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Elements of Hearing in Revocation of Parole Proceedings

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Elements of Hearing in Revocation of Parole Proceedings*

In re *Tate*[1] recently held that right to counsel in revocation-of-parole proceedings was mandatory, despite the fact that recommitment was by an administrative rather than a judicial tribunal. The parolee's right to present evidence and adduce witnesses was also held mandatory. The applicable District of Columbia statute[2] provided for an "opportunity to appear" before revocation. The court deduced: "opportunity to appear" necessarily demands recognition of the right to a hearing;[3] this requires the right to both counsel and presentation of evidence;[4] with these rights denied, the statute was violated, and a writ of habeas corpus would issue.[5] Constitutional basis for the decision was denied.

The right to a hearing in revocation-of-parole cases has long been litigated.[6] Apparently it was recognized at common law.[7] Although it has been held an element of constitutional due process under state decisions,[8] some finding a violation of both federal and state constitutions,[9] the federal cases now clearly indicate that the right

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* This case note also appeared in (1946) 41 Illinois Law Review 277.

[1] 63 F. Supp. 961 (D.C. D.C. 1946).

[2] Indeterminate Sentence and Parole Act of the District of Columbia, D. C. Code (1940) §24-205, 206.

[3] This is by no means a necessary conclusion. "'Appearance' in the law has several significations, and the word must always be understood in reference to the particular . . . subject matter to which it relates. In some cases it means to appear in person; in others *by* attorney" (italics supplied). Pope: Legal Definitions, Chicago; Callaghan and Co., 1919. Only one early case, Dundee Mortgage Trust Investment Co. v. Charlton, Sheriff, etc., 32 Fed. 192 (D.C. Ore., 1887), may be cited on this point: "The right 'to appear' before a tribunal . . . implies the right to be heard thereabout; so far, at least, as the party is 'interested.'"

[4] The court apparently regarded the right to a hearing and the right to counsel as independent. This view is sustained by the Constitutional Amendments. It was the view expressed in State *ex rel.* Charles v. Port Commissioners of New Orleans, 159 La. 70, 105 So. 228 (1925): "We think the right to be heard is one thing, and the right to be assisted by counsel is quite another thing." Since, however, the parolee's rights here came under statute, there is little basis for finding any right to counsel except as such a right inheres in the hearing prescribed by that statute.

[5] The order of the court was stayed for a reasonable time to allow "proceedings for . . . revocation . . . in conformity with statute."

[6] Early cases are Rex v. Miller, [1771] 1 Leach 74, 168 Eng. Rep. 139. People v. James, 2 Caines 57 (N.Y. 1804), State v. Barnes, 32 S.C. 14, 10 S.E. 611 (1847), and People v. Potter, 1 Parker Cr. Rep. 47 (N.Y. 1846). The last case contains an opinion by Bronson, Attorney General of New York, in 1829, which found the basis for a right to a hearing in "a just regard for personal liberty."

[7] State *ex rel.* O'Conner v. Wolfer, 53 Minn. 135, 54 N.W. 1065 (1893): "The procedure . . . is governed by the rules of the common law." See also Alvarez v. State, 50 Fla. 24, 39 So. 481 (1905). People v. Burns, 28 N.Y.S. 300 (1894), *aff'd* 143 N.Y. 665, 39 N.E. 21 (1894) recognized that the mode adopted by the lower court "had authority of precedent"; People *ex rel.* Stumpf v. Craig, 140 N.Y.S. 652 (1913) relied on "elementary principles of criminal jurisprudence."

[8] Comm. *ex rel.* Meredith v. Hall, 277 Ky. 612, 126 S.W. (2d) 1056 (1939). *Ex parte* Lucero, 23 N.M. 433, 168 Pac. 713 (1917) was a similar case involving violation of a suspended sentence order. But many states have found no due process violation. Johnson v. Walls, 185 Ga. 177, 194 S.E. 380 (1937).

[9] People *ex rel.* Joyce v. Strassheim, 242 Ill. 359, 90 N.E. 118 (1909).

comes only by statute.[10] The constitutional approach, however, is by no means dead.[11]

Statutes covering revocation procedure now exist in most states. About half expressly deny the right to a hearing in such cases;[12] some expressly provide for it.[13] In addition to express statutory sanction of summary revocation, many courts have denied the right to a hearing because a provision in the parolee's release statement has stipulated summary revocation;[14] this is the "contract" approach.[15] Other courts have revoked paroles without a hearing on a "constructive custody" concept.[16] Where the applicable statutes deal with the right only by implication, the duty of determining the existence of the right has fallen to the courts. Theirs has likewise been the task of determining the elements of the hearing.

In those revocation-of-parole cases where a hearing has been sanctioned, either expressly[17] or by judicial implication,[18] the elements necessary are shadowy in outline. There would seem to be a general requirement of orderly procedure,[19] and a right of the accused to be present at the hearing, at least personally.[20] There is a right to a jury trial if the question of identity of the person to be recommitted is involved.[21] The rights to counsel, to present evi-

[10] Escoe v. Zerbst, 295 U.S. 490 (1934).

[11] Fleenor v. Hammond, 116 F. (2d) 982 (C.C.A. 6th, 1941).

[12] Alabama, Colorado, Florida, Georgia, Iowa, Louisiana, Maryland, Missouri, Montana, Nebraska, New Mexico, North Carolina, Oklahoma, Oregon, Tennessee, South Dakota, West Virginia, Wisconsin and Wyoming have statutes to this effect. See Weihofen, Revoking Probation, Parole or Pardon Without a Hearing (1942) 32 J. Crim. Law & Crim. 531. Courts generally distinguish competently the three different release categories—pardon, conditional pardon and parole, and handle cases in the last two similarly.

[13] California, New York, North Dakota and Tennessee have such provisions. Unless appeal is provided for, as in Illinois, the remedy for error in the hearing, or for failure to grant a hearing, is by habeas corpus.

[14] *Ex parte* Foster, 60 Okla. Crim. Rep. 50, 61 P. (2d) 37 (1936); *Ex parte* Frazier, 91 Tex. Crim. Rep. 475, 239 S.W. 972 (1922); Woodward v. Murdock, 124 Ind. 439, 24 N.E. 1047 (1890). But see Plunkett v. Miller, 161 Ga. 466, 131 S.E. 170 (1925), where it was held that a consent to summary recommitment could not remove the duty to hear imposed by statute.

[15] This unrealistic approach follows an early Supreme Court case, United States v. Wilson, 7 Pet. 150 (1833).

[16] "The paroled prisoner is until discharged finally constructively in imaginative jail limits, which may be narrowed or widened as appears proper to the commission." People *ex rel.* Romain v. Parole Commission, 191 N.Y.S. 410 (1921), *aff'd* without opinion, 197 N.Y.S. 940 (1921).

[17] See *supra* note 13.

[18] A long list of cases is collected in Weihofen, *Revoking Probation, Parole or Pardon Without a Hearing* (1942) 32 J. Crim. Law and Crim. 531. Arkansas, Florida, Illinois, Minnesota and New York decisions read a hearing requirement into the statutes.

[19] See *Roberts v. Anderson*, 66 F. (2d) 874 (C.C.A. 10th, 1933), where a confusion of counsel brought due process violation.

[20] See *supra note* 3.

[21] Alvarez v. State, 50 Fla. 24, 39 So. 481 (1905) and State *ex rel.* O'Conner v. Wolfer, 53 Minn. 135, 54 N.W. 1065 (1893) recognize this as a matter of right. State v. Everett, 164 N.C. 339, 79 S.E. 274 (1913) holds that there is no such right. If found to exist it may be waived. State v. Charles, 107 S.C. 413, 93 S.E. 134 (1917). New York requires a jury trial on the general question of whether the conditions of parole have been violated; Code of Criminal Procedure, c. 478, §696.

dence, and to adduce witnesses have been granted.[22] The full requirements of a judicial hearing, including the right to counsel, the right to produce evidence, the right to cross-examine, the right to findings, and to an appeal from findings,[23] are decreed infrequently. The more general trend is to preserve only those elements which the applicable statute's background and purpose demand.[24] Proper recognition of the character of administrative action supports this view.[25]

Under the federal act covering pardon and parole,[26] a hearing before a district court, acting in an administrative rather than a judicial capacity, is expressly granted. The Supreme Court in *Burns v. United States*[27] gave the general outline of individual guarantees in such a hearing.[28] The *Burns* case concerned a defendant who violated parole by unduly absenting himself from jail, where he was confined for another crime, permission having been granted for him to be absent when necessary for dental treatment. Upon complaint of summary proceedings to recommit, the Court said, "There are no limiting requirements as to the . . . manner of hearing or determination." *United States v. Moore*[29] stated that the appointment of counsel was discretionary. *Christianson v. Zerbst*[30] sanctioned the use of hearsay testimony, following the liberal lead of *Morrell v. Baker*.[31] But there is pointed language in other fed-

[22] *Counsel*: People v. Dudley, 173 Mich. 389, 138 N.W. 1044 (1912); Sellers v. State, 105 Neb. 748, 181 N.W. 862 (1921); *Evidence*: Christianson v. Zerbst, 89 F. (2d) 40 (C.C.A. 10th, 1937); Howe v. State, 170 Tenn. 571, 98 S.W. (2d) 93 (1936); *Witnesses*: Morrell v. Baker, 270 Fed. 577 (C.C.A. 2nd, 1920); Robinson v. State, 62 Ga. App. 539, 8 S.E. (2d) 698 (1940).

[23] This is required by North Dakota statute. See Vadnais v. Stair, 48 N.D. 472, 185 N.W. 301 (1921).

[24] Much depends on the person or agency revoking. If complete power is placed in the giver of the pardon, ordinarily the governor, courts are willing to find more rights in more hearings. "Statutes are not directory when to put them in that category would result in serious impairment of the public or the private interests that they were intended to protect." Escoe v. Zerbst, 295 U.S. 490, 494 (1932). Perhaps the "different statute—different hearing" concept of Mr. Justice Cardozo in Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294 (1933), most logically explains the decisions.

[25] Hearings before administrative bodies are ordinarily quicker, less expensive, helpful in lightening courts' loads. The pertinency of these considerations is usually admitted by courts; they are often unable, however, to give them determining weight on the facts of a particular case. Some have. In Burns v. United States, 287 U.S. 216 (1932), the Court said, "The hearing was summary but it cannot be said that it was improper or inadequate, in view of the nature of the proceeding. . . ." In Morrell v. Baker, 270 Fed. 577 (C.C.A. 2nd, 1920), the court said, "Hearings before administrative bodies . . . are not subject to the rules governing judicial proceedings . . . the hearing may be summary."

[26] Federal Probation Act, 43 Stat. 1259 (1925), 18 U.S.C.A. §724 (1927).

[27] 287 U.S. 216 (1932).

[28] "The question, then, in the case of revocation of probation, is not one of formal procedure either with respect to notice or specification of charges or a trial upon the charges. The question is simply one of abuse of discretion," *id.* at 222.

[29] 101 F. (2d) 56 (C.C.A. 2nd, 1939), *cert. den.* 306 U.S. 664 (1939). It has never been argued that the right to counsel, unquestioned in the original judicial proceeding, carried over to the revocation proceeding, on the theory of the right being required at every stage of trial. See Harris v. Norris, 188 Ga. 610, 4 S.E. (2d) 840 (1939).

[30] 89 F. (2d) 40 (C.C.A. 10th, 1937).

[31] 270 Fed. 577 (C.C.A. 2nd, 1920). This case clearly foreshadowed Burns v. United States, cited *supra* note 27.

eral cases[32] construing the same statute[33] that seems to read limitations into the hearing requirement. The necessity of further safeguards is implied. These cases, perhaps more in point for support of the principal case, were ignored by it.

Here the court relied most heavily on *Escoe v. Zerbst*,[34] where a criminal was arrested and returned to jail without a hearing of any kind, in direct violation of the mandate of the federal statute that he "be forthwith taken before the court." There is little parallel with the principal case, where a timely hearing[35] was given before the parole board. There are passages in the *Escoe* case broad enough and narrow enough[36]—depending upon the viewpoint—to sustain a determination either way on the questions of counsel, the presentation of evidence, and the right to witnesses.

Under state parole statutes, some decisions have clearly ruled on elements of a revocation hearing.[37] There has been the same general outline as appeared in the federal cases.[38] Ordinarily, however, state courts have merely sanctioned a lower court's procedure, and have refrained from holding any particular elements necessary. The right to counsel, to produce evidence, and to adduce witnesses have all been recognized in this manner.[39]

Since, in almost half the states, a hearing itself is not mandatory in revocation-of-parole cases,[40] and in others the hearing granted may be summary in character,[41] this decision could be regarded as burdening the District of Columbia parole statute with a hearing whose elements were beyond legislative intent. Statutes covering revocation procedures were enacted against a background of "full hearing" already recognized;[42] their primary significance is in the extent to which they change pre-existing procedures. Moreover, these statutes commonly provide for commissions and boards com-

[32] Moore v. Aderhold, 108 F. (2d) 729, (C.C.A. 10th, 1939), called the right to counsel "constitutional." Hollandsworth v. United States, 34 F. (2d) 423, (C.C.A. 4th, 1929) called for violations to be "judicially determined."

[33] Federal Probation Act, 43 Stat. 1259 (1925), 18 U.S.C.A. §724 (1927).

[34] 295 U.S. 490 (1934).

[35] "In November 1945, he was apprehended. . . . On December 6, 1945 he was given a hearing before the Board. The hearing resulted in a revocation of his parole."

[36] Consider the following: "Probation . . . comes as an act of grace, and may be coupled with such conditions . . . as Congress may impose." ". . . there shall be an inquiry so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused. . . ." In a large part, the District of Columbia court's opinion was an extract of Escoe v. Zerbst, in which extract the above passages were included. This language would seem to indicate a Congressional intent to limit the scope of recommitment hearings under the federal statute.

[37] See *supra* note 22. *Jury trial*: (statute) People *ex rel.* Rabiner v. Warden, 205 N.Y.S. 694 (1924); Huff v. Dyer, 4 Ohio C.C. 595 (1890). *Revocation by partial board*: People *ex rel.* Seiler v. Hill, 348 Ill. 441, 181 N.E. 295 (1932).

[38] "A paroled prisoner is not entitled to any judicial hearing or determination by a court." People *ex rel.* Joyce v. Strassheim, 242 Ill. 359, 90 N.E. 118 (1909).

[39] People v. Burns, 28 N.Y.S. 300 (1894), *aff'd* 143 N.Y. 665, 39 N.E. 21 (1894).

[40] See *supra* note 12.

[41] Summary hearings only are provided for in Kansas, Massachusetts and Michigan. See *Re* Patterson, 94 Kan. 439, 146 Pac. 1009 (1915).

[42] See *supra* note 7.

posed of laymen;[43] it must have been intended that legal personnel and techniques be dispensed with. "Strict observance of technical rules of law and procedure accorded parties in a judicial proceeding is not required in such a hearing before an administrative body."[44] Whether or not a hearing will be allowed at all in such cases must, of course, remain a policy consideration for the respective governments; where a hearing *is* sanctioned, strong administrative arguments compel that it be summary in character—without the panoply of judicial safeguards.[45] This is a more enlightened approach.[46]

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[43] There is a vast difference of opinion as to the capability of the administrators. See Jaffe, Invective and Investigation in Administrative Law (1939) 52 Harv. L. Rev. 1201.

[44] Christianson v. Zerbst, cited *supra* note 30.

[45] See *supra* note 25.

[46] "The very least that it can mean, however, is that the defendant be apprised of the facts alleged to constitute the violation of his probation, and that he be given an opportunity to inform the court of any facts which would tend to contradict, explain, or mitigate the violation." People v. Hill, 300 N.Y.S. 532 (1937).