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PAROLE REVOCATION

In *Morrissey v. Brewer*,[1] the United States Supreme Court held that due process requires "a simple factual hearing" before parole can be revoked.[2] The Court reasoned that the liberty of a parolee, although conditional, "includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others."[3] Thus, the Court concluded that what is required before termination of parole is a two-stage process, consisting of a reasonably prompt hearing to determine whether there is probable cause to believe that the parolee has violated a condition of his parole[4] and later on, if requested by the parolee, a full revocation hearing in front of the parole board.[5] Minimum due process requirements were enunciated by the Court for each stage of the process.[6] One year later, in *Gagnon v. Scarpelli*,[7] the Court extended the *Morrissey* due process protections to revocations of probation.[8]

Several courts have struggled with the problem of determining when a parolee has endured a "grievous loss" sufficient to trigger the due process requirements of *Morrissey-Gagnon*.[9] In *Means v. Wainwright*,[10] the Florida supreme court held that the *Morrissey* requirements were applicable to the revocation of an unexecuted grant of parole.[11] The court reasoned that the "grievous loss" suffered by the person whose parole is revoked is no different than the "grievous loss" suffered by the person whose unexecuted grant of parole is rescinded. Thus, the summary recission of petitioner-Mean's parole was held to be a violation of the due process mandate of *Morrissey-Gagnon*. In *Small v. Britton*[12] the Court of Appeals for the Tenth Circuit held that it is the "execution" rather than the "issuance" of the revocation warrant which triggers the due process time limits for the revocation hearing set forth in *Morrissey*.[13] The petitioner had contended that the federal parole board's delay in affording him a revocation hearing until after the completion of his service of an intervening state sentence constituted a violation of his right to due process. In rejecting this claim, the court noted that the *Morrissey* requirement for a parole revocation hearing was triggered only "within a reasonable time after the parolee is *taken into custody*."[14] It was determined that such custody for the federal parolee was not effectuated until after the parolee revocation warrant had been actually executed. While noting the general rule that the warrant must be executed within a reasonable time,[15] the *Small* court ac-

[1] 408 U.S. 471 (1972).
[2] *Id.* at 483.
[3] *Id.* at 482.
[4] *Id.* at 485.
[5] *Id.* at 487.
[6] *Id.* at 485–89.
[7] 411 U.S. 778 (1973).
[8] For a general discussion of the implications of the *Morrissey-Gagnon* due process doctrine see Cohen and Tobriner, *How Much Process is "Due" Parolees and Prisoners?*, 25 HAST. L.J. 801 (1974); Fisher, *Parole and Probation Revocation Procedures After Morrissey and Gagnon*, 65 J. CRIM. L. & C. 46 (1974); Note, *Limitations Upon Trial Court Discretion in Imposing Conditions of Probation*, 8 GA. L. REV. 466 (1974).
[9] In addition to the cases discussed in this section see Gardner v. McCarthy, 503 F.2d 733 (9th Cir. 1974); Williams v. United States Board of Parole, 383 F. Supp. 402 (D. Conn. 1974); *In re* Valrie, 12 Cal. 3d 139, 524 P.2d 812, 115 Cal. Rptr. 340 (1974).
[10] 299 So. 2d 577 (Fla. 1974).
[11] The court cited *In re* Prewitt, 8 Cal. 3d 470, 503 P.2d 1326, 105 Cal. Rptr. 318 (1972), in support of its position. The *Prewitt* case held that, with the exception of the preliminary hearing, the minimum due process requirements of *Morrissey* are constitutionally required for parole recission hearings.
[12] 500 F.2d 299 (10th Cir. 1974).
[13] The court rejected the following decisions which stand for the proposition that it is the "issuance" of the revocation warrant which triggers the due process time limits set forth in *Morrissey:* Fitzgerald v. Sigler, 372 F. Supp. 889 (D.D.C. 1974); Jones v. Johnston, 368 F. Supp. 571 (D.D.C. 1974); Sutherland v. District of Columbia Board of Parole, 366 F. Supp. 270 (D.D.C. 1973).
[14] Morrissey v. Brewer, 408 U.S. 471, 488 (1972) (emphasis added).
[15] Simon v. Moseley, 452 F.2d 306 (10th Cir. 1971).

cepted the petitioner's incarceration in a state institution as good reason for the delay in such execution.[16]

In *Peele v. Sigler*[17] a seemingly conflicting result was reached by the United States District Court for the Eastern District of Washington. The court held that once a revocation warrant is issued and lodged as a detainer, a revocation hearing must be granted within a reasonable time in order to allow the parolee an opportunity to refute the charges.[18] It was reasoned that the filing of such detainer causes a prisoner to lose eligibility for many types of rehabilitation programs and results in many more prison restrictions being placed upon him. In addition, a federal detainer might conceivably distort the decision by state officials as to when to grant parole from the holding institution. These restrictions imposed upon the prisoner were determined to constitute a sufficiently "grievous loss" so as to bring the *Morrissey* due process standards into play.[19]

Transcripts For Indigents

The rights of indigents to the basic instruments for an adequate trial or post-trial proceeding are now broadening in several jurisdictions despite a temporary setback. When the Supreme Court granted the indigent petitioner access to trial transcripts for use in appellate proceedings, *Griffin v. Illinois*,[20] it opened the doorway for additional rights of indigents before the court.[21] The extension of such rights to indigents was founded on the constitutional principles of due process and equal protection: that a fair adjudication of a party's claim should not be denied on the basis of poverty.[22] Nevertheless, the Court qualified this right to a state-provided transcript,[23] creating a loophole through which the expansion of indigents' rights to prior transcripts was temporarily blocked. In *Britt v. North Carolina*,[24] the Supreme Court upheld the state court's denial of Britt's request for a free transcript of the mistrial for use in the second trial. This decision was based on the Court's finding that alternative means existed by which the appellant could have constructed an adequate defense. *Britt* constitutes the first limitation on the *Griffin* policy toward indigents.[25]

In light of recent decisions in state and federal courts, however, it appears that the future of the *Griffin* policy is one of expansion rather than limitation. The Ninth Circuit ruled in *MacCollom v. United States*[26] that an indigent federal prisoner was entitled to a free transcript of his criminal trial to assist him in the preparation of a post-conviction motion under 28 U.S.C. § 2255.[27] After being convicted and

[16] *Accord, e.g.*, Small v. United States Board of Parole, 421 F.2d 1388 (10th Cir. 1970), *cert. denied*, 397 U.S. 1079 (1970); Robinson v. Willingham, 369 F.2d 688 (10th Cir. 1966).

[17] ___F. Supp. ___ (E.D. Wash. 1974).

[18] The court did not reach the issue of whether the issuance of or the execution of an arrest warrant gives rise to the right to a revocation hearing within a reasonable time. Therefore, the decision is not directly in conflict with Small v. Britton, 500 F.2d (10th Cir. 1974). However, the *Peele* court's holding that *Morrissey* requires a revocation hearing within a reasonable time after the filing of a parole detainer, would seem to be in conflict with the *Small* conclusion that the parolee's incarceration in a state institution tolls the timing requirements of *Morrissey*, notwithstanding the fact that a federal parole detainer has been filed against him.

[19] In so holding, the court is expressly rejecting the view of the Fifth Circuit on this issue, as stated in Cook v. United States Attorney General, 488 F.2d 667 (5th Cir. 1974).

[20] 351 U.S. 12 (1955).

[21] Wade v. Wilson, 396 U.S. 282 (1970) (right to transcripts for use in habeas corpus proceedings); Gardner v. California, 393 U.S. 367 (1969) (right to transcripts for use in de novo habeas corpus hearings); Robert v. La Vallee, 389 U.S. 40 (1967) (right to preliminary hearing records for preparation of trial); Long v. District Court, 385 U.S. 192 (1966) (right to transcript of trial for use in appeal of habeas corpus proceeding).

[22] The general constitutional theory was that, "in criminal trials a state can no more discriminate on account of poverty than on account of religion, race, or color." Griffin v. Illinois, 351 U.S. at 17 (plurality opinion of Black, J.).

[23] The caveat inserted in the *Griffin* majority opinion stated:

> We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants. *Id* at 20.

[24] 404 U.S. 226 (1971).

[25] *See* Note, *Criminal Procedure—Free Transcripts for Indigents*, 51 N.C.L. Rev. 621 (1973). *See also* Ross v. Moffitt, 417 U.S. 600 (1974).

[26] ___ F.2d ___ (9th Cir. 1974).

[27] 28 U.S.C. § 2255 provides in pertinent part that:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that

imprisoned in 1970, MacCollom filed a motion for a transcript in forma pauperis in 1972. The court clerk notified him that no action would be taken upon the request until MacCollom filed a motion for post-conviction relief under 28 U.S.C. § 2255. After complying with such notice, MacCollom was granted his request and obtained appointed counsel. However, the § 2255 action was dismissed for failure to state a claim upon which relief could be granted. The appointed counsel argued that he could not represent to the court the existence of any constitutional grounds for relief without first explaining the transcript, yet the law seemed to require assertion of a claim prior to issuance of the transcript. Although the Supreme Court had never reached this point, the Ninth Circuit majority found that *Griffin* and its progeny mandated a finding for the indigent petitioner. Neither these cases nor the Constitution were found to require the indigent to have a better memory of his trial than the nonindigent petitioner. Furthermore, the court noted that the cost of such transcripts to the government should not be overestimated. First, the cost of opposing the request may exceed the cost of preparing the trial transcript. Second, a transcript provided upon demand may reveal no colorable ground for relief and thus dispel the need for a § 2255 motion altogether. In furtherance of these views, the Ninth Circuit held that the indigent federal prisoner in this situation has an unqualified right to a free trial transcript and need not demonstrate a "particular need."

Pollard v. Kidd[28] constitutes a recent consideration of a similar point by the United States District Court for the Eastern District of Virginia. Pollard, an indigent state prisoner convicted of robbery, brought a civil action under 42 U.S.C. § 1983[29] alleging that the state trial court's denial of his request for portions of his trial transcript was unconstitutional. Stating that Pollard "has raised a valid constitutional claim and has made a showing of need, however slight," the federal court determined that due process and equal protection require the state to provide the plaintiff with the transcript portions relevant to that claim. The court further stated that an application of a stringent "particular need" as set forth by a recent Fourth Circuit case[30] was not necessary in this case. Therefore, the holding in the *Pollard* case is that "whenever a litigant seeks to raise claims of a constitutional dimension which are not patently frivolous, on collateral review of his conviction in either a state or federal court," [31] he will be granted access to the portion of the transcript which can be identified with reasonable particularity and which have arguable relevance to the constitutional claim. No denial of such a request will be made unless the claim is "patently frivolous" or the portions are "absolutely irrelevant."

State courts are following this trend of expanding the *Griffin* policy, as demonstrated by *Blazo v. Superior Court.*[32] In this case, the Massachusetts supreme court concluded that the indigent state defendant is entitled to a cost-free process for obtaining a stenographer for a misdemeanor trial, upon a good-faith representation by counsel that the stenographer record is necessary to insure the defendants' rights. The reasoning this court drew from *Griffin* and its progeny was that the misdemeanor defendant should not be deprived of the stenographic facilities routinely provided for felony defendants simply because these are crimes of lesser grades. Fair and comparable treatment at public expense should be provided at all criminal levels to protect the defendants' right of appeal. This court found that a requirement of a pre-trial demonstration of the need for a stenographer rather than alternative

the sentence was imposed in violation of the Constitution or laws of the United States, . . . or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

[28] 383 F. Supp. 1056 (E.D. Va. 1974).

[29] 42 U.S.C. § 1983 provides:
Every person who, under color of any statute, ordinance, regulation, custom or usage, or any State or Territory, subjects, or causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[30] Jones v. Superintendent, 460 F.2d 150 (4th Cir. 1972).

[31] 383 F. Supp. at 1059.

[32] ___ Mass. ___, 315 N.E.2d 857 (1974).

means of recording could prove difficult and damaging to even a misdemeanor defendant's case.[33] Thus the court holds that the determination of such need must be left to the indigent's counsel, just as it would be left to a nonindigent's counsel. Any objection the court may have to the delay or expense necessitated by the request will be considered in an informal hearing. At the conclusion of this *Griffin*-oriented decision, the Massachusetts court, unlike the federal courts, recognizes the limitation of *Britt*. It recognizes the shortage of competent stenographers and the possible expense of providing transcripts. Alternative methods of recording are suggested as a general solution for the future. Nevertheless, the course offered for the present coincides with the concept of *Griffin* that indigents must be treated in a manner equivalent to that of nonindigents before the court.

Impeachment of Defendant's Testimony

Significant exceptions to the *Mapp* and *Miranda* exclusionary rules were enunciated by the United States Supreme Court in *Walder v. United States*[34] and *Harris v. New York*.[35] Two lower court decisions have attempted to clarify the scope of this *Walder-Harris* exception, as it relates to the use of illegally seized evidence for impeachment purposes.[36]

In *United States v. Tweed*[37] the defendant was charged with the illegal possession of destructive devices. At trial, he testified on both direct and cross examination that he was not in possession of any dynamite on the occasion in question. The trial court permitted the prosecution to introduce expert testimony indicating that the defendant's clothing, which had been unlawfully seized, contained traces of certain chemicals found in ammonia dynamite. The jury was admonished that this evidence could only be considered in passing on the defendant's credibility and could not be considered as evidence of guilt. On appeal, the defendant argued that it was error for the trial court to have admitted the rebuttal evidence.

In affirming the defendant's conviction, the Court of Appeals for the Seventh Circuit held that the illegally-seized evidence was properly admissible for impeachment purposes, notwithstanding the fact that it was used to impeach testimony relating directly to the crime charged. The court noted that *Harris* had eliminated any distinction between impeachment as to collateral matters and impeachment as to testimony bearing more directly on the crimes charged. Further, the fact that the prosecution's evidence was circumstantial in character did not vitiate its admissibility as impeaching evidence.

In *People v. Sturgis*[38] the Illinois supreme court was faced with the issue of whether reversible error occurred when the trial court allowed the prosecution to use for impeachment purposes certain statements sworn to and signed by the defendant in his motion to suppress. At trial, the defendant had denied, on cross examination, that the police had taken any physical evidence from him. The prosecution challenged the credibility of this testimony by noting the variance of the addresses where the arrest was said to have been made and the allegation in the suppression motion relating to the seizure of physical evidence. The trial court permitted this line of questioning over

[33] *See* Draper v. Washington, 372 U.S. 487, 498 (1963).

[34] 347 U.S. 62 (1954). In *Walder*, a defendant charged with possession of narcotic drugs testified on both direct and cross-examination that he had never possessed or sold narcotics. The trial court permitted the prosecution to present, in rebuttal, evidence of a heroin capsule, which had been unlawfully seized from the defendant's home. The jury was charged that the heroin was admitted solely for the purpose of impeaching the defendant's credibility. The Supreme Court affirmed the trial court decision and held that the illegally-seized evidence could properly be used as the basis for impeachment of a defendant's testimony on "collateral matters."

[35] 401 U.S. 222 (1971). In *Harris*, the defendant had made a statement which was inadmissible under the requirements of Miranda v. Arizona, 384 U.S. 436 (1966). During the trial, the defendant took the stand and made statements on direct examination which contradicted the prior inadmissible statement. The Supreme Court held that the prosecution could use the defendant's prior inadmissible statement to impeach the defendant's testimony on direct, where the proper jury admonition had been given.

[36] For a general discussion of the implication of the *Walder* and *Harris* decisions see Comment, *The Impeachment Exception to the Exclusionary Rule*, 73 Colum. L. Rev. 1476 (1973); Note, *Impeachment by Unconstitutionally Obtained Evidence—The Erosion of the Exclusionary Rule*, 34 Ohio State L.J. 706 (1973).

[37] 503 F.2d 1127 (7th Cir. 1974).

[38] 58 Ill. 2d 211, 317 N.E. 2d 545 (1974).

defendant's objections, and admitted the motion into evidence for impeachment purposes. Relying principally upon *Simmons v. United States*[39] and *Brown v. United States*[40] the defendant argued that it was reversible error for the trial judge to permit a damaging admission necessary to raise a fourth amendment claim to be used against him at the subsequent trial.

In rejecting defendant's contention, the court stated that the *Simmons-Brown* doctrine must be read in harmony with the *Harris* admonition that, "[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury." [41] Thus, the use of the suppression motion to impeach the defendant was viewed by the *Sturgis* court as merely an effectuation of the *Walder-Harris* impeachment exceptions to the exclusionary rule.

Sturgis is an important case for three reasons: (1) it extends the *Walder-Harris* rationale to cover the use, for impeachment purposes, of a defendant's testimony in support of his motion to suppress evidence; (2) it permits such impeachment as to testimony relating to collateral matters, as well as testimony relating to matters more directly bearing upon the crimes charged; and (3) it finds impeaching evidence as to defendant's testimony on cross-examination, as well as direct examination, to be within the scope of admissible rebuttal evidence.[42]

[39] 390 U.S. 377 (1968). The court forbade the use at trial of a defendant's inculpatory testimony given in support of a motion to suppress the evidence.

[40] 411 U.S. 223 (1973). The Court interpreted *Simmons* to prohibit the direct admission at trial of an accused's testimony given during a suppression hearing in order to establish standing to raise a fourth amendment claim.

[41] Harris v. New York, 401 U.S. 222, 225 (1971).

[42] *Contra,* People v. Taylor, 8 Cal. 3d 174, 501 P.2d 918, 104 Cal. Rptr. 350 (1972).