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Criminal Procedure--Parole Revocation Hearings Hearings--Requiring the Reasonable Doubt Standard of Proof and the Application of Double Jeopardy Principles--Standlee v. Smith

tion and rescission is great, an award of damages may indeed be unduly burdensome. Second, if a creditor fails to take the necessary steps to effectuate the consumer's rescission, the consumer is allowed to keep the property without obligation.[68] In such a case an additional award of damages may actually subject a creditor to two penalties; the caveat seeks to avoid this result.

Judge Wright, Circuit Judge of the Ninth Circuit, stated in *Palmer v. Wilson:* "[He] would limit the court's equitable discretion [to refuse a monetary award] to cases where a civil penalty would be an inequitable windfall to an overreaching [consumer]."[69] The two previous examples would fall within this category.

Allowing courts this discretionary power will have little effect upon the Act. The creditor is deterred in any event. He must disclose according to the Act's requirements, for a court would surely award penalties regardless of any resulting harshness if he deliberately fails to disclose. The ever-present threat of both sanctions insures creditor adherence to the Act; without this threat rescission might not be sufficient to enforce disclosure compliance.[70]

Criminal Procedure — PAROLE REVOCATION HEARINGS — REQUIRING THE REASONABLE DOUBT STANDARD OF PROOF AND THE APPLICATION OF DOUBLE JEOPARDY PRINCIPLES — *Standlee v. Smith,* 83 Wash. 2d 405, 518 P.2d 721 (1974).

Daryl Standlee, a Washington State parolee,[1] was charged with abduction, assault, attempted rape, and molesting a minor. Proceedings to suspend his parole began following the charges but were stayed pending a criminal trial. Even though Standlee was acquitted at trial on an alibi defense, the prison authorities, considering the same evidence, ruled he had violated his parole and revoked it. The only factual issue in either proceeding was the identity of the assailant. Standlee sought a writ of habeas corpus, contending that collateral estoppel[2] prevented the reliti-

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[68]15 U.S.C. § 1635(b) (1970). This result was reached in *Sosa v. Fite,* 498 F. 2d 114 (5th Cir. 1974), where 2 years after siding was installed on a consumer's residence the consumer was allowed to rescind the transaction because disclosure of credit terms had not been made. Because of the creditor's failure to effectuate rescission the consumer was allowed to keep the siding without obligation. In addition, it should be noted that the consumer was awarded attorney's fees even though the rescission section of the Act does not provide for them.

[69]502 F.2d 860, 864 (9th Cir. 1974) (Judge Wright, concurring in part and dissenting in part). Judge Wright dissented from the majority conclusion that a court could condition rescission on repayment by a debtor. He stated the right to rescind was unconditional.

[70]*See* Boyd at 182-83; Griffith at 16-17; *Private Remedies, supra* note 39, at 207.

[1]Standlee's prior conviction was for rape. Petitioner's Brief for a Writ of Habeas Corpus at iv, Standlee v. Smith, 83 Wash. 2d 405, 518 P.2d 721 (1974).

[2]

> Res Judicata necessitates an identity of causes of action, while the invocation of collateral estoppel does not. . . . Where there is a second action between the parties, or their privies,

gation of issues in a parole revocation hearing previously adjudicated in a criminal trial. The court of appeals denied the writ and the Washington State Supreme Court affirmed, upholding the revocation of Standlee's parole. It reasoned that the standard of proof in a parole revocation hearing is less than that required in a criminal trial, thus denying the application of collateral estoppel to prevent the relitigation of issues in the revocation hearing.[3]

I. BACKGROUND

It is generally held by state and federal courts that the standard of proof in parole revocation hearings is less than that required in a criminal trial.[4] State courts generally require that the hearing officer be reasonably satisfied that the parole has been violated;[5] and while a definitive standard for federal boards has not been set by the Supreme Court, it appears such boards are also required to find violations based on satisfactory evidence.[6] Appellate courts reviewing parole board rulings only examine the sufficiency of the evidence to determine whether the parole authority has been capricious or arbitrary in revoking the parole.[7]

Evidentiary standards for revocation hearings, however, may shortly come under greater scrutiny in view of recent United States Supreme Court decisions broadening due process requirements for parolees. In *Morrissey v. Brewer*[8] the Court required that a parolee be afforded a preliminary hearing in order to meet the requirements of due process when

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who are bound by a judgment rendered in a prior suit, but the second action involves a different claim, cause, or demand, the judgment in the first suit operates as a collateral estoppel as to, but only as to, those matters or points which were in issue or contraverted and upon the determination of which the initial judgment necessarily depended.

1B J. MOORE, FEDERAL PRACTICE ¶ 0.441 [2], at 3777 (2d ed. 1974) (footnotes omitted).

[3]Standlee v. Smith, 83 Wash. 2d 405, 518 P.2d 721 (1974).

[4]*See* United States v. D'Amato, 429 F.2d 1284, 1286 (3d Cir. 1970); Hyser v. Reed, 318 F.2d 225, 241-42, 244 (D.C. Cir.), *cert. denied,* 375 U.S. 957 (1963); cases cited note 5 *infra; see also* ANNOT., 29 A.L.R. 1074 (1953).

[5]*See, e.g.,* People v. Whittaker, 101 Ill. App. 2d 432, 243 N.E.2d 467 (1968) (preponderance); People v. Kuduk, 320 Ill. App. 610, 51 N.E.2d 997 (1943) (reasonable doubt is not required); State v. Whilhite, 492 S.W.2d 397, 399 (Mo. App. 1973) (reasonable satisfaction).

[6]United States v. D'Amato, 429 F.2d 1284, 1286 (3d Cir. 1970); Hyser v. Reed, 318 F.2d 225, 241-42, 244 (D.C. Cir.), *cert. denied,* 375 U.S. 957 (1963); Note, *Parole Revocation in the Federal System,* 56 GEO. L.J. 705, 717 (1968) (hereinafter cited as *Parole Revocation in the Federal System*); 6 SUFF. UNIV. L. REV. 1206 (1972); *see also* Arciniega v. Freeman, 404 U.S. 4 (1971); 28 C.F.R. 235 (1974) (satisfactory evidence is necessary to issue an arrest warrant on a parolee).

[7]Burns v. United States, 287 U.S. 216, 222 (1932); Caton v. Smith, 486 F.2d 733, 735 (7th Cir. 1973); *In re* McLain, 55 Cal. 2d 78, 84, 9 Cal. Rptr. 824, 830, 357 P.2d 1080, 1086 (Sup. Ct. 1960), *cert. denied,* 368 U.S. 10 (1961); Johnson v. Stucker, 203 Kan. 253, 260, 453 P.2d 35, 42 (1969); Cohen, *Due Process, Equal Protection and State Parole Revocation Proceedings,* 42 U. COL. L. REV. 197, 210 (1970) (hereinafter cited as Cohen).

[8]408 U.S. 471 (1972).

depriving him of his *valuable conditional* liberty,[9] and in *Gagnon v. Scarpelli*[10] the Court added the right to counsel under certain circumstances.[11] In the earlier decision of *In re Winship*,[12] the Court specifically held that the reasonable doubt standard of proof for criminal prosecutions is a due process requirement, and that due process mandates this same standard for juvenile hearings.[13] The Court in *Morrissey* and *Gagnon* did not consider what standard of proof due process requires for parole revocation hearings, leaving the question of whether the principles of *Winship* apply to parolees as well as juveniles. A second issue, related to the applicable standard of proof, is whether the double jeopardy clause of the fifth amendment allows the result reached in *Standlee*. The trend[14] has been to increase the protections for parolees. This note will discuss whether this trend includes the reasonable doubt standard of proof and the application of double jeopardy principles for parole revocation hearings.

II. Instant Case

Standlee contended that collateral estoppel should have prevented the parole board from relitigating issues of fact which had been previously resolved in his favor in a criminal prosecution. While the Washington State Supreme Court agreed that the collateral estoppel doctrine is a necessary incident of the fifth amendment's guarantee against double jeopardy, it agreed with other jurisdictions holding that a parole revocation hearing is not a criminal prosecution.[15] It reasoned that parole revocation is not punishment for conduct violative of the terms and conditions of the parole, but simply a continuation of punishment for an original conviction. These distinctions, according to the court, support the position that a different standard of proof is permitted in the revocation hearing from that required at a criminal trial. The result is that collateral estoppel does not prevent the relitigation of issues in the sub-

[9] *Id.* at 484.

[10] 411 U.S. 778 (1973).

[11] *Id.* at 790. The Court said counsel should be provided when the parolee denies the alleged parole violations or where there are mitigating circumstances for parole violation which would either be difficult to present at the hearing or make revocation inappropriate.

[12] 397 U.S. 358, 364 (1970).

[13] *Id.* at 368.

[14] For a comprehensive review of the history of parole revocation hearings in the state and federal jurisdictions see Cohen, *supra* note 7; *Parole Revocation in the Federal System, supra* note 6; Note, *Parole Revocation Procedures*, 65 Harv. L. Rev. 309 (1951) (hereinafter cited as *Parole Revocation Procedures*), Comment, *Revocation of Conditional Liberty — California and the Federal System*, 28 S. Cal. L. Rev. 158 (1955); Comment, *The Parole System*, 120 U. Pa. L. Rev. 282, 342-58 (1971) (hereinafter cited as *The Parole System*).

[15] 83 Wash. 2d at 407, 518 P.2d at 722, *citing* Morrissey v. Brewer, 408 U.S. 471 (1972).

sequent parole hearing.[16] As authority for denying the application of collateral estoppel, the court relied on two federal tax decisions disallowing application of the doctrine in behalf of taxpayers in civil suits which were subsequent to criminal prosecutions in which they were found not quilty under a different standard of proof.[17]

The court acknowledged that revocation hearings are subject to some due process requirements, but that those requirements did not prohibit its holding.[18]

Justice Utter argued in dissent that due process required the reasonable doubt standard of proof for parole revocation hearings. He also argued that collateral estoppel should, therefore, apply and prohibit the relitigation of issues resolved at trial.[19]

III. Analysis

A. Due Process and the Reasonable Doubt Standard of Proof

Essential to the majority holding is the proposition that due process does not require the reasonable doubt standard of proof for parole revocation hearings because such hearings are not criminal proceedings. The majority of state and federal decisions support this position[20] and are summarized by the United States Supreme Court in *Morrissey:* "[T]he revocation of parole is not a part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations."[21] However, the trend away from the traditional view[22] of the purposes and characterizations of parole revocation hearings was also suggested in the *Morrissey* opinion:

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[16]83 Wash. 2d 405, 407-08, 518 P.2d 721, 722-23.

[17]*Id. citing* Helvering v. Mitchell, 303 U.S. 391 (1938) and Neaderland v. Commissioner, 424 F.2d 639 (2d Cir. 1970).

[18]83 Wash. 2d at 409, 518 P.2d at 723. Here the court was referring to language in *Morrissey v. Brewer,* 408 U.S. at 480. The court did not consider whether the principles outlined in *Morrissey* affected the standard of proof to be applied at parole revocation hearings.

[19]83 Wash. 2d at 410, 518 P.2d at 724.

[20]*See* cases and authorities cited in notes 3-7 *supra.*

[21]408 U.S. at 480.

[22]Cohen, *supra* note 7, at 206-13; *The Parole System, supra* note 6, at 284-89. The following theories have been used to deny due process protections for parolees in revocation hearing:

Right — Privilege Distinction. The principal case is *Escoe v. Zerbst,* 295 U.S. 490 (1935), where the Court said that parole is a privilege and a matter of grace rather than a right. Its reasoning is that due process only protects against invasion of rights held under the Constitution and not mere privileges. This distinction is no longer dispositive and was buried for the purposes of parole revocation hearings by Morrissey v. Brewer, 408 U.S. 471, 482 (1972).

Constructive Custody. By this approach, courts have denied procedural due process because the parolee was held to have been serving his sentence in an expanded prison wall. Since the parolee is thought to remain within the custody of the prison, he has no freedom for due process to protect. Jones v. Cunningham, 371 U.S. 236, 243 (1963); McCoy v. Harris, 108 Utah 407, 408, 160 P.2d 721, 722 (1945).

> [T]he liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a "grievous loss" on the parolee and often on others. . . . By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal.[23]

This passage indicates the social and legal interests supporting the extension of due process safeguards to a parolee. On one hand the government has an interest in returning to prison a parolee who has violated the conditions of his parole. Underlying this interest are many of the same considerations which motivate the government to imprison a person for a crime, such as the public safety and welfare, protection of property, respect for law, and rehabilitation.[24] On the other hand is the parolee's interest in his *conditional liberty* and the due process guarantees involved when one is deprived of liberty.[25]

It is clear that the state has an interest in exercising more control over parolees than it exercises over the general citizenry, but it is not clear that a standard of proof for revocation hearings lower than the reasonable doubt standard better serves the interests of the public. Just as with a criminal, the sovereign has an interest in assuring the fair treatment of a parolee, especially when he denies the allegations that he violated his parole. The Supreme Court has indicated special concern for a revocation hearing involving a parolee who denies he has violated his parole. In *Gagnon* the Court held that due process requires that counsel be provided when a parolee denies the acts which are the basis for the revoca-

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Contract Theory. Under this theory it is held that when a parole is granted, the parolee contracts with the sovereign and agrees to act within the terms and conditions of his parole. Failure to meet those terms results in the loss of all the rights he held under the contract, and it is held that due process does not prevent this forfeiture. United States v. Wilson, 32 U.S. (7 Pet.) 150, 161 (1833).

Civil — Criminal Distinction. Many courts do not allow due process protections for a parolee as a result of the holding that a parole revocation hearing is not a criminal proceeding. *Standlee* is an example of this reasoning.

Parens Patriae. This phrase is to explain the identity of interest a parole board is supposed to have with the parolee in his rehabilitation. It is argued that one need not be protected from another who has an identity of interest and that procedural safeguards are not necessary. Menechino v. Oswald, 430 F.2d 403, 407 (2d Cir. 1970).

Statutory. It has been held that the rights of a parolee are statutory only and are therefore not protected by the Constitution. Escoe v. Zerbst, 295 U.S. 490, 492 (1935).

Exhausted Rights Theory. Since the parolee was given full constitutional protection at his original trial, it is not necessary to further protect him and his parole can be revoked at anytime. Fuller v. State, 122 Ala. 32, 26 So. 146 (1899); *In re* Patterson, 94 Kan. 439, 442, 146 P. 1009, 1011 (1915).

[23]*Id.* at 482; *see* Cohen, *supra* note 7 at 201.

[24]Morrissey v. Brewer, 408 U.S. at 483; *see generally The Parole System, supra* note 14, at 347.

[25]*The Parole System* at 346; for cases representing the view that the parolee's loss of freedom outweighs an increased state burden in affording due process guarantees in parole revocation hearings see cases cited in Cohen, *supra* note 7, at 209 n.78.

tion of his parole.[26] The *Morrissey* decision also indicated the Court's concern for procedural safeguards when a parolee's conduct is in issue. The court asserted no fewer than three times that the first stage of the parole revocation hearing is to be a determination of whether the parolee had "in fact" violated his parole.[27] By requiring that counsel be provided when acts of violation are denied and in unequivocally using the phrase *in fact* when speaking of parole revocation, the Court is emphasizing the importance of protecting the parolee at this stage of the hearing. Although the standard of proof in a parole revocation hearing has not been considered since *Morrissey* and *Gagnon,* the expanding due process requirements recognized in those two cases may be sufficient to encompass the reasonable doubt standard of proof.

In the similar area of juvenile hearings,[28] the United States Supreme Court has specifically held that the fifth and fourteenth amendments require the reasonable doubt standard of proof to prove alleged criminal acts.[29] A review of the history of juvenile hearing decisions of the Supreme Court shows that due process requirements for juvenile hearings were expanded in much the same way as they are now being expanded for revocation hearings.[30] By its decision in *In re Gault,*[31] the Court provided accused juveniles the due process protections of notice of charges, the right to counsel, the right to be confronted by and examine witnesses, and the privilege against self-incrimination.[32] Following *Gault,* the Court in *In re Winship* specified the standard of proof required by due process for juvenile hearings, stating:

> [T]he constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicating stage of a delinquency proceeding as are those constitutional safeguards applied in *Gault* . . . .[33]

In *Gault* the Court decided that all the due process requirements of a criminal trial are not necessary for juvenile hearings, but did require "the essentials of due process and fair treatment."[34] By requiring the reason-

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[26]411 U.S. at 790.

[27]408 U.S. at 479, 483-84, 487-88.

[28]Cohen, *supra* note 7, at 212:

> [I]n an area closely analogous to parole revocation proceedings in both philosophy and procedure, juvenile delinquency proceedings, the United States Supreme Court rejected most of [the theories similar to the traditional views of parole] which had theretofore been accepted as reasons for denying traditional due process safeguards to juveniles.

[29]*In re* Winship, 397 U.S. 358, 368 (1970).

[30]For a history of juvenile court cases and the evolution of due process for juveniles *see In re* Gault, 387 U.S. 1, 12-31 (1967) and Ketcham, *Legal Renaissance in the Juvenile Court,* 60 Nw. U.L. Rev. 585 (1965).

[31]387 U.S. 1 (1967).

[32]*Id.* at 31-58; *In re* Winship, 397 U.S. at 368.

[33]397 U.S. at 368.

[34]387 U.S. at 30; 397 U.S. at 359.

able doubt standard of proof in *Winship* the Court has placed this standard of proof in the category of "the essentials of due process and fair treatment."[35]

Morrissey and *Gagnon* exhibit the same procedural concerns with respect to parole revocation hearings as *Gault* represents for juvenile hearings. These concerns are manifest because it is recognized that liberty is being taken and must be done so constitutionally.[36] Because parole revocation hearings, just as juvenile hearings, may result in imprisonment, the *Morrissey* and *Gagnon* decisions suggest that due process should also require the reasonable doubt standard of proof in parole revocation hearings.

The traditional theories of parole and parole revocation[37] have avoided due process requirements for parolees.[38] For example, courts have reasoned that a parolee is not being returned to prison for the violation of his parole, but only to serve the remainder of the sentence imposed for his original crime.[39] The *Morrissey* decision undermines these theories by stating that a parolee possesses "core values of unqualified liberty," the loss of which would be grievous.[40] Regardless of the theory a parole board uses for reincarcerating a parolee, the fact remains that liberty is taken from the parolee. The same standard should apply for parolees as is used in criminal and juvenile cases without regard to the degree or nature of the liberty being taken.

It has been further suggested that there are questions a hearing officer must decide which are not consistent with the use of the higher standard of proof, such as whether the parolee is likely to commit another criminal act if granted continued parole and whether he has demonstrated sufficient rehabilitation to warrant release.[41] The reasoning is that these questions are judgmental, discretionary, and not susceptible of specific proof, making it impractical to hold the decision makers to a strict standard of proof.[42] However, these discretionary questions arise in the second stage of the parole revocation hearing and are improper if the parolee did not violate the terms and conditions of his parole. Chief Justice Burger outlined the stages of a revocation hearing in *Morrissey*, stating:

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[35]The Court defined the issue in *Winship* as "whether proof beyond a reasonable doubt is among the 'essentials of due process and fair treatment' . . . ." 397 U.S. at 359.

[36]*See* note 23 and accompanying text *supra*.

[37]*See* note 22 *supra*.

[38]Cohen, *supra* note 7, at 206.

[39]*Id.* at 211; *see also* note 14 *supra*.

[40]408 U.S. at 482.

[41]Tobriner and Cohen, *How Much Process is "Due"? Parolees and Prisoners*, 25 HASTINGS L.J. 801, 810 (1974).

[42]*Id.*

> The first step in a revocation decision thus involves a wholly retrospective factual question: whether the parolee has in fact acted in violation of one or more conditions of his parole. Only if it is determined that the parolee did violate the conditions does the second question arise: should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation?[43]

Of the severability of these two stages, the Chief Justice further said:

> A simple factual hearing will not interfere with the exercise of discretion. . . .
>
> This discretionary aspect of the revocation decision need not be reached unless there is first an appropriate determination that the individual has in fact breached the conditions of parole. The parolee is not the only one who has a stake in his conditional liberty. Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law. Society thus has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given the breach of parole conditions.[44]

Under this two-step procedure, the use of the reasonable doubt standard of proof will not interfere with the discretionary aspects of the board's decision.[45] If revocation is based on denied allegations of parole violation, then those allegations should be proven beyond a reasonable doubt or the discretionary stage of the hearing should not be reached.

Parole is a universal feature of the modern penal system and some jurisdictions have provisions for automatic parole.[46] It has been estimated that 35 to 45 percent of all parolees have their paroles revoked and are returned to prison.[47] This high frequency of revocation indicates the increased possibility that a parolee may be reimprisoned who is actually innocent of any parole violations. This is the same fundamental concern that has led to the use of the reasonable doubt standard of proof in criminal prosecutions.

The higher standard of proof in parole revocation hearings will have the further advantage of requiring judges and hearing officers to be more careful in passing judgment on the evidence, leaving fewer opportunities for capricious or arbitrary action.[48] Further, the parolee should perceive

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[43]408 U.S. at 479-80.

[44]*Id.* at 483-84.

[45]Indeed, as Chief Justice Burger implies, one standard of proof will not burden the discretion of a parole board any more than any other standard of proof.

[46]408 U.S. at 477; *e.g.*, 18 U.S.C. § 4163 (1971).

[47]408 U.S. at 479. According to a 1973 report, 60 percent of all felons released in 1968 from prisons in state and federal jurisdictions are released on parole. In some states this percentage goes as high as 95. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 391 (1973). If the 35 to 45 percent revocation rate is the same today as it was in 1968, it means that 21 to 27 percent of all felons sent to prison violate their subsequent parole.

[48]Winship, 397 U.S. at 363-64; *see also, In re* Gault, 387 U.S. at 17-20 for a discussion of how

that he is more fairly treated as a result of the increased procedural concern for a strict determination of the truth, and this should aid in his rehabilitation.[49]

If the reasonable doubt standard of proof were adopted for the factual determination stage of the hearing, the standard of review on appeal could focus on the sufficiency of the evidence, instead of the present limited inquiry into the use of discretionary power. This closer examination of the evidence by appellate courts would be another incentive for hearing officers to increase the care with which they pass upon the evidence.[50] Use of the reasonable doubt standard of proof in revocation hearings would also provide collateral estoppel protection against the relitigation of issues already determined at trial, preventing incongruous results like the decision reached in *Standlee*.

B. Collateral Estoppel and Acquitted Parolees

Even if the higher standard of proof is not adopted, the fifth amendment's double jeopardy clause should be held to prohibit the result reached in *Standlee,* regardless of the due process issues. The Supreme Court has applied the double jeopardy clause of the fifth amendment to the states through the fourteenth amendment,[51] and included, as a part of double jeopardy, the doctrine of collateral estoppel.[52] As authority for denying the application of collateral estoppel, the Washington Supreme Court relied on *Helvering v. Mitchell*[53] and *Neaderland v. Commissioner*.[54] The court cited these two cases for the proposition that if there is a different standard of proof in a subsequent civil case, the previous criminal acquittal is not a bar to the relitigation of issues in the civil action.[55] In fact, this is the present majority rule as it applies to a criminal trial and a subsequent parole revocation hearing.[56]

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the supposed good intentions in a hearing that lacks procedural due process protections can result in high-handed treatment of the juvenile.

[49]Cohen, *supra* note 7, at 214-15; *Parole Revocation Procedures, supra* note 14, at 309 & n.6.

[50]The added burden on the parole board resulting from the shift to the reasonable doubt standard of proof would be no greater than that which has resulted from changing the standard in juvenile hearings. Of that change the Supreme Court has said it would not "compel the states to abandon or displace any of the substantive benefits of the juvenile process." Winship, 397 U.S. at 367.

[51]Benton v. Maryland, 395 U.S. 784 (1969), *overruling* Palko v. Connecticut, 302 U.S. 319 (1937).

[52]Ashe v. Swenson, 397 U.S. 436 (1970).

[53]303 U.S. 391 (1938).

[54]424 F.2d 639 (2d Cir. 1970).

[55]83 Wash. 2d at 407-08, 518 P.2d at 722-23.

[56]Powell v. Wainright, 403 F.2d 33 (5th Cir. 1968), *cert. denied,* 395 U.S. 912 (1969); MacLaren v. Denno, 173 F. Supp. 237, 241 (S.D.N.Y. 1959), *aff'd,* 272 F.2d 19, *cert. denied,* 363 U.S. 814 (1960); Valdez v. State, 508 S.W.2d 842, 843 (Tex. Cr. App. 1974); *contra, In re* Hall, 63 Cal. 2d 115, 117, 45 Cal. Rptr. 133, 135, 403 P.2d 389, 391 (1965).

In both *Mitchell* and *Neaderland,* the taxpayers were acquitted of criminal charges which carried possible punishments of fine and imprisonment. A subsequent civil action was brought by the government for payment of the taxes, and in both cases the defense of collateral estoppel was raised. In setting aside the defense, the Supreme Court reasoned in *Mitchell* that the first proceeding was punitive and that the subsequent suit was remedial, in which case double jeopardy did not apply.[57] The Court also pointed out that one of the issues in the criminal prosecution not litigated in the civil action was whether there was a willful evasion of the income tax.[58] Thus there was not only a different standard of proof in the two proceedings, but also different issues and different potential sanctions.[59] The *Mitchell* Court further asserted in dictum that if the two proceedings are both criminal or if the aim of both proceedings is to punish the defendant, the relitigation of issues in the second proceeding is prohibited by the fifth amendment's double jeopardy clause.[60]

There are four questions derived from *Mitchell* to consider in determining whether collateral estoppel should prevent a subsequent litigation: (1) Are the standards of proof in the two proceedings the same? (2) Are the issues identical in the two proceedings? (3) Are the proceedings both criminal? and (4) Are the possible sanctions both punitive? An affirmative answer to question (2) is necessary for the principles of collateral estoppel to apply by definition.[61] Since an affirmative answer to either question (3) or (4) will suffice for collateral estoppel to bar the subsequent proceeding,[62] question (1) need not be answered affirmatively.

In *Standlee,* even though the standards of proof for the criminal trial and the revocation hearing were different, the only factual issue in each proceeding was the identity of the assailant. Thus *Standlee* is distinguishable from *Mitchell* and *Neaderland* in that the latter two cases did not relitigate identical issues in the subsequent civil action.

In attempting to obtain an affirmative answer to question (3), parolees must show that a revocation hearing is a criminal proceeding for purposes of double jeopardy analysis. This is difficult because courts have not

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[57]303 U.S. at 404-05.

[58]*Id.* at 397-99.

[59]*Id.* at 397. The court in *Neaderland* did not examine the sanctions, but did indicate that the nature of the two proceedings, the standard of proof, and the issues were different as between the trial and the civil action. 424 F.2d at 641-43. The holding of the court in *Neaderland* was that the issue of willfully evading the payment of income tax in a criminal trial is different from the issue of fraud in a civil action. *Id.* at 642. The Court in *Mitchell* only inferred that the two issues may be different. 303 U.S. at 398. The only issue presented at the trial and the revocation hearing in *Standlee* was the identity of the assailant.

[60]303 U.S. at 398-99; One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232, 235-37 (1972).

[61]*See* Note 1 *supra.*

[62]*See* note 60 *supra* and accompanying text.

precisely defined what type of proceeding a revocation hearing is.[63] An argument finding some support is that a revocation hearing is enough like a criminal proceeding[64] to be in the same category as a criminal trial for certain purposes. However, as indicated above, courts have declined to characterize a revocation hearing as a criminal proceeding for the purposes of due process,[65] but this is not necessarily true under double jeopardy requirements. Double jeopardy guarantees focus more on the possibility of two criminal sanctions for one crime. Since a revocation hearing may ultimately result in imprisonment, it is more like a criminal trial than a civil proceeding. The Supreme Court, in the context of a forfeiture action, has held that a proceeding may be civil in form but criminal in nature, and that this criminal nature is sufficient to require the imposition of double jeopardy guarantees when the forfeiture action follows a criminal trial.[66] Certainly this same reasoning applies to the forfeiture of liberty involved in a revocation hearing.

In connection with question (4) above, the strongest argument under the *Mitchell* inquiry for the application of collateral estoppel for parolees in cases like *Standlee* is that the ultimate sanctions of a criminal trial and a revocation hearing are both punitive. It is obvious that the sanctions are the same in degree if not in purpose. Even though it is widely held that a parolee is reincarcerated and punished only for the original crime when found guilty of parole violations,[67] it does not comport with reality[68] to say that he is not being punished for his parole violations. His punishment for his parole violation is the loss of his conditional freedom, and this cannot be considered a remedial sanction. Consequently, there is not the distinction in *Standlee* between a trial with a punitive sanction and a civil action with a remedial sanction as in the tax cases, for both proceedings in *Standlee* carried punitive sanctions.

It appears, therefore, that the *Mitchell* rationale would require application of double jeopardy guarantees in *Standlee,* even though different standards of proof may be upheld with respect to a trial and a revocation hearing. The criminal nature of the revocation proceeding and the punitive nature of its sanction seem to require the operation of double jeopardy principles to prohibit the relitigation of identical issues in the revo-

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[63]Courts usually only go so far as to state that a revocation hearing is not a criminal proceeding and point to differences between a trial and the revocation hearing as the court did in *Standlee.*

[64]United States v. Bright, 471 F.2d 723, 726 (5th Cir. 1973), *cert. denied,* 412 U.S. 921 (1973). The court said, "a parole revocation proceeding, subjecting the parolee to imprisonment, is assuredly a 'criminal proceeding.' " It limited this, however, to 26 U.S.C. § 5848 (1971).

[65]408 U.S. at 480.

[66]United States v. United States Coin and Currency, 401 U.S. 715, 718 (1970); Boyd v. United States, 116 U.S. 616, 634 (1886).

[67]*See, e.g.,* People v. Morgan, 55 Ill. App. 2d 157, 204 N.E.2d 314, 316 (1965).

[68]*The Parole System, supra* note 14, at 293-95.

cation hearings. The recent Illinois Supreme Court case of *People v. Grayson*[69] directly supports this position. Grayson had been indicted for armed robbery while on probation, but at the criminal trial the judge found that there was insufficient evidence to find guilt beyond a reasonable doubt. A petition to revoke Grayson's probation was granted based on the same armed robbery. The court reversed the revocation, holding that collateral estoppel applied and was a bar to the relitigation of issues already determined at trial. The court said that the differences between a criminal trial and revocation hearing were not sufficient to prevent collateral estoppel protections, specifically stating that the different standards of proof "could not fairly serve to permit relitigation of the identical issue upon the same evidence."[70] *Grayson* appears to better represent the requirements set forth in *Mitchell* and *Neaderland* as to when collateral estoppel should apply than does *Standlee*.

A popular phrase reflects the conviction that "a man should not have to run the gantlet twice for the same charge."[71] In reality the petitioner in *Standlee* was subjected to the risk of imprisonment for the same charges in two different proceedings. Of a situation involving two trials the Supreme Court said:

> "No doubt the prosecutor felt the state had a provable case on the first charge, and, when he lost, he did what every good attorney would do — he refined his presentation [in the second trial] in light of the turn of events in the first trial." But this is precisely what the constitutional guarantee forbids.[72]

The same reasoning should apply to parolees who have been acquitted at criminal proceedings and then are required to again "run the gantlet" at revocation hearings.[73]

IV. Conclusion

It is likely that the Supreme Court will need to clarify which standard of proof is required to uphold the principles set down in *Morrissey* and

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[69]People v. Grayson, 319 N.E.2d 43 (Ill. Sup. Ct. 1974); *accord., In re* Hall, 63 Cal. 2d 115, 117, 63 Cal. Rptr. 133, 135, 403 P.2d 389, 391 (1965).

[70]319 N.E.2d at 45.

[71]Winship, 397 U.S. at 446.

[72]*Id.* at 447, quoting the brief for the state.

[73]A completely different situation arises where a parole board revokes the parole, and subsequently a criminal trial is instituted to prosecute the suspect for the same crimes which were the basis for his parole revocation. When the parole board revokes parole, it does so on the jurisdiction it maintains over the parolee because of his previous crime. The board is justified in finding a violation of parole based on a trial conviction or mere parole violations. On the other hand, the trial court gets jurisdiction because of the commission of the new crimes, and a parolee's right to a jury trial of the new crimes with all other constitutional protections provided at a trial prevents a reliance on the factual determinations made at the revocation hearing.

Gagnon. This is a fertile area for parolees anxious to test their status under the expanding requirements of due process and the newly developing double jeopardy doctrine. Also, a precise definition of the standard of proof to be used in federal parole revocation hearings is needed. A radical modification of the standard of proof in revocation hearings will likely be difficult to achieve. Even though there are constitutional arguments favoring the change, the due process principles are sufficiently elusive to support either position.

In assessing the potential success of challenges to the law enunciated in *Standlee,* it is likely that an argument based upon the double jeopardy doctrine will be the stronger approach. First, there is already support for the position, as indicated by *Grayson*.[74] Second, the fifth amendment does not draw distinctions among the many types of proceedings, nor is the double jeopardy clause restricted to criminal trials. A single sovereign should not be able to circumvent a constitutionally guaranteed freedom by drawing meaningless distinctions between two closely related proceedings. Finally, the constitutional protection afforded by the double jeopardy doctrine in cases such as *Standlee* appeals to notions of fairness and justice, which may prove to be the single most important consideration when the question ultimately reaches the Supreme Court.

Elections — CORRUPT PRACTICES — CORPORATE MONEY CONTRIBUTIONS TO INFLUENCE THE OUTCOME OF BALLOT-MEASURE CAMPAIGNS — *Schwartz v. Romnes,* 495 F.2d 844 (2d Cir. 1974).

On May 24, 1971, the New York Legislature enacted the Transportation Capital Facilities Bond Act of 1971 which authorized the State Comptroller to issue bonds in the amount of $2.5 billion upon approval by the voters in the 1971 general election.[1] A nonprofit corporation, Yes for Transportation in New York State, Inc. (YES), was organized on August 24, 1971, to campaign for voter approval of the Act. YES received individual and corporate contributions, including $50,000 from the New York Telephone Company (NYT), a wholly owned subsidiary of American Telephone and Telegraph Company (AT&T).

By letter dated January 26, 1972, the executive director of the Project on Corporate Responsibility (Project), a nonprofit corporation owning one share of AT&T stock, notified the Chairman of the Board of AT&T and the President of NYT of the Project's belief that NYT's $50,000 contribution to YES violated section 460 of the New York Election Law

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[74] 319 N.E.2d 43.

[1] N.Y. CONST. art. VII, § 11 disallows any legislative enactment which increases the public debt unless approved by a majority of the voters in a general election. The Capital Facilities Bond Act of 1971 was not so approved in New York's 1971 general election.