

APPENDIX C

DOWNIE CONSENT DECREE

This cause coming on to be heard by agreement of the Parties, after due notice, and the Court being duly advised as to the circumstances,

IT IS HEREBY ORDERED:

1. In all final parole revocation hearings, the Prisoner Review Board, and each of its members, shall conduct the final revocation hearings in such a manner that confrontation and cross-examination of adverse witnesses is allowed as described below.

2. Standard of Proof. The standard of proving charges of a violation at a final parole/MSR revocation hearing is a *preponderance of the evidence*. If the evidence supporting the charged violation as a whole shows that it is *more probable than not* that the parolee has violated, as charged, then the Board shall so find. In those cases in which the evidence as a whole does *not* show that it is more probable than not that the parolee has violated, as charged, the Board shall find no violation.

3. Burden of Proof. The charge of a violation, by itself, does not establish evidence of a violation. If the charge is not admitted by the alleged violator, then the charge must be supported by some presentation of evidence sufficient to meet the burden of proof. Except in those cases where a document bears, on its face, constitutionally adequate indicia of reliability or where an additional extrinsic factor enhances the reliability of the documentary evidence, the failure to call witnesses constitutes an absence of sufficient proof. In such a case, the Board shall find that the parolee did not violate as charged.

4. Confrontation. The alleged violator has a right to confront and cross-examine persons who have provided adverse information, whether in a document or by means of live testimony, upon which a charge of violation is based.

a. If the documentation itself contains a sufficient indicator of reliability, examples of which are listed below, the alleged violator need not be granted the right to confront, in person, the preparer of the documentation or any witness whose statements formed the substance of the documentation and the Board may then find a violation as charged. However, the Board may, in its discretion, allow confrontation even where a document contains a sufficient indicator of reliability.

b. If the documentary evidence does not contain a suffi-

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cient indicator of reliability, the Board may not find that the parolee violated as charged unless the right of confrontation is granted.

c. The Board may deny confrontation for "good cause" as described in *Morrissey v. Brewer*, 408 U.S. 471 (1972), and those cases cited in Judge Moran's Memorandum and Order dated February 11, 1991. Any finding of "good cause" must be placed on the record and must be consistent with the indicators of reliability described in paragraph 5 below.

5. Indicators of Reliability. Any one of the following factors may be accepted by the Board as an indication that documentary evidence alone may be relied upon to prove the charged violation. These factors are representative examples only and should not be construed as an exhaustive list.

a. The nature of the documentation proves, in itself, a certain geographical or biographical element of the violation or documentation prepared by the parole officer establishing a non-criminal violation of the conditions of parole. Example: (1) An out-of-state arrest report establishes parolee's whereabouts when absconion is in issue; (2) Parolee is charged with failure to report monthly as ordered, and parole officer specifies the missed month or presents as evidence business records showing missed office visits.

b. The documentation is a transcript of testimony under oath in another setting, where the parolee had the opportunity to cross-examine the witness whose testimony or report is at issue in the revocation proceeding.

c. The documentation is a copy of a signed order or finding of a court of law or other competent tribunal which establishes the parolee's guilt of the criminal violation, which is the basis of the parole violation.

d. The documentation is a lab report or forensic evidence prepared by a competent scientific source, where the only issue is the subject-matter of the scientific report.

6. The Board may rely upon documentary evidence that contains none of the described indicators of reliability, even absent confrontation, if the documentary evidence is presented in conjunction with some additional extrinsic factor that adequately enhances the reliability of the documentary evidence.

7. Whether an additional extrinsic factor is sufficient to enhance the reliability of the documentary evidence must be determined by the Board on [a] case-by-case basis.

8. A police or parole agent report which summarizes the statements or observations of a citizen (non-police) witness may bear sufficient reliability upon which to find a violation of parole, absent confrontation, if, and only if, some additional extrinsic factor is presented which adequately enhances the reliability of the police or parole agent report. Such a report, standing alone, unenhanced by any additional extrinsic factors, does not bear sufficient indicia of reliability to revoke parole absent confrontation.

9. An eye-witness police report (one that indicates that the officer who prepared the report claims to have seen the alleged violation) may bear sufficient reliability upon which to find a violation of parole, absent confrontation, if, and only if, some additional extrinsic factor is presented which adequately enhances the reliability of the police or parole agent report. Such a report, standing alone, unenhanced by any additional extrinsic factors, does not bear sufficient indicia of reliability to revoke parole absent confrontation.

10. If a Board member determines that confrontation will not be allowed, that Board member must include on the record the specific reasons for not allowing confrontation.

11. This Order shall be applied consistent with the rules and regulations of the Board as found in Ill.Rev.Stat. Ch. 38, par. 1003-3-1 *et seq.* and Title 20, Ch. IV, Section 1610.140 of the Illinois Administrative Code and is intended to supersede or modify those rules only to the extent that they relate to the issue of confrontation at a final revocation hearing.

12. Defendants hereby agree to pay to plaintiff[s] reasonable costs and attorneys' fees from monies properly appropriated by the State of Illinois and set aside for such purpose by the Department of Central Management Services.

13. Plaintiffs release and discharge the Board, its members and the State of Illinois from any and all claims for damages resulting from those actions which formed the subject matter of this action. Nothing in this order shall be construed as an admission of liability.