to the rules relating to indictments, the court noted that due process only requires that the accused be given sufficient notice of the charges against him in order that he may prepare a defense.<sup>166</sup> Service on the probationer of a copy of the motion to revoke should be sufficient notice of the alleged violations. Restating the allegations in a separate notice of hearing is senseless paperwork, especially when the notice of hearing and the motion can be combined in a single document. The court did not require the use of two pieces of paper.

In *State v. Nevells*,<sup>167</sup> the information to revoke alleged that the probationer had violated the laws of the State of Nebraska on November 4, 1968. The court characterized the allegation as a specific charge of a violation of the paragraph of the probation that required the probationer to be law abiding and to not violate any laws.<sup>168</sup> The court held the allegation was sufficiently specific. Since probation revocation proceedings are not a stage of a criminal case, only the due process test of the sufficiency of the allegations and notices should apply. The double jeopardy clauses of the federal and state constitutions should not apply. However, prosecutors can finesse the issue by taking the few minutes necessary to be specific.

### **Confrontation and Hearsay**

Alleged violators have the right at the final hearing to confront and cross-examine adverse witnesses, unless the hearing officer specifically finds good cause for not allowing confrontation.<sup>169</sup> Normally, disclosure of the identity of the state's witnesses and the substance of their likely testimony would be helpful in preparing a defense. Confrontation is a criminal trial right. The confrontation clause has been held inapplicable to normal sentencing proceedings,<sup>170</sup> but applicable to supplemental sex offender proceedings.<sup>171</sup> A revocation

hearing is not a criminal trial. Nevertheless, the Court has extended a conditional confrontation right to probation revocation proceedings. Appellate courts have disagreed on the nature and mechanics of the precedent finding of good cause necessary to a denial of confrontation in probation revocation hearings.

In *Kartman v. Parratt*,<sup>172</sup> the trial court denied the probationer the opportunity to review his probation file at the preliminary hearing. The probationer was allowed to examine the file at the final hearing. The Eighth Circuit Court of Appeals noted that a probationer should normally be given the names of persons who have provided information against the probationer and should be granted the opportunity to confront those persons. However, if the hearing officer finds an informant would be subjected to a risk of harm if identified, then the informant need not be subjected to confrontation and cross-examination. The court said that *Morrissey* does not require an express written finding of a risk of harm. Therefore, since there was no showing of prejudice to the probationer at the hearing, the court refused to assume the hearing officer did not find that a risk of harm was presented by identifying the informant at the preliminary hearing.<sup>173</sup>

A risk of harm to an informant is not the only acceptable basis for a finding of good cause for denial of confrontation recognized by the Eighth Circuit. The Eighth Circuit has adopted a balancing test requiring trial courts in probation revocation actions to balance the probationer's conditional right to confront adverse witnesses against the reasons the government asserts for not requiring confrontation. There are no fixed rules on what the government must present to establish good cause, but the court of appeals has listed the factors to be used in evaluating the government's basis for its requested denial of confrontation.<sup>174</sup> First, trial courts must assess the government's explanation for its position that confrontation is undesirable or impractical. The examples the court gave are danger of harm to government witnesses and the expense or difficulty of procuring the attendance of live witnesses. The second factor trial courts must consider is the reliability of the evidence the government offers as a substitute for live testimony. When the trial court is persuaded that the burden of producing live testimony is inordinate and offers demonstrably reliable hearsay as a substitute, then the government has made a strong showing of good cause. However, if the government shows neither that presenting live testimony would be unreasonably burdensome nor offers as a substitute hearsay evidence bearing indicia of reliability, then the probationer is entitled to confrontation.<sup>175</sup>

In *United States v. Bell*,<sup>176</sup> the government sought a revocation based upon Bell's alleged violations of state and federal laws. The revocation hearing was held in Arkansas, Bell's place of residence at the time of the probation sentence. Some time after the sentence, Bell moved to Kansas. While living in Kansas, Bell was arrested by the Wichita police for driving while intoxicated, possession of marijuana, and possession of drug paraphernalia. The Wichita charges had not been tried at the time of the revocation hearing. In addition, three urine samples taken from Bell in Kansas under the probation order tested positive for THC, indicating Bell's use of marijuana. Through Bell's Kansas probation officer, the government offered the Wichita police arrest reports and the reports of the California chemical laboratory that had done the urinalyses of Bell's samples.<sup>177</sup> Bell objected on both hearsay and confrontation grounds. The trial court overruled the objections. The court of appeals noted a finding of good cause is implicit in the

decision to overrule a confrontation clause objection in probation revocation proceedings. A remand for explicit findings of good cause was not necessary.<sup>178</sup>

The court of appeals ruled the urinalysis reports bore substantial indicia of reliability. The reports are the regular reports of a company whose business it is to conduct such tests with the expectation that the company's clients will act on the company's reports. There was no evidence contradicting Bell's alleged drug use. Bell made only general, unsubstantiated claims that the analyses may have been defective. The court of appeals found good cause existed to permit the government to avoid the difficulty and expense of bringing the testing personnel from California to Arkansas to testify in person.<sup>179</sup>

With respect to the Wichita police reports, the court of appeals concluded the reports are reliable evidence that an arrest was made but are significantly less reliable evidence of the commission of the offenses alleged. The Wichita officers could have been brought voluntarily or by subpoena to the hearing in Arkansas, but at considerable expense. However, even though the court made these observations, it chose not to use its balancing test, because Bell's admissions and the detailed narrative in the reports established the reliability of the arrest reports. However, the court carefully pointed out it was not endorsing the use of arrest reports instead of arresting officer testimony in every revocation case.<sup>180</sup> The court said:

Whether arrest reports are sufficiently reliable, and whether the expense and inconvenience of producing live testimony are sufficiently great, to justify dispensing with the right of confrontation, are questions to be faced on a case-by-case basis considering all the relevant circumstances, including any admissions that may have been made by the probationer or parolee.<sup>181</sup>

An interesting twist gave the court the chance to deal with oral hearsay and double hearsay within the good cause balancing test context. Bell called his Arkansas probation officer for the purpose of showing that probation officer had received good reports about Bell during the time he supervised Bell's case. For the sole purpose of detracting from whatever weight the good reports testimony might have had, the prosecutor cross-examined the probation officer on the subject of an Arkansas state police investigation of Bell for drug trafficking. The evidence presented in this manner was not the investigation reports, but only the probation officer's account of his conversations with the investigating officers and with a FBI agent not personally involved in the investigation. The court of appeals indicated it would not have disapproved had the use of the evidence been restricted to the government's purpose in eliciting it. However, the district court did not so confine its use of the evidence. The district court relied in part on that evidence in its revocation decision.

That hearsay and double hearsay was the only evidence offered about any drug dealing. With respect to that substantive use of that evidence, the court of appeals ruled it lacked sufficient reliability and that the government had not shown any difficulty would have been posed by calling local officers to testify in person. Therefore, for substantive use, the admission of the oral hearsay violated Bell's conditional confrontation right.<sup>182</sup>

In *State v. Mosley*,<sup>183</sup> the Nebraska Supreme Court reviewed a revocation record in which the trial court admitted hearsay to prove the probationer's violation. The identity of the informant was disclosed, but the informant was not produced at the final hearing. The investigating police officer was allowed to testify at the final hearing to what the informant had told him. The officer had no personal knowledge of anything related to the violation. The probationer denied involvement in the violation. The court said there was no showing of possible risk to the informant or other good cause why confrontation should not have been granted. Further, the trial court made no determination of whether good cause had been shown. Therefore, the court reversed and remanded for further hearing, with instructions that the right of confrontation be allowed unless the trial court specifically finds good cause for a denial.<sup>184</sup> Whether the supreme court would accept implicit findings of good cause is unclear.

Ten years later, in *State v. Ozmun*,<sup>185</sup> the court allowed hearsay in a probation revocation. The probation officer was allowed to testify to what he had been told by a counselor at an alcoholism treatment center from which the probationer allegedly voluntarily absented herself without permission and whose rules she had violated during her stay there. The probationer had admitted her violations to the probation officer. The court noted that the Nebraska Evidence Rules do not apply in probation revocation proceedings. Therefore, the admission of the hearsay was not an error.

The court did not indicate in its opinion whether the probationer only objected on hearsay grounds or whether the probationer also charged a violation of her conditional right of confrontation. Assuming a hearsay objection also puts confrontation in issue,<sup>186</sup> the only difference between *Ozmun* and *Mosley* is Ozmun's admission to her probation officer. Ozmun's extrajudicial admission to her probation officer imparted an aura of reliability to the hearsay, but it was still oral hearsay of the type condemned in *Bell*. Bringing the alcohol program counselor from Omaha to Kearney would not have entailed the difficulty involved in interstate situations. But, again, if Ozmun's counsel did not object on confrontation grounds, the supreme court had no reason to consider confrontation. It is counsel's obligation to raise the proper issues. The courts should not be expected to do counsel's job.

Counsel should not rely on a hearsay objection to raise a confrontation issue in any proceeding, but certainly not in a probation revocation hearing to which the rules of evidence do not apply. Specific confrontation objections should be made whenever appropriate in probation revocation proceedings to avoid the possibility of waiving the confrontation issue by failing to interpose the proper objection. Some latitude can be allowed, but counsel should not rely on obtaining latitude. It worked once, as we'll see, but may not work frequently.

Cross-examination is one essential component of confrontation. In *State v. Clark*,<sup>187</sup> the transcribed proceedings showed that Clark advised the district court that his objection to the admission of a lab report without the technician's testimony rested upon his fundamental due process right to cross-examine the person who conducted the chemical test. Noting "[i]t is the duty of counsel to make his [or her] objections so specific that the court may understand the

point intended to be raised,” the court of appeals ruled that Clark's counsel met that duty.<sup>188</sup> But two paragraphs earlier in its opinion, the court of appeals reported that “when Clark demanded the right to confront the lab technician or chemist, the trial court denied the motion without making a finding of good cause.”<sup>189</sup> So, not only did Clark’s counsel use the magic word, “cross-examine,” in his objection to the lab report when offered through the probation officer, but counsel also, at some point, demanded the right to confront the person who did the analysis. The court of appeals reversed and remanded the revocation decision for further hearing with instructions that the right of confrontation be allowed unless the trial court specifically finds good cause shown for a denial.<sup>190</sup> So, the admonition remains. Specific confrontation objections should be made whenever appropriate in probation revocation proceedings to avoid the possibility of waiving the confrontation issue by failing to interpose the proper objection. The *Clark* decision cannot be pushed too far. Precedents are only as binding as their facts permit.

### Self-Incrimination

The *Morrissey-Gagnon* rules do not include any mention of the privilege against compulsory self-incrimination. In *Minnesota v. Murphy*,<sup>191</sup> the issue was whether the fifth and fourteenth amendments prohibited the introduction into evidence at a later criminal proceeding of admissions made by the defendant to his probation officer during a mandatory meeting with the probation officer. The Court held the admissions could be used in the criminal trial because they were voluntary and the defendant had not claimed his privilege when the probation officer asked the questions, but answered the probation officer's incriminating questions instead. The Court further held the probation officer was not required to give a *Miranda* rights advisory prior to questioning the defendant. In reaching the holdings in the case, the Court included a footnote with significance for probation revocations.

If the questions put to a probationer by the probation officer in a probation meeting are relevant to the probationary status and pose no realistic threat of incrimination in a separate criminal proceeding, then the privilege is inapplicable. The fact that a truthful answer might lead to a revocation of probation does not render the privilege applicable. A probation revocation proceeding is not a criminal proceeding. Even though due process must be provided in a revocation proceeding, the rights accorded to accused persons in criminal proceedings do not apply.

Just as there is no right to a jury trial before probation may be revoked, neither is the privilege . . . available to a probationer. It follows that whether or not the answer to a question about [the probationary status] is compelled by the threat of revocation, there can be no valid claim of the privilege on the ground that the information sought can be used in revocation proceedings.<sup>192</sup>

The Court’s footnote language bears repeating: “[i]f the questions put to a probationer by the probation officer in a probation meeting are relevant to the probationary status and pose no realistic threat of incrimination in a separate criminal proceeding, then the privilege is

inapplicable.” If the probation officer’s questions pose a realistic threat of incrimination in a separate criminal proceeding, then the privilege may apply, but would be lost if the probationer answered instead of claiming the privilege. The example the Court used was a question relating to a residential requirement. The situation would differ if the probationer were in custody and the probation officer asked a question that could be incriminating in a separate criminal proceeding and the result likewise might differ.<sup>193</sup>

An alleged probation violator can be compelled to testify about the alleged violations in the probationer's own revocation hearing over self-incrimination objections based on both the federal and state constitutions, as long as the state does not compel the probationer to incriminate himself or herself concerning a new or separate criminal offense. A probation revocation hearing is not a stage of a criminal prosecution. Admitting a probation violation other than admitting commission of a new crime does not implicate necessarily the constitutional self-incrimination privilege, but could.<sup>194</sup>

In *State v. Burow*,<sup>195</sup> the probationer challenged the revocation of her probation on the ground that her admission was not voluntary and intelligent because the revocation court did not advise her on the record of her privilege against compulsory self-incrimination before accepting her admission. The supreme court noted the revocation court had advised the probationer of all her rights under the Act. The Act does not require notice of the privilege.

The supreme court also noted the privilege, under both constitutions, applies only to criminal cases and that probation revocation hearings are not criminal proceedings. Therefore, “[t]he admission . . . of the facts alleged in the motion to revoke was not a criminal guilty plea, just as the result was not a new conviction but, rather, a change in probationary status with respect to a previous conviction.”<sup>196</sup> So, the pleas tendered in probation revocation cases are admissions and denials, not the familiar guilty, not guilty, and no contest pleas. If the pleas in probation revocations are not the familiar criminal pleas, the question arises as to what advice, if any, must a revocation court give to an accused probationer?

### **Rights Advisory**

The *Blankenbaker* case, disapproved in *Burow*, also suggested that a plea to a motion or information charging a probation violation must be tendered voluntarily, knowingly, and intelligently. Whether that suggestion was disapproved is unclear. It remains unclear whether any criminal arraignment-like colloquy must be held with probationers tendering admissions. The United States Supreme Court and the Nebraska Supreme Court have not ruled directly on the point. However, the Fifth Circuit Court of Appeals ruled in *United States v. Ross*,<sup>197</sup> a federal probation revocation, that a waiver of counsel must be knowing and intelligent and that requires an explanation of possible consequences of a revocation hearing.

In *United States v. Johns*,<sup>198</sup> the probationer admitted a probation violation through counsel. Her probation was revoked on the admission. She contended on appeal that the revocation court erred in not addressing her personally to determine on the record that she

understood what rights she was waiving on her admission through counsel. The court held that Fed. R. Crim. P. 11 does not apply to probation revocations. The Fifth Circuit did not rule on the applicability of *Boykin v. Alabama*, holding instead that the error, if any, was harmless. The Ninth Circuit Court of Appeals has ruled that both *Boykin* and Rule 11 are inapplicable in probation revocation proceedings.<sup>199</sup>

In *United States v. Rapert*,<sup>200</sup> the Eighth Circuit held that neither Rule 11 nor *Boykin* apply to probation revocation proceedings. As a result, a rights advisory is unnecessary. Further, because Rapert was advised at the time he tendered his plea to the underlying criminal charge of the possible penalties, it was not necessary to advise him again of the penalties at his revocation proceeding. The theoretical justifications underlying *Boykin* do not obtain in probation revocation proceedings. A probationer in revocation actions has no right to a jury trial, only an attenuated right of confrontation, and only a limited self-incrimination privilege.<sup>201</sup>

### Written Statement of Fact Finder

The *Morrissey-Gagnon* rules require the hearing officer to prepare, after the revocation hearing, a written statement as to the evidence relied on and the reasons for revoking probation in the event of a revocation. In *State v. Jaworski*,<sup>202</sup> the Nebraska Supreme Court dealt with the need for and sufficiency of the written statement after final hearing. First, the court distinguished both *Morrissey* and *Gagnon* as cases involving revocations by administrative agencies, not by courts. The Supreme Court has not dealt with judicial probations and judicial revocations as provided for in the Nebraska Probation Act in the direct appeal context. The court also noted that the requirement of a written statement does not fit the pattern of a judicial hearing in a court of record in which the proceedings, findings, and judgments are recorded and subject to appellate review. The court said: "It would be strange indeed if the formal requirements of fact finding and determination of guilt were to be more strict at a probation revocation hearing than at an original criminal trial."<sup>203</sup>

The court also admonished trial courts:

Good practice under the . . . Act dictates that the trial court's order of its findings, reasons, and conclusions should be reasonably detailed and precise. . . . The trial courts should also take additional care with the written findings where there are multiple charges of acts constituting violations of . . . probation in order to make sure that findings are made for each specific charge. . . . In its written findings and judgment in the record the court need only refer to the evidence in the record.<sup>204</sup>

The court's admonition was made under Nebraska statutory law and could easily be deemed an independent state standard supervisory rule.

In *Kartman v. Parratt*,<sup>205</sup> the Eighth Circuit reviewed the revoking state judge's written statement of evidence relied on and reasons for revoking probation. The state judge had referred

to the conduct for which revocation was sought and to the term of probation allegedly violated. The court of appeals explained:

The purpose of the written statement is to allow the reviewing court to determine whether there was a factual basis for revocation and to provide the probationer with a record of the proceeding so as to protect him from a second revocation proceeding based on the same conduct.<sup>206</sup>

Viewed in that light, the question was still a close one, but, even though meager, the revoking court's findings were sufficient for appellate review. Whether the findings were sufficient for the probationer's protective record was not addressed, leading to the inference that the court of appeals was not especially concerned about that use of the record. Further, the court did not indicate any basis for the idea that a probationer is entitled to a record for double-jeopardy-like defense purposes; double jeopardy does not apply to probation revocation actions. After *Kartman* it did not appear the Eighth Circuit would demand strict compliance with the written statement requirement of *Morrissey-Gagnon*. However, *Kartman* was an instance of a federal court reviewing the acts of a state court just a short time after *Gagnon* was announced and not in a direct appeal context.

Later, in *United States v. Lacey*,<sup>207</sup> the federal district judge did not make findings of fact, did not describe the evidence relied upon, and stated only general principles as reasons for the revocation. The court held that the general conclusory reasons given for the revocation did not meet the due process requirement that the revoking judge state the factual findings and the reasons for the revocation. The court remanded the case to the district court for further proceedings which it said could include the task of making proper findings and stating proper reasons for the revocation if the district court still believed revocation was warranted.

In *Morishita v. Morris*,<sup>208</sup> the Tenth Circuit Court of Appeals reviewed a state probation revocation in which the state court did not prepare a written statement. Morishita contended he was denied due process by that omission. The court of appeals distinguished *Gagnon* by pointing out that *Gagnon* dealt with an administrative revocation, not a judicial revocation. In *Morashita*, the state court had prepared a transcript of the proceedings and the state court was a court of record. The court of appeals held that written findings are required constitutionally only if the transcript and record do not enable a reviewing court to determine the basis of the trial court's decision to revoke the probation.<sup>209</sup> The Tenth Circuit seemed inclined to a more informal and less burdensome revocation procedure than did the Eighth Circuit.

Then in *Bearden v. Georgia*,<sup>210</sup> the United States Supreme Court held that in probation revocation proceedings based upon a failure to pay fines or restitution the revocation court must inquire into the reasons for the failure to pay. If the probationer's failure to pay was willful or if the probationer had failed to make good faith efforts to pay, then revocation followed by a sentence within the statutorily prescribed limits of incarceration could be imposed. However, if the probationer could not pay despite sufficient good faith efforts to amass the resources to do so, then the revocation court must consider alternatives to imprisonment. Only if the alternatives are

inadequate to satisfy the state's need for punishment and deterrence may imprisonment be imposed on a probationer who has made sufficient good faith efforts to pay.<sup>211</sup>

In order to meet the Court's *Bearden* requirements, revocation courts must make adequate records to sustain their decisions on appellate review. Findings of fact are necessary. The findings must be accessible to the reviewing court. Whether written decisions are required in all cases was not addressed. The revocation courts, therefore, must state their findings in open court on the record or prepare detailed written decisions in order to facilitate appellate review.

In *Black v. Romano*,<sup>212</sup> the Court held that revocation courts need not explicitly state why alternatives to incarceration were rejected. The record before the Court included a memorandum prepared by the state trial judge and a transcript of the proceedings. The Court considered the memorandum and transcript to comport with due process,<sup>213</sup> even though neither contained an explicit statement of the revocation court's reasons for rejecting alternatives to imprisonment. The majority opinion said the purpose of the *Morrissey-Gagnon* written statement requirement was to help insure accurate fact finding with respect to any alleged violation and to provide an adequate basis for review to determine if the decision rests on permissible grounds supported by the evidence.<sup>214</sup> The concurring opinion said the written statement allows courts to determine whether revocations are substantively valid or fundamentally unfair even without recorded consideration of alternatives to revocation.<sup>215</sup>

*Romano* was a federal *habeas* action attacking a state judicial revocation. The Court did not seem to back away from its commitment to the written statement requirement of *Morrissey-Gagnon*. The distinction made in some of the cases of judicial as opposed to administrative revocations as it relates to the need for a written statement may not have survived *Romano*. Cautious revocation courts still will take the time to prepare written statements under the *Morrissey-Gagnon* rules.

Two months after *Romano*, the Eighth Circuit decided *United States v. Smith*,<sup>216</sup> an appeal from a federal probation revocation. The federal district judge did not prepare a written statement of evidence relied upon and the reasons for the revocation. Smith contended on appeal that the absence of a written statement violated his due process rights and therefore a remand to obtain a written statement was necessary in order to obtain a written statement for appellate review purposes. The government contended the written statement requirement did not apply because the revocation was conducted in a court of record and the hearing was transcribed. The government relied on the *Morishita* decision.<sup>217</sup> The court of appeals rejected the government's contention for two reasons.

First, the *Romano* case dealt with a judicial revocation and the Court reaffirmed its written statement requirement in *Romano* anyway. Second, the *Morishita* case was factually distinguishable in that only one allegation of probation violation was involved in that case. In *Smith*, there were two alleged probation violations. A written statement of the evidence relied upon is thus necessary for a meaningful appellate review. As a result, the Nebraska Supreme Court's *Jaworski*<sup>218</sup> rule lay dormant amid some doubt for a time.

The Nebraska Court of Appeals cleared up that doubt in *In re Thomas W.*,<sup>219</sup> a juvenile probation revocation case in which the county court judge, sitting as a juvenile court judge, did not produce a full, detailed, written statement of the judge's findings of fact, evidence relied on, and reasons for revoking the juvenile's probation. As a result, the juvenile sought on appeal to invalidate the revocation. The Nebraska Court of Appeals reviewed the United States Supreme Court's pronouncements through *Romano*, noted the Nebraska Legislature's adoption of the *Morrissey-Gagnon* rules in the Juvenile Code, and ruled that a judge's oral, in-court statements transcribed in the bill of exceptions for use on appeal and supplemented by the judge's written revocation order could suffice to satisfy the written statement rule, both constitutional and statutory. Sufficient specificity still must appear in the judge's reported, oral statements.

None of the federal appellate courts has addressed the point made by the Nebraska Supreme Court that the written statement requirement is more than is required in the underlying criminal proceeding.<sup>220</sup> The heavier caseload and lack of resources faced by state courts should also be taken into consideration by federal courts in setting minimum requirements.<sup>221</sup>

## **DEFENSES**

The Nebraska Supreme Court has not specifically named any defenses to probation violation allegations. However, the court has considered several approaches that could constitute defenses if the facts fit the theory advanced. Of course, the basic defenses lie in the denial of the violation as a factual matter, in the presentation of facts that would excuse the violations, and in the presentation of mitigating circumstances or other reasons why revocation would not be warranted, despite the violation.

### **Illegally Obtained Evidence**

*State v. Howard*<sup>222</sup> established the proposition that evidence seized in violation of the federal constitution is incompetent evidence and is for that reason inadmissible in probation revocation proceedings.<sup>223</sup> *Howard* presented an unusual fact pattern in which the defendant's probation forbade Howard from being in a state of intoxication in public or in a motor vehicle. Howard was found alone and unconscious in a car that had been in a collision. A police officer obtained a blood sample from Howard at the hospital while Howard was still unconscious without a warrant, without consent, and under circumstances not covered by the implied consent statute. The court held the sample was obtained involuntarily and in violation of the fourth amendment.<sup>224</sup> The generalization from *Howard* is that evidence obtained in violation of the constitution cannot be used to revoke probation. However, evidence seized in a warrantless residential search, to which a probationer is required to submit under a probation condition, can be used to revoke probation.<sup>225</sup>

### **Inability to Pay**

The Nebraska Supreme Court adopted the *Bearden* rule in *State v. Heaton*.<sup>226</sup> In *Heaton*,

the court held that where the alleged violation of probation is the failure to make restitution, the evidence must clearly and convincingly show the probationer has willfully refused to make restitution when the probationer has the resources to pay or has failed to make sufficient good faith efforts to seek employment and otherwise acquire the resources to make restitution.<sup>227</sup> Thus, indigent probationers can defend against failure to pay allegations on the grounds that their failure to pay was not willful, that they have not had the resources to pay, and that they have made sufficient good faith efforts to acquire the resources to pay.<sup>228</sup> If the revocation court finds the failure to pay was willful for reasons unrelated to ability to pay, then further analysis under *Bearden* is unnecessary.<sup>229</sup>

### **Insufficiently Prompt Consideration**

Nebraska law provides no special procedure to claim the state failed to afford an accused probationer a prompt consideration of a motion to revoke. That means the only way to raise the objection of no prompt consideration is as a defense to the revocation motion; a speedy trial act motion for discharge will not work.<sup>230</sup>

A former probationer may be able to raise successfully the defense that the revocation proceedings were not initiated within the probation term nor within a reasonable time thereafter in a case where there has been a substantial time lapse between the end of the probation term and the commencement of revocation proceedings. In *State v. White*,<sup>231</sup> the court held that a proceeding to revoke probation may be instituted within the probationary period or within a reasonable time thereafter. The revocation proceeding in *White* was commenced on the day after the term of probation ended.<sup>232</sup>

In *State v. Hernandez*,<sup>233</sup> the defendant argued he had lost the opportunity to serve his Nebraska and his Arizona sentences concurrently because Nebraska waited for his Arizona sentence to expire before returning him to Nebraska for probation revocation proceedings based on his Arizona crime. The Nebraska Supreme Court rejected that argument. The decision focused on the claim that the state had failed to provide Hernandez with a prompt consideration of the probation violation charge. The supreme court ruled:

if a defendant is incarcerated in another jurisdiction and the State wishes to charge the defendant with violating probation, it provides the defendant with reasonably 'prompt consideration' of the charge if the State invokes the detainer process and notifies the defendant of the pending revocation proceedings. Absent unusual circumstances, the State is not required to extradite the defendant to revoke probation and sentence the defendant before the term of the defendant's foreign incarceration expires.<sup>234</sup>

In reaching that result, the supreme court applied its general test from *State v. Windels*<sup>235</sup> for evaluating the reasonableness of a delay that courts should consider such factors as the length of any delay in proceedings against a probationer for probation revocation, the reasons for the delay, and the prejudice to the defendant resulting from the delay.

The court distinguished the *Windels* situation from the *Hernandez* situation. In *Windels*, the motion to revoke the defendant's probation was filed the day before the end of the defendant's probationary term, October 2, 1990, and the defendant was not personally served with the warrant on the alleged violation of probation until 6 months and 26 days after the filing of the motion to revoke probation. On September 28, 1990, the Douglas County Court issued a warrant for the defendant's arrest for violation of probation. On October 1, 1990, an affidavit alleging the defendant's violation of probation was filed in the county court. The return on the warrant stated that on October 3, 1990, notice of the warrant was mailed to the defendant's address by regular U.S. mail without return receipt requested. Apparently, *Windels* did not learn of the existence of the warrant until April 27, 1991, when he turned himself in. Nothing in the record indicated that the state made any effort, other than mailing the warrant to the defendant's home address, to serve the defendant with the warrant. The record contained no evidence to support a finding that *Windels* had actual notice of the warrant before April 27, 1991.

The supreme court noted that service of a warrant by regular mail will not support an inference that the accused had notice of a command to appear in court. Further, a presumption of receipt of mail by the addressee does not arise unless it is shown that the letter was properly addressed, stamped, and mailed. In *Windels*, the state produced no evidence that the envelope the warrant was mailed in was properly addressed, stamped, and actually and regularly mailed. Thus, the state failed to afford *Windels* with the required prompt consideration of the alleged violations.

Actual notice of the filing of a motion to revoke seems an obvious enough requirement. This time, I refer to "notice" in the sense of a document telling the alleged probation violator a motion to revoke has been filed. The state could attempt reliance on the presumption of receipt as long as the state proved it mailed a copy of the filed motion to revoke and notice to appear properly addressed to the probationer at the last known address in an envelope with proper postage affixed and deposited properly with the post office. But the need to rely on that presumption arises from sloppy practice.

Several practical matters should be obvious. An alleged probation violator can refuse to pick up regular mail notices and defeat the state's attempt to proceed with a revocation action. An alleged probation violator can refuse to pick up certified mail notices and defeat the state's attempt to proceed with a revocation action. The offender community will spread the word when those techniques work. They will also spread the word when courts refuse to accept unproved claims of attempts to notify alleged violators.

The supreme court isn't insisting on the impossible. Just a little more effort than mailing an arrest warrant by regular mail is all that's necessary. Arrest warrants are served by making arrests. Documented attempts to locate the alleged violator at the last known address and last known place of employment go a long way toward presenting an evidentiary record of diligent efforts to find the offender and help persuade courts that the offender is responsible for the lack of notice. Obtaining issuance of an arrest warrant, putting the issuance on the computer, such as

NCIC, and passively waiting for someone maybe to stop the offender for a traffic violation and find the warrant on inquiry likely will not go a long way toward presenting an evidentiary record of diligent efforts to find the offender. Once in custody and brought into court, the court can give the probationer unimpeachable in-court, on-the-record, notice of further appearance dates and of the allegations in the motion to revoke. Documented attempts to serve actual notice also might work. Of course, the documented attempts at arrest or service will need testimony to support their existence. Both actual arrest and personal service of the motion to revoke and appearance date by a sheriff's deputy or a process server can remove the need to rely on a weak presumption.

### **Not-Yet-Final New Convictions**

The Nebraska Supreme Court has not considered some other possible defenses such as a claim that the later conviction alleged as a violation of probation is not final but is pending on appeal, or a claim that the later conviction alleged as a probation violation was an invalid conviction. The Nebraska Court of Appeals has considered the possible defense of claiming that the later conviction alleged as a violation of probation is not final but is pending on appeal. The appellate court ruled, in harmony with the uniform practice of courts across the country, that a new criminal conviction, even though not yet final, and even if pending on appeal, may be used as proof that a probationer has violated the conditions of his or her probation.<sup>236</sup> Defeating revocation actions is not included among the recognized purposes of criminal appeals.

The presumption of innocence of the new conviction does not apply in revocation proceedings based on the new conviction even if pending on appeal. If it did apply, new criminal behavior could not form the basis for revocations unless the substantial delay resulting from appeals could be tolerated and such delay cannot be tolerated. Further, the state still could obtain revocations using the same evidence it used to obtain the new convictions anyway. The standard of proof in revocation actions is clear and convincing, not beyond a reasonable doubt. Thus, the defense of not-yet-final new convictions does not exist even if some localities think it does.

## **MISCELLANEOUS**

### **Invalid Conditions and Appeals**

A probationer must take a direct appeal in order to attack the validity of a requirement of a probation order as well as to attack the validity of the conviction on the grounds that the probationer's guilty plea was involuntary.<sup>237</sup> A probation sentence is a final, appealable judgment. However, *State v. Ozmun*<sup>238</sup> was an appeal after a probation revocation. In *Ozmun*, the court took notice on its own motion that there was no showing in the plea taking record that Ozmun was either represented or had waived counsel at the time of the prior conviction and reversed the enhancement of the conviction.<sup>239</sup>

A probationer who did not challenge by direct appeal the validity of a condition of the probation might be foreclosed from violating the condition involved and then attacking the

validity of the condition in the ensuing revocation proceeding. However, the court could take notice of the condition and its invalidity if that were the case. Also, the court might allow an exception in order to do substantial justice. It seems doubtful that the court would enforce an invalid probation condition simply because the probationer failed to take a direct appeal from the initial imposition of the probation sentence. But the court just might do that in the interest of finality.

### **Which Court Is the Sentencing Court**

Under *State v. Daniels*,<sup>240</sup> a case in which the county court tried the case and sentenced the probationer, later affirmed by the district court on appeal, the district court does not obtain jurisdiction to entertain the later revocation proceeding. The county court remains the sentencing court, despite the concept that the judgment of the district court vacates the judgment of the county court even if affirmed on appeal.<sup>241</sup> The *Daniels* decision was worded broadly enough that it also should apply in cases in which the district court reverses or modifies the sentence of the county court. The district court, when hearing appeals from the county court, acts as an intermediate court of appeals. Appellate courts do not have jurisdiction over matters requiring the taking of evidence unless a special statute applies. The district court reviews county court judgments for error on the record only.<sup>242</sup>

### **The New Sentence**

Earlier, I said revocation of probation under the present system should result in the imposition of a new sentence as a matter of course. The new sentence, however, cannot be a sentence under an amended statute increasing or decreasing the severity of the possible sentence on the underlying conviction. “[O]ne whose probation is revoked is subject to sentencing under the statute in effect at the time of conviction. The court can impose such sentence as it could have imposed originally for the crime.”<sup>243</sup> The penal statute in effect at the time of the original sentence to a term of probation applies, not that which is effective at the time of sentencing following the revocation.<sup>244</sup>

The revocation court, in imposing the new sentence, also does not work under any restriction of the new sentence to a sentence of incarceration no longer, in terms of time, than the length of the original probation.<sup>245</sup>

The Nebraska Supreme Court disapproved the practice of terminating probations on an unsuccessful or unsatisfactory basis in *State v. Caniglia*.<sup>246</sup> When the state brought revocation proceedings against Caniglia, the district judge terminated the defendant’s probation as unsuccessful. The supreme court explained:

Given the violation, under § 29-2268, the district court was authorized to revoke probation and impose a sentence, to reprimand and warn the probationer, to intensify supervision, to impose additional terms of probation, or to extend the term of probation. The district court did none of the above. Instead, the district

court ordered the probation ‘terminated as unsuccessful.’ This was neither an authorized order nor a sentence.<sup>247</sup>

Thus, trial court judges no longer have available that somewhat more amicable avenue of resolving probation revocation actions.

### **Jail Credit**

Jail time imposed as a condition of probation and not as a part of a sentence does not count against time imposed on a new sentence after revocation.<sup>248</sup> However, if a probationer is arrested and held pending revocation proceedings and was arrested for the revocation proceedings, the time spent in jail awaiting revocation probably should be credited against a maximum sentence imposed after revocation; if the arrest was for some other reason, probably not.<sup>249</sup> Whether presentence jail time must be credited against any jail time imposed as a condition of probation remains an open question, but granting credit does not prejudice anyone.

### **Driver's License Sanctions**

The *Schulz* decision created a serious limitation on courts imposing driver's license sanctions after probation revocations on all criminal charges to which court ordered driver's license sanctions applied as part of straight (non-probation) sentences.<sup>250</sup> The statute involved in *Schulz* required the sentencing court to revoke a straight sentenced offender's license "as part of the judgment of conviction . . . for a period of one year from the date of . . . conviction."<sup>251</sup> The court found that statutory language modified the general statute allowing courts to impose on probation violators such new sentences as might have been imposed originally.<sup>252</sup> The probation sentence is the judgment of conviction. The supreme court reasoned the statute in *Schulz* allowed a one year license revocation for only the period of the one year following imposition of the probation sentence. Therefore, on re-sentence following revocation of the probation sentence, the trial court could not revoke *Schulz*'s license for one year commencing on the date of the re-sentence. *Schulz* involved a 2d offense driving under the influence conviction. The Legislature attempted to remove the *Schulz* limitation by its adoption of LB 377 (1988)<sup>253</sup> for all driving under the influence and refusal to submit cases arising after the effective date of LB 377 (1988).<sup>254</sup>

The Legislature also has attempted to remove the *Schulz* limitation from any of the other offenses to which *Schulz* logically applies. It is necessary, therefore, that courts and counsel carefully consider the effect of *Schulz* whenever probation is revoked and a new sentence is imposed on any charge for which a driver's license sanction is part of the sentence. While the applicability of *Schulz* depends upon the language of the statute involved, *Schulz* probably still applies across the board to all driver's license sanction sentences, with the possible exception of sanctions imposed under Neb. Rev. Stat. § 60-496 (Lexis 2007). Neb. Rev. Stat. § 60-496 does not refer to the date of the judgment or imposing the license sanction as a part of the judgment of conviction.<sup>255</sup>

## Violation of Non-Probation Community Service Sentences

The Legislature has authorized the use of community service sentences as an alternative to fines or imprisonment to be imposed as a condition of probation sentences or as straight (non-probation) sentences for specified classes of offenses.<sup>256</sup> Offenders who fail to perform community service sentences may be arrested, and, after a hearing, be re-sentenced on the original charge, have their probations revoked, or be found in contempt.<sup>257</sup> If the failure to perform is a violation of a probation condition, the required hearing obviously must be a probation revocation hearing conducted in compliance with the *Morrissey-Gagnon* rules. Normal contempt procedures should be used if the failure is treated as a contempt.<sup>258</sup> But, if the failure to perform is a violation of a straight sentence, and the court<sup>259</sup> chooses to use the re-sentence approach, then the procedures to be followed at the required hearing are not prescribed in the statute.

Since one function of alternative sentences to community service is to allow offenders who might otherwise be imprisoned<sup>260</sup> to retain their liberty subject to the condition that they perform the community service as ordered,<sup>261</sup> the position of an offender straight-sentenced to perform community service is analogous to the position of a probationer. Such an offender has an interest in continued conditional liberty much like the interest of a probationer in continued conditional liberty. The state has an interest in efficient enforcement of the community service sentence.

The procedures required by *Morrissey* and *Gagnon*, at the minimum, probably should apply to the situation of alleged community service straight sentence violators. Trial courts would be following a seemingly safe path should they apply the *Morrissey-Gagnon* rules to community service straight sentence violation hearings. Counsel for both parties should advocate the use of the *Morrissey-Gagnon* rules at the minimum in such cases.<sup>262</sup> Criminal contempt procedures, considerably more demanding, also might apply. We must await resolution of this lack of clarity in the community service sentence statutes through judicial interstitial law making.<sup>263</sup>

## CONCLUSION

The Nebraska Supreme Court, the United States Supreme Court, and the Eighth Circuit Court of Appeals apply essentially the same rules to probation revocation proceedings, except with respect to the requirement of written statements of evidence relied upon and reasons for revocation, the need for preliminary hearings, and the types of violations that warrant revocation. The Nebraska Supreme Court does not require written statements of evidence relied upon and reasons for revocation in adult cases, even though it has said the better practice is to prepare such statements when there are two or more alleged violations. The Nebraska Court of Appeals does require at least oral, on the record, statements of evidence relied upon and reasons for revocation in juvenile cases. Both the Eighth Circuit and the United States Supreme Court require written statements, although the Eighth Circuit has not insisted on detailed statements from state revocation courts. The Nebraska Supreme Court requires preliminary hearings or waivers in all

cases on independent state grounds. The Eighth Circuit requires preliminary hearings only for probationers who are in custody. The United States Supreme Court has not taken a position since *Gagnon*. The Nebraska Supreme Court has affirmed revocations based upon violations of any condition of probation. The Eighth Circuit sometimes requires and sometimes does not require law violations or antisocial acts as the predicates for revocation. The United States Supreme Court has taken a position only with respect to failure to make restitution as the alleged violation.

Because of the fiction that probation revocation proceedings are not part of their antecedent criminal proceedings, many of the rules of criminal procedure do not apply. Probation revocation law forms a discrete, developing legal area, a basic knowledge of which should be mastered by judges and those practitioners who handle criminal cases only sporadically as well as criminal law specialists. The basic rules are established. Only the finer points remain to be developed. In the absence of specific precedents or statutory provisions, fundamental fairness to *both* the prosecution and the probationer should be the guiding star when an unanswered question of procedure arises in a probation revocation proceeding.

\* District Court Judge, Fifth Judicial District of Nebraska, 1995 to present; County Court Judge, Fifth Judicial District of Nebraska, 1980-1995; B.A. 1971 and J.D. 1975, University of Nebraska-Lincoln. Nothing in this article should be taken as an official position of the author or the judges of any other Nebraska courts.

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1. I thank the Nebraska Law Review for granting permission to reprint here substantial parts of this article in its 1989 form. See Alan G. Gless, *Nebraska Probation Revocation--A Primer*, 68 NEB. L. REV. 516 (1989). We have incidental temporal symmetry with these two versions of this article. The 1989 article was published eighteen years after the Nebraska Probation Act's adoption; this revision appears eighteen years after the publication of the first version.
  2. The amendments' importance led Deb A. Minardi, Nebraska's Deputy State Probation Administrator/Community Corrections Programs Coordinator, to ask me for this revision. Deb's comments after her review of an earlier draft of this 2007 revision improved this revision and I thank Deb for sharing her insights with me.
  3. Neb. Rev. Stat. § 29-2246 (4) (Lexis 2007)(all citations to Neb. Rev. Stat. (Lexis 2007) are current through the 2006 Second Legislative Session). Given the inclusion of persons found delinquent or in need of special supervision in the statutory definition of probation, coupled with the inclusion of juvenile courts in Neb. Rev. Stat. § 29-2246 (2) (Lexis 2007) the Probation Administration Act now obviously must be construed to apply to probation dispositions in juvenile cases heard by county courts and separate juvenile courts, as well as to probation sentences in the adult criminal system, except where special provisions of the Juvenile Code control. E.g., Neb. Rev. Stat. §43-286 (4) (Lexis 2007) relating to revocation of juvenile probations. The definition of court for purposes of the Probation Administration Act now does include the separate juvenile courts, as well as county courts sitting as juvenile courts. Neb. Rev. Stat. § 29-2246 (2) (Cum. Supp. 1988) did not include the separate juvenile courts.
  4. *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986); *State v. Christiansen*, 217 Neb. 740, 351 N.W.2d 67

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(1984); & *State v. Kinney*, 217 Neb. 701, 350 N.W.2d 552 (1984).

5. Neb. Rev. Stat. § 29-2268 (Lexis 2007). We could nitpick about whether imposition of a sentence following the revocation of a probation sentence is a sentencing or a re-sentencing, but I use re-sentencing and imposition of a new sentence as synonymous in this article (and so does the American Law Institute). Defining one's own terms one's own way does happen to fall within the range of an author's privileges, after all.

6. In fact, the Eighth Circuit Court of Appeals has decided no cases of importance to Nebraska probation revocation since 1989.

7. 9 Neb. App. 824, 621 N.W.2d 821 (2000)(single-judge decision). *State v. Poppe*, 2006 Neb. App. LEXIS 200 (Neb. Ct. App. Dec. 12, 2006), explains later developments suggest single-judge decisions may not be precedential, however, even if not precedential, single-judge appellate decisions can be instructive, even persuasive, to later appellate court panels. Counsel and trial judges cannot afford to ignore single-judge appellate opinions.

8. 411 U.S. 778 (1973).

9. Neb. Rev. Stat. §§ 29-2246 to 29-2268 ((Lexis 2007)) [hereinafter referred to as the Probation Act or the Act].

10. The legislative history reveals the Legislature was not told it was based on the ABA Standards, but the Nebraska Supreme Court said it was in *State v. Dovel*, 189 Neb. 173, 201 N.W.2d 820 (1972). Compare, ALI Model Penal Code §§ 301.1 et seq. (P.O.D. 1962). The Act appears to be a combination of the ABA Standards and the Model Penal Code provisions relating to probation.

11. Neb. Rev. Stat. § 29-2246 (4) (Lexis 2007). Prior to the adoption of the Probation Act, sentence was suspended and then probation was granted. See, e.g., Neb. Rev. Stat. § 29-2218 (Reissue 1964)("the court may, in its discretion, enter an order, without pronouncing sentence, suspending further proceedings and placing the accused on probation").

12. Reasonable cause and probable cause are synonymous. LaFave, *Search and Seizure* § 5.1(b) (2d ed. 1987).

13. Neb. Rev. Stat. § 29-2266 (1) (Reissue 1985). Presumably the county attorney then had discretion to file or decline to file a revocation motion, although a strong argument could have been made that the county attorney had no discretion after a court referral. But, see, Neb. Rev. Stat. § 29-2266 (4).

14. Neb. Rev. Stat. § 29-2266 (2) (Reissue 1985) & (Lexis 2007). The probation officer could then and can now ask any peace officer for assistance in effecting a warrantless arrest of a probationer.

15. Neb. Rev. Stat. § 29-2266 (3) (Reissue 1985).

16. Neb. Rev. Stat. § 29-2266(1)(b) (Lexis 2007). For present purposes, the fees non-payment of which may constitute a form of non-criminal violation generally include the probation administration enrollment fee and the monthly probation administration programming fees, and, possibly the monthly chemical testing fees along with potentially only a very few other fees ordered as part of adult probation sentences. Neb. Rev. Stat. § 29-2262.06 (Lexis 2007).

17. Neb. Rev. Stat. § 60-6,197.04 (Lexis 2007).

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18. Neb. Rev. Stat. § 60-6,164 (Lexis 2007).
  19. Neb. Rev. Stat. § 60-672 (Lexis 2007).
  20. Neb. Rev. Stat. § 29-2266(2)(a) (Lexis 2007) specifies the decision to impose administrative sanctions in lieu of formal revocation proceedings rests with the probation officer and his or her chief probation officer or such chief's designee and shall be based upon the probationer's risk level, the severity of the violation, and the probationer's response to the violation. The probation officers then must use a matrix under Neb. Prob. Sys., Pol. & Proc. Man., Response to Offender Non-Compliance 5-101 to 5-116 (Oct. 2003), in an effort to make their decision on a standardized and objective basis.
  21. Neb. Rev. Stat. § 29-2266(2)(a) (Lexis 2007).
  22. Neb. Rev. Stat. § 29-2266(2)(b) (Lexis 2007).
  23. Neb. Rev. Stat. § 29-2266(2)(a) (Lexis 2007).
  24. Neb. Rev. Stat. §§ 29-2277 to 29-2279 (Lexis 2007).
  25. Neb. Rev. Stat. § 29-2266(7) (Lexis 2007).
  26. Neb. Prob. Sys., Pol. & Proc. Man., Response to Offender Non-Compliance 5-101 to 5-116 (Oct. 2003).
  27. Neb. Rev. Stat. § 29-2266(3) (Lexis 2007).
  28. Neb. Rev. Stat. § 29-2266(4) (Lexis 2007).
  29. Neb. Rev. Stat. § 29-2266(5) (Lexis 2007).
  30. Neb. Rev. Stat. § 29-2266(2)(a) (Lexis 2007).
  31. Neb. Rev. Stat. § 29-2267 (Lexis 2007).
  32. *Id.* The pre-Act case law contained one inconsistency of importance. In one case, the court said the state's burden of proof in a revocation hearing was to present any probative evidence sufficient to convince the trial court that the probationer's conduct in violating probation indicated the probationer would not refrain from future criminal conduct without punishment. *State v. Ward*, 182 Neb. 370, 154 N.W.2d 758 (1967). But in an earlier case, the court said proof beyond a reasonable doubt was not required. Clear and satisfactory evidence was sufficient to prove a probation violation. *Phoenix v. State*, 162 Neb. 669, 77 N.W.2d 237 (1956). The court was never called upon to resolve the apparent conflict. The Act resolved the conflict.
  33. Neb. Rev. Stat. § 29-2267 (Lexis 2007).
  34. Neb. Rev. Stat. § 29-2268 (Lexis 2007).
  35. Neb. Rev. Stat. § 27-101 et. seq. (Lexis 2007).
  36. At least not in the southern six counties of the Fifth Judicial District. The evidence supporting the statement relating to increased use of warrantless arrests remains anecdotal. Sometimes anecdotal evidence suffices, because it's all there is.
  37. Neb. Rev. Stat. § 29-2267 (2) (Lexis 2007).
  38. Neb. Rev. Stat. § 29-401 et. seq. (Lexis 2007).

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39. Neb. Rev. Stat. § 83-1,102(6) (Lexis 2007). This provision appears to be a leftover from the days when county courts did not have the authority to sentence offenders to probation and there was no statewide probation system.
40. Neb. Prob. Sys., Pol. & Proc. Man., *supra*, n. 20 at 5-102 to 5-104.
41. 500 U.S. 44 (1991).
42. Or, *McLaughlin*, as many commentators shorten it; I prefer calling it *Riverside*, as does the Seventh Circuit U.S. Court of Appeals.
43. A Nebraska felony arraignment cannot be held until the filing of an information in district court after either a preliminary hearing (an adversarial proceeding) or waiver of preliminary hearing, generally, but not necessarily held in county, but also possible in district court, and an order from the preliminary hearing court binding the case over for trial in the district court. A Nebraska felony arraignment does not consist of an appearance simply for a probable cause determination or a bond setting. A Nebraska felony arraignment consists of the proceeding in the trial court with felony jurisdiction at which the court advises the accused of the charges and possible penalties, trial rights, plea options and consequences, takes a plea to the general issue (assuming no other procedural motions prevent taking a plea to the general issue, such as a motion to quash, demurrer, plea in abatement, and similar activities) and more.
44. 77 F.3d 285 (9<sup>th</sup> Cir. 1996).
45. Van Poyck, 77 F.3d at 289.
46. Neb. Rev. Stat. § 25-2121 (3) & (4) (Lexis 2007).
47. *Id.*
48. Neb. Rev. Stat. § 28-104 (Lexis 2007).
49. Neb. Rev. Stat. §§ 29-403 & 29-404 (Lexis 2007).
50. Neb. Rev. Stat. § 29-404 (Lexis 2007). This duty is modified by the discretion to issue citations in-lieu-of-arrest whenever the court believes a citation would serve all of the purposes of an arrest warrant. Neb. Rev. Stat. § 29-425 (Lexis 2007). See, generally, Alan G. Gless, *Arrest and Citation: Definition and Analysis*, 59 NEB. L. REV. 279 (1980).
51. Which is the real basis for contempt proceedings.
52. There was a clear, direct grant of authority to issue probation violation arrest warrants before 1971, but it was deleted and not replaced when the Probation Administration Act was proposed and adopted. See, Neb. Rev. Stat. § 29-2219 (Reissue 1964).
53. See, Cohen & Gobert, *The Law of Probation and Parole* § 9.03 (1983). The fiction that probation violation proceedings are not criminal proceedings leads to this result.
54. Neb. Rev. Stat. §§ 29-901 et. seq. (Lexis 2007). The probation sentence is the judgment.
55. Neb. Rev. Stat. § 25-2730 (3) (Lexis 2007) & § 29-2302 & 2303 (Lexis 2007).
56. *State ex. rel. Partin v. Jensen*, 203 Neb. 441, 279 N.W.2d 120 (1979).

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57. *Id.*, at 447, 279 N.W.2d at 123.

58. Release on bail and even on their own recognizance remains routine practice in the southern six counties of the Fifth Judicial District. But routine practice varies by locality.

The Parole Board has statutory authority to release alleged parole violators pending revocation proceedings. Neb. Rev. Stat. § 83-1,119 (Lexis 2007).

59. Compare, ABA Standards, Probation §§ 5.1 et seq. (1970).

60. Although the Legislature did amend the Juvenile Code's probation revocation provision and the parole revocation statutes to reflect the Court's developments. See, e.g., Neb. Rev. Stat. § 43-286 (4) (Lexis 2007) & § 83-1,119 et. seq. (Lexis 2007).

61. Referring to *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

62. *Burns v. United States*, 287 U.S. 216 (1932).

63. 411 U.S. 778 (1973).

64. *State v. Holiday*, 182 Neb. 229, 153 N.W.2d 855, modified, 182 Neb. 410, 155 N.W.2d 855 (1967) [hereinafter referred to as *Holiday I* and *Holiday II*].

65. *Holiday I*, at 233, 153 N.W.2d at 858.

66. *Holiday I* at 232, 153 N.W.2d at 857.

67. This article will not examine the demise of right/privilege analysis in constitutional law.

68. *Supra*, n. 64.

69. 389 U.S. 128 (1967).

70. *Id.*, at 137 (because of the sentencing aspect, not the revocation aspect). Thus, *Mempa* became the first shot in the building revolution.

71. *Supra*, n. 64.

72. The court withdrew only that part of *Holiday I* that dealt with the right to appointed counsel in revocation proceedings. The statement that there is only a statutory right to be heard before revocation of probation was included in the court's analysis of the right to counsel issue.

73. *Phoenix v. State*, 162 Neb. 669, 673, 77 N.W.2d 237, 240 (1956).

74. *Id.*

75. 182 Neb. 370, 154 N.W.2d 758 (1967).

76. 155 Neb. 261, 51 N.W.2d 326 (1952).

77. *Id.*, at 268-69, 51 N.W.2d at 330-331.

78. See, Neb. Rev. Stat. § 27-401 (Lexis 2007).

79. Other than those with respect to privileges. Neb. Rev. Stat. § 27-1102 (4) (b) (Lexis 2007).

80. *In Re Interest of D.L.S.*, 230 Neb. 435, 438, 432 N.W.2d 31, 34 (1988).

81. 408 U.S. 471 (1972).

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82. *Id.*, at 488. Justice Douglas dissented from the detailed minimum requirements on the ground that the Court should not tell the states the precise procedures they should follow. *Id.*, at 499-500.
83. *Id.*, at 488.
84. *Id.*, at 486-87.
85. *Id.*, at 487.
86. *Id.*, at 488.
87. *Id.*
88. *Id.*, at 489.
89. *Id.* The Court did not reach or decide the question of whether accused parolees would be entitled to the assistance of counsel, retained or appointed. *Id.*
90. 411 U.S. 778 (1973) (8-1 decision).
91. *Id.* at 779 & 780.
92. *Id.*, at 790 & 791.
93. *Supra*, n. 69.
94. *State v. Kartman*, 192 Neb. 803, 224 N.W.2d 753 (1975).
95. 420 U.S. 103 (1975).
96. *Id.*, at 125, n. 26.
97. *Id.*, at 120.
98. *Id.*, at 122.
99. *Id.*
100. *Id.*, at 121, n. 22. The Court gave no evidence of the frequency upon which it relied.
101. It could be argued that more should be required to deprive accused persons of their liberty, but any such argument would ignore centuries of tradition and run headlong into the current get tough on criminals political philosophy. The effort to make the argument, most likely, would not be successful.
102. *Cf.*, *Coleman v. Alabama*, 399 U.S. 1 (1970).
103. U.S.C.S. Fed. R. Crim. P. 32.1 (Lexis 2007).
104. 503 F.2d 1081 (8th Cir. 1974); accord, *Petition of Meidinger*, 168 Mont. 7, 539 P.2d 1185 (1975). See also, *Armstrong v. State*, 312 So. 2d 620 (Ala. 1975)(no need for preliminary hearing if adequate notice and sufficient time to prepare a defense are granted).
105. *Id.*, at 1084.
106. *Id.*
107. Notes of Advisory Committee, Fed. R. Crim. P. 32.1 at p. 36 (U.S.C.S. Cum. Supp. 1987). The federal rule only applies to probation revocations in federal courts. However, given the process followed in developing federal rules, the federal rule does represent an authoritative interpretation of federal constitutional requirements that could

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be useful to the prosecution in appropriate cases. See, also, *United States v. Sutton*, 607 F.2d 220 (8th Cir. 1979)(failure to hold preliminary hearing harmless error where probationer serving sentence of imprisonment on new conviction at time of probation violation arrest). In *Chilembwe v. Wyrick*, 574 F.2d 985 (8th Cir. 1978), the court held that where obtaining permission before leaving the state is a condition of probation, a probationer's presence in another state without permission is sufficient probable cause to believe the probationer has violated probation to dispense with the requirement of a preliminary hearing.

108. Neb. Rev. Stat. §§ 29-504 to 29-506 (Lexis 2007).

109. The rules are different with respect to felony charges brought by indictment.

110. *Lingo v. Hann*, 161 Neb. 67, 71 N.W.2d 716 (1955).

111. *Id.*

112. *Maher v. State*, 144 Neb. 463, 13 N.W.2d 641 (1944); & Neb. Rev. Stat. § 29-1816 (Lexis 2007).

113. *State v. Ferree*, 207 Neb. 593, 299 N.W.2d 777 (1980).

114. *State v. Franklin*, 194 Neb. 630, 234 N.W.2d 610 (1975).

115. 207 Neb. 593, 299 N.W.2d 777 (1980).

116. The charging instrument in probation revocation matters properly is denominated either a motion or an information, not a complaint. Neb. Rev. Stat. §§ 29-2266 (3) (b) & 29-2267 (Lexis 2007).

117. The sufficiency of the evidence at the final hearing must not have been raised as an issue on appeal.

118. *Id.*, at 597, 299 N.W.2d at 779.

119. Whether the due process the court found had been denied *Ferree* was federal or state due process is impossible to determine from the court's opinion. Of course, there may be no difference.

120. But, the Eighth Circuit has held that written notice is not required before the preliminary hearing, only before the final hearing. *United States v. Pattman*, 535 F.2d 1062 (8th Cir. 1976).

121. See, *Boykin v. Alabama*, 395 U.S. 238 (1969).

122. The supreme court has adopted a county court rule that requires waivers of felony preliminary hearings to be made on the record through the court's supervisory power over state court procedures. Neb. Cty. Ct. Gen. R. 15 (Lexis 2007).

123. I've written elsewhere of the inherent redundancy of that phrase, "knowing, voluntary and intelligent." A waiver cannot be intelligent if not knowing, and, in the same sense, cannot be voluntary, if not intelligent. Alan G. Gless, *Nebraska Plea-Based Convictions Practice: A Primer & Commentary*, 79 NEB. L. REV. 293 (2000).

124. The record should demonstrate the knowing, voluntary, and intelligent nature of any such waiver because the supreme court cited to *Boykin v. Alabama*, *supra*, n. 121.

125. *Morrissey* at 485.

126. I.e., the arrest for the probation violation or an arrest for a new criminal charge forming the basis for the violation arrest?

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127. Anecdotally, again, at least in the six southern counties of the Fifth Judicial District, but also, again, only anecdotally supported, the situation differs in the more populous areas.
128. *State v. Kartman*, 192 Neb. 803, 806, 299 N.W.2d 753, 755 (1975).
129. *Kartman v. Parratt*, 397 F. Supp. 531, 533 (D. Neb. 1975).
130. 207 Neb. 593, 299 N.W.2d 777 (1980).
131. 212 Neb. 248, 322 N.W.2d 426 (1982).
132. In *State v. Moreno*, 193 Neb. 351, 227 N.W.2d 398 (1975), the probationer attacked the use of the chief district probation officer as the preliminary hearing officer, but did not make his objection until he was before the supreme court. The supreme court did not reach the issue as a result. In *State v. McFarland*, 195 Neb. 395, 238 N.W.2d 237 (1976), the county court conducted the preliminary hearing on a felony probation revocation motion. The district court conducted the final revocation hearing. No issue was raised before the supreme court on the identity of the preliminary hearing officer.
133. The idea of preserving the sentencing judge's impartiality by keeping the sentencing judge's mind empty regarding the facts of the case is a myth. Impartiality is a characteristic of an open, disciplined mind --- not an empty mind. The sentencing judge, at least in smaller jurisdictions, will have reviewed the probation officer's violation information report and will have advised the probationer of the alleged violation/s at the intake hearing. If an arrest warrant or a warrantless arrest is involved, the sentencing judge also will have considered the case in acting on the application for the arrest warrant and bail hearing.
134. Use of probation officers from other probation districts would solve this problem, but would not provide for a bail or bond hearing.
135. *Morrissey* at 487.
136. 535 F.2d 450 (8th Cir. 1976).
137. The Nebraska Supreme Court has not decided any cases on the sufficiency of the preliminary hearing officer's report.
138. The rights of accused probationers to confront adverse witnesses at preliminary hearing and to appear and present evidence at preliminary hearing have not been dealt with in any published decisions of the Nebraska Court of Appeals, the Nebraska Supreme Court, the Eighth Circuit Court of Appeals, or the United States Supreme Court since the adoption of the *Morrissey-Gagnon* rules. See, *Cohen & Gobert*, *supra*, n. 30, at § 9.22 et seq.
139. *Morrissey*, 408 U.S. at 487-88.
140. *Id.*
141. *Id.*, at 489-90.
142. *Id.*, at 489. Consistent with the view that a probation revocation proceeding is not part of a criminal prosecution, the Court has held the Interstate Agreement on Detainers does not apply to probation violation detainers. *Carchman v. Nash*, 473 U.S. 716 (1985).

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143. *Morrissey*, 408 U.S. at 489. Both in *Morrissey*, 408 U.S. at 490, and in *Carchman*, *supra*, n. 142, 473 U.S. at 731, the Court indicated its belief that a new criminal conviction was conclusive proof of a probation violation.

144. *Id.*, at 479.

145. *Id.*, at 480.

146. E.g., third degree sexual assault, driving under the influence of alcohol, etc.

147. 197 Neb. 42, 246 N.W.2d 657 (1976).

148. *Id.*, at 47, 246 N.W.2d at 660.

149. 573 F.2d 1020 (8th Cir. 1978).

150. *Id.*, at 1024-25.

151. Of course, imposing such probation terms ignores or violates the personal autonomy of individual offenders, but whether sentencing that violates individual autonomy is philosophically justifiable is a question outside the scope of this article. Any sentencing having as its goal the rehabilitation of the offender may violate the personal autonomy of individual offenders.

152. 536 F.2d 1257 (8th Cir. 1976).

153. 807 F.2d 749 (8th Cir. 1986).

154. 588 F.2d 604 (8th Cir. 1978).

155. *Id.*, at 606-607.

156. 588 F.2d 651 (8th Cir. 1978).

157. *Smallwood* was decided by Circuit Judges Van Oosterhout and Henley and District Judge Devitt. *Reed* was decided by Circuit Judges Lay and Bright and District Judge Van Sickle. *Burkhalter* was decided by Circuit Judges Lay, Ross, and McMillian. *Rodgers* was decided by Circuit Judges Bright, Stephenson, and McMillian. *Goeller* was decided by Circuit Judges Fagg, Bowman, and Timbers (Judge Timbers was a Second Circuit Court of Appeals judge sitting by designation with the Eighth Circuit in *Goeller*).

158. *State v. Sievers*, 2 Neb. App. 463, 511 N.W.2d 205 (1994).

159. 192 Neb. 803, 224 N.W.2d 753 (1975).

160. *Kartman v. Parratt*, 397 F. Supp. 531, 533-34 (D. Neb. 1975).

161. *Id.*, at 534.

162. *Kartman v. Parratt*, 535 F.2d 450, 456 (8th Cir. 1976).

163. Under *State v. Ferree*, *supra*, n. 113, any change in the nature or identity of the alleged violations after preliminary hearing would require a new preliminary hearing to be offered to the probationer.

164. *Kartman v. Parratt*, *supra*, n. 162, at 453.

165. 212 Neb. 248, 322 N.W.2d 426 (1982).

166. *Id.*, at 251, 322 N.W.2d at 428-429.

167. 185 Neb. 58, 173 N.W.2d 395 (1970).

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168. *Id.*, at 60, 173 N.W.2d at 396.
169. *Morrissey*, 408 U.S. at 489.
170. *Williams v. New York*, 337 U.S. 241 (1949); & *State v. Whitehurst*, 224 Neb. 174, 396 N.W.2d 433 (1984).
171. *Specht v. Patterson*, 386 U.S. 605 (1967).
172. *Supra*, n. 162.
173. *Id.*, at 456-457.
174. *United States v. Bell*, 785 F.2d 640, 642-43 (8th Cir. 1986).
175. *Id.*, at 643.
176. *Supra*, n. 174.
177. *Id.*, at 642-43.
178. *Id.*, at 643, n. 3.
179. *Id.*, at 643.
180. *Id.*, at 643-44. In *United States v. Pattman*, 535 F.2d 1062 (8th Cir. 1976), the alleged violation was a failure to report an arrest. The court of appeals approved admission of an arrest report for the limited purpose of proving an arrest was made.
181. *Id.*, at 644.
182. *Id.*, at 644-45. The Eighth Circuit adhered to the *Bell* decision in *United States v. Burton*, 866 F.2d 1057 (8th Cir. 1989), as it relates to the use of laboratory reports without live foundation testimony. *Bell* was decided by Circuit Judges Arnold and Wollman and District Judge Gunn. *Burton* was decided by Circuit Judges Arnold, Gibson and Bright.
183. 194 Neb. 740, 235 N.W.2d 402 (1975).
184. *Id.*, at 744, 235 N.W.2d at 404-405.
185. 221 Neb. 481, 378 N.W.2d 170 (1985).
186. This is no small assumption and is probably erroneous. However, in view of the supreme court's language in *In re D.L.S.*, *supra*, n. 80, that the rules of evidence can be used in deciding what type of evidence satisfies due process, the court may have left an escape hatch open for counsel who fail to object specifically on confrontation grounds.
187. 8 Neb. Ct. App. 525, 598 N.W.2d 765 (1999).
188. *Id.*, at 528-29, 598 N.W.2d at 767.
189. *Id.*, at 528, 598 N.W.2d at 767.
190. *Id.*
191. 465 U.S. 420 (1984)(6-3 decision).
192. *Id.*, at 435, n. 7.
193. *Id.*, at 429, n. 5.

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194. *State v. Sites*, 231 Neb. 624, 437 N.W.2d 166 (1989). The alleged violations Sites was compelled to testify about were his failure to attend AA meetings and to comply with Antabuse therapy as conditions of a DWI and DUS probation. Those violations are not separate crimes. Thus, no constitutional problem.

*Sites* represents the extent of development of the idea of compelled testimony of an accused probation violator. There are several instances in which accused probationers conceivably could be subject to efforts to compel their testimony about separate criminal offenses in their own revocation proceedings. Each such instance presents issues in the area of inapplicability of the privilege, all of which are beyond the scope of this article. For example, compelled testimony about a crime for which the witness has been pardoned, or on which the statute of limitations has run, or as to which the witness has already been convicted, or with respect to which the witness has been granted immunity does not implicate the constitutional privilege against self-incrimination because incrimination is not possible in such instances. Other protective rules may apply, such as the privilege under Neb. Rev. Stat. § 25-1210 (Lexis 2007) or due process considerations, but the self-incrimination privilege *per se* does not.

For use at the later criminal trial of a parolee's admission of the offense on trial made before the Parole Board, see, *State v. Portsche*, 2006 Neb. App. LEXIS 153 (Neb. Ct. App. Aug. 29, 2006)(not designated for permanent publication).

195. 223 Neb. 867, 394 N.W.2d 665 (1986).

196. *Id.*, at 869-70, 394 N.W.2d at 667. The court also disapproved of any suggestion in a prior case that an admission of a probation violation is a guilty plea. *State v. Blankenbaker*, 197 Neb. 344, 248 N.W.2d 773 (1977).

The Eighth Circuit agrees with the Nebraska Supreme Court that an admission to a probation violation charge is not a guilty plea, but an admission. Admitting a probation violation is not even the equivalent of pleading guilty to a criminal charge. As a result, a probationer need not be advised of the privilege prior to tendering an admission at a revocation proceeding. *United States v. Rapert*, 813 F.2d 182 (8th Cir. 1987).

197. 503 F.2d 940 (5th Cir. 1974).

198. 625 F.2d 1175 (5th Cir. 1980). But see, *Hicks v. State*, 452 So. 2d 606 (Fla. Ct. App. 1984), *aff'd* 478 So. 2d 22 (Fla. 1985)(before accepting plea in probation revocation proceeding, court must advise of right to counsel); *State v. Bryan*, 395 A.2d 475 (Md. Ct. App. 1978)(Md. R. Crim. P. apply to probation revocation proceedings).

199. *United States v. Segal*, 549 F.2d 1293 (9th Cir. 1977), *cert. denied*, 431 U.S. 919 (1977). For a complete discussion of the requirements of *Boykin v. Alabama*, see Alan G. Gless, *Nebraska Plea-Based Convictions Practice: A Primer & Commentary*, 79 NEB. L. REV. 293 (2000).

200. 813 F.2d 182 (8th Cir. 1987).

201. *Id.*, at 185. Any implication that Fed. R. Crim. P. 11 applies to probation revocations arising out of the court's language in *United States v. Smallwood*, 536 F.2d 1257 (8th Cir. 1976) is invalid after *Rapert*.

202. 194 Neb. 645, 234 N.W.2d 221 (1975); accord, *State v. MacFarland*, 195 Neb. 395, 238 N.W.2d 237 (1976); & *Morishita v. Morris*, 702 F.2d 207 (10th Cir. 1983).

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203. *Id.*, at 647, 234 N.W.2d at 223.
204. *Id.*, at 647-48, 234 N.W.2d at 223.
205. *Supra*, n. 162.
206. *Id.*, at 457-458.
207. 648 F.2d 441 (8th Cir. 1981).
208. 702 F.2d 207 (10th Cir. 1983).
209. *Id.*, at 210.
210. 461 U.S. 660 (1983)(announced two months after *Morashita*).
211. *Id.*, at 672.
212. 471 U.S. 606 (1985)(6-2-1 decision).
213. *Id.*, at 616.
214. *Id.*, at 613-14. What the Court meant by transcript is unclear in Nebraska practice, but clear in federal practice. In Nebraska practice, a transcript consists of certified copies of case filings. A transcription is a written verbatim record of oral proceedings prepared and used for purposes other than appeals. If prepared and used for an appeal, then a transcription is a bill of exceptions.
215. *Id.*, at 619. The Court also noted the diminished justification for requiring judges to explain their rulings when the risk of unfairness has already been minimized by other procedural safeguards. *Id.*
216. 767 F.2d 521 (8th Cir. 1985).
217. Discussed *supra* at nn. 208-209.
218. Discussed, *supra*, at nn. 202-204.
219. 3 Neb. App. 704, 530 N.W.2d 291 (1995).
220. Again, one could argue that more should be done in entering verdicts of conviction in terms of stating the evidence relied upon in reaching findings of guilt and perhaps the reasoning process used in deciding criminal cases. However, requiring juries to produce written statements of the evidence they relied upon and their reasoning processes would be quite awkward in most cases. No more should be required of judges hearing criminal cases without juries than is required of the juries themselves.
221. There have been no published Nebraska, Eighth Circuit, or United States Supreme Court decisions dealing with the probationer's right to appear in person and to present witnesses and defense evidence at the final hearing. See, *Cohen & Gobert*, *supra*, n. 30 at § 922 et. seq.
222. 193 Neb. 45, 225 N.W.2d 391 (1975).
223. *Id.*, at 54, 225 N.W.2d at 397.
224. *Id.*, at 53, 225 N.W.2d at 396. The Eighth Circuit has held the fourth amendment exclusionary rule does not apply in probation revocation proceedings. *United States v. Frederickson*, 581 F.2d 711 (8th Cir. 1978).
225. *State v. Morgan*, 206 Neb. 818, 295 N.W.2d 285 (1980).

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226. 225 Neb. 702, 407 N.W.2d 780 (1987); followed in *State v. Englehart*, 231 Neb. 579, 437 N.W.2d 468 (1989).

227. *Id.*, at 705, 407 N.W.2d at 783.

228. The Legislature has adopted the *Bearden* standard as part of its restitution sentencing act. Neb. Rev. Stat. § 29-2284 (Lexis 2007)(which expressly applies to probation revocations).

The situation of persons sentenced to probation on convictions of criminal non-support with a probation requirement that they pay support arrearages is analogous to the situation of defendants required to pay restitution and fines as conditions of probation. Probationers in such cases against whom revocations are sought on the basis of failure to pay their support arrearages logically ought to be able to interpose the defense of inability to pay under *Bearden*. Back child support is a debt as is restitution. Indigence is the same in either case.

229. *Martin v. Solem*, 801 F.2d 423 (8th Cir. 1986).

230. *State v. Sklenar*, 269 Neb. 98, 690 N.W.2d 631 (2005).

231. 193 Neb. 93, 225 N.W.2d 426 (1975).

232. *Id.*, at 94, 225 N.W.2d at 427.

233. 273 Neb. 456, 730 N.W.2d 96 (2007).

234. *Id.*, at 463, 730 N.W.2d at 101.

235. 244 Neb. 30, 503 N.W.2d 834 (1993).

236. *State v. Sievers*, 2 Neb. App. 463, 511 N.W.2d 205 (1994).

237. *State v. Williams*, 194 Neb. 483, 233 N.W.2d 772 (1975); *State v. Jacobson*, 221 Neb. 639, 379 N.W.2d 772 (1986). Of course, post-conviction proceedings and federal *habeas* proceedings are not affected by the rules relating to direct appeals. In the context of an appeal from a revocation of probation by a federal district court, the Eighth Circuit refused to consider the probationer's claims that his plea to the underlying charge was involuntary and that he had ineffective counsel at that time. *United States v. Goeller*, 807 F.2d 749 (8th Cir. 1986).

238. 221 Neb. 481, 378 N.W.2d 170 (1985).

239. *Id.*, at 482, 378 N.W.2d at 172 (nor was there a record of an enhancement hearing nor of the trial court's findings on enhancement).

240. 224 Neb. 264, 397 N.W.2d 631 (1986).

241. Neb. Rev. Stat. § 25-2733(3) (Lexis 2007).

242. *Id.*, at 266-267, 397 N.W.2d at 633. The record on appeal need not be complete. It is sufficient if it contains enough evidence to establish a violation by clear and convincing evidence. *State v. Schulz*, 221 Neb. 473, 378 N.W.2d 165 (1985).

243. *State v. Wragge*, 246 Neb. 864, 524 N.W.2d 54 (1994). See, also, *State v. Painter*, 223 Neb. 808, 394 N.W.2d 292 (1986)(the revocation court is to impose a *new* sentence for the crime of which the defendant was *originally convicted*).

244. *State v. Jacobson*, 221 Neb. 639, 379 N.W.2d 772 (1986).

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245. *State v. Wayt*, 13 Neb. App. 759, 701 N.W.2d 841 (2005).

246. 272 Neb. 662, 724 N.W.2d 316 (2006).

247. *Id.*, at 668, 724 N.W.2d at 320.

248. *State v. Schulz*, 221 Neb. 473, 378 N.W.2d 165 (1985); see, also, *State v. Tweedy*, 1995 Neb. App. LEXIS 111 (Neb. Ct. App. Mar. 28, 1995)(not designated for permanent publication).

249. *State v. Wayt*, 13 Neb. App. 759, 701 N.W.2d 841 (2005).

250. The legislature has added useful language to many of its driver's license sanctions statutes. That language, as it appears in Neb. Rev. Stat. § 28-905 (Lexis 2007), operating a motor vehicle in an effort to avoid arrest or citation, follows this pattern: " An order of the court under this section prohibiting operation of a vehicle or vessel and revoking the operator's license shall be administered upon sentencing, upon final judgment of any appeal or review, or upon the date that any probation is revoked, whichever is later."

Court ordered driver's license sanctions appear in a wide variety of the straight sentences applicable to a number of offenses. Examples include (there are more lurking in the statutes): driving under the influence of alcohol or drugs and refusal to submit to chemical test, Neb. Rev. Stat. § § 60-6,197.03 (Lexis 2007); willful reckless driving; first offense, Neb. Rev. Stat. § 60-6,216 (Lexis 2007); and, a catch-all provision relating to offenses committed in such manner as to endanger life, limb or property, which is certainly applicable to 1st offense reckless driving, but its scope is not easily determinable, Neb. Rev. Stat. § 60-496 (Lexis 2007).

251. 221 Neb. at 478, 378 N.W.2d at 169. What constituted the date of conviction, whether it is the date an offender's plea of guilty or no contest is accepted, the date a verdict of guilty is rendered (in contested cases), or the date of the first sentence to be imposed (a probation sentence is a judgment of conviction) presents an interesting question essentially outside the scope of this article. The alternative that creates the fewest administrative problems is the date the first sentence is imposed. However, at least once, the supreme court has held that the date the plea of guilty or no contest is accepted is the date of conviction for purposes of the allowable period of driver's license sanctions. *State v. McKain*, 230 Neb. 817, 434 N.W.2d 10 (1989).

In order to allow for the consideration of presentence investigations where it is desirable to do so, in cases in which license sanctions are a part of the penalties, trial courts would be forced, under *McKain*, to decline acceptance of the pleas until the date set for sentencing. Otherwise, the license sanctions will have to be imposed separately from the rest of the sentences (a strange and likely invalid approach). License sanctions generally are to be made a part of the judgment of conviction. The alternative is to sentence without the benefit of presentence investigations, which reduces the ability to individualize sentences. In *Schulz*, the court used the date of the judgment of conviction (the date of the probation sentence) in determining the allowable period of license revocation because the record presented to the supreme court did not reveal the date the defendant's plea was accepted.

LB 377 (1988) rendered the *McKain* holding inapplicable to cases arising under former §§ 39-669.07 & 39-669.08, now §§ 60-6,196 & 60-6,196 after the effective date of LB 377. However, there were some probation

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sentences predating LB 377 that could have become revocation cases to which *McKain* would have applied as well as potentially a few such cases may have remained pending on appeal. There also could have been some driving under suspension or revocation cases that could have been affected due to invalid revocations and suspensions imposed under the pre-*McKain* understanding and before LB 377.

Finally, if the statute providing for license sanctions, including the statutes involved in *Schulz* and *McKain*, requires that the sanctions be imposed as part of the judgment of conviction, the logic of *Schulz* and *McKain* applies to those license sanction sentences. Thus, in one sense, *Schulz* and *McKain* have limited direct applicability, but they could lead indirectly to considerable mischief in a number of cases if the supreme court decided to adhere to the *McKain* date of conviction rule in this context.

Over the years, depending upon the purposes for which the definition might apply, the Nebraska Supreme Court has adopted several definitions of conviction:

- 1). For purposes of impeachment by proof of a prior conviction, entry of a guilty plea does not ripen into a conviction until sentence is imposed (the judgment of conviction). *Ford v. State*, 106 Neb. 439, 184 N.W. 70 (1921); & *Marion v. State*, 16 Neb. 349, 20 N.W. 289 (1884).
- 2). For purposes of a constitutional provision declaring a public office vacant upon conviction of a felony, the court said a guilty plea or verdict plus a sentence constitutes a conviction. *State ex. rel. Hunter v. Jurgensen*, 135 Neb. 136, 280 N.W. 886 (1938).
- 3). For purposes of computing the time for the filing of a motion for new trial, the finding of guilt and the imposition of sentence constitute a conviction. *State v. Mosely*, 194 Neb. 740, 235 N.W.2d 402 (1975).
- 4). A finding of guilty is a conviction, but it is not appealable until a judgment (sentence) is imposed. In *Interest of Wolkow*, 206 Neb. 512, 293 N.W.2d 851 (1980); & *State v. Long*, 205 Neb. 252, 286 N.W.2d 772 (1980).  
In *State v. Kramer*, 231 Neb. 437, 439, 436 N.W.2d 524, 525-26 (1989), the supreme court ruled that its *Wolkow* and *Long* holdings overruled by implication its definitions of conviction in *Jurgensen* and *Mosely*. Thus, there is a distinction between a conviction and a judgment of conviction.
- 5). A plea of guilty or no contest, accepted and entered by the court, is a conviction or the equivalent of a conviction, the effect of which is to authorize the imposition of sentence. *Stewart v. Ress*, 164 Neb. 876, 83 N.W.2d 901 (1957); & *Taylor v. State*, 159 Neb. 210, 66 N.W.2d 514 (1954). However, this line of cases, relied upon in *McKain*, does not really define conviction, but is directed at the effects of the pleas of guilty and no contest.
- 6). Finally, in *Western Union Telegraph Co. v. State*, 86 Neb. 17, 124 N.W. 937 (1910), the court held that the word "convicted" when used in a statutory phrase must refer to a determination of guilt in a criminal proceeding. The court was deciding whether the liability imposed by the statute in question was intended to be criminal or civil liability.

252. Neb. Rev. Stat. § 29-2268 (Lexis 2007).

253. Then codified as Neb. Rev. Stat. §§ 39-669.07 & 39-669.08 (Reissue 1988), providing that the license revocation shall be administered upon sentencing, upon final judgment after appeal, or upon the date of any probation revocation.

254. LB 377 (1988) took effect on July 9, 1988.

255. See example statutes cited *supra*, n. 250.

256. Neb. Rev. Stat. §§ 29-2277 to 29-2279 (Lexis 2007).

257. Neb. Rev. Stat. § 29-2278 (Lexis 2007). Note: a specific, direct authorization of arrests for a specified type of probation violation, but still no warrant issuance authority.

258. Presumably, the failure to perform would be a criminal contempt to be followed by a contempt sentence upon an adjudication of guilt.

259. Who decides which remedy to pursue is an interesting question implicating matters of proper judicial role, beyond the scope of this article.

260. At least on class III misdemeanors and above. See, Neb. Rev. Stat. § 29-2279 (Lexis 2007).

261. In this sense, probation itself is an alternative sentence.

262. The prosecution should not be anxious to have to retry such matters due to procedural deficiencies.

263. The legislative history is silent on the type of hearing the legislature had in mind.