

maintain sufficient mental capacity to report as directed to their supervision officers, to follow instructions, to comply with the conditions of parole, and to avoid committing new crimes. Given the overriding public interest in preventing new crimes by released offenders, the Commission may justifiably require any parolee who lacks the mental capacity to function successfully on parole to complete his sentence in prison.

The mental incompetency of a defendant facing a criminal prosecution has a far different consequence. A defendant who is found unable to regain competence to stand trial in the foreseeable future cannot be incarcerated indefinitely and must be released, as mandated by *Jackson v. Indiana*, 406 U.S. 715 (1972). But this requirement does not apply to an accused parole violator, who is a convicted felon whose imprisonment will terminate with the expiration date of his sentence. Moreover, a parolee's mental condition is not a defense to revocation, though the parolee's condition is a factor for the decision-maker to consider in the disposition of the case. *E.g.*, *United States v. Brown*, 899 F.2d 189 (2d Cir. 1990); *Steinberg v. Police Court of Albany, New York*, 610 F.2d 449 (6th Cir. 1979). A parolee cannot, therefore, gain immunity from revocation of parole, and force the government to resort to civil commitment procedures, merely by reason of mental incompetency.

On the other hand, maintaining an accused parole violator on a potentially indefinite six-month reporting cycle without a revocation hearing, as permitted by the present rule, fails to serve the interest of both society and the parolee in seeing that parole violation charges are resolved in a reasonable time. Conducting a revocation hearing notwithstanding the parolee's mental incompetency is the appropriate solution because, in the final analysis, revocation of parole is remedial in nature. *E.g.*, *United States v. Pinjuv*, 218 F.3d 1125, 1131 (9th Cir. 2000), *citing*, *Standlee v. Rhay*, 557 F.2d 1303, 1306 (9th Cir. 1977). Although it is obviously important for an accused parole violator to be able to participate meaningfully in the revocation process, the overriding consideration is that the Commission should avoid excessive delay in determining whether revocation is appropriate. A prolonged delay in holding the revocation hearing may result in the loss of witnesses, or the ability of witnesses to recall the events underlying a charged violation, which would impede the Commission's ability to make an accurate evaluation of the

parolee's conduct and needs, and make an informed predictive judgment of the parolee's ability to live a law-abiding life. *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). It can also keep the parolee in custody unjustly where the violation charges would otherwise be dismissed.

If revocation is ordered, depending on the seriousness of the violations committed and the risk of new criminal behavior, the Commission can take such measures as are best suited to protect the public, which may include a reparole under conditions of supervision adequate to support the parolee's mental health needs. If the charges are dismissed, or revocation is otherwise not found appropriate, the Commission can return the parolee to the community with a better understanding of the needs that must be addressed to improve the parolee's chances for success.

Consequently, the Commission's revised regulation requires that, whenever a parolee appears to be incompetent to go forward with a revocation hearing, the hearing examiner must temporarily postpone the hearing to obtain a report concerning the parolee's competency from mental health professionals. If the incompetency appears at the probable cause hearing stage, the examiner (or Commission) will make a finding as to probable cause and, if probable cause is found, will schedule a revocation hearing to be held with such a report.

At the postponed revocation hearing, the hearing examiner will make a preliminary determination as to the parolee's competency before proceeding with the revocation hearing. But the hearing examiner will proceed with the revocation hearing even if the examiner determines that the parolee is mentally incompetent to participate in the hearing. Under the interim rule, a finding of incompetency is not a reason for ordering further postponements or for canceling the hearing. In such a case, the purpose of the mental competency determination is to inform the examiner of the parolee's condition, so that the examiner can ensure that both a fair revocation hearing and a reasonable decision results.

In drafting this revised regulation, the Commission has taken account of the possibility that holding a revocation hearing in the case of an incompetent parolee could result in an increased risk of erroneous fact-finding. This risk will be controlled by the provision that any mentally incompetent parolee must be afforded representation by counsel at the revocation hearing. Counsel will be expected to investigate the charges by speaking to witnesses, family members,

and others with relevant information. Counsel will be permitted to present any substantial defense to the charges which the circumstances suggest, even if the parolee is not able to testify or give counsel meaningful assistance. This is not an unfair expectation because counsel is not tasked with preparing a defense in a criminal trial under the standard of "beyond a reasonable doubt." Counsel is only tasked with preparing a defense in an informal administrative hearing, under the lesser standard of the "preponderance of the evidence," whereby counsel need only provide the Commission with the explanation of the facts which "best accords with reason and probability." *See* 28 CFR 2.19(c). As the Supreme Court stated in *Morrissey v. Brewer*, *supra*, 408 U.S. at 489, a parole revocation hearing is not a criminal trial "in any sense."

Therefore, the absence of any readily evident defenses to the alleged parole violations will, in most cases, result in counsel emphasizing factors in mitigation. Even though a case may occur in which a parolee cannot communicate to counsel some defense that is known only to the parolee, it is still preferable for the Commission to hold a hearing and make the best decision it can, as opposed to postponing the hearing until such time as the parolee is able to regain his competence.

In sum, the only requirement of due process in such a case is that the Commission must take the parolee's mental condition fully into account in conducting the revocation hearing and making its decision. *Pierce v. State Department of Social and Health Services*, 646 P.2d 1382 (S. Ct. Wash. 1982) (*en banc*). Before making a finding as to whether the parolee violated parole as charged, the Commission will consider the parolee's difficulty in communicating his version of the facts, and weigh that factor in the balance in assessing the probabilities under 28 CFR 2.19(c). If the Commission finds that violations have occurred, the Commission will consider the parolee's inability to provide a coherent explanation of the reasons for his misconduct in determining whether revocation is the appropriate remedy.

Because this is a rule of procedure only, and implementation of the rule at the earliest opportunity is necessary for the Commission to be able to resolve any potential delays in its revocation caseload, this rule will go into effect as an interim rule with request for comments, in contrast to proposals for rulemaking on substantive matters such as paroling policy.