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Criminal Law--Due Process--Non-Reviewability of Denial of Probation

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this procedure the mortgagor would have an opportunity for a hearing, but the expense of a full judicial foreclosure would be avoided.

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CRIMINAL LAW–DUE PROCESS–NON-REVIEWABILITY OF DENIAL OF PROBATION

Smith v. State[1]

Darwin Lee Smith pleaded guilty to a charge of first degree robbery. The trial court received a presentence investigation report and sentenced Smith to the statutory minimum term of five years' imprisonment. Probation was denied Smith but granted to his codefendants. Smith moved under rule 27.26[2] to vacate the judgment of conviction, alleging that he was denied due process of law because the court relied upon false accusations against him in the presentence report and this deprived him of the right of confrontation. The trial court overruled the motion and Smith appealed. The Missouri Supreme Court dismissed the appeal for two reasons, without reaching the constitutional question. The court first held that matters relating to probation and parole do not come within the scope of rule 27.26. It further held that appellate courts have no power to review or revise decisions to grant or deny probation by reason of section 549.141, RSMo 1969,[3] which provides that the action of any court regarding probation "is not subject to review by any appellate court."

Section 549.141 or a similar provision has been part of Missouri law

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Upon such hearing, the clerk shall consider the evidence of the parties and may consider, in addition to other forms of evidence required or permitted by law, affidavits and certified copies of documents. If the clerk finds the existence of (1) valid debt of which the party seeking to foreclose is the holder, (2) default, (3) right to foreclose under the instrument, and (4) notice to those entitled to such under subsection (b), then the clerk shall further find that the mortgagee or trustee can proceed under the instrument, and the mortgagee or trustee can give notice of and conduct a sale pursuant to the provisions of this Article. . . .

N.C. GEN. STAT. § 45-21.16 (1975 Cum. Supp.).

1. 517 S.W.2d 148 (Mo. 1974).

2. MO. SUP. CT. R. 27.26 provides in part:

A prisoner in custody under sentence and claiming a right to be released on the ground that such sentence was imposed in violation of the Constitution and laws of this State or the United States, . . . or is otherwise subject to collateral attack, may file a motion at any time in the court which imposed such sentence to vacate, set aside or correct the same. . . .

3. § 549.141, RSMo 1969, provides:

The action of any court in granting, denying, revoking, altering, extending or terminating any order placing a defendant upon probation or parole is not subject to review by any appellate court.

since 1897.[4] Missouri appellate courts have relied on it in the past in refusing to review orders revoking probation or parole.[5] In *Morrissey v. Brewer*,[6] however, the United States Supreme Court held that parole could not be revoked without meeting certain due process requirements, both in the factual determination of whether a violation occurred and in the discretionary decision of whether to revoke. The *Smith* court recognized that decisions to revoke probation are now reviewable in Missouri because of *Morrissey*.[7] It held, however, that appellate courts have no power to review a *denial* of probation.[8] The court distinguished the revocation of probation from the denial of probation by relying on a distinction between rights and privileges. According to *Smith*, once probation is granted it is a right which cannot be taken away without due process of law. Probation in the first instance, however, "is a privilege which may be granted or withheld in the discretion of the sentencing court."[9]

The characterization of a government benefit as a right or a privilege should not be controlling in determining the applicability of constitutional safeguards to the decision to grant or deny the benefit.[10] The use of

4. In 1897 Missouri became the first state to provide statutory authorization for the granting of probation, then called judicial parole. Mo. LAWS 1897, at 71. Section 13 of that act prohibited appellate review of the grant or termination of probation. *See* § 549.180, RSMo 1959. In 1963 that section was repealed and present section 549.141 was enacted. Mo. LAWS 1963, at 671, § A.

5. *See, e.g.*, State v. Phillips, 443 S.W.2d 139, 143 (Mo. 1969).

6. 408 U.S. 471 (1972). *Morrissey* involved the administrative revocation of parole and generally required two hearings. At the second hearing, where the actual decision to revoke is made, *Morrissey* stated that the minimum requirements of due process include:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Id. at 489. The provisions of *Morrissey* have been applied to revocation of probation, even though neither revocation of probation nor revocation of parole is part of the criminal prosecution. Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973). The right to counsel at revocation hearings depends on a case-by-case decision. *Id.* at 790.

7. State *ex rel.* Douglas v. Buder, 485 S.W.2d 609 (Mo. En Banc 1972), *rev'd on other grounds*, 412 U.S. 430 (1973).

8. The broad statement of non-reviewability of denial of probation apparently forecloses a state remedy for situations other than that presented in *Smith—e.g.*, a person allegedly denied probation due to racial or other invidious discrimination. Also, probation is rarely granted except after a plea of guilty (justified on the theory that the first step to rehabilitation is an admission of guilt). This would arguably interfere with an individual's right to a jury trial because he is punished more severely if he exercises that right. Again, under *Smith*, there can be no appeal on this matter.

9. 517 S.W.2d at 150.

10. *See* Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Graham v. Richard-

the right-privilege distinction is conclusory and lends itself to circular reasoning—*i.e.*, because probation is a privilege, constitutional safeguards do not apply; because constitutional safeguards do not apply, probation is a privilege. In *Graham v. Richardson*[11] the Supreme Court said that it "has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.' "[12] *Morrissey* quoted this statement with approval and went on to say that "it is hardly useful . . . to try to deal with this problem in terms of whether the parolee's liberty is a right or a privilege."[13]

Instead of relying on the concept of "privilege," other matters should be considered in making the determination whether the Constitution requires any procedural safeguards. The *Morrissey* Court used a seemingly simple test for the general application of due process, but it may not always be easy to apply. First, it must be determined to what extent the individual will be "condemned to suffer grievous loss." Second, the interest being taken from the individual must be within the scope of the fourteenth amendment "liberty or property" language.[14] The difficulty lies in determining whether the individual must be presently enjoying the liberty, as in *Morrissey*, or whether the denial of future liberty is also a "grievous loss."

This problem has been considered by at least two courts dealing with the application of due process to the administrative decision to grant or deny parole. In *Scarpa v. United States Board of Parole*[15] the Fifth Circuit held that due process does not attach to the parole-granting decision because the government is not depriving the individual of a benefit previously conferred. In *United States ex rel. Johnson v. Chairman of N.Y. State Bd. of Parole*,[16] however, the Second Circuit held that due process does attach. It relied on *Morrissey* and said: "Whether the immediate issue be release or revocation, the stakes are the same: conditional liberty versus incarceration."[17] The Second Circuit also pointed out that requiring the liberty to have been previously conferred is really the "right-privilege dichotomy in a not-too-deceptive disguise."[18]

The Supreme Court vacated the judgments in both *Scarpa* and *Johnson* without opinion, but some indication of the Court's view on this problem may be found in *Wolff v. McDonnell*.[19] *Wolff* held that a prisoner's inter-

son, 403 U.S. 365, 374 (1971); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

11. 403 U.S. 365 (1971).
12. *Id.* at 374.
13. 408 U.S. at 482.
14. *Id.* at 481.
15. 477 F.2d 278 (5th Cir.), *vacated*, 414 U.S. 809 (1973).
16. 500 F.2d 925 (2d Cir.), *vacated sub nom.*, Regan v. Johnson, 95 S. Ct. 488 (1974).
17. 500 F.2d at 928.
18. *Id.* at 927-28 n.2.
19. 94 S. Ct. 2963 (1974).

est in statutory "good time"[20] was "liberty" protected by the fourteenth amendment and could not be taken away without meeting certain procedural requirements. Because the practical importance of "good time" is to hasten release of the inmate, *Wolff* supports the proposition that due process attaches whenever a convicted person is deprived of prospective liberty.

The application of due process to the deprivation of prospective liberty is important when one considers the status of a person eligible for probation. One approach is to view this status as the legal equivalent of a prison inmate. Support for this view can be found in section 549.071, RSMo 1969,[21] which appears to limit probation to persons of "previous good character" thus indicating that probation is to be the exception to a general rule of automatic imprisonment, or, in the words of *Smith,* "a matter of grace and clemency."[22] If viewed this way, the determination of constitutional rights involved in the administrative decision to deny parole to prison inmates[23] should be influential in determining rights at the judicial decision to deny probation.

On the other hand, the status of the person seeking probation can be viewed as analogous to that of a probationer facing revocation. Section 549.291, RSMo 1969, indicates a statutory preference for probation or parole except where "institutional treatment has been deemed essential."[24] As a practical matter, the use of probation is so widespread in Missouri that viewing it as an unusual disposition is difficult to support.[25] If this

20. An inmate earns "good time" by good behavior while in prison. Under the Nebraska statute involved in *Wolff,* it shortened the offender's sentence for parole purposes. NEB. REV. STAT. § 83-1,107 (Supp. 1975).

21. Section 549.071 (1), RSMo 1969, provides in part:

> When any person of previous good character is convicted of any crime and commitment to the state department of corrections or other confinement or fine is assessed as the punishment therefor, the court before whom the conviction was had, if satisfied that the defendant, if permitted to go at large, would not again violate the law, may in its discretion, by order of record, suspend the imposition of sentence or may pronounce sentence and suspend the execution thereof and may also place the defendant on probation upon such conditions as the court sees fit. . . .

22. 517 S.W.2d at 150.

23. *See* notes 15-17 and accompanying text *supra.*

24. Section 549.291, RSMo 1969, provides:

> Sections 549.205 to 549.291 shall be liberally construed to the end that the treatment of persons convicted of crime shall take into consideration their individual characteristics, circumstances, needs, and potentialities as revealed by a case study, and that such persons shall be dealt with in the community by a uniformly organized system of constructive rehabilitation, under probation supervision instead of in correctional institutions, or under parole supervision when a period of institutional treatment has been deemed essential, whenever it appears desirable in the light of the needs of public safety and their own welfare.

25. *See generally* MISSOURI BOARD OF PROBATION AND PAROLE, ANNUAL REPORT 1973-1974. On June 30, 1974, the Missouri Board of Probation and Parole was supervising 8,511 probationers for Missouri courts, compared to 1,059 parolees from the state prisons and 354 parolees from local jails. *Id.* at 28.

second approach is accepted, then incarceration--*i.e.*, denial of probation, would involve the same type of loss as that which justified safeguards in *Morrissey*.

The other ground for dismissing the appeal in *Smith* was the court's holding that infirmities in the denial of probation do not come within the scope of rule 27.26,[26] which provides relief to a prisoner in custody under a *sentence* subject to collateral attack. The court, relying on dicta in *McCulley v. State*,[27] distinguished between "sentence" and "probation." According to *McCulley*, the sentence is the "punishment that comes within the particular statute designating the permissible penalty for the particular offense."[28] *McCulley* further stated that probation or parole is not part of the sentence.[29] This distinction between "sentence" and "probation" is important not only because it limits the scope of rule 27.26, but also because the Constitution guarantees some rights at sentencing.

In *Mempa v. Rhay*[30] the Supreme Court held that sentencing, even when delayed and combined with revocation of probation, was a stage of the criminal prosecution and as such required appointment of counsel for indigents. The holding was not limited to the effect of counsel on the appellate process, but extended to the presentation of evidence in mitigation of punishment.[31] It is not entirely clear what other rights, if any, attach at sentencing. Unresolved matters include disclosure of presentence

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This is significant because 47% of all releases from the Department of Corrections were on parole. *Id.* at 29.

26. 517 S.W.2d at 150. The same result has been reached in revocation of probation cases. Green v. State, 494 S.W.2d 356 (Mo. En Banc 1973); Stroder v. State, 522 S.W.2d 77 (Mo. App., D. St. L. 1975). The court has not always viewed rule 27.26 so restrictively. In Benson v. State, 504 S.W.2d 74 (Mo. 1974), the court ruled on the merits of a rule 27.26 motion that claimed the trial court had delegated its judicial discretion to the parole officer. In that case the defendant sought only to vacate the denial of probation, not the sentence.

27. 486 S.W.2d 419 (Mo. 1972). *McCulley* is distinguishable because it was limited to the question whether the granting of probation in one instance should be considered in determining which of two sentences was more severe. In deciding that it should not be considered, the court reasoned that because the probation might be revoked, the correct comparison was of the potential period of imprisonment in each case. This was dicta, because the court upheld the heavy second sentence on the basis that North Carolina v. Pearce, 395 U.S. 711 (1969), was not to be applied retroactively. 486 S.W.2d at 426.

28. 486 S.W.2d at 423.

29. *Id.*

30. 389 U.S. 128 (1967). For a more detailed discussion of *Mempa* and rights at sentencing, see Note, 81 HARV. L. REV. 821 (1968).

31. 389 U.S. at 135. Beyond presenting evidence in mitigation of punishment, it is not clear what counsel can do to prevent a sentence being based on improper or incorrect information. A sentencing judge is not restricted to evidence received in open court with right of cross-examination. Williams v. New York, 337 U.S. 241 (1949). However, courts have held some matters improperly considered. United States v. Tucker, 404 U.S. 443 (1972); Burgett v. Texas, 389 U.S. 109, 115 (1967); Verdugo v. United States, 402 F.2d 599 (9th Cir. 1968), *cert. denied*, 402 U.S. 961 (1971); State v. Killian, 91 Ariz. 140, 370 P.2d 287 (1972); People v. Rednour, 24 Ill. App. 3d 1072, 322 N.E.2d 492 (1974); State v. Pohlabel, 61 N.J. Super. 242, 160 A.2d 647 (1960).

reports[32] and a requirement that the court state reasons for the sentence.[33] It is important to note, however, that some recent criminal code revisions permit appellate review of sentences.[34]

There are several reasons why the decision to grant or deny probation should be viewed for constitutional purposes as being a part of sentencing, and thus subject to the protections afforded by *Mempa* and the developing law of due process at sentencing. Such a view recognizes that probation, through the imposition of conditions, supervision, and threatened incarceration, is a form of deprivation of liberty just as is imprisonment following sentencing.[35] Secondly, section 549.071[36] provides a general authorization for probation. There is no reason, then, to require that an authorization for probation be included in each penalty statute in order for constitutional rights to be involved, as *McCulley* seemed to say.[37] Finally, the decision to grant or deny probation may come before or after the imposition of a prison term[38] and is generally influenced by the same facts that determine the length of incarceration.

The Supreme Court has in recent years recognized that the discretionary judicial decisions to revoke probation and to sentence offenders involve constitutionally-protected interests of the offender. *Smith v. State* distinguished the decision to grant or deny probation by relying on the right-privilege distinction and on a narrow definition of "sentence." These should not be compelling for constitutional law purposes; rather, the similarities in the offender's stake in the outcome and in the factors influencing the decisions should be considered. To the extent that the procedures are similar, it is evident that before probation is denied the offender should enjoy some of the rights he would enjoy in the discretionary aspect of either probation revocation or sentencing.

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32. *See generally* Verdugo v. United States, 402 F.2d 599, 613 (9th Cir. 1968), *cert. denied,* 402 U.S. 961 (1971) (Browning, J., separate opinion); Mr. Justice Douglas' statement dissenting to adoption of FED. RULE OF CRIM. PROC. 32(c)(2), 39 F.R.D. 69 (1965); ADVISORY COMMITTEE ON SENTENCING AND REVIEW, SENTENCING ALTERNATIVES AND PROCEDURES § 4.4 (Approved Draft, 1968); MODEL PENAL CODE § 7.07(5) Comment (Tent. Draft No. 2, 1954); Zastrow, *Disclosure of the Presentence Investigation Report,* 35 FED. PROB. 20 (Dec. 1971).

33. United States v. Carden, 428 F.2d 1116, 1118 (8th Cir. 1970).

34. *See, e.g.,* MO. PROP. CRIM. CODE § 2.070(2) (1973). *See also* Parsons-Lewis, *Due Process in Parole-Release Decisions,* 60 CAL. L. REV. 1518, 1545 (1972).

35. *See generally* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, PROBATION (Approved Draft, 1970).

36. *See* statute quoted note 21 *supra.*

37. 486 S.W.2d at 423.

38. *See* statute quoted note 21 *supra.*