DEPARTMENT OF THE ATTORNEY GENERAL

Memo From

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Date: 26 April 1974

To: G. Raymond Nichols, Director Dept: Probation and Parole

Subject: Preliminary Hearings in Parole and Probation Revocations

SYLLABUS:

It is the Opinion of the Attorney General that no preliminary hearing is required to be held when the reason for a proposed parole revocation is a new criminal conviction.

Preliminary, "probable cause" hearings are required in the probation revocation context which hearings are the responsibility of the Division of Probation and Parole.

FACTS:

The advice of this Office has been requested with respect to the following questions.

QUESTIONS AND ANSWERS:

1. In the parole revocation context, does the United States Supreme Court decision in Morrissey v. Brewer require that a preliminary hearing be held when the revocation is to be based on a new criminal conviction? No.

2. In probation revocation proceedings, are preliminary hearings necessary and, if so, do the courts or the Division of Probation and Parole bear the responsibility for holding such hearings? Yes; the Division of Probation and Parole.

REASONS:

1. Under Maine law there is no statutory requirement to hold a preliminary hearing in the parole revocation context. Title 34 M.R.S.A. §1675, which requires that a hearing be held before the Parole Board at which the parolee is entitled to appear and be heard before his parole may be revoked, is the only Maine statute which requires a parole revocation hearing. However, in Morrissey v. Brewer, 92 S.Ct. 2593 (1973), the United States Supreme Court held that the United States Constitution requires every parole jurisdiction to establish a bifurcated hearing procedure which must be employed in parole revocations. These procedures include a preliminary hearing to be held at or near the place of arrest or alleged parole violation as well as a revocation hearing held before the parole authority. The Parole Board and your Division have been previously advised concerning this important decision, (See advice by Courtland D. Perry, dated August 29, 1973) and further discussion of it here shall be limited by the requirements of this response.

It is the opinion of the Attorney General that a preliminary hearing is not required when the basis for the revocation is the conviction of a crime committed by the parolee while on parole. Support for this opinion is found in principal part within the Morrissey decision itself. Speaking in reference to its just announced parole revocation requirements, the Court stated, "Obviously a parolee cannot relitigate issues determined against him in other forums, as in the situation presented when the revocation is based on conviction of another crime." p. 2605.

The reasons behind the requirement that a preliminary hearing be held are contained within the Morrissey decision. The Court saw such an inquiry "as in the nature of a 'preliminary hearing' to determine whether there is probable cause or reasonable grounds to believe that the arrested parolee has committed acts which could constitute a violation of parole conditions." p. 2602. It is only after probable cause that the

parolee has violated conditions of his parole has been found that the individual may be returned to the institution from which he was paroled, pending the revocation hearing. The preliminary hearing would therefore prevent a prolonged summary incarceration of a parolee.

The California Court of Appeals for the Fifth District, in considering this precise issue, emphasized that, "When a parolee is arrested and prosecuted on criminal charges the criminal prosecution is adequate protection against the evils and dangers Morrissey was designed to protect against." In re Edge, 108 Cal. Reptr. 757, 764 (1973). That decision was based in large measure upon the above quoted language of Morrissey v. Brewer. This issue has also been considered by two other California Courts of Appeals and in an Appellate Court of New York State. This Office is persuaded by the above outline rationale which also persuaded all but one of the above noted Courts. See Valczark v. Dept. of Corr. Services, 342 N.Y.S. 2d 146 (1973), (No preliminary hearing required); In re Scott, 108 Cal. Rp pr. 49 (Cal. App. 1973), (Criteria for an impartial determination that probable cause existed having been met by a criminal prosecution, no preliminary hearing required); In re LaCroix, 108 Cal. Reptr. 93 (Cal. App. 1973). (Preliminary hearing required).

2. It is our opinion that a preliminary probation revocation hearing is required. The United States Supreme Court has held, "That a probationer, like a parolee, is entitled to a preliminary and a final revocation hearing, under the conditions specified in Morrissey v. Brewer, (403 U.S. 471 (1972))." Gagnon v. Scarpelli, 93 S. Ct. 1756, 1760 (1973).

It is considered that the responsibility for conducting the preliminary hearing rests with your Division, and that the probation revocation procedures be in accordance with 34 MRSA §1633.

Pursuant to §1632, a person on probation is under the jurisdiction of the Court

which ordered the probation and such other Court as assumes jurisdiction as provided in §1633. However, §1632 provides that a person on probation is committed by the Court to the custody and control of your Division. In addition, this section provides that probation and parole officers within your Division are required to supervise the probationer during the term of his probation. These two sections set out the procedure to be followed in the event that the Division of Probation and Parole charges a probationer with violation of a condition of his probation. The Supreme Court designed the preliminary hearing to ensure, as soon as possible after arrest, that probable cause does exist to believe that the probationer or parolee has violated a condition of their trust. Such a finding of probable cause would authorize continued detention of the probationer or parolee pending the revocation hearing. The question of whether the Courts should share the cost of these preliminary hearings is considered an administrative matter. (See advice of William J. Kelleher, dated June 11, 1973, for further explanation of the impact of the Scarpelli decision.)

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