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December 3, 1985

r. Richard Ortiz, Chairman
Arizona Board of Pardons and Paroles
1645 West Jefferson Street, Suite 326
Phoenix, Arizona 85007

Re: I85-125 (R85-149)

Dear Mr. Ortiz:

You have asked whether there are constitutional or other legal objections preventing the use of a two-way television communications system in Board of Pardons and Parole hearings. We find no legal impediments to the general use of such systems, so long as all procedural protections now required to be extended to prisoners and parolees for each type of hearing continue to be extended.

Of the hearings held by the Board, the strongest procedural protection extends to parole revocation hearings. Citing Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), the United States Supreme Court held that "[e]ven though the revocation of parole is not a part of the criminal prosecution, . . . the loss of liberty entailed is a serious deprivation requiring that the parolee be accorded due process." Gagnon v. Scarpelli, 411 U.S. 778, 781, 93 S.Ct. 1756, 1759, 36 L.Ed.2d 656, 661 (1973). In Morrissey the Court itemized the "minimum requirements of due process" for the parole revocation hearing to include in relevant part:

- (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).

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Morrissey v. Brewer, 408 U.S. at 489, 92 S.Ct. at 2604, 33 L.Ed.2d at 449. Recognizing that the Morrissey requirements would lead to practical difficulties, the Court noted:

Petitioner's greatest concern is with the difficulty and expense of procuring witnesses from perhaps thousands of miles away. While in some cases there is simply no adequate alternative to live testimony, we emphasize that we did not in Morrissey intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence. Nor did we intend to foreclose the States from holding both the preliminary and the final hearings at the place of violation or from developing other creative solutions to the practical difficulties of the Morrissey requirements.

Gagnon v. Scarpelli, 411 U.S. at 782 n. 5, 93 S.Ct. at 1760 n. 5, 36 L.Ed.2d at 662 n. 5 (emphasis added). The use of a two-way television communications system is surely the type of "creative solution" contemplated by the Court. So long as the parolee is still able to be seen and heard by all involved in the hearing, he will "be heard in person."

Of course the parolee must still be given the opportunity to present his witnesses and documentary evidence, and must be able to visually and orally confront the witnesses against him unless good cause exists. The Arizona Supreme Court has already authorized the use of such communication systems at arraignments. Arizona Rule of Criminal Procedure 14.2 provides: "The defendant shall be arraigned personally before the trial court or by video telephone."

The language of the specific state statutes regarding parole and parole revocation hearings does not present an obstacle to the general use of a two-way television communication system. A.R.S. § 31-411 (parole) and A.R.S. § 31-417 (parole revocation) both use the language that the prisoner "shall be given an opportunity to appear" before the Board.

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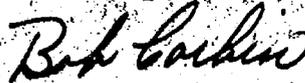
In a case in which the identical language has been construed regarding parole or parole revocation, the court held that the statutory language "'shall be given the opportunity to appear before said Board' . . . contemplates an effective appearance and not the mere physical presence of the prisoner before the Board." In re Tate, 63 F.Supp. 961, 962 (D.C.D.C. 1946) (emphasis in original). The court went on to state that the language implies the prisoner will be given a hearing where he is entitled to be represented by retained counsel, present evidence, and adduce witnesses. Id. A two-way television communication system would afford the prisoner all of these rights to "an effective appearance."

Rule 14.2 of the Arizona Rules of Criminal Procedure, quoted above, avoids the ambiguity of the word "appear" in criminal arraignments by itemizing the acceptable methods of an appearance "personally . . . or by video telephone." Inasmuch as the Court has deemed video telephones to be an effective means of appearing in an arraignment, we think it likewise would consider a two-way television communication system to be an effective appearance under A.R.S. § 31-411 and 31-417.

The different language used in the statute relating to work furloughs merits separate attention. A.R.S. § 31-233(E) provides that "the board may revoke the inmate's work furlough after he has been given an opportunity to be heard." (Emphasis added.) This language does not even extend the protection of "an opportunity to appear;" an inmate can be heard without being afforded the opportunity to confront witnesses. Surely, then, a two-way television communication system would satisfy the requirements of A.R.S. § 31-233(E).

In conclusion, the general use of a two-way television communication system would not offend the constitutional or statutory rights of prisoners or parolees.

Sincerely,



BOB CORBIN
Attorney General

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