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THE COURTS INTERPRET THE FEDERAL PROBATION ACT

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RICHARD A. CHAPPELL*
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Historical Background

Before the decision in the *Killits* case December 4, 1916, it had been the practice of many district judges to suspend the execution of sentence indefinitely by a method known as "laying the case on file," or "sentence deferred until further order of the Court." This procedure was more than sixty years old and at the time of the *Killits* decision there were in excess of 2,000 persons at large on suspended sentences. In *ex parte United States Petitioner Mandamus Judge Killits*,¹ Mr. Chief Justice White writing the opinion, it was held that a district judge was without power to suspend sentence indefinitely. It was argued for Judge *Killits* that the power existed at common law and many cases were cited as tending to uphold it. It was pointed out that the best reason for holding that the power existed was a long and continuous exercise by State and Federal judges.

It was pointed out that there were two types of reprieves at common law—"Ex Arbitio Judis," or "Ex Necessitate Legis." The latter covered cases of temporary suspensions, as for insanity, pregnancy, etc. The former seemed to apply wherever it appeared that injustice would result from conviction or execution. This power was an implied common law exception to the statutory duty to punish. If the Courts could suspend sentences to limited time in avoidance of injustices, why not indefinitely?

It was further argued for the respondent that the practice of suspending sentence in the Federal Court had been followed for a long time with the tacit approval of administrative officers of the Government and presumably recognized by the legislative branch which had made no move to make provision by statute.

However, the Supreme Court held that the practice was inconsistent with the Constitution, ". . . since its exercise in the very nature of things amounts to a refusal by the judicial power to

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¹ 242 U. S. 27.

perform a duty resting on it and, as a consequence thereof, to an interference with both the legislative and executive authority as fixed by the Constitution." The Court suggested ". . . probation legislation or such other means as the legislative mind may devise," to answer the need of the judiciary to exercise ". . . enlarged but wise discretion the infinite variations which may be presented to them for judgment . . ."

Notwithstanding the fact that Chief Justice White had pointed out that the legislature could devise a remedy for the situation, ten years passed before the enactment of the Probation Law. Such leaders in the probation field as Charles L. Chute, Herbert Parsons and Judge Hoffman appeared before the Committee of Congress and pointed out the crying need for probation legislation. Their efforts were in vain largely because of the opposition of Mr. Volstead and other friends of the National Prohibition Act. Those opposing argued that if probation legislation was passed that many judges unfriendly toward the purposes of the Volstead Law would use the provisions of the Probation Law to nullify the effects of the Volstead Act by placing all Prohibition Law violators on probation. Later developments showed that Mr. Volstead's fears were well founded because in a few districts trial judges did abuse the use of probation. This abuse was terminated, however, with the repeal of the 18th Amendment.

Constitutionality of Probation Act

One of the earliest attacks brought against the Federal Probation Act was directed against the question of constitutionality. All of the cases, however, hold the act to be constitutional.

The attacks, for the most part, were brought on the ground that the power of a judge to place one on probation encroached upon the executive power to pardon. The Court held this position as untenable and pointed out that there is no conflict.^{1a} The power of the President to pardon one ". . . extends to every offense known to law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment." A State case—*Belden v. Hays*,² was cited with the notation that that case draws a distinction between probation after sentence and pardon. The former involves a change of judgment; the latter leaves sentence

^{1a} *Nix v. James*, 7 Fed. 2nd 590.

² 88 Vt. 500.

as it was passed, but protects the defendant from its operation. In one case³ the Court cites the Supreme Court decision in the *Killits* case holding that there was no authority for suspended sentence (before Probation Act), but specifically stated that the legislative power to provide for probation was adequately complete.

Purposes of Probation Act

Chief Justice Taft in writing the opinion in *United States v. Murray*⁴ states the purpose of the Probation Act in the following language:

“The great desideratum was the giving to young and new offenders of law the chance to reform and to escape the contaminating influence of association with hardened or veteran criminals in the beginning of the imprisonment. Experience had shown that there was a real *locus poenitentiae* between the conviction and the certainty of punishment, on the one hand, and the actual imprisonment and public disgrace of incarceration and evil association, on the other. If the case was a proper one, great good could be done in stopping punishment by putting the new criminal on probation. The avoidance of imprisonment at time of sentence was therefore the period to which the advocates of a Probation Act always directed their urgency. Probation was not sought to shorten the term. Probation is the attempted saving of a man who has taken one wrong step and whom the judge thinks to be a brand who can be plucked from the burning at the time of the imposition of the sentence.”

Chief Justice Hughes in *Burns v. United States*⁵ said:

“The Federal Probation Act * * * was designed to provide a period of grace in order to aid the rehabilitation of a penitent offender; to take advantage of an opportunity for reformation which actual service of the suspended sentence might make less probable.”

Grounds for Probation

It has been pointed out that the granting of probation is a matter of grace and not of right. No defendant can demand the privilege. There is no requirement that it can be granted on a specified showing.⁶ Old age, insolvency, chronic ailments, hardship to family did not constitute an undeniable claim to probation.⁷ Neither did a pending petition for pardon or motion for new trial

³ *Riggs v. United States*, 14 Fed. 2d 5.

⁴ 275 U. S. 347.

⁵ 287 U. S. 216.

⁶ *Burns v. United States*, 287 U. S. 216.

⁷ *United States v. Meagher, et al.*, 36 Fed. 2d 824.

or stay of execution or review on appeal entitle one to probation during the time he is awaiting the outcome.⁸ Imprisonment for a crime is not a brand of infamy, avoidance of which may be urged as a ground for probation, nor is a recommendation of leniency by convicting jury a ground for probation.⁹

The placing of one codefendant on probation does not entitle another codefendant to the same privilege.¹⁰

Restrictions on Power of Trial Judges

The trial judge cannot place one on probation for a period exceeding five years, the limitation specified in the statute.¹¹ The Court is not restricted to the length of time for which the person might be sentenced to prison. The probation term can be longer or shorter as the Court wishes. In the case of *Hollandsworth v. United States*,¹² it was argued for the appellant that the Court could not impose a probation sentence to run longer than the maximum imprisonment penalty for the offense committed. The Court said:

“There is indeed no necessary connection between the term of probation and the term of imprisonment.”

It was pointed out that the purpose and desired end of probation is the rehabilitation of the offender. The supervision period should be long enough to test the probationer's good faith. It was not the intent of Congress to limit the period except by the expressed five year provider in the statute.

Where the Court attempts to suspend sentence without placing the defendant on probation, the suspension is invalid since the Probation Act.¹³ The suspension was ruled invalid but the sentence held good.

The trial judge is not prevented from deferring sentence temporarily pending reports of probation officers.¹⁴ It is interesting to note in this connection that the Supreme Court rules of practice prescribed by order of May 7, 1934, under the authority of an Act of Congress approved March 8, 1934, provides that:

⁸ *United States v. Davis, et al.*, 19 Fed. 2d 536.

⁹ *United States v. Nix*, 8 Fed. 2d 759.

¹⁰ *United States v. Gargano*, 25 Fed. 2d 723.

¹¹ *Burns v. United States*, 287 U. S. 216.

¹² 34 Fed. 2d 423.

¹³ *Miller v. Aderhold*, 288 U. S. 206.

¹⁴ *Ex Parte De Angelo*, 50 Fed. 2d 547 and *Rosenwinkel v. Hall*, 61 Fed. 724.

“After plea of guilty or verdict of guilt the Court shall impose sentence without delay unless (1) * * * (2) the condition or character of the defendant, or other pertinent matters, should be investigated in the interest of justice before sentence is imposed.”

It is reasonable to assume that Congress, in enacting the Probation Law, and the Supreme Court, in prescribing rules of practice providing temporary delay of sentence, realized that district judges need sufficient time in which to have a thorough investigation made, by their probation officer, into the past history, habits, conduct, work record, family responsibilities, and such other matters as the Court will wish to be advised concerning, before shaping the punishment of the defendant. Without sufficient time for such investigation the purposes of the Probation Act will be defeated by its abuse in granting the privilege to undeserving persons and withholding it from those who are good risks. Without sufficient information regarding a defendant's past, the Court may extend the privilege to an anti-social person. The recommendation of the probation officer is supported by information ascertained after careful investigation and is not subject to the criticism leveled against recommendations by prosecuting attorneys and defense counsel which may be biased. It is imperative that the probation officer be a well-trained skillful investigator who discharges his duties free of all extensive influences. The service demands a very high type personnel.

The District Court is not restricted merely to the suspension of the execution of sentence, but may also suspend the imposition of sentence.¹⁵

The trial judge cannot provide for probation after the beginning of the execution of sentence. Chief Justice Taft wrote the opinion in *United States v. Murray*,¹⁶ in which it was pointed out that Congress did not intend this provision as executive clemency already applies to these cases and the parole laws also apply to prisoners serving more than a year and a day. To have granted judges this power would have permitted them to encroach upon the executive power to pardon.¹⁷ The trial Court has jurisdiction after term and after affirmance on appeal to hear petition for probation provided, of course, execution of sentence has not been entered upon.¹⁸ It has been held also that a district judge is without power to impose

¹⁵ *United States v. Murray*, 275 U. S. 347.

¹⁶ 275 U. S. 347.

¹⁷ Only one case *contra*: *United States v. Chafina*, 14 Fed. 2d 622.

¹⁸ *Kriebel v. United States*, 10 Fed. 2d 762.

sentence of imprisonment and at the same time provide for the release of the prisoner on probation after he has completed service of a portion of the sentence. In the case of *United States v. Praxulis*¹⁹ the Court said:

“The Court has not power to arrest execution of the sentence after the sentence is closed, and the defendant having passed from the Court’s jurisdiction by delivery to the Marshal to carry sentence into execution, by a restrictive provision to take effect in the future, which amounts to a commutation of sentence of conditional parole, which is the province of the executive department.”

In the case of *Archer v. Snook*²⁰ the Court said:

“It (the Court) cannot, therefore, impose one imprisonment sentence, and provide for its suspension and for probation after it is partly executed.

“I am convinced that such a procedure, at least in the case of a penitentiary sentence, is unwarranted. The penitentiaries are at a great distance from most of the judges. It would involve much complication to place persons on probation after arrival at the penitentiary. By their incarceration, the shame, stigma and criminal contact, which the probation system sought in proper cases to avoid, will have already been accomplished. The existing provision for paroles is sufficient to meet most cases deserving leniency.”

The Courts are not in accord on the question whether a person convicted on several counts may be committed to the penitentiary on some count while at the same time be placed on probation on other count or counts. The most recent case on the point²¹ held that the various sentences on the different counts were essentially one sentence and that since the defendant had been confined to prison on some count the attempted probation of the remaining count was void. The 10th Circuit Court of Appeals took the opposite view in 1930, six years prior to the *Greenhaus* decision.²² The Supreme Court has not ruled directly on this question, but in the case of *Burns v. United States*²³ the revocation of probation was held good where a jail sentence and a probation sentence had been imposed on different counts of the same indictment. It would appear that the *Greenhaus* case presents the better view. It is not believed that Congress intended to provide both probation and imprisonment for the same offender. (There is no question but that

¹⁹ 49 Fed. 2d 774.

²⁰ 10 Fed. 2d 567.

²¹ *United States v. Greenhaus*, 85 Fed. 2d 116.

²² *White v. Steigleder*, 37 Fed. 2d 858.

²³ 287 U. S. 216.

the trial judge may sentence one to imprisonment on one indictment and on a separate indictment place the person on probation.) This practice, however, appears to be in contradiction to the purposes of the probation statute. The intent of the law was to save the young, inexperienced or casual offender from the stigma and experiences of imprisonment. The question of the power of the Court to place one on probation and also impose a fine on the same indictment is also unsettled. However, the weight of authority seems to hold that this arrangement is possible. The probation statute provides:²⁴

“When it shall appear to the satisfaction of the Court that the ends of justice and best interests of the public, as well as the defendant, will be subserved thereby, shall have power after conviction or after plea on nolo contendere for any crime or offense not punishable by death or life imprisonment to suspend the imposition or execution of sentence and to place the defendant upon probation for a period and upon such terms and conditions as they may deem best; or the Court may impose a fine and may also place the defendant upon probation in the manner aforesaid.”²⁵

In the case of *Barney v. Aderhold*²⁶ the Court pointed out that Congress intended for the “condition” to be consistent with the rehabilitation of the offender. A fine may be a proper “condition,” but imprisonment would not be.

It appears that the Probation Act confers upon the Court the power to reduce a fine or change any of the conditions imposed during the period of probation. In *United States v. Wagner*²⁷ the Court said:

“It is therefore a reasonable interpretation of the statute and its purpose to hold that when a sentence is imposed upon the defendant, whether of a fine or imprisonment, and same is suspended and defendant placed upon probation, that such sentence deemed proper at the time becomes a condition of the probation order expressly stated or not and like any other condition before entering upon any service of the sentence may thereafter be changed, enforced, increased or reduced within the particular law applicable as the Court in its legal discretion may later find necessary to subserve the ends of justice and best interests of both the public and the defendant.”

It is interesting to note that the Supreme Court will permit the reduction of a sentence within the term when service of the sen-

²⁴ United States Code, Annotated, Title 18, 724.

²⁵ In accord *Reeves v. United States*, 35 Fed. 2d 323; *contra: Archer v. Snook*, 10 Fed. 2d 567; also *Santis v. Esola*, 50 Fed. 2d 516.

²⁶ D. C. Ga., Jan. 19, 1935 (unreported).

²⁷ Eastern District of New York, December 4, 1933 (unreported).

tence has actually begun on the theory that the sentence remains in the breast of the Court until the end of the term.²⁸ Before this decision, the majority view held otherwise. Although the Court may reduce the sentence, it cannot change a prison sentence although for less than a year and a day to probation. *United States v. Murray*.²⁹ Although the trial judge has "an exceptional degree of flexibility in administration" of the Probation Act and "broad discretion," revocation of a probation must not be capriciously had. When the probation is revoked, the defendant is entitled to a hearing. Mr. Justice Cardozo delivering the opinion in *Escoe v. Zerbst*³⁰ pointed out the source of the privilege of a hearing is in the Probation Act rather than in the Fifth Amendment. Congress in the Act commands:

"* * * that a probationer shall be brought before the Court. * * * The revocation is not valid unless the command has been obeyed."

"* * * Clearly the end and aim of an appearance before the Court must be to enable the accused probationer to explain away the accusation. The charge against him may have been inspired by rumor or mistake or even downright malice. He shall have a chance to say his say before the word of his pursuers is received to his undoing. This does not mean that he may insist upon a trial in any strict or formal sense."

Although it is clear that the trial judge may reduce the previously imposed imprisonment sentence upon revocation of probation, it does not necessarily follow that the trial court has the power to increase a sentence previously imposed upon the revocation of probation. In *United States v. Antinori*³¹ the Court declined to rule upon this question. It would appear from the language of the Act that the power does exist, but if the Act intended to provide this, it seems that it would be in conflict with the Fifth Amendment. In the case of *United States v. Benz*³² the court said:

"The distinction that the Court during the same term may amend a sentence so as to mitigate the punishment, but not so as to increase it, is not based upon the ground that the Court has lost control of the judgment in the latter case, but upon the ground that to increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment to the Constitution, which provides that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb.'"

²⁸ *United States v. Benz*, 282 U. S. 304.

²⁹ 275 U. S. 347.

³⁰ 295 U. S. 490.

³¹ 59 Fed. 2d 171.

³² 282 U. S. 304.

To Whom Probation Act Was Intended to Apply

Judge Henning in the case of *United States v. Nix*³³ had the following to say:

"No hard and fast rule can be laid down as to the type of offenders who should be considered for probation. * * * It is my view that the Congress in passing the Probation Law had in mind, particularly, juvenile offenders, youthful offenders, first offenders and offenders whose release on probation will not endanger the public and that where there is reason to believe that the individual will make a serious effort to overcome the abnormalities and difficulties which brought him into Court. In general the offenses contemplated, as I view it, would be largely those of a more or less minor character, are those induced by youth, inexperience, mental abnormalities, physical abnormalities, ignorance, poverty, superstition, jealousy, or heat of passion. Conversely, I do not think that the law, except in very rare cases, should have application to hardened, habitual criminals, to those who need to be restrained as a matter of protection to themselves and to society, or to those of mature years, of fair education, of broad experience, who have committed some very deliberate offense. A survey of the Probation System of the several States supports this view."

Discharge from Probation

Upon successfully completing the period of probation, the probationer is entitled to a discharge from probation.

In the case of *United States v. Maisel*,³⁴ Judge Hutcheson said:

"This defendant, having made his application under the statute so conceived, having fully established during the period of his probation, what the court tentatively decided to be true, when the imposition was suspended, that the defendant was not anti-social by nature or habit and that his offense was not habitual, but only a sporadic departure from social obligations, justice, the interests of the public and of the defendant alike, are subserved by fully discharging the proceedings against the prisoner; and it will be so ordered."

He quoted DeQuiro's *Modern Theories of Criminology*, Sec. 38,

"When the period of probation ends favorably, there remains nothing of the procedure, not even the record of the offense committed. If anything remains, it is the healthful reform of the delinquent."³⁵

Many other questions of less moment have been presented to the courts for decision. The matter of appeal to the higher courts has been ruled upon. Appeal and not habeas corpus is the proper

³³ 8 Fed. 2d 759.

³⁴ 26 Fed. 2d 275.

³⁵ In accord *Hollandsworth v. United States*, 24 Fed. 2d 423.

remedy when trial judge has abused discretion in revoking probation.³⁶

Refusal of the trial judge to consider one for probation is not subject for review, and appeal to the higher courts will not lie.³⁷

More than a hundred decisions have been published in the reports in the twelve years of the Probation Act's existence. Most of these were handed down from 1928 to 1933. Since that time the number has diminished yearly until now they appear at the rate of only two each year. It appears that on most of the interesting problems arising under the act the courts have spoken.

³⁶ *United States v. Mulligan*, 48 Fed. 2d 93.

³⁷ *Green, Moore & Co., et al. v. United States*, 29 Fed. 2d 740.