tendered in order to avoid pre-verdict interest. In *City of Franklin v. Badger Ford Truck Sales*, 58 Wis.2d 641, 207 N.W.2d 866 (1973), prejudgment interest was denied in a suit which was instituted against three defendants, even though the damages claimed was determinable. In *Luber v. Milwaukee County*, 47 Wis.2d 271, 177 N.W.2d 380 (1970), prejudgment interest was denied because the constitutionality of the statute under which the plaintiff's claim was computed was disputed. When there is a real dispute as to the amount of the claim, prejudgment interest is properly denied a successful plaintiff who is awarded only a part of the amount demanded for the reason that the policy of the law is to discourage grossly inflated or overstated claims. *Valiga v. National Food Co.*, 58 Wis.2d 232, 206 N.W.2d 377 (1973); *Congress Bar & Restaurant v. Transamerica Insurance Co.*, 42 Wis.2d 56, 165 N.W.2d 409 (1969). Finally, in *Necedah Manufacturing Corp. v. Juneau County*, 206 Wis. 316, 329, 237 N.W. 277, 240 N.W. 405 (1932), this court stated that a claimant is entitled to prejudgment interest as part of his compensatory damages "from the time payment or performance was due by the terms of the contract, or, if that was not specified, then from the time that demand was made; and if no demand was made prior to the time of the commencement of the action, then from that time." *See, Kleinschmidt v. Aluminum & Bronze Foundry*, 274 Wis. 231, 234, 79 N.W.2d 802, 804 (1956).

[9] Under the above standards we think the trial court erred in granting pre-verdict interest. In this case the amount of damages awarded by the jury exceeded that demanded in the complaint by a considerable sum. The plaintiffs demanded compensatory damages in the amount of $160,000 (for the loss of the building and contents) as well as punitive damages in the amount of $160,000. The jury awarded a total of $128,000 as damages for property losses; 80% of the total compensatory damages claimed. A demand which exceeds the ultimate award by 20% is a substantial variance. The award of pre-verdict interest in this case is improper under the rule of *Congress Bar & Restaurant v. Transamerica Insurance Company, supra.*

New Trial in Interest of Justice

[10] Appellants argue that a new trial should be granted in the interest of justice under sec. 251.09, Stats. Our review of the record does not lead us to believe that justice has miscarried or a retrial would probably produce a different result. *Billingsley v. Zickert*, 72 Wis.2d 156, 240 N.W.2d 375 (1976).

Judgment modified and, as modified, affirmed.

ABRAHAMSON, J., not participating.

81 Wis.2d 376

STATE ex rel. Hugh Edward FLOWERS, Appellant,

v.

DEPARTMENT OF HEALTH AND SOCIAL SERVICES, State of Wisconsin, Respondent.

No. 75–501.

Supreme Court of Wisconsin.

Argued Nov. 1, 1977.

Decided Jan. 3, 1978.

Parolee petitioned for writ of certiorari to review revocation of parole. The Circuit Court, Milwaukee County, John L. Coffey, J., entered order denying petition and upholding revocation of parole, and parolee appealed. The Supreme Court, Connor T. Hansen, J., held that: (1) parolee's acquittal on criminal charge did not preclude consideration of conduct related to the alleged criminal incident at parole revocation hearing; (2) where parolee had adequate notice of charges for final hearing, his parole

could be revoked on basis of charges as to which no determination of probable cause had been made at preliminary hearing; (3) parolee was afforded adequate notice of parole hearing and grounds alleged for revocation, especially considering the continuances which were granted enabling parolee to prepare case; (4) parolee was not denied a speedy hearing based on approximate two-month delay between the preliminary and final hearing, and (5) evidence did support determination that parolee had absconded state.

Affirmed.

1. **Criminal Law** ⇐163

"Jeopardy" in constitutional sense denotes risk traditionally associated with criminal prosecution and with proceedings to invoke criminal punishment for vindication of public justice; this risk is absent from proceedings which are not essentially criminal.

See publication Words and Phrases for other judicial constructions and definitions.

2. **Criminal Law** ⇐163

Proceeding is criminal for double jeopardy purposes if it imposes a sanction intended as punishment.

3. **Criminal Law** ⇐186

Under double jeopardy clause, verdict of acquittal is final, ending defendant's jeopardy, so that he may not thereafter be subjected to criminal sanctions for same offense. U.S.C.A.Const. Amend. 5.

4. **Pardon and Parole** ⇐14.15

Parole revocation is not a part of a criminal prosecution, and does not require all procedural components associated with adversary criminal proceeding.

5. **Pardon and Parole** ⇐14.18, 14.19

Revocation hearing does not require judicial hearings, rules of evidence need not be strictly adhered to, and privilege against self-incrimination does not prevent consideration of inculpatory statements or parolee's refusal to answer questions.

6. **Pardon and Parole** ⇐14.8

Ultimate question in revocation proceedings is whether parolee remains a good risk; whether his rehabilitation can be successfully achieved outside prison walls or will be furthered by returning him to a closed society.

7. **Pardon and Parole** ⇐14.8

In making ultimate determination in parole revocation hearing as to whether a parolee should remain outside prison walls or be returned to a closed society, Department of Health and Social Services is concerned not only with threats to safety of general community but also with any behavior inimical to parolee's rehabilitation; parole may be revoked for conduct which does not violate criminal law.

8. **Pardon and Parole** ⇐14

Legally, parolee is in constructive custody of Department of Health and Social Services subject to forfeiture of his liberty for violation of conditions of his parole, so that revocation deprives him not of absolute liberty to which every citizen is entitled, but only as a conditional liberty properly dependent upon observance of special parole restrictions.

9. **Pardon and Parole** ⇐14.12

Sentence person is required to serve upon revocation of parole is the punishment for crime of which he has been previously convicted, so that revocation hearing is concerned primarily with manner of serving sentence previously imposed.

10. **Criminal Law** ⇐163
Judgment ⇐751

Proceeding with a parole revocation based on an incident for which parolee had been criminally charged and acquitted is not precluded by either doctrine of double jeopardy, or doctrine of collateral estoppel.

11. **Judgment** ⇐713(1)

Collateral estoppel precludes relitigation of issue of ultimate fact previously determined by valid final judgment in an action between same parties, or when matter raised in second suit is identical in all respects to that cited in first proceeding

and the controlling facts and applicable legal principles remain unchanged; second proceeding must involve same bundle of legal principles that contributed to rendering of first judgment.

12. Pardon and Parole ⇐14.19

Preponderance of evidence standard of proof is the proper standard to use in parole and probation revocation cases.

13. Pardon and Parole ⇐14.18

Defendant parolee may not relitigate a conviction at a parole revocation hearing.

14. Judgment ⇐951(1)

Burden of establishing collateral estoppel falls on party seeking estoppel.

15. Judgment ⇐751

Parolee whose parole was revoked on ground that he was in possession of firearm failed to sustain burden of establishing collateral estoppel by reason of prior criminal proceeding in which he was acquitted, since on record it was impossible to determine whether question of possession of firearm was determined or whether the charge of reckless use of firearm was dismissed because there was insufficient evidence of recklessness.

16. Pardon and Parole ⇐14.20

Where preliminary revocation hearing examiner merely found that there was no probable cause to believe that the parolee had violated his agreement when he was in possession of rifle at specified place, no probable cause determination was made on the charge relating to reckless use of firearm at such place.

17. Pardon and Parole ⇐14.18

Initial parole revocation proceeding provides assurance that there is reasonable justification for deprivation involved in detaining parolee for final revocation hearing and in returning him to state from which he was paroled in event his apprehension occurs outside state; requirement of notice and prompt hearing in vicinity of arrest or alleged violation permits parolee to prepare a defense and put it on record before memories have dimmed and before he is removed to a different state.

18. Pardon and Parole ⇐14.17

Once a prima facie case for revocation is made at preliminary hearing, the need to determine whether there is probable cause to hold parolee for final decision of parole board on revocation has been met.

19. Pardon and Parole ⇐14.18

Preliminary parole revocation hearing is not required where grounds for detention of parolee are established by a guilty plea to a subsequent criminal charge or where there is incarceration on a subsequent conviction.

20. Pardon and Parole ⇐14.18

After it has been determined at preliminary hearing that parolee should be held for final revocation hearing, principal purpose of preliminary hearing is satisfied even though some alleged parole violations are not considered; appropriate test for introduction of additional charges at parole hearing is whether parolee has received adequate and proper notice of additional charges prior to holding of revocation hearing.

21. Pardon and Parole ⇐14.18

There is no constitutional right to pretest prosecution's evidence in a parole revocation hearing nor is there right to a preliminary hearing as a discovery device, an adverse examination, or as a mechanism for cross-examination of witnesses and preservation of testimony.

22. Pardon and Parole ⇐14.20

Although there was no determination of whether probable cause existed with respect to one of the charges for revocation in preliminary hearing, existence of charge provided adequate notice to parolee such charge was properly not dismissed at final parole revocation hearing.

23. Pardon and Parole ⇐14.5

Where parolee, as required under parole agreement, secured advance permission from parole agent to possess and use a gun for hunting and agent did not impose any limitation as to when parolee could carry

gun or where he could carry it and there was testimony to effect that parolee took rifle to tavern in an effort to sell it, judge properly dismissed third charge against parolee at revocation hearing relating to possession of firearm in a public place.

24. Constitutional Law ⇐272

Due process requires reasonable notice for both the preliminary hearing and final hearings on parole revocation; among minimum requirements of due process for final hearing is written notice of claimed violations of parole.

25. Pardon and Parole ⇐14.18

Where on the first day of parole revocation hearing, State presented its case with regard to shooting incident and hearing was thereafter continued several times so that parolee was able to prepare his case with full knowledge of State's case concerning shooting incident, charges which had been advanced at the preliminary revocation hearing and the criminal prosecution of parolee who was acquitted, there was no significant probability that the short three-day notice of final hearing had prejudicial effect on parolee.

26. Pardon and Parole ⇐14.18

Approximate two-month delay between preliminary hearing and final parole revocation hearing did not deprive parolee of a speedy revocation hearing.

27. Pardon and Parole ⇐14.19

There was sufficient evidence at parole revocation hearing to support charge that parolee had absconded from the State, despite parolee's claim that he had told parole agents he was traveling to Minnesota although he had received no travel permit.

Hugh Edward Flowers, defendant-appellant, was convicted of a felony, sentenced and subsequently paroled. His parole was revoked by the Department of Health & Social Services, respondent. Flowers petitioned the circuit court for a writ of certiorari to review his revocation of parole. He now appeals from an order denying his petition and upholding the revocation of his parole.

Howard B. Eisenberg, State Public Defender, and Ronald L. Brandt, Deputy State Public Defender (argued), on brief, for appellant.

James H. Petersen, Asst. Atty. Gen., with whom on the brief was Bronson C. La Follette, Atty. Gen., for respondent.

CONNOR T. HANSEN, Justice.

This case presents the question whether conduct of a parolee arising out of an incident for which he was criminally charged and acquitted may constitute one of the grounds for parole revocation. The case also raises questions with respect to the scope and nature of preliminary revocation hearings, the adequacy of notice, the need for a speedy hearing, and the sufficiency of the evidence.

Flowers was convicted of indecent behavior with a child, contrary to sec. 944.11(2), Stats., in 1967, and sentenced to an indeterminate term not to exceed ten years. He was paroled in 1971. His parole was revoked in 1974 by the Department of Health & Social Services (hereinafter Department) after a three-day hearing. He was alleged to have violated his parole in five instances.[1] The hearing examiner found that each

1. "1. On or about June 9, 1972, you did assault and batter one Confessor Ortiz by striking him in the face and otherwise assaulting his person in violation of Rule 1 of the rules and conditions of your parole.

"2. That on or about June 9, 1972, you did have in your possession a firearm, to wit: a shotgun, in violation of Rules 4 and 5 of the rules and conditions of your parole.

"3. That on or about February 26, 1972, you were in possession of a firearm in a public place, to wit: a loaded rifle in Big Jimmy Green's Tap, 1432 West Vliet Street, Milwaukee, Wisconsin, in violation of Rule 4 of the conditions of your parole.

"4. That on or about February 26, 1972, at Big Jimmy Green's Tap, 1432 West Vliet Street, Milwaukee, Wisconsin, you engaged in reckless use of a firearm, to wit: a loaded rifle, or engaged in conduct regardless of human life, by discharging said rifle in said public place, causing injury to another person, to wit: Herbert Sims, all in violation of Rule 1 of the rules and conditions of your parole.

of the allegations was established by a preponderance of the evidence, and the Department adopted his findings.

The first and second grounds for revocation concerned an altercation which occurred on June 9, 1972. On that date Flowers admittedly battered one Confessor Ortiz, allegedly because Ortiz, attempted to molest Flowers' wife. Witnesses testified that Flowers had a gun at the time.

The third and fourth grounds for revocation relate to a barroom shooting. Flowers took a loaded rifle into Big Jimmy Green's Tap in Milwaukee. The rifle discharged, and a man was injured. At a preliminary revocation hearing, evidence was introduced that Flowers had permission from his parole agent to possess a firearm for hunting; that he was attempting to sell the rifle; and that it discharged accidentally. Apparently, on the basis of this information, the examiner at the preliminary hearing determined that there was no probable cause to believe Flowers had violated his parole agreement when he took the loaded rifle into the tavern. However, at his subsequent parole revocation hearing, the allegation of improper possession of a firearm was set forth as the third grounds for revocation. The fourth charge of reckless use of a firearm was also considered at his revocation hearing, although it was not specifically considered at his preliminary revocation hearing.

Finally, the revocation was also based on the charge that Flowers absconded from supervision. The record shows that in August, 1972, shortly before a scheduled preliminary hearing on parole revocation, Flowers left the state. He was located and arrested in St. Paul, Minnesota. He resisted return to Wisconsin, and while released on bond in Minnesota, went to Winnipeg, Manitoba. Later, after detention by Canadian authorities, he was released to officials of the State of Washington. In October of 1973, he was returned to Wisconsin. Flowers maintains there was insufficient evidence to establish that he absconded.

On certiorari review the circuit judge found that reinstatement of the charge relating to possession of a loaded rifle in Big Jimmy Green's Tap, after the examiner who conducted preliminary revocation hearing had found no probable cause, was arbitrary and capricious. This charge was ordered dismissed. In all other respects the petition for a writ of certiorari was denied and the revocation upheld.

Additional facts will be set forth in our consideration of the issues, which are:

1. Does the acquittal of a crime preclude the consideration of conduct related to the alleged criminal incident at a parole revocation hearing?

2. May parole be revoked on the basis of charges as to which no determination of probable cause has been made at a preliminary hearing?

3. May the Department proceed to a revocation hearing on a charge after a determination has been made at a preliminary hearing that there was not probable cause to support the charge?

4. Was the appellant afforded adequate notice of the parole revocation hearing and the grounds alleged for revocation?

5. Was the appellant denied a speedy hearing?

6. Does the evidence support the determination that the appellant absconded?

I.

Flowers contends that reliance, by the Department, on conduct relating to an incident for which he was prosecuted and acquitted subjects him to impermissible double jeopardy. Therefore, he argues, such conduct cannot be used to establish grounds for parole revocation.

This argument is directed to the first two charges concerning the battery of Confessor Ortiz.

"5. That on or about August 7, 1972, you absconded from supervision under the terms of your parole and you did not report to or inform your agent of your whereabouts and activities, which were unknown until your return to the State of Wisconsin in 1973, in violation of Rules 3 and 4 of the rules and conditions of your parole."

As a result of this incident, Flowers was charged with reckless use of a weapon, contrary to sec. 941.20(1)(c), Stats., and with battery, contrary to sec. 940.20. In July of 1972, the first charge was dismissed for lack of evidence. Flowers was acquitted by a jury of the second charge.

[1] Jeopardy, in the constitutional sense, denotes the risk traditionally associated with criminal prosecution and with proceedings to invoke criminal punishment for the vindication of public justice. This risk is absent from proceedings which are not "'essentially criminal.'" *Breed v. Jones*, 421 U.S. 519, 528, 529, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975).

[2] The essential nature of a proceeding is not determined by its form or label, however; *United States v. U. S. Coin & Currency*, 401 U.S. 715, 718, 91 S.Ct. 1041, 28 L.Ed.2d 434 (1970). A proceeding is criminal, for double jeopardy purposes, if it imposes a sanction intended as punishment. *See: Helvering v. Mitchell*, 303 U.S. 391, 399, 58 S.Ct. 630, 82 L.Ed. 917 (1938). It is therefore necessary to determine whether the revocation of parole is properly characterized as a punitive sanction, in light of the purposes of the double jeopardy clause, the nature of the individual interests at stake, and the character of the parole revocation decision.

[3] Under the double jeopardy clause, a verdict of acquittal is final, ending a defendant's jeopardy, so that he may not thereafter be subjected to criminal sanctions for the same offense. This rule reflects the deeply ingrained idea that repeated attempts at punishment would unfairly subject him to embarrassment, expense and ordeal, would put him in a continuing state of anxiety and insecurity, and would enhance the possibility that even though innocent he may be found guilty. *Green v. United States*, 355 U.S. 184, 187, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).

[4] In *Morrissey v. Brewer*, 408 U.S. 471, 479, 92 S.Ct. 2593, 2599, 33 L.Ed.2d 484 (1972), the United States Supreme Court recognized that revocation "is often preferred to a new prosecution because of the procedural ease of recommitting the individual on the basis of a lesser showing by the State." This does not mean, however, that a revocation hearing is a part of a criminal prosecution. It clearly is not, nor does it require all the procedural components associated with an adversary criminal proceeding. *Morrissey v. Brewer, supra*, at 480, 92 S.Ct. 2593; *State ex rel. Struzik v. H&SS Dept.*, 77 Wis.2d 216, 220, 221, 252 N.W.2d 660 (1977); *State ex rel. Hanson & H&SS Dept.*, 64 Wis.2d 367, 378, 379, 219 N.W.2d 267 (1974). Rather, it has been repeatedly emphasized that:

> ". . . there are critical differences between criminal trials and probation or parole revocation hearings, and both society and the probationer or parolee have stakes in preserving these differences . . . ." *State ex rel. Struzik v. H&SS Dept., supra*, 77 Wis.2d at 220, 252 N.W.2d at 661, *quoting Gagnon v. Scarpelli*, 411 U.S. 778, 788, 789, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973).

[5] Thus revocation does not require a judicial hearing, *Morrissey, supra*, 408 U.S. at 486, 92 S.Ct. 2593; the rules of evidence need not be strictly adhered to, *Morrissey, supra*, at 489, 92 S.Ct. 2593; and the privilege against self-incrimination does not prevent consideration of inculpatory statements or a parolee's refusal to answer questions. *State ex rel. Struzik, supra; State v. Evans*, 77 Wis.2d 225, 252 N.W.2d 664 (1977). These distinctions reflect substantial differences between the interests involved in parole revocation and those in a criminal prosecution.

[6] Revocation hearings are not concerned with retribution. Parole and probation are intended to foster the reintegration of the individual into society at the earliest opportunity. *Gagnon v. Scarpelli, supra*, 411 U.S. at 783, 93 S.Ct. 1756. The ultimate question in revocation proceedings is whether the parolee remains a "good risk"; whether his rehabilitation can be successfully achieved outside prison walls or will be furthered by returning him to a closed society. *State ex rel. Plotkin v. H&SS Depart-*

ment, 63 Wis.2d 535, 543, 545, 217 N.W.2d 641 (1974); *State ex rel. Johnson v. Cady*, 50 Wis.2d 540, 549, 185 N.W.2d 306 (1971).

[7] In making this determination, the Department is concerned not only with threats to the safety of the general community, but also with any behavior inimical to the parolee's rehabilitation. *See: Morrissey, supra*, 408 U.S. at 478, 92 S.Ct. 2593; *Gagnon v. Scarpelli, supra*, 411 U.S. at 783, 93 S.Ct. 1756. For this reason, parole may be revoked for conduct which does not violate the criminal law. *Morrissey, supra*, 408 U.S. at 478, 92 S.Ct. 2593; *State v. Evans, supra*, 77 Wis.2d at 234, 252 N.W.2d 664.

The ends of parole revocation are therefore distinct from the punitive functions of the criminal law, and the revocation decision requires wide-ranging consideration of intangible non-legal factors irrelevant to a criminal prosecution. This court has recognized that:

"'. . . an agency whose delicate duty is to decide when a convicted offender can be safely allowed to return to and remain in society is in a different posture than the court which decides his original guilt. To blind the authority to relevant facts in this special context is to incur a risk of danger to the public . . . .'" *State ex rel. Struzik, supra*, 77 Wis.2d at 223, 252 N.W.2d at 663, *quoting, In re Martinez*, 1 Cal.3d 641, 650, 83 Cal.Rptr. 382, 463 P.2d 734 (In Bank, 1970), *cert. den.* 400 U.S. 851, 91 S.Ct. 71, 27 L.Ed.2d 88.

[8] While recognizing that a parolee suffers a "'grievous loss'" when his conditional liberty is withdrawn, *Morrissey, supra*, 408 U.S. at 482, 92 S.Ct. 2593, we believe there is a considerable distinction between the liberty of a parolee and that of one who stands accused of a crime without a prior conviction. Legally, the parolee is in the constructive custody of the Department, subject to the forfeiture of his liberty for violation of the conditions of his parole. *State ex rel. Johnson v. Cady, supra*, 50 Wis.2d at 547, 548, 185 N.W.2d 306. Therefore revocation deprives him:

". . . not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions." *Morrissey, supra*, 408 U.S. at 480, 92 S.Ct. at 2600.

This court has said:

"The liberty enjoyed by a probationer is, under any view, a conditional liberty. It is conditioned on adhering to the conditions of probation as set forth in the probation agreement. His position is not that of the non-convicted citizen. . ." *State v. Evans, supra*, 77 Wis.2d at 230, 252 N.W.2d at 666.[2]

The individual rights and the public purposes at stake in parole revocation are therefore distinct from those ordinarily associated with criminal punishment. The element of punishment in parole revocation is attributable to the crime for which the parolee was originally convicted and sentenced.

[9, 10] The sentence he is required to serve upon revocation is the punishment for the crime of which he has previously been convicted. *Brown v. Warden, U. S. Penitentiary* (7th Cir. 1965), 351 F.2d 564, 567, *certiorari denied*, 382 U.S. 1028, 86 S.Ct. 651, 15 L.Ed.2d 541. The revocation hearing is concerned primarily with the manner of serving the sentence previously imposed. *See: State ex rel. Johnson v. Cady, supra*, 50 Wis.2d at 556, 185 N.W.2d 306. Revocation is thus a continuing consequence of the original conviction from which parole was granted. *Standlee v. Smith*, 83 Wash.2d 405, 407, 518 P.2d 721 (1974); *People v. Morgan*, 55 Ill.App.2d 157, 204 N.E.2d 314 (1965). Proceeding with parole revocation after an acquittal does not invoke the doctrine of double jeopardy, therefore.

[11] Nor does the doctrine of collateral estoppel, itself an aspect of the double jeop-

2. "What we say in this opinion applies also to parole revocation." *State v. Evans, supra*, at 228, *fn.* 1, 252 N.W.2d at 665.

ardy clause, *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), preclude revocation. Collateral estoppel precludes relitigation of an issue of ultimate fact previously determined by a valid final judgment in an action between the same parties. *Ashe v. Swenson, supra*, at 443, 90 S.Ct. 1189. This doctrine applies:

> ". . . where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and *where the controlling facts and applicable legal rules remain unchanged.* . . ." (Emphasis added.) *C. I. R. v. Sunnen*, 333 U.S. 591, 599, 600, 68 S.Ct. 715, 720, 92 L.Ed. 898 (1948).

The second proceeding "must involve . . . the same bundle of legal principles that contributed to the rendering of the first judgment." *C. I. R. v. Sunnen, supra*, at 602, 68 S.Ct. at 721.

Here the "bundle of legal principles" is not the same because different burdens of proof apply, and the paramount considerations are different. While this court has never precisely set forth the standard of proof necessary to show a violation of parole or probation, it has been alluded to. To the best of our knowledge all authorities and jurisdictions are unanimous in rejecting the criminal standard of proof beyond a reasonable doubt. In *Morrissey, supra*, 408 U.S. at 489, 92 S.Ct. 2593, the Supreme Court emphasized that a revocation hearing is not in any sense equivalent to a criminal prosecution and noted, at 479, 92 S.Ct. 2593, that parole may be revoked on the basis of a lesser showing.

[12] Other courts have consistently rejected the criminal standard of proof in proceedings for revocation of parole or probation,[3] and have required a lesser showing variously stated as reasonably satisfactory evidence,[4] a preponderance of the evidence,[5] or clear and satisfactory evidence.[6] In *State ex rel. Johnson v. Cady, supra*, 50 Wis.2d at 559, 185 N.W.2d 306, Mr. Chief Justice Hallows, *concurring in part*, proposed a preponderance of the evidence standard. It appears from the record in this case that this is the standard of proof recognized by the Department. In our opinion, the preponderance of evidence standard of proof is the proper standard to use in parole and probation revocation cases.

[13] In *One Lot Stones v. United States*, 409 U.S. 232, 235, 93 S.Ct. 489, 492, 34 L.Ed.2d 438, the Supreme Court held that the difference in the burden of proof between criminal prosecutions and civil forfeiture proceedings precluded application of the doctrine of collateral estoppel. The court said:

> ". . . The acquittal of the criminal charges may have only represented ' "an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused." ' *Helvering v. Mitchell*, 303 U.S. 391, 397, 58 S.Ct. 630, 82 L.Ed. 917 . . . (1938). As to the issues raised, it does not constitute an adjudication on the preponderance-of-the-evidence burden applicable in civil proceedings. *See Murphy v. United States*, 272 U.S. 630, 47 S.Ct. 218, 71 L.Ed. 446 . . . (1926); *Stone v. United States*, 167 U.S. 178, 17 S.Ct. 778, 42 L.Ed. 127 . . . (1897)."

See also: Helvering v. Mitchell, supra, at 397, 58 S.Ct. 630. Other courts have applied this reasoning in the context of parole and probation revocation. *See, e. g.: In re Dunham*, 16 Cal.3d 63, 127 Cal.Rptr. 343, 545 P.2d 255 (In Bank, 1976); *see generally:*

3. *See: United States v. Chambers* (3rd Cir. 1970), 429 F.2d 410; *United States v. Lauchli* (7th Cir. 1970), 427 F.2d 258, *certiorari denied*, 400 U.S. 868, 91 S.Ct. 111, 27 L.Ed.2d 108 (1970); *Amaya v. Beto* (5th Cir. 1970), 424 F.2d 363; *United States v. Markovich* (2nd Cir. 1965), 348 F.2d 238.

4. *See, e. g.: United States v. D'Amato* (3rd Cir. 1970), 429 F.2d 1284; *Standlee v. Smith, supra.*

5. *See, e. g.: People v. Smith*, 105 Ill.App.2d 14, 245 N.E.2d 13 (1969); *State v. Fisher*, 21 Ariz. App. 604, 522 P.2d 560 (1974); *State v. Hughes*, 200 N.W.2d 559 (Iowa, 1972).

6. *See, e. g.: People v. Calais*, 37 Cal.App.3d 898, 112 Cal.Rptr. 685 (1974).

Annot. 76 A.L.R.3d 571 (1977), and Annot. 76 A.L.R.3d 564 (1977).[7]

We also observe that the second ground for revocation of parole alleges that Flowers was in possession of a firearm on June 9, 1972. He was criminally charged with reckless use of a firearm, and the charge was dismissed, apparently for lack of evidence.

[14, 15] Collateral estoppel applies only where it is reasonably clear that the issue in question has in fact been decided. *See: Ashe v. Swenson, supra*, 397 U.S. at 444, 90 S.Ct. 1189. On the present record it is impossible to ascertain whether the question of possession was determined, or whether the charge was dismissed because there was insufficient evidence of recklessness. The burden of establishing collateral estoppel must fall on the party seeking the estoppel, and that burden has not been sustained.

Neither the principle of double jeopardy nor the doctrine of collateral estoppel is applicable to the facts of this case. The order on appeal is affirmed with regard to the first and second grounds for revocation.

II.

The next issue on this appeal is whether an alleged violation of parole may be advanced and considered at the final revocation hearing without having been considered at the preliminary hearing.

[16] Flowers contends that at the preliminary hearing no specific reference was made to the fourth charge which related to the reckless use of a firearm in Big Jimmy Green's Tap. The Department insists this charge was considered in substance at the November 9, 1973, preliminary hearing because it was implicit in one of the counts considered there. That count alleged:

> "2. That on or about February 26, 1972, [Flowers was] in possession of a loaded rifle in a public place, to wit, Big Jimmy Green's Tap, 1432 West Vliet Street, Milwaukee, Wisconsin, and as a result said rifle was discharged at said time and place causing injury to another person all in violation of the laws of the United States, the State of Wisconsin and in violation of Rule 1 of [his] parole agreement, in violation of Rule 4 of [his] Parole Agreement."

With regard to this shooting incident, the preliminary hearing examiner found:

> ". . . that there was not probable cause to believe that [Flowers] had violated [his] agreement when [he was] *in possession* of a rifle at Big Jimmy Green's Tap, 1432 West Vliet Street, Milwaukee, WI." (Emphasis added.)

We believe the circuit court was correct when it observed that no probable cause determination was made on the fourth specified charge.

It is therefore necessary to determine whether a probable cause determination must be made with regard to each alleged parole violation, a question which goes to the nature of the preliminary revocation hearing. In *Morrissey, supra*, the Supreme Court observed that there is often a substantial time lag between the original arrest for an alleged parole violation and the final revocation hearing, and that the place of arrest may be distant from the institution to which the parolee is to be returned. "Given these factors," the court said:

> ". . . due process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available. *Cf. Hyser v. Reed*, 115 U.S.App.D.C. 254, 318 F.2d 225 (1963). Such an inquiry should be seen as in the nature of a 'preliminary hearing' to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that

7. Evidence sufficient to support a conviction, on the other hand, would necessarily satisfy the lesser standard applicable to revocations. The defendant-parolee therefore may not relitigate a conviction at a revocation hearing. *Morrissey, supra*, 408 U.S. at 484, 92 S.Ct. 2593.

would constitute a violation of parole conditions. . . . ." *Morrissey, supra*, 408 U.S. at 485, 92 S.Ct. at 2602.

[17] The initial revocation proceedings serve two functions. First they provide assurance that there is reasonable justification for the deprivation involved in detaining the parolee for a final revocation hearing, and in returning him to the state from which he was paroled in the event his apprehension occurs outside the state. In addition, the requirement for notice and a prompt hearing in the vicinity of the arrest or alleged violation permits the parolee to prepare a defense and to put it on record before memories have dimmed and before he is removed to a distant state.

[18] The first of these purposes is served by demonstrating any reasonable ground for incarceration. Once a prima facie case for revocation is made, the need to determine "whether there is probable cause to hold the parolee for the final decision of the parole board on revocation," *Morrissey, supra*, at 487, 92 S.Ct. at 2603, has been met.

[19] Thus a preliminary hearing is not required where grounds for detention are established in some other manner, for example, by a guilty plea to a subsequent criminal charge. *State ex rel. Niederer v. Cady*, 72 Wis.2d 311, 326, 240 N.W.2d 626 (1976). Incarceration on a subsequent conviction also eliminates the need for a preliminary hearing:

> ". . . both because the subsequent conviction obviously gives the parole authority 'probable cause or reasonable ground to believe that the . . . parolee has committed acts that would constitute a violation of parole conditions[,]' 408 U.S. at 485, 92 S.Ct. 2602, and because issuance of the warrant does not immediately deprive the parolee of liberty. . . . ." *Moody v. Daggett*, 429 U.S. 78 fn. 7, 97 S.Ct. 274, 278, 50 L.Ed.2d 236 (1976), *citing Morrissey, supra*.

[20] Once probable cause is established with regard to any charge, the function of the preliminary hearing in a parole revocation proceeding has been fulfilled. After it is determined that a parolee should be held for a final revocation hearing, the principal purpose of the preliminary hearing is satisfied, even though some alleged parole violations are not considered.

The appropriate test for the introduction of additional charges at a parole revocation hearing is whether the parolee has received adequate and proper notice of the additional charges prior to the holding of the revocation hearing.

[21] There is no constitutional right to "pretest the prosecution's evidence", *State ex rel. Welch v. Waukesha Co. Cir. Court*, 52 Wis.2d 221, 225, 189 N.W.2d 417 (1971), in a parole revocation hearing. Nor is there a right to a preliminary hearing as a discovery device, an adverse examination, or a mechanism for the cross-examination of witnesses and preservation of testimony. *See: Bailey v. State*, 65 Wis.2d 331, 343, 344, 222 N.W.2d 871 (1974); *Whitty v. State*, 34 Wis.2d 278, 287, 149 N.W.2d 557 (1967).

[22] Therefore a preliminary hearing need not be held with regard to every alleged violation, provided adequate notice is given prior to the parole revocation hearing. The circuit judge correctly declined to order dismissal of the fourth allegation.

III.

The appellant next argues that because the preliminary hearing examiner found no probable cause with regard to the third charge (possession of a firearm in a public place), the Department could not reinstate the charge and proceed to a revocation hearing on that charge. Partly for this reason, and partly for the reason that Flowers' parole officer had exceeded his authority in giving Flowers permission to possess a gun for hunting, the circuit judge found that the attempt of the Department to reinstate the charge was arbitrary and capricious, and ordered dismissal of the third charge.

As previously stated, the purposes of the preliminary hearing are satisfied without a

showing of probable cause as to each charge ultimately presented at the revocation hearing. Where an issue has once been fully litigated and has been determined adversely to the Department, however, additional concerns are present. Repeated litigation of the same issue involves additional expense and disorder, and may create hardship on the parolee; the law generally prefers that controversies once decided on their merits remain in repose.

The charge of possession of a firearm in Big Jimmy Green's Tap raised a question as to whether the agent exceeded his authority when he granted Flowers permission to have a gun. It also posed a question as to whether the permission to possess a gun for hunting was precisely stated and carefully defined. As the United States Supreme Court observed in *Morrissey, supra*, 408 U.S. at 479, 92 S.Ct. at 2599.

". . . The broad discretion accorded the parole officer is also inherent in some of the quite vague conditions, such as the typical requirement that the parolee avoid 'undesirable' associations or correspondence. . . ."

[23] Flowers was required, under his parole agreement, to secure advance permission from his parole agent to own or carry any firearm. In the winter of 1971, after he expressed a desire to hunt rabbits, his agent gave him permission to possess and use a gun for hunting. The agent was not sure whether the gun was a shotgun or a rifle. He did not impose any limitations as to when Flowers could carry the gun, or where he could carry it. Rather, he assumed that Flowers would not carry the gun within the city of Milwaukee, or carry it loaded into a public establishment. This assumption, although reasonable, was never stated. There was testimony to the effect that Flowers took the rifle to the tavern in an effort to sell it, because a prospective buyer had asked to see it.

On this evidence, the circuit judge ordered the third charge dismissed. The circuit court did not abuse its discretion in ordering dismissal of this charge.

However, we do not intend this case to stand for the proposition that once a preliminary hearing examiner has found no probable cause with regard to a particular charge, the Department can never, under any circumstances, reinstate the charge. Nor do we attempt to consider the facts and circumstances under which the Department could reinstate a charge. That case is not before us.

IV.

[24] Flowers contends that he was not afforded adequate notice of the revocation hearings and the alleged parole violations. *Morrissey* makes clear that due process requires reasonable notice for both the preliminary and final hearings:

"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. . . ." *Morrissey, supra*, at 486, 487, 92 S.Ct. at 2603.

Among the minimum requirements of due process for the final hearing, the court included "written notice of the claimed violations of parole . . . ." *Morrissey, supra*, p. 489, 92 S.Ct. p. 2604.

In the instant case, notice of the March 28, 1974, revocation hearing was not mailed until March 22, 1974, and was not received until March 25, 1974. Flowers contends that this notice was prejudicial, (1) because it did not provide him adequate opportunity to interview witnesses and prepare his defense; (2) because he was unaware of the allegation of reckless use of a weapon; and (3) because he did not expect to be charged with possession of a weapon after the finding of no probable cause with regard to that charge.

[25] On the facts of this case, however, it cannot be said that lack of timely notice was prejudicial to the cause of the defendant. After one day of hearing on March 28, 1974, the hearing was adjourned for three

weeks. At the March 28th hearing, the state presented its case with regard to the barroom shooting. The hearing was continued to April 19th, and again to April 22, 1974. These adjournments were to the benefit of the defendant. He was able to prepare his case with full knowledge of the case of the state concerning the incident in Big Jimmy Green's Tap.

Although Flowers insists that he was unaware that he would be charged with possession of and reckless use of a weapon, it cannot be said that he was prejudiced by the notice of these charges. The allegation of possession had been noticed, raised and disputed at the November 9, 1973, preliminary. In addition, as already stated, the allegation considered at the preliminary was broadly worded, and advised the defendant that the Department considered his possession and use of a loaded firearm in a public place as a violation of his parole.

Moreover, a criminal charge of reckless use of a weapon, stemming from the same incident, had been pending, and had been dismissed for lack of timely prosecution shortly before the revocation hearing. Because these charges had been advanced at the preliminary and in the criminal prosecution, it is unlikely that Flowers and his counsel had not made every effort to gather evidence and locate witnesses for use in defense against the charges. On the facts of this case, therefore, there is no significant probability that the short notice had a prejudicial effect. The fact is that after the state presented its evidence with regard to the barroom incident, the defendant had three weeks in which to prepare his response.

V.

Flowers next contends that he was not afforded a speedy revocation hearing. Following the November 9, 1973, preliminary hearing, Flowers petitioned for a writ of habeas corpus. On January 24, 1974, after the petition was denied, he informed the Department that he "was ready for the hearing." The hearing was begun on March 28, 1974. Flowers contends that the delay of approximately two months was unreasonable.

This contention cannot be sustained in view of the Supreme Court's comments in *Morrissey, supra*, at 488, 92 S.Ct. at 2603, that:

> ". . . The revocation hearing must be tendered within a reasonable time after the parolee is taken into custody. A lapse of two months, as respondents suggest occurs in some cases, would not appear to be unreasonable."

[26] Despite this apparently dispositive statement, Flowers asserts that the delay was unreasonable because: (1) It reflected a deliberate design to hold him in custody until his mandatory release date, which was approaching; (2) it gave the state some "tactical advantage" in a pending criminal prosecution; and (3) he was not informed of the reason for the delay. The first of these contentions has no foundation in the record; the second is not clearly explained; and the third is irrelevant to the present question.

The record shows the hearing was delayed to await trial on a pending criminal charge. The criminal charge arose from the incident in Big Jimmy Green's Tap. In this setting, Flowers could well have been prejudiced if the hearing had *not* been delayed. Because the proceedings predated this court's recent decision in *State v. Evans, supra*, any testimony he had given at the hearing would have been admissible against him at the criminal trial. He might therefore have felt compelled to remain silent at the hearing, and his silence might itself have been grounds for revocation.

The decision to delay the hearing was consistent with the American Bar Association's recommendation that probation revocation proceedings based solely on a pending criminal charge should ordinarily be delayed until the criminal charge is resolved. ABA *Standards Relating to Probation*, sec. 5.3, pp. 62, 63.

In *State v. Evans, supra*, this court resolved the self-incrimination concerns which underlie the ABA recommendation, and which support the delay in the instant case,

by holding that inculpatory statements at a revocation hearing are not admissible at a later trial, except for purposes of impeachment or rebuttal. Because problems of self-incrimination have now been sharply reduced, other concerns may, in some cases, outweigh any interest in postponement. This determination can only be made on a case-by-case basis.

The circuit court correctly ruled, therefore, that the decision to delay the hearing was not unreasonable or prejudicial.

VI.

[27] Flowers' final contention is that there was insufficient evidence to support the allegation that he absconded from the state. The circuit court rejected this contention, finding that Flowers had not sustained the substantial burden of proof in such actions:

". . . In *State ex rel. Johnson v. Cady* (1971), 50 Wis.2d 540, 550, 185 N.W.2d 306, 311, this court set forth the standard of judicial review on certiorari in a probation revocation proceeding when the sufficiency of the evidence to support a probation revocation is at issue to be as follows:

"'. . . We further conclude that the scope of the review shall be addressed to whether the department's action was arbitrary and capricious and represented its will and not its judgment.

"'"The board is presumed to have had before it information which warranted the order of revocation, and its determination of the matter is conclusive unless the prisoner can prove by a preponderance of the evidence the board's action was arbitrary and capricious. That burden rests squarely on the prisoner, and if he fails to sustain the burden, the courts will not interfere with the board's decision . . . ."'" *State ex rel. Hanson v. H&SS Dept., supra*, 64 Wis.2d at 375, 376, 219 N.W.2d at 272.

The evidence supports the charge of absconding. Flowers reported to the office of his parole agent on August 3rd or August 4th of 1972. Because his regular agent was not in the office, Flowers spoke with another agent. Flowers testified that he told the agent he was destitute and that he was going to visit his wife in St. Paul, Minnesota, to get some money and a place to stay. The substitute agent did not recall any such statement. Flowers' regular agent testified that he would normally have received travel permit forms if any out-of-state travel had been authorized, but that he received no such forms.

Flowers denied knowledge that a preliminary revocation hearing had been scheduled for August 7, 1972. The substitute agent testified, however, that he gave Flowers a letter notifying him of the hearing. A carbon copy of the letter was introduced. The copy, dated August 3, 1972, bears a handwritten acknowledgement, in Flowers' name, of receipt of the original.

Flowers did not appear at the August 7, 1972, preliminary hearing. He was arrested in St. Paul that evening. Although he now contends that his whereabouts in Minnesota were known to the Department, there can be no suggestion that the Department was informed of his subsequent travels to and in Canada. On this evidence, it cannot be said that the appellant has sustained the burden described in *State ex rel. Johnson v. Cady, supra.* The circuit court properly upheld the finding that Flowers had absconded.

Order affirmed.

81 Wis.2d 399

STATE of Wisconsin, Plaintiff in Error,

v.

Murill STARKE, Defendant in Error.

No. 76-727-CR.

Supreme Court of Wisconsin.

Argued Dec. 1, 1977.

Decided Jan. 3, 1978.

Writ of error was issued to review orders of the Waukesha County Court, Nick