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Criminal Procedure—Constitutional Right to Counsel in Parole Revocation Hearing

Clarence J. Sundram

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the fairness of "custodial interrogation," since minority group members are often victims of police abuse. This position thus leads to the conclusion that only a mechanical rule, similar to the one proposed by the dissenters, can give any real meaning to fifth and sixth amendment rights.

The elements of truth which exist in both positions does not make reconciliation impossible, but rather groping and difficult. Depriving law enforcement officials of a valuable tool of investigation is likely to have untoward effects, while maintaining the pretense of rights which are unenforceable makes a mockery of the law. Unwilling, therefore, to surrender law and order for liberty and law, the solution to the problem must rest on the ground of delicate adjustment,³⁹ refinement, and continuous evaluation of the actual effects of the new rules devised.

BERNARD M. BRODSKY

CRIMINAL PROCEDURE—CONSTITUTIONAL RIGHT TO COUNSEL IN PAROLE REVOCATION HEARING

In 1947, a relator was convicted on a plea of guilty to a charge of murder in the second degree in the court of general sessions and was sentenced to prison for a term of from twenty years to life. He was paroled in the summer of 1963 after having served sixteen years. In December of 1964 he was declared "delinquent" and subsequently taken into custody in March of 1965, charged with having violated the conditions of his parole by consorting with criminals and giving false information to his parole supervisor. The relator admitted these charges in a revocation hearing held before a parole court at which he was not represented by counsel. His parole was then revoked and the board ordered him barred from parole reconsideration for at least two years. In three subsequent appearances before the board held for the purpose of determining eligibility for parole release, the relator appeared without counsel and was denied release, apparently on the basis of his initial violation. He then brought an action to redress the deprivation of asserted constitutional rights to counsel and other procedural safeguards. The proceeding was dismissed on the ground that it

39. Because of the need for *delicate* adjustment, this writer is forced to reject the dissenters' rule. While this position does end the problem of the trustworthiness of a waiver, this is done without first determining whether some less drastic remedy would secure the desired measure of rights, without hobbling law enforcement efficiency. If modest remedies fail, then a choice between competing considerations may be necessary; but until such time it is incumbent upon courts and legislators to make sincere and imaginative efforts to create practices which will guarantee the reality of fifth and sixth amendment safeguards.

had been commenced beyond the time permitted by statute.¹ Following that dismissal, the relator brought the present habeas corpus proceeding alleging denial of due process at the parole revocation hearing. Special term dismissed the petition and he appealed directly to the Court of Appeals.² *Held*, three judges dissenting, that the relator had a constitutional right under the due process clause of the fourteenth amendment to representation by counsel and to presentation of testimony at a parole revocation proceeding resulting in the deprivation of liberty. *People ex rel. Menechino v. Warden, Greenhaven State Prison*, 27 N.Y.2d 376, 267 N.E.2d 238, 318 N.Y.S.2d 449 (1971).

The right to assistance of counsel in criminal prosecutions has been recognized by the Supreme Court to be necessary to insure a fair hearing.³ This right was extended to indigents charged with serious crimes in state courts in *Gideon v. Wainwright*,⁴ and to other stages of the criminal proceedings where rights of the accused could be substantially affected.⁵ The right to counsel has not been limited to criminal proceedings but has been held applicable in areas where governmental action substantially affects an individual's right to liberty regardless of the label applied to such proceedings.⁶ There has been, however, no general constitutional right to counsel in parole revocation hearings.⁷ The reason for distinguishing the

1. See *Menechino v. Division of Parole*, 26 N.Y.2d 837, 258 N.E.2d 84, 309 N.Y.S.2d 585 (1970), *aff'g* 32 App. Div. 2d 761, 301 N.Y.S.2d 350 (1st Dep't 1969), *rev'g* 57 Misc. 2d 865, 293 N.Y.S.2d 741 (Sup. Ct. 1968).

2. N.Y. CIV. PRAC. § 5601 (b) (1) (McKinney 1963).

3. *Powell v. Alabama*, 287 U.S. 45 (1932). "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Id.* at 68-69.

4. 372 U.S. 335 (1963).

5. See, e.g., *Hamilton v. Alabama*, 368 U.S. 52 (1961) (certain arraignments); *Douglas v. California*, 372 U.S. 353 (1963) (appeal of right); *Massiah v. United States*, 377 U.S. 201 (1964) (covert interrogation of indicted suspect); *Escobedo v. Illinois*, 378 U.S. 478 (1964) (pretrial interrogation); *Miranda v. Arizona*, 384 U.S. 436 (1966) (same); *United States v. Wade*, 388 U.S. 218 (1967) (identification line up); *Mempha v. Rhay*, 389 U.S. 128 (1967) (probation revocation).

6. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *In re Gault*, 387 U.S. 1 (1967).

7. In federal court actions state prisoners whose parole has been revoked have been held to have no federally protected constitutional right to counsel in a parole revocation proceeding. *Martinez v. Patterson*, 429 F.2d 844 (10th Cir. 1970); *Dunn v. California Dep't of Corrections*, 401 F.2d 340 (9th Cir. 1968); *Williams v. Patterson*, 389 F.2d 374 (10th Cir. 1968); *Williams v. Dunbar*, 377 F.2d 505 (9th Cir.), *cert. denied*, 389 U.S. 866 (1967); *Gonzales v. Patterson*, 370 F.2d 94 (10th Cir. 1966). Federal prisoners likewise have no federal constitutional right to counsel in parole revocation proceedings before the United States Parole Board. *Moore v. Reid*, 246 F.2d 654 (D.C. Cir. 1957). Prisoners under the District of Columbia Parole Board jurisdiction also have no constitutional right to counsel. *Fleming v. Tate*, 156 F.2d 848 (D.C. Cir. 1946).

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"liberty" of parolees from that of welfare recipients in *Goldberg v. Kelly*⁸ is not clear. The distinction is often based on the right-privilege differentiation promulgated in *Escoe v. Zerbst*⁹ although the viability of *Escoe* is questionable following the Supreme Court decision in *Mempha v. Rhay*.¹⁰ It has repeatedly been held that a presently enjoyed interest is protected by procedural due process,¹¹ but apparently a parolee has had no right to continued liberty as he has been considered as merely enjoying the benefits of an act of mercy from the sovereign.¹² One writer has responded to this argument by pointing out that parole is not a personal act of grace from a monarch but

a highly institutionalized system administered to tens of thousands of offenders each year by hundreds of governmental officials. So administered in a democratic community, even grace itself, it may be thought, must be dispensed and withdrawn according to some sense of principle and order and with some respect for the forms of procedural regularity associated with concepts of basic fairness. But more significantly, the institution of individualized treatment represented by the indeterminate sentence laws and the system of probation and parole are not remotely charity, but an integral part of our system of criminal law.¹³

Another argument for denying parolees the rights enjoyed by holders of other privileges is that the parolee remains in the custody of the warden and therefore the status of the parole violator is analogous to that of an escapee who is susceptible to reincarceration without due process protections. The fundamental problem with this argument is that it assumes

Similarly state courts have held that there is no right to counsel under due process in parole revocation proceedings. *Pope v. Superior Court of Solano County*, 9 Cal. App. 3d 636, 88 Cal. Rptr. 483 (1970); *Johnson v. Stucker*, 203 Kan. 253, 453 P.2d 35, cert. denied, 396 U.S. 904 (1969); *In re Spurlock*, 153 Mont. 475, 458 P.2d 80 (1969); *Robinson v. Cox*, 77 N.M. 55, 419 P.2d 253 (1966); *Menechino v. Division of Parole*, 32 App. Div. 2d 791, 301 N.Y.S.2d 350 (1st Dep't 1969), aff'd, 26 N.Y.2d 837, 309 N.Y.S.2d 585 (1970); *People ex rel. Smith v. Deegan*, 32 App. Div. 2d 940, 303 N.Y.S.2d 789 (2d Dep't 1969) (Both New York cases have, in effect, been overruled by the instant case); *State ex rel. Gilmore v. Cupp*, 458 P.2d 711 (Ore. App. 1969). But see *Commonwealth v. Tinson*, 433 Pa. 328, 249 A.2d 549 (1969).

8. 397 U.S. 254 (1970).

9. 295 U.S. 490 (1935).

10. 389 U.S. 128 (1967).

11. *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare benefits); *In re Ruffalo*, 390 U.S. 544 (1968) (disbarment); *In re Gault*, 387 U.S. 1 (1967) (adjudication as a juvenile delinquent); *Greene v. McElroy*, 360 U.S. 474 (1959) (employment); *Long May Ma v. Barber*, 357 U.S. 185 (1958); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951).

12. Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process*, 45 MINN. L. REV. 803, 826 (1961).

13. *Id.* at 826-27. See also *Menechino v. Oswald*, 430 F.2d 403, 409 (2d Cir. 1970).

that there has been a violation and this is the precise question on which procedural due process guarantees are demanded.¹⁴

In *Hyser v. Reed*,¹⁵ the existence of a constitutional right to counsel in parole revocation proceedings was denied on the rationale that the parole board acts as *parens patriae* of the parolee and therefore due process protections are unnecessary.¹⁶ However, a similar argument made four years later before the Supreme Court in the case of a proceeding to adjudicate juvenile delinquency was rejected.¹⁷ Insofar as a parole revocation proceeding is dispositional, the *parens patriae* argument may be valid since, theoretically, both the board and the parolee are interested in the well-being of the parolee and of society. Nonetheless, where there is a factual dispute, the hearing is, of necessity, adversarial. The factual dispute must be resolved before the discretionary dispositional assessment can be made. Regardless of whether the proceeding is labelled discretionary, due process considerations must be complied with.¹⁸

Despite the almost uniform insistence of the absence of a constitutional right to counsel at parole revocation hearings,¹⁹ many jurisdictions have provided for counsel at such proceedings either by statute²⁰ or by judicial

14. Note, 65 HARV. L. REV. 309, 311 (1951). See also *Rose v. Haskins*, 388 F.2d 91 (6th Cir. 1968) (dissenting opinion).

15. 318 F.2d 225 (D.C. Cir.), cert. denied, *Jamison v. Chappell*, 375 U.S. 957 (1963).

16. See Note, 18 BUFFALO L. REV. 607, 609-10 (1968). The *Hyser* decision may be a significant indicator of the direction the Supreme Court may take in this area. Mr. Chief Justice (then Judge) Warren Burger wrote the majority opinion in that case.

17. *In re Gault*, 387 U.S. 1, 26 (1967).

18. *Id.* Cf. *Specht v. Patterson*, 386 U.S. 605 (1967); *Kent v. United States*, 383 U.S. 541 (1966); *Baxtrom v. Herold*, 383 U.S. 107 (1966). In the early history of parole, lack of due process was justified since "[i]n practically every instance, the hearing on a parole violation is merely a formality to permit the returned violator to give his version of the events which led up to the revocation of his parole. As far as the parole authorities are concerned, the facts justifying the revocation of the parole almost invariably are clearly established before the time of (or concurrent with) the return of the offender to the institution." 4 ATTORNEY GENERAL SURVEY OF RELEASE PROCEDURES 246 (1939).

19. See *supra* cases cited note 7.

20. For example, since 1962, the United States Parole Board grants such a right under 28 C.F.R. § 2.41 which provides:

Each alleged parole or mandatory release violator shall be advised that he may be represented by counsel and that voluntary witnesses who have information relevant and material may testify at the preliminary interview or the revocation hearing, or both, authorized by § 2.40; *Provided*, that the alleged violator arranges for the appearance of counsel and witnesses in accordance with procedures prescribed by the Board.

See also, e.g., GA. CODE ANN. § 77-541 (Supp. 1970); MICH. COMP. LAWS ANN. §§ 791.234 (1958), 791.244 (1953); MONT. REV. CODE § 94-9835 (1955); TEX. CODE CRIM. PROC. art. 42.12 § 18 (1966). See also Kadish, *supra* note 12, at 824 n.101; Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. CRIM. L.C. & P.S. 175, 181 (1964).

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interpretation.²¹ In *Fleming v. Tate*²² the Court of Appeals for the District of Columbia, although holding that there is no constitutional right to counsel in a parole revocation hearing, found that a right to counsel must be inferred from the nature of parole.²³

The parole system is an enlightened effort on the part of society to rehabilitate convicted criminals. Certainly no circumstance could further that purpose to a greater extent than a firm belief on the part of such offenders in the impartial, unhurried, objective and thorough processes of the machinery of the law. And hardly any circumstance could with greater effect impede the progress towards the desired end than a belief on their part that the machinery of the law is arbitrary, technical, too busy or impervious to the facts.²⁴

The court then interpreted the statutory "opportunity to appear" before the Parole Board to mean an effective appearance thus necessitating the presence of counsel if the prisoner so elects.²⁵

In most jurisdictions where the right to be represented by counsel has been accepted, it has not been extended to require appointment of counsel for indigents. The question of whether a parolee is entitled to be represented by counsel is distinguished from the question of whether an indigent parolee is entitled to have counsel assigned to represent him at such a hearing.²⁶ In *Hyser*, the court, having held that the parole revocation proceeding was not a criminal prosecution, declared that sixth amendment

21. In the following cases, statutory language providing for an "opportunity to appear" has been held to implicitly provide for the right to counsel: *Barnes v. Reed*, 301 F.2d 516 (D.C. Cir. 1962); *Reed v. Butterworth*, 297 F.2d 776 (D.C. Cir. 1961); *Glen v. Reed*, 289 F.2d 462 (D.C. Cir. 1961); *Hurley v. Reed*, 288 F.2d 844 (D.C. Cir. 1961); *Robbins v. Reed*, 269 F.2d 242 (D.C. Cir. 1959); *Moore v. Reid*, 246 F.2d 654 (D.C. Cir. 1957); *Fleming v. Tate*, 156 F.2d 848 (D.C. Cir. 1946); *United States ex rel. Obler v. Kenton*, 262 F. Supp. 205 (D. Conn. 1967); *State v. Boggs*, 49 Del. 277, 114 A.2d 663 (1955); *Warden v. Palumbo*, 214 Md. 407, 135 A.2d 439 (1957). *But see* *Washington v. Hagan*, 287 F.2d 332 (3d Cir. 1960), *cert. denied*, 366 U.S. 970 (1961); *Hiatt v. Compagna*, 178 F.2d 42 (5th Cir. 1949), *aff'd by an equally divided court*, 340 U.S. 408 (1950); *Gibson v. Markley*, 205 F. Supp. 742 (S.D. Ind. 1962); *Poole v. Stevens*, 190 F. Supp. 938 (E.D. Mich. 1960); *Hock v. Hagan*, 190 F. Supp. 749 (M.D. Pa. 1960); *U.S. ex rel. McCreaney v. Kenton*, 190 F. Supp. 689 (D. Conn. 1960); *Lopez v. Madigan*, 174 F. Supp. 919 (N.D. Cal. 1959). In *probation* revocation proceedings under New York's Code of Criminal Procedure section 935 similar language has been likewise held to require not only that the probationer be given the right to have counsel present but also that he be informed of such right. *People v. Hamilton*, 26 App. Div. 2d 134, 271 N.Y.S.2d 694 (4th Dep't 1966).

22. 156 F.2d 848 (D.C. Cir. 1946).

23. *Id.* at 849.

24. *Id.* at 850.

25. *Id.* at 849.

26. *Martin v. United States Bd. of Parole*, 199 F. Supp. 542 (D.D.C. 1961).

guarantees were inapplicable.²⁷ Thus, although the right to retained counsel was acknowledged, the right to appointed counsel was not.²⁸ It was reasoned in *Jones v. Rivers*²⁹ that:

When a person accused of crime has been tried, defended, sentenced and, if he wishes, has exhausted his rights of appeal, the period of contentious litigation is over. The problem then becomes one of an attempt at rehabilitation and the progress of that attempt should be measured, not by legal rules, but by the considered judgment of those who make it their professional business. So long as that judgment is fairly and honestly exercised, a judgment which is subject to judicial review, we think there is no place for *required* counsel representation in the matter of parole revocation. In short, it is illogical to equate parole processes with criminal prosecution and we conclude that due process does not require that indigent parolees be provided with counsel when they appear before the Parole Board. . . .³⁰

The incongruity of granting the right to retained counsel as a necessary safeguard to a fair hearing while denying this safeguard to indigents was pointed up in separate concurrences in both *Jones* and *Hyser*.³¹ More recently, in *Earnest v. Willingham*,³² the court said: "Where liberty is at stake a State may not grant to one even a non-constitutional, statutory right such as here involved and deny it to another because of poverty."³³ A few states have by statute granted the right of assigned counsel in parole

27. 318 F.2d 225, 237 (D.C. Cir. 1963).

28. *Id.* See also *Martinez v. Patterson*, 429 F.2d 844 (10th Cir. 1970); *Boddie v. Weakley*, 356 F.2d 242 (4th Cir. 1966); *Gaskins v. Kennedy*, 250 F.2d 311 (4th Cir. 1965); *Hodge v. Markley*, 339 F.2d 973 (7th Cir.), *cert. denied*, 381 U.S. 927 (1965); *Jones v. Rivers*, 338 F.2d 862 (4th Cir. 1964); *United States ex rel. Bradshaw v. Parker*, 307 F. Supp. 451 (M.D. Pa. 1969); *Lawson v. Coiner*, 291 F. Supp. 79 (N.D. W. Va. 1968); *Holder v. United States*, 285 F. Supp. 380 (E.D. Tex. 1968); *United States ex rel. Obler v. Kenton*, 262 F. Supp. 205 (D. Conn. 1967); *Lavendera v. Taylor*, 234 F. Supp. 703 (D. Kansas), *aff'd*, 347 F.2d 989 (10th Cir. 1964); *Martin v. United States Bd. of Parole*, 199 F. Supp. 542 (D.D.C. 1961); *Johnson v. Wainwright*, 208 So. 2d 505 (Fla. App. 1968); *Robinson v. Cox*, 77 N.M. 55, 419 P.2d 253 (1966); *Riggins v. Rhay*, 75 Wash. 2d 271, 450 P.2d 806 (1969).

29. 338 F.2d 862 (4th Cir. 1964).

30. *Id.* at 874.

31. [W]ere we to construe the statutory grant of right to counsel as intended only for those who can pay, substantial constitutional questions would arise. . . . Poverty bears no more relationship to the question of parole violation than to the question of guilt. Therefore congressional discrimination against parolees who cannot afford counsel would raise serious problems of due process of law.

318 F.2d 225, 255 (D.C. Cir. 1963) (concurring opinion). See also *Jones v. Rivers*, 338 F.2d 862, 876 (4th Cir. 1964) (Sobeloff J., concurring specially).

32. 406 F.2d 681 (10th Cir. 1969).

33. *Id.* at 683-84. See also *Menechino v. Oswald*, 430 F.2d 403, 410 (2d Cir. 1970). See generally *Perry v. Willard*, 247 Ore. 145, 427 P.2d 1020 (1967).

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revocation proceedings to indigents,³⁴ and several correctional studies have recommended such a practice.³⁵

Recently, the Supreme Court of Pennsylvania, in *Commonwealth v. Tinson*,³⁶ held that a parolee has a constitutional right to counsel in a parole revocation hearing. In reaching its decision, the court noted the absence of significant difference between a probation revocation proceeding, where counsel is constitutionally required under *Mempha v. Rhay* and *McConnell v. Rhay*,³⁷ and a proceeding to revoke parole. Prior to the decision in the instant case, no New York court had recognized the existence of such a federal constitutional right. A New York supreme court decision on the issue had held that a parolee was not entitled to constitutional due process because parole revocation is not a criminal prosecution within the meaning of the sixth amendment guarantee.³⁸ In *People ex rel. Combs v. LaVallee*,³⁹ however, the Appellate Division for the Fourth Department held that a parolee is entitled to counsel and due process at a proceeding to revoke parole under the New York Constitution, article I, section 6, which guarantees right to counsel "in any trial in any court."⁴⁰ This constitutional provision was applied to section 218 of the Correction Law which required the Board to "hold a parole court,"⁴¹ and the court declared:

When all the legal niceties are laid aside a proceeding to revoke parole involves the right of an individual to continue at liberty just as much as did the original criminal action and, it is submitted, falls within the due process provision of Section 6 of Article I of our State Constitution.⁴²

The *Combs* decision was followed in *People ex rel. Ochs v. LaValle*⁴³ where a new revocation hearing with counsel and due process was ordered. The

34. See, e.g., P. R. LAWS ANN. tit. 4, § 646 (1965). Appointment of counsel is not required but is provided for in Maryland and West Virginia. Kadish, *supra* note 12, at 826-27, citing, PROCEEDINGS OF THE 89TH ANNUAL CONGRESS OF CORRECTIONS OF THE AMERICAN CORRECTIONAL ASS'N WORKSHOP V, COMM. ON PAROLE BD. PROBLEMS 83-84 (1959).

35. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 368 (1968); A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE—STANDARDS RELATING TO PROVIDING DEFENSE SERVICES 43 (1967); ATTORNEY GENERALS' COMM. ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE, REPORT 49 (1963).

36. 433 Pa. 328, 249 A.2d 549 (1969).

37. 393 U.S. 2 (1968).

38. *People ex rel. Turner v. Deegan*, 55 Misc. 2d 261, 285 N.Y.S.2d 253 (Sup. Ct. 1967).

39. 29 App. Div. 2d 128, 286 N.Y.S.2d 600 (4th Dep't), *appeal dismissed*, 22 N.Y.2d 857, 293 N.Y.S.2d 117 (1968).

40. *Id.* at 131, 286 N.Y.S.2d at 603.

41. *Id.*

42. *Id.*

43. 60 Misc. 2d 627, 303 N.Y.S.2d 772 (Sup. Ct. 1968).

Parole Board failed to comply with the order in several respects and the case went back to the Clinton County Supreme Court.⁴⁴ The court, noting that the Court of Appeals had in the intervening period declared that a revocation hearing was not an adversary proceeding requiring counsel,⁴⁵ modified its prior opinion to conform to the Court of Appeals' statement and dismissed the petition.⁴⁶ The New York Legislature responded to the *Combs* decision by deleting the word "court" from section 218 of the Correction Law,⁴⁷ and the present statutory proscription of the right to counsel at parole revocation⁴⁸ has been held not to violate any constitutional provision.⁴⁹

In the instant case, the Court of Appeals relied on the principle articulated by the Supreme Court in *Mempha* in reaching the decision that the right to counsel in parole revocation proceedings is constitutionally mandated. Since a proceeding to revoke parole involves a factual determination of a violation of the condition of release just as much as does a probation revocation proceeding, the rule applicable to the latter should be equally essential in the former. Relying on *Combs*' language⁵⁰ the court refused to be diverted by labels into drawing the distinction between judicial and administrative proceeding and instead, weighed the consequences of each action.⁵¹ The court noted that the revocation decision could condemn the relator to imprisonment for life.⁵² Considering these grave consequences, the court reasoned, the Board could not be permitted to act on possibly mistaken information either due to inaccurate reports or due to the parolee's inability to present a coherent defense. Noting that the sixth amendment could no longer be narrowly limited to "criminal prosecutions," the court proceeded to argue that the presence of counsel at the revocation hearing would insure the accuracy of the factual determination on which the decision to revoke was to be based.⁵³ The court then attempted to restrict the scope of its holding to "assure, to the board as well as to the parolee, that the board is, insofar as the parolee is concerned,

44. 60 Misc. 2d 629, 303 N.Y.S.2d 774 (Sup. Ct. 1969).

45. *Briguglio v. New York State Bd. of Parole*, 24 N.Y.2d 21, 246 N.E.2d 512, 298 N.Y.S.2d 704 (1969) (dictum).

46. 60 Misc. 2d 629, 303 N.Y.S.2d 774 (Sup. Ct.), *aff'd*, 33 App. Div. 2d 80, 307 N.Y.S.2d 982 (3d Dep't 1969).

47. N.Y. Sess. Laws, ch. 203, July 9, 1968.

48. N.Y. CORR. LAW § 218 (McKinney 1968) provides in part that a parole violator shall have "an opportunity to appear personally, but not through counsel or others, before three members of such board of parole and explain the charges made against him."

49. *See, e.g., People ex rel. Brock v. LaVallee*, 33 App. Div. 2d 722, 307 N.Y.S.2d 981 (3d Dep't 1969).

50. *See supra* note 42 and accompanying text.

51. 27 N.Y.2d 376, 382, 267 N.E.2d 238, 241, 318 N.Y.S.2d 449, 453 (1971).

52. *Id.*

53. *Id.* at 382-83, 267 N.E.2d at 241-42, 318 N.Y.S.2d at 454.

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accurately informed of the facts before it acts."⁵⁴ The contention that parole was a privilege whose enjoyment could be terminated without any constitutional guarantees was squarely rejected by the court. Instead, it accepted the argument that the right to a revocation hearing, once granted to the parolee, implies compliance with constitutional requirements.⁵⁵ The majority, citing the experience in other jurisdictions, pointed out that providing counsel to parolees would have no adverse impact on the parole system.⁵⁶

The dissent, per Judge Scileppi, disagreed, contending that the presence of counsel would result in "undue delays and procedural difficulties which already plague the administration of criminal justice."⁵⁷ While indicating that the right to counsel at parole revocation proceedings might be desirable if promulgated by a legislative body, the dissent insisted that it was not constitutionally required.⁵⁸ The argument by the majority that parole revocation results in a loss of liberty was strongly rejected. Since the parolee was already in custody, notions of preconviction liberty were held to be inapposite and the parole violator was therefore subject to reincarceration at any time without the protection of due process rights applicable prior to conviction.⁵⁹ The dissent also rejected the court's reliance on *Mempha*, arguing that *Mempha* was a "sentencing case," where the probationer, unlike the parolee here, was subject to an increased sentence.⁶⁰

Agreeing with Judge Scileppi that although counsel at revocation hearings may be desirable without being constitutionally required, Judge Breitel's dissent focused on the impact of the court's decision. The attempted limitation on the right granted by the court, noted this dissent, would prove to be evanescent and would inevitably convert the revocation hearing into a trial-type proceeding.⁶¹ The decision would compound the difficulty thus created by generating several concomitant rights—assignment of counsel (probably creating a need for a prosecuting attorney as well), review (thus necessitating the maintenance of a record and the formulation of a measurable standard of proof), and probably new post-conviction

54. *Id.* at 383, 267 N.E.2d at 242, 318 N.Y.S.2d at 455.

55. *Id.* at 384, 267 N.E.2d at 242, 318 N.Y.S.2d at 455.

56. *Id.* at 385, 267 N.E.2d at 243, 318 N.Y.S.2d at 456. It should be noted, however, that both articles cited by the court (Sklar, *supra* note 20 and Kadish, *supra* note 12) antedated *Gideon* and other Supreme Court decisions extending the indigent's right to counsel to various stages of the proceedings. Granting the right to counsel prior to these decisions would not necessarily have the same impact as doing so at present when the doctrinal development in the area of indigent's right to counsel is more complete.

57. *Id.* at 392, 267 N.E.2d at 247, 318 N.Y.S.2d at 462 (Scileppi J., dissenting).

58. *Id.* at 393, 267 N.E.2d at 248, 318 N.Y.S.2d at 463 (Scileppi J., dissenting).

59. *Id.* at 390-91, 267 N.E.2d at 247, 318 N.Y.S.2d at 461 (Scileppi J., dissenting).

60. *Id.* at 390-91, 267 N.E.2d at 246-47, 318 N.Y.S.2d at 460-61 (Scileppi J., dissenting).

61. *Id.* at 394, 267 N.E.2d at 249, 318 N.Y.S.2d at 464 (Breitel J., dissenting).

proceedings.⁶² Furthermore, the decision would have to be held retroactive thus aggravating all the other practical problems created.⁶³ Had the court deferred to the legislature, it would have given that body a greater degree of flexibility necessary to make the implementation transition a smooth one.⁶⁴

As noted by Judge Breitel's dissent, the court's attempted limitation of its holding appears to be ineffective. For example, the court declares that counsel should be permitted to question the accuracy of the parole supervisor's report.⁶⁵ Parole reports often contain hearsay statements,⁶⁶ and the accuracy of the reports could not effectively be questioned unless the declarant were available for questioning and possible impeachment.

Producing the declarant in court may not be an easy task although the Parole Board has the power of compulsory process⁶⁷ since the witness will more than likely be reluctant to confront the parolee. A potential informant faced with the possibility of having his identity disclosed may well decide to withhold his information. This would be especially true in the frequent case where the informant is a family member or close friend who imparts information under assurances of confidentiality.⁶⁸ Granting such informants a privilege from testifying seems incompatible with notions of due process and would be especially ironic since the right to counsel has been granted to insure a more reliable fact-finding process.⁶⁹ An informant secure in the knowledge that he is free from the compulsion to testify and free from the risk of discovery may be invited to lie without fear of contradiction. Malicious misinformation is likely where the informant bears a grudge against the parolee. Unless the identity of the informant is disclosed, proper impeachment of words in cold print may be impossible.⁷⁰ Furthermore, parole officers have been known to have

62. *Id.* at 394-95, 267 N.E.2d at 249-50, 318 N.Y.S.2d at 464-65 (Breitel J., dissenting).

63. *Id.* at 395, 267 N.E.2d at 250, 318 N.Y.S.2d at 465 (Breitel J., dissenting).

64. *Id.* at 393, 267 N.E.2d at 248, 318 N.Y.S.2d at 463 (Breitel J., dissenting).

65. *Id.* at 382-83, 267 N.E.2d at 241-42, 318 N.Y.S.2d at 454.

66. See note 68 *infra* and accompanying text.

67. N.Y. CORR. LAW § 6-a (5) (McKinney Supp. 1970).

68. Conversation between the writer and N.Y. Parole Board Area Supervisor for Buffalo on Jan. 29, 1971.

69. "Where the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of the accused, or is essential to a fair determination of a cause, the [informer's] privilege must give way." *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957).

70. Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the actions depends on fact findings, the evidence used to prove the Government's case must be disclosed to

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biases which affect their professional decisions.⁷¹ At the very minimum, the officer who prepared the report would have to be available for questioning. Such a practice will not only protract the proceedings but also will take the officer away from his supervisory duties.⁷² Thus the parole system may be placed in a situation where it is faced on one hand with a course of action inconsistent with the intent of the court or, on the other, it may have to comply with procedural rights that cannot coexist with parole practices. It does not appear to be possible to provide revocation hearings that are at once speedy and effective. A semblance of compliance with the court's order would appear to mandate at the very minimum a drastic increase in the manpower of the parole system—both at the parole board level and at the supervisory level.⁷³

Furthermore, it seems inescapable that, having provided for an adversarial proceeding on factual questions, some mechanism for review of the ultimate determination must be made available. For example, it is not clear precisely what constitutes "consorting." Thus even if it is factually established that a parolee was in the company of persons with criminal records, is this sufficient to establish a charge of "consorting" as a matter of law? It would seem that this is precisely the type of issue that should be reviewable. This, of course, would necessitate an identifiable standard of proof at the revocation proceeding—such as the preponderance of the evidence test used in civil cases.⁷⁴

the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy.

Greene v. McElroy, 360 U.S. 474, 496 (1958).

71. 4 ATTORNEY GENERAL SURVEY OF RELEASE PROCEDURES 246-47 (1939).

72. See Note, *Parole Revocation in the Federal System*, 56 GEO. L.J. 705, 726 (1968); Kadish, *supra* note 12, at 837.

73. In 1969, 3,192 parolees were declared delinquent and after revocation hearings 2,299 were returned to correctional institutions as parole violators. STATE OF NEW YORK FACTS AND FIGURES ABOUT THE ACTIVITIES OF THE BOARD OF PAROLE AND THE DIVISION OF PAROLE OF THE EXECUTIVE DEPARTMENT 20 (1969). This figure represents *revocation* hearings alone. The number of *release* hearings are somewhat higher. The present twelve-man Board which must sit in panels of three cannot devote more than a few minutes to each hearing. Implicit in the right to counsel are longer hearings. The experience under the *Combs* decision bears this out. One hearing in Auburn Prison in which a parolee was represented by counsel lasted over three hours and the attorney reportedly complained bitterly to the Division of Parole in Albany that he was not given an adequate opportunity to defend his client! This episode was recounted in the conversation referred to in *supra* note 68.

74. 27 N.Y.2d at 395, 267 N.E.2d at 249, 318 N.Y.S.2d at 464 (Breitel J., dissenting).

The court also does not specify at what point the revocation hearing must take place. In *People ex rel. Johnson v. Follette*⁷⁵ parole revocation procedures were explained:

The parole violation procedure is set in motion by the filing of a written violation report by a parole officer that contains allegations 'proven and supported with the same thoroughness which is used in obtaining evidence for legal action.' Before the report is submitted, the parolee's statement is taken and included. The report is then submitted to a member of the board [in Albany] who determines whether a return or a detainer warrant should issue and upon the issuance of the warrant the parolee is declared delinquent.⁷⁶ Revocation hearings before members of the board are determined on the basis of the violation report and an appearance by the parolee. Upon the information supplied the board may make its determination or order a further investigation and report.⁷⁷

This would indicate that the revocation hearing be held in the correctional institution where the parolee may remain incarcerated for as long as a month before being heard on the issue of his violation. Continuing such a practice appears to be inconsistent with the court's decision, especially since such a deprivation of liberty is no longer justifiable as a withdrawal of a mere privilege.⁷⁸ Furthermore, although the court talks generally of parole revocation hearings, the thrust of its opinion is directed to improper deprivations of liberty.⁷⁹ It would follow then that either the revocation hearing must be held at a point in time earlier than that indicated in *Johnson* or that some provision be made to permit the parolee to remain at liberty until the hearing is held and the fact of the violation of parole properly established.⁸⁰ Complying with the former alternative would work

75. 58 Misc. 2d 474, 295 N.Y.S.2d 565 (Sup. Ct. 1968).

76. At this point he is usually transferred from the local jail to a correctional institution. The Parole Board panel of three members usually meets and holds hearings at the correctional institution. N.Y. CORR. LAW § 218 (McKinney 1968). Hearings are usually held once a month. See generally N.Y. CORR. LAW, §§ 216-18 (McKinney 1968).

77. 58 Misc. 2d 474, 477-78, 295 N.Y.S.2d 565, 570 (Sup. Ct. 1968) (citations omitted).

78. 27 N.Y.2d at 384, 267 N.E.2d at 242, 318 N.Y.S.2d at 455.

79. *Id.* at 381-82, 267 N.E.2d at 241-42, 318 N.Y.S.2d at 453-54.

80. In order that the period between retaking and the revocation hearing be of value to the parolee in preparing his defense, he should be given the right to release in his own recognizance when a technical violation is alleged. If the alleged violation has also been the subject of a criminal charge, the Board should not interfere with such bail arrangements as have been made by the court before whom the parolee has been arraigned.

Note, *Parole Revocation in the Federal System*, 56 GEO. L.J. 705, 739 (1968). California has experimented with a system of bail release and release on recognizance of selected parolees. See ANNUAL RESEARCH REVIEW, CALIFORNIA DEPARTMENT OF CORRECTIONS 36 (1969). See also G. GIARDINI, *THE PAROLE PROCESS* 255 (1959):

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a severe hardship on the present twelve-man Parole Board.⁸¹ Holding revocation hearings at the prison is convenient because the number of venues is limited and because release hearings are held at the same location. If revocation hearings were to be held before the parolees were sent to prison, not only would the Board have to continue to make their regular trips to the prison to hold release hearings but they would also have the impossible task of holding revocation hearings in cities across the state.

Continuing to hold revocation hearings at the prison has other disadvantages for indigent parolees. The court grants the parolee the right to call witnesses,⁸² but unless the Board allows him to fully utilize its power of compulsory process, he will be forced to rely on voluntary witnesses.⁸³ To the indigent unable to pay witness fees and transportation costs to and from the location of the hearing, especially if it is a distant correctional institution, the opportunity to produce credible voluntary witnesses may thus be made illusory. Here again the Board is confronted with a choice of equally unattractive options—granting compulsory process and thus undermining its system of information⁸⁴ or withholding the power and thus providing an ineffective hearing.

The right to counsel probably cannot be fully implemented without legislative action.⁸⁵ Parole boards as administrative agencies generally lack the power to appoint counsel,⁸⁶ and courts generally have no jurisdiction

Parolees are frequently prevented from obtaining bail by parole authorities by detainers lodged against them following arrest for a new offense. It is usually assumed that, if a parolee is charged with a new offense, he has probably violated his parole in some way. Furthermore, the legal status of a parolee may not be regarded as the same as that of a person who is not on parole. A parolee is still under sentence and, therefore, may not have the same rights and privileges as a free person. . . . However, parolees arrested for new offenses frequently request release on bail. If the Bill of Rights holds for parolees as for other persons, it seems that the only safe basis for refusing release on bond would be proof that the parolee has violated his parole in ways other than are indicated by the charges for which he was arrested and for which he is yet to be found guilty.

- Id.*
81. See text of *supra* note 73.
 82. 27 N.Y.2d at 384, 267 N.E.2d at 242, 318 N.Y.S.2d at 455.
 83. See, e.g., *Boddie v. Weakley*, 356 F.2d 242 (4th Cir. 1966); *Barnes v. Reed*, 301 F.2d 516 (D.C. Cir. 1962); *Reed v. Butterworth*, 297 F.2d 776 (D.C. Cir. 1961); *Martin v. Board of Parole*, 199 F. Supp. 542 (D.D.C. 1961); *Riggins v. Rhay*, 75 Wash. 2d 271, 450 P.2d 806 (1969).
 84. See *supra* note 68 and accompanying text.
 85. Unquestionably, the constitutional right to counsel granted by the instant case extends to indigents. Cf. *Griffin v. Illinois*, 351 U.S. 12 (1956); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Douglas v. California*, 372 U.S. 353 (1963); *Lane v. Brown*, 372 U.S. 477 (1963). See also *Earnest v. Willingham*, 406 F.2d 681 (10th Cir. 1969).
 86. *Jacob and Sharma, Justice after Trial: Prisoner's Need for Legal Services in the Criminal Correctional Process*, 18 KAN. L. REV. 493, 544 (1970).

to appoint counsel to represent an indigent who faces possible parole revocation.⁸⁷ The court's power appears limited to setting aside the parole board decision, on review, for failure to provide counsel to the indigent parolee.⁸⁸ Legislative action, for example, could take the form of either extending the function of the public defender to representation of indigents at parole revocation hearings⁸⁹ or appropriating money to create a fund to be used by the Parole Board to hire counsel for indigents.⁹⁰ The dissenting opinion⁹¹ points out that the decision will have to be applied retroactively since it "affects, and is justified only because it affects, the integrity of the fact-finding process."⁹² The additional burdens thus imposed on the Parole Board are apparent.⁹³

The court's emphasis in the instant case on the importance of fact-finding where the status of a person caught up in the correctional system is substantially affected has major significance not limited to the specific facts of this case. Insofar as parole release is denied *solely* because the Board is convinced of a certain fact (*e.g.*, that the prisoner is a kleptomaniac or has homicidal tendencies) it would follow that the same interests in a reliable fact-finding process are present even though there is no pres-

87. *Id.*

88. *Id.* Cf. *People ex rel. Combs v. LaVallee*, 29 App. Div. 2d 128, 286 N.Y.S.2d 600 (4th Dep't), *appeal dismissed*, 22 N.Y.2d 857, 293 N.Y.S.2d 117 (1968).

89. Cf. *Commonwealth ex rel. Patterson v. Pa. Bd. of Probation and Parole*, 215 Pa. Super. 532, 258 A.2d 693 (1969). Advanced law students working under careful supervision could be effectively utilized.

90. See generally *Jacob and Sharma, supra* note 86, at 545-46. It is interesting to consider if the right to appointed counsel would exist had the court avoided the constitutional issue and arrived at its decision by reading into the statutory right of an "opportunity to appear" (N.Y. CORR. LAW § 218 (McKinney 1968)) the right to counsel. See cases cited in *supra* notes 21 and 28.

91. 27 N.Y.2d at 395, 267 N.E.2d at 250, 318 N.Y.S.2d at 465 (Breitel J., dissenting).

92. *Id.* See *Linkletter v. Walker*, 381 U.S. 618, 639 (1965). *But see Murray v. Page*, 429 F.2d 1359 (10th Cir. 1970).

The right to appear and be heard at a parole revocation hearing is minimal, not to be compared to the elaborate protections afforded the criminally accused. And at this late date we do not believe the administration of justice would be best served by now imposing perhaps an insurmountable burden of conducting revocation hearings years after the decision to revoke has been made.

Id. at 1362-63. On the retroactivity issue see generally *Desist v. United States*, 394 U.S. 244 (1969).

93. *Murray v. Page*, 429 F.2d 1359, 1362-63 (10th Cir. 1970). The Chairman of the Parole Board, Paul J. Regan, in a letter to the writer dated March 15, 1971, stated that he anticipates litigation of the retroactivity issue since "the retroactive application of the decision would place an almost impossible burden on us." A recent case, *People ex rel. Fuca v. Department of Correction*, ... Misc. 2d ..., ... N.Y.S.2d ... (Sup Ct. Dutchess Cty., February 23, 1971), held, per Hawkins, J., that the instant decision is to be accorded prospective application only. On the other hand, Judge John S. Conable of the Wyoming County Court, in a conversation with the writer on March 22, 1971,

ently enjoyed liberty.⁹⁴ The decision may also have an impact on prison disciplinary hearings where a violation of major proportions is alleged and where the prisoner is deprived of the "liberty" of mingling with the general prison population and is confined in an isolated cell block (prison within a prison) for a substantial period of time. Here again it would seem that notions of due process are equally applicable, especially since such hearings may result in actually increasing the effective length of the prisoner's sentence through loss of "good time" which he would otherwise earn.

In spite of the seemingly insurmountable burdens and procedural difficulties imposed on the parole system by the instant decision, it is difficult to dispute the inherent logic of the court's argument and the justice of its position. Nothing rankles in the human breast more than a sense of injustice. Procedural fairness has for too long a time been sacrificed on the altar of expedience. By acting to reverse the order of priorities in some measure the court has perhaps taken a step that not only will guarantee a greater measure of justice in the correctional process but may also have the welcome side effect of creating an atmosphere conducive to real rehabilitation.

CLARENCE J. SUNDRAM

EVIDENCE—COCONSPIRATOR RULE ALLOWING ADMISSION OF ACCOMPLICE'S DECLARATION HELD NOT VIOLATIVE OF SIXTH AMENDMENT RIGHT OF CONFRONTATION

Discovery of the handcuffed, bullet-riddled bodies of three police officers led to the arrest of appellee Evans, and two suspected accomplices, Williams and Truett. Charged with murder, Evans pleaded not guilty and asked to be tried separately. Truett was granted immunity from prosecution in return for his testimony as a State's witness. The case came before the Supreme Court on appeal after the United States' Court of Appeals for the Fifth Circuit reversed the denial of a writ of habeas corpus by the United States District Court of Georgia.¹ Truett, the prosecution's chief witness testified that he, appellee and Williams were accosted by the policemen while changing the license plates on a stolen car. As one of the officers was searching the automobile, Evans grabbed his firearm, disarmed the

stated that the retroactive application of the decision is mandated since it is a constitutional decision. Inmates of the Attica Correctional Facility have been granted retroactive application of the *Menechino* decision.

94. The Court of Appeals for the Second Circuit rejected the notion that counsel should be permitted in parole release hearings. *Menechino v. Oswald*, 430 F.2d 403, 410 (2d Cir. 1970).

1. *Evans v. Dutton*, 400 F.2d 826 (5th Cir. 1968).