OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-465

TITLE LEE ROY BLACK, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS AND HUMAN RESOURCES AND DICK D. MOORE, CHAIRMAN, MISSOURI BOARD OF PROBATION AND PAROLE, Petitioners V. NICHOLAS J. ROMANO

PLACE Washington, D. C.

DATE March 18, 1985

PAGES 1 thru 55

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IN THE SUPREME COURT OF THE UNITED STATES

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Washington, D.C.

Monday, March 18, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:01 o'clock p.m.

APPEARANCES:

JOHN M. MORRIS, III, ESQ., Assistant Attorney General of Missouri, Jefferson City, Missouri; on behalf of the petitioners.

JORDAN B. CHERRICK, ESQ., St. Louis, Missouri; appointed by this Court.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will have arguments now in Black against Romano.

Mr. Morris, you may proceed whenever you are ready.

ORAL ARGUMENT OF JOHN M. MORRIS, III, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. MORRIS: Thank you, Mr. Chief Justice, and may it please the Court, the respondent, Nicholas Romano, entered a plea of guilty in November of 1976 to two felony counts of the transfer and sale of a controlled substance.

The record indicates that Romano had sought to trade 26 pounds of marijuana to a person who turned out to be an undercover police officer in exchange for heroin.

In April of 1977, after the preparation of a presentence investigation, a hearing was held before the circuit judge, the state circuit judge who had accepted Romano's guilty plea on the issue of sentence, and at that hearing Romano's attorneys presented testimony and evidence which sought to mitigate the offense and consequently keep Romano out of prison.

After hearing this evidence, the court observed that he had labored with this case, as he had

with any in which a person might be sent to prison, and the ccurt also remarked that Romano's past track record was not very good.

Nevertheless, the court said, because this was not a personal crime, a crime against a person, he was inclined to and would grant probation. So saying the court sentenced Romano to two concurrent terms of 20 years' imprisonment, suspended the execution of those terms, and placed Romano on probation for a term of five years, and at that time indicated to Romano that in all probability when that five years were up he would add a second five-year probation term for a total of ten years' probation on this offense.

Two months after he was placed on probation, a car driven by Romano struck and seriously injured a young man outside the bar where Romano was employed as a bartender. Romano did not after the accident remain at the scene or identify himself. Instead, he absconded. He drcve away. He sought to conceal his car at the home of his employer at the bar, who parenthetically was the only live character witness at his sentencing proceeding.

He stayed out of sight for some eleven or twelve hours, and then finally after that period came to the victim's hospital room and sought to blame the

victim for the accident.

At the revocation hearing -- the offense of driving while intoxicated under Missouri law is a felony, and revocation proceedings were instituted, and at the revocation hearing, the only issue that was advanced by Romano and his attorneys was whether he was guilty of leaving the scene of an accident.

No contention whatsoever was made by evidence or by argument that if he were guilty, that he should no be and could not be sent to prison. The state circuit court, the judge who had originally heard his guilty plea and made the decision on the sentence, heard the case, concluded in written findings and conclusions that he had indeed committed this act, and based upon that, stated that his probation was revoked.

Three years after he was incarcerated, Romano filed the first of a series of state and federal --

QUESTION: What was the penalty for the crime?

MR. MORRIS: You mean the range of punishment, Your Honor? You mean the range of punishment?

QUESTION: Yes, sir.

MR. MORRIS: The range of punishment for the transfer or sale of controlled substances --

QUESTION: No, no, no, no, for the last thing

he was convicted of, was charged with, the crime that brought about the revocation.

MR. MORRIS: Oh, the penalty for that crime is, I think, in the vicinity of up to five years' imprisonment, Your Honor. He was not -- oh --

QUESTION: Five years for leaving the scene?

MR. MORRIS: Yes, sir. Under Missouri law, that is the range of punishment. If you are asking whether he was convicted of leaving the scene, the answer is --

QUESTION: It is up to five years?

MR. MORRIS: Excuse me?

QUESTION: It is up to five years.

MR. MORRIS: It is up to five years in Missouri, yes. In any case, the Romano respondent filed the first of a series of state collateral attacks, which ultimately reached the Missouri Supreme Court and was summarily denied.

Now, the District Court in granting Romano's federal habeas corpus petition --

QUESTION: Where is he now?

MR. MORRIS: Mr. Romano, of course, was discharged as a result of the ruling of the District Court.

QUESTION: So he is free?

MR. MORRIS: He is free. As a matter of fact, at the time the District Court rendered its ruling, Romano was on parole. He served a period of incarceration, was placed on parole, and the effect of the District Court's decision was to discharge him from parole supervision.

QUESTION: How long did he serve before that?

MR. MORRIS: He served approximately -- he served from -- approximately five, a little over five years, I believe.

QUESTION: And if the case is reversed, as you would like it to be, what would be the result?

MR. MORRIS: Your Honor, our basic contention is that -- and as I will get into in much more detail later, is that the revocation hearing was entirely valid, and that being the case, we submit that he should be restored to parole supervision.

QUESTION: Yes. For what additional period of time?

MR. MORRIS: It is rather a substantial additional period of time. I think he is currently -- until the District Court's decision reversing his -- overturning his revocation, I think he was scheduled to be on parole until the turn of the century, 2000 or thereabouts.

The District Court in granting this habeas corpus petition professed to find in this Court's decisions of Morrissey versus Brewer and Gagnon versus Scarpelli a procedural due process requirement that any revoking authority, revoking court or presumably a board in a probation or parole revocation case was required to specify on the records that it considered various alternatives to incarceration, which the District Court said included driver training classes and public service and restitution and such like, and that the court is not only required to specify that it considered such alternatives, but it must specify as to why it rejected them.

The District Court in fact said if this was not done on the record at the time of the revocation that the revocation is not only invalid but perpetually so. The District Court refused the petitioner's request for an evidentiary hearing in which the state circuit judge might have been called to testify about his state of mind.

The Eighth Circuit affirmed this, what we submit to be a novel principle even though it had previously rejected a similar attempt in a federal probation revocation case called United States versus Burkhalter.

QUESTION: How long after the hit and run episode was it before he was apprehended?

MR. MORRIS: After the hit and run it was when he went to the hospital room about 12 hours later. He was sentenced. Two months later he had the hit and run accident. He left the scene, and about 12 hours later he was found by police at the hospital room of the victim.

QUESTION: Any evidence taken on whether he was under the use of drugs at that time?

MR. MORRIS: No, Your Honor, there is no evidence of that, and of course because Mr. Romano absented himself for eleven hours, we have no idea as to his condition when he was driving, which is not a direct issue in this case, but it is something --

QUESTION: Anything in the judge's action that indicated that he took that into account?

MR. MORRIS: No, Your Honor, it wasn't something that was discussed.

QUESTION: As a matter of Missouri law, upon a revocation, did the judge actually have any alternative except to do what he did?

MR. MORRIS: Well, that is a matter of some uncertainty, Your Honor. The petitioner and respondent dispute, and Missouri law really hasn't settled whether

or not, for example, the court could reduce the sentence that was originally imposed, instead of 20 years, put it down to ten years. It just simply hasn't come up in appellate cases.

I believe it is safe to conclude that the court could have changed the terms of his probation or imposed some other sort of equitable remedy, not that there is any direct authority for it, but that has been the procedure in the past. There has been no problem with that.

The petitioners submit that the decision of the Eighth Circuit below is not only not supported by Morrissey and Gagnon but is directly contrary to it and is not consistent with any reasonable due process analysis.

QUESTION: Has there been any practice in Missouri of violation of a condition of probation automatically to reimpose the prison sentence?

MR. MORRIS: I am not sure I understand the question.

QUESTION: When a revocation of probation is sought and the only thing that is established is that there has been a violation of the condition of probation, automatically is there any practice of reimposing the sentence?

MR. MORRIS: Your Honor, I really have no statistics on the subject. It is just something -- I think as a matter of general practice it is frequently done.

QUESTION: It is?

MR. MORRIS: Yes, I think that is fair to say. I don't have any -- I am not an attorney who does probation revocations at the trial level, but I have that impression.

In Morrissey and Gagnon, this Court acknowledged a significant liberty interest in revocation and probation and parole. And the court said, I think perfectly correctly, that there are two stages to a revocation decision, the first being whether a person is guilty of the alleged probation or parole violation, and the second is what this Court called the predictive and discretionary decision as to whether he should be sent to prison or what other disposition should be made of this person because of the violation.

The Court stated that both of these questions involve factual bases. Obviously, the first decision, the guilt decision is almost entirely factual, but even when one is talking about a decision on sentencing after one finds that a violation of probation has been committed, this Court said it is important to know not

only that some violation was committed, but also to know accurately how many and how serious the violations were.

Thus, this Court established a framework, a procedural framework whereby the facts of the case, the facts pertinent to both these issues would be reliably and fairly determined. This Court described the remedy, the procedure it was requiring under the due process clause in Morrissey as an informal hearing structured to assure that the finding of a parole violation would be based on verified facts, and that the exercise of discretion would be informed by an accurate knowledge of the parolee's behavior.

And this Court expressly in Morrissey rejected the concern that this procedure that it was mandating would impair or affect the exercise of discretion. It said, a simple factual hearing will not interfere with the exercise of discretion.

Yet that is exactly what the Eighth Circuit is doing in this case, and that is exactly what respondent demands. There is not the slightest contention in this case that the facts of this matter were not adequately develcped, that the state circuit court was not fully aware of all pertinent facts both pertaining to the persen's guilt of the revocation and to enable him to

make a decision as to what disposition should be made.

Rather, what they are asking, and what the Eighth Circuit is saying can be done and should be done as a matter of federal constitutional law is that for the federal habeas court to look into the mind, based purely upon the record, of the state revoking judge or revoking authority and say that that court or authority did not use the right mental process in arriving at its conclusion.

And I submit respectfully that that is completely beyond the contemplation and beyond the policy that was stated by this Court in Morrissey and Gagnon.

QUESTION: Well, in the view of the Eighth Circuit, Mr. Morris, was there some way that a trial court could have satisfied this requirement, like making findings of record or something like that?

MR. MORRIS: That is how I understand the Eighth Circuit and the District Court's requirement to be, that the court is required to make some sort of record statement by which it can be determined what it was thinking about when it made the decision on sentencing.

It must say, I consider A, B, C, D, and E as alternatives to incarceration, and I don't think they

are adequate because A, B, C, D, and E. And again, that is -- goes beyond the factual concerns that this Court had in Morrissey, and it goes to the question of the exercise of the Court's discretion.

Now, the respondent has very heavily relied upon one passage in this Court's decision in Morrissey, and it was in the early part of the decision, in Part 1 of the decision, in which this Court said, as I just mentioned before, that there are two stages, the stage of determination of guilt of the violation and the decision on sentencing.

He has not only cited this over and over again, but he cited lower court state and federal cases that simply quoted the language, as if the language supports his conclusion. The difficulty, the petitioners submit, is that this language was a purely factual statement in this Court's opinion. It contained no constitutional holding or principle. It is a correct factual statement.

Exactly the same thing could be said that this Court said in Morrissey about a criminal trial. One could say that there are two stages in a criminal trial, a determination of whether the person is guilty of the offense charged, and if he is guilty whether he should be sent to prison or put on probabion or whatever the

alternatives may be.

Yet this Court has repatedly recognized in cases too numerous -- I can cite several, but this Courth has well established that as a matter of constitutional law one cannot review the sentencing discretion of the state court unless the sentence itself is inherently unconstitutional, or there is some other due process defect.

This Court has, in Roberts versus United States, United States versus Grayson, and other cases, has acknowledged that that area is not a constitutional question.

QUESTION: May I ask, going back to my earlier question, supposing the Missouri law really does allow the judge to exercise a variety of options in this situation, but the judge made a statement on the record that made it perfectly clear that he thought he had no option, that he thought he had to do it as a matter of law, and it later turned out he was wrong.

Would that be a ground for a collateral attack like this on the sentencing.

MR. MORRIS: Your Honor, I submit not, because our position is that there is no and should be no constitutional requirement that a judge consider alternatives to incarceration. That is at a stage just

like, qualitatively like a decision on --

QUESTION: As long as whatever he does is within the range of permissible conduct at the time, then there is no constitutional review at all?

MR. MORRIS: Well, I admit that is a rather close question, because this Court has acknowledged that, for example, in the sentencing context a sentence can be invalid because the court employs an improper information or impoper factual background for its sentencing.

QUESTION: Well, in any event, I gather -- doesn't, if one is given probation, I gather he has a liberty interest in the probation term, doesn't he?

MR. MORRIS: That's correct, Your Honor.

QUESTION: Can that be taken away from him without some kind of process?

MR. MORRIS: Absolutely, Your Honor, I agree it cannot, but that is exactly what this Court specified in Morrissey and Gagnon, and that is exactly what it has been providing.

QUESTION: I suppose as a practical matter if a defendant was sentenced in what he regarded or had probation revoked in violation of Missouri law, the practical thing to do would be to appeal to the Missouri appellate courts. They are the ones to determine a

state law violation.

MR. MORRIS: Your Honor, there are remedies. There are remedies I have cited in my reply brief. One can challenge both sentence and other matters in Missouri courts. There is also --

QUESTION: We have been assuming no violation of law, just a misunderstanding of the range of options open to the judge, but he picked one that was within the range, but based on a faulty understanding of the fact that there were other --

MR. MORRIS: Your hypothetical.

QUESTION: That is my hypothetical.

MR. MORRIS: I mean, there is no evidence of this in this case.

QUESTION: There would be no review as a matter of Missouri law in my hypothetical, I don't think, would there?

MR. MORRIS: Unless -- oh, no, not as far as the fact that the judge had not -- you know, had -- was of the mistaken impression that he was bound by law, no.

QUESTION: Yes.

QUESTION: In this case there was a revocation hearing, I take it.

MR. MORRIS: That's correct, Your Honor.

QUESTION: And the defendant at that hearing had an opportunity to be represented by counsel, and to argue against the revocation, and --

MR. MORRIS: That is exactly what they did.

QUESTION: -- address any remarks that he chose to make to the appropriateness of the sentence.

MR. MORRIS: Respondent had two attorneys at the hearing. Evidence was introduced, and there was after the evidence full argument by both sides.

The other language in Morrissey that has been relied upon besides the two step language, which again, we submit, is not constitutional in its character, is the admittedly constitutional requirement that the revoking authority state the evidence it relied upon and the reasons for revoking probation.

The respondent has sought to draw this into what he believes to be the constitutional right to consideration of alternatives to incarceration, yet that requirement is easily understandable as permitting and facilitating an appellate review of the decision to revoke probation.

For example, in this Court's decision in Douglas versus Bruder, this Court held that due process was violated because the person who was revoked, there was no evidence to support a finding that he had

committed a probation violation.

Particularly where you have multiple charges of probation violation, obviously a finding is essential to allow a court to make that sort of decision. Similarly in Bearden versus Georgia, there had to be something on the record to indicate that the probationer was revoked because he could not pay his restitution.

QUESTION: Tell me, at the revocation hearing, did the respondent's attorneys argue, Your Honor, you can't consider reimposing sentence except as a last resort, you have to consider a lot of other possible alternatives and tell us why you don't adopt one of them?

MR. MORRIS: No, sir, he --

QUESTION: That argument was not made?

MR. MORRIS: Nothing regarding the appropriateness of a sentencing decision was said. Their only theory at the revocation proceeding was that he was not guilty of leaving the scene of an accident, and that was their evidence, and that was their argument. There was nothing else.

In the present case, as far as the finding, a finding requirement is concerned, there was only one issue at this revocation hearing, and that was, again, whether or not he was guilty of leaving the scene of an

accident.

The court indubitably found and expressly and extensively found that he was indeed guilty of leaving the scene, and the court said based upon the evidence that he discussed and the credibility of the witnesses he discussed, the court said based upon this evidence, this probation is revoked.

The court has by its finding, which is in the Joint Appendix, in the last few pages, the court has by its finding stated the evidence upon which it relied and the reason for revoking probation, and that is all that this Court has ever asked of a revoking authority, be it a court or a parole board.

Had respondent originally been sentenced to imprisonment, there is no dispute that there would be no requirement, and respondent has not attempted to dispute that there would be no requirement that alternative incarceration be specified by the sentencing court.

Although we acknowledge that there may be some difference in terms of liberty interest, although frankly I find it very hard to analyze what liberty interest or what due process principles apply to sentencing, because this Court really hasn't directly addressed it, we submit that the two decisions are qualititatively the same, and in fact in many cases,

principally involving a suspended imposition of sentence, they are identical. They are one and the same.

In a suspended imposition of sentence, of course, a person is convicted or pleads guilty, and no sentencing decision is made, and he is placed on probation. The decision is simply deferred until such time, if ever, that his probation is revoked.

I submit that it is not reasonable or it is not an offense against fundamental fairness to hold that these two are essentially the same, and the discretion that exists as to one should and does as a matter of due process exist as to the other.

QUESTION: Mr. Morris, what is your position? Is it that the finding of the trial court and -- the findings of fact and determination to revoke probation simply implicitly meets a requirement that alternatives be considered, or is it your position that no alternatives need be considered, period?

MR. MORRIS: The latter, Your Honor. Our position is that there is or there should be, there has never been in the past, at least, any requirement that alternatives to incarceration is a constitutional question.

The purpose of the statement of the revoking

authority is to show that it has -- the facts upon which it relies to permit appellate review of its decision on that subject, and that is pretty much the extent of the statement.

There is no requirement according to the state's position that there be alternatives to incarceration considered because this is a matter no longer of fact, which Morrissey and Gagnon cover, but of discretion.

It should be clear, I think, why the State of Missouri and the 19 other amici curiae states oppose this holding of the lower court. We submit that this is an engraved invitation to a whole new front of federal habeas corpus litigationinvolving probation and parole revocations.

I know the inmate writ writers, some of them I am acquainted with would just be absolutely ecstatic at the notion of saying in every case in which one has a probation or parole revocation, trying to come up with new and creative alternatives that the revoking court did not consider.

On top of that, we submit, and the respondent has cited no cases, and we are not aware of any, in which this alternative, this requirement of consideration of alternatives to incarceration exists.

He cited a number of state cases. Most of these cases -- and federal cases, and most of these cases simply cite the two-step language, which does not get him anywhere.

There are a couple of cases that address the question of whether one can prevent the introduction of evidence in mitigation at as revocation hearing, and that is not in issue here. In fact, that was pretty well covered in Morrissey.

With one possible exception in, I believe, Hawaii, this is an entirely novel principle that respondent is urging. And for reasons I have already discussed, we think it is completely out of line with what this Court has previously demanded in terms of due process of probation and parole revocation.

There is one final reason why this holding should be opposed, and I think if respondent didn't benefit from this, the lower court's decision, I would think it would oppose it on the same grounds. The fact is, and as we have stated it is abolutely undisputed that there is, according to respondents' position and according to the decisions of the court below, they seek to create a disparity, a difference in burden between a sentencing decision after the original pleading of plea or finding of guilt and a sentencing decision after a

revocation of probation.

In fact, in doing so, they have created an additional risk, an additional concern for a state sentencing court in deciding to put someone on probation. If he puts the person on probation, there is a possibility that a number of years down the line that habeas corpus can be filed, and a number of years down the line the person can be -- if the right words are not said at the time of the revocation, that he can be, in this case, discharged completely, whereas if a person sentences this individual to a term of imprisonment initially, that is undisputably by the holdings of this Court not a subject of review unless there is an inherent constitutional --

QUESTION: Isn't there this difference between the two? I don't know if it is constitutionally significant or not, but everybody -- I mean, every judge knows at the time of original sentencing that he has alternatives, and presumably -- I mean, it is fair to presume he has always thought about different possibilities before he imposed the sentence.

But I think there are a lot of judges who think that a parole revocation automatically and necessarily leads to the imposition of the original sentence, because it happens so often, and we don't even

know what the law is in Missouri. That is what puzzles me.

MR. MORRIS: Your Honor -- well, I will tell you what. The thing about -- when you are asking about the law in Missouri, all I can supply is anecdotal information, and I am not sure how appropriate or useful that is. I just can say I am aware of cases where the sentence executed was not imposed.

You know, what else can I say, because it -- I don't think that is the case. I don't think courts are under the assumption that they can do nothing, that they are powerless to do nothing aside from what they have originally ordered. It is still their decision. It is still their order.

QUESTION: Mr. Attorney General, I asked you before what would happen to this man, and you said he would go back on probation.

MR. MORRIS: Parole, sir.

QUESTION: Oh, parole.

MR. MORRIS: I am sorry.

QUESTION: Well, Judge Whipple didn't say that. He said 20 years.

MR. MORRIS: Here is the sequence, Your Honor. He was, of course, placed on probation. He was revoked. He was sent to prison based upon the

revocation of probation.

In about 1983 he was paroled, so therefore his current custody status if this case as we hold it to be, that the lower court decision is invalid and the decision of the -- the revocation proceeding was proper, the proper remedy is to restore him to parole, which is where he was when this case was decided.

QUESTION: Did Judge Whipple in this case send him back and give him 20 years, on Page 108 of the Joint Appendix? Am I wrong?

MR. MORRIS: That, Your Honor, is when his revocation was -- when his probation was revoked. He was sent back to prison, and he did his time, and he was put on parole. Am I not answering your question?

QUESTION: Is the revocation still in existence?

MR. MORRIS: The revocation is still in existence. He was in custody under the revocation.

QUESTION: If you win here, does he get on parole or does he get 20 years?

MR. MORRIS: Inasmuch as petitioners have released him on parole, and as of the time that his habeas corpus petition was granted he was on parole, all we are asking is that he be restored to parole. There is no legal question or contention here that --

QUESTION: What are you going to do with this order of Judge Whipple? Just disregard it?

MR. MORRIS: Well, Your Honor, I don't think it is a matter of disregarding that order. It was carried out, and he was put in prison. Of course, the order of Judge Whipple says he was --

QUESTION: This is on the revocation. This isn't on the original.

MR. MORRIS: Your Honor, as I see it, this is --

QUESTION: On the revocation the defendant was ordered transported to the reception of the Missouri Department of Corrections at Jefferson City, Missouri, to be kept and confined for a period of 20 years unless sooner discharged according to law.

MR. MORRIS: Unless sooner discharged, Your Honor.

QUESTION: Hasn't the parole superseded that sentence?

MR. MORRIS: Excuse me?

QUESTION: Hasn't the parole superseded the revocation?

MR. MORRIS: Your Honor, it is no different than if he were originally sentenced to 20 years, he had done five or whatever he did and was released on

parole. We are not asking that he be sent back to prison. We are just asking that he be restored to the custody level at which he was at the time of the -- that the Missouri law provides for and which he was on at the time.

But the final point I would like to make is that this does create a greater risk, a greater concern for a court in deciding to put someone on parole, and I just would -- I am amazed to hear this point advocated, because it would seem to me in close cases, and I submit this was a close case involving a decision on prison versus incarceration, this individual amazingly, even the presentence investigation recommended that he be incarcerated, that he not be placed on probation. He had committed a rather serious, rather large-scale drug offense, and his record, as the Judge said, was not very good.

I can't believe that there wouldn't be or couldn't be in some cases, that this would, this disparity of consequences, this risk is not going to weigh upon judges' minds, and that is no more in the interest of the State of Missouri than it is in the interest of persons who are candidates for probation and parole, because Missouri, like every other state, has its concern with prison population.

So, we submit for all these reasons and under this Court's decisions in Morrissey and Gagnon, this decision of the Eighth Circuit should be reversed.

Thank you.

CHIEF JUSTICE BURGER: Mr. Cherrick.

ORAL ARGUMENT OF JORDAN B. CHERRICK, ESQ.,
APPOINTED BY THIS COURT

MR. CHERRICK: Mr. Chief Justice, and may it please the Court --

QUESTION: Is it clear that your client is now on parole?

MR. CHERRICK: Yes, it is clear, Mr. Chief Justice.

QUESTION: He is at large.

MR. CHERRICK: He is on parole. However, that parole term extends until the year 2002, which is a very serious and difficult, greivous loss to his liberty. We are asking in terms of the remedy that this Court affirm the lower court's decision and release him from all custody because he in effect has served out his probation term in jail, and that is the remedy under Missouri law, as the District Court found.

When the District Court and the Eighth Circuit Court of Appeals granted Romano a writ of habeas corpus, we submit they remedied a very gross injustice in this

case. Jim Romano spent five and a half years incarcerated as a result of an unconstitutional probation revocation hearing which occurred almost eight years ago in Lebanon, Missouri.

This Court should require and should hold that the due process clause, the Fourteenth Amendment requires that trial judges should state on the record whether alternatives should be considered before revoking probation, and we submit that this Court should make this holding and follow this holding for three principal reasons.

First, it is the precedent of this Court, a 12-year precedent in the landmark decisions of Morrissey versus Brewer and Gagnon versus Scarpelli. In those cases this Court stated that alternatives to incarceration should be considered before a trial judge revokes probation. We have cited numerous federal and state cases which have applied that rule, have it applied it consistently and uniformly. There is no conflict among the state and the federal courts as to this issue.

Mr. Cherrick, do you think then that Morrissey and Gagnon included a substantive requirement like that along with their procedural requirements?

MR. CHERRICK: Justice Rehnquist, we believe

that was part of the procedural requirement of Gagnon. Indeed, all the numerous cases which we have cited in our brief follow that rule. There is a two-step rule requirement in a revocation hearing.

First is the issue of whether a probation violation existed, and second, if a violation is found, and this, of course, is the critical issue in this case, should the probationer be recommitted to prison or should other steps be taken to protect society --

Supposing that the state law provides and the sentencing judge sentenced under a statute that says I am giving you parole, but if your parole is revoked, your probation is revoked -- was it probation or parole?

MR. CHERRICK: Probation in this case.

QUESTION: If your probation is revoked, I will have no choice but to simply reimpose the sentence, and you will have to start serving it. That is what state law provided. If probation is revoked, there is no other alternative.

Now, do you think Morrissey against Brewer as you interpret it would require the state judge in that case on a probation revocation hearing to consider alternatives to imprisonment.

MR. CHERRICK: Yes, Justice Rehnquist. If the

statute as you have hypothesized it stated that, we think it would be unconstitutional under Morrissey and Gagnon.

QUESTION: Then you say that one of the holdings of Morrissey and Gagnon is that a state may not provide by statute for a granting of probation, suspending imposition of sentence, granting of probation on the condition that if probation is revoked for violation of a condition, that you automatically go to jail. I think your interpretation would come as a surprise to a lot of people.

MR. CHERRICK: Your Honor, we submit that all state and federal courts that have interpreted this issue have held that, and as Justice O'Connor wrote in the Bearden -- excuse me -- yes, in the Bearden decision, that sentencing courts daily throughout this land consider alternatives to incarceration. They do that, we submit, because they are following Gagnon and Morrissey.

QUESTION: Yes, of course, counsel. However, in Bearden, we had a situation of a person who was unable to live up to the terms of probation through no fault of his own, and Bearden in no way involved a probation revocation based on conduct at which the defendant was at fault, did it?

MR. CHERRICK: Yes, Justice O'Connor. However, the Court noted in Bearden that fault was not the standard by which the alternatives to incarceration requirement should be considered. Indeed, we believe that Bearden stands for the proposition that this issue must be decided, as the Eighth Circuit said, on a case by case basis.

There can be no bright line drawn as to when alternatives to incarceration must be considered. There are an infinite amount of factual possibilities as to what the underlying crime is and what the probation revocation is. That indeed is why Bearden was decided on its facts.

The Court was able to look at those particular facts and state under those particular facts that an indigent who fails to make restitution, it would be fundamentally unfair to revoke probation without considering alternatives under those facts.

QUESTION: Well, do you think it is fundamentally unfair to automatically sentence someone to the original sentence that is imposed after the finding on the first offense after the probationer commits a new criminal offense?

MR. CHERRICK: Justice O'Connor, the fact that a probationer commits a crime is not the issue in a

probation revocation proceeding. As to the crime, the probationer is punished later by the state. In this case, for example, the state decided that this crime which Romano committed involving this traffic accident was careless and reckless driving, and they punished him under the state's purposes.

QUESTION: My question, though, is whether you think it is a denial of due process to send someone to prison on the original sentence which was on appeal when the probationer commits a new criminal offense in violation of the terms of probation.

MR. CHERRICK: Well, the court --

QUESTION: Is that fundamentally unfair?

MR. CHERRICK: It is fundamentally unfair if, for example, the probation violation is a technical offense. For example, if a probationer does not report, let us say, one Friday afternoon to his probation officer, and the court states, yes, we think the law is that for any probation violation probation must be revoked, no matter whether it is significant and whether it has any relationship to the underlying offense, whether it reflects that the probationer can no longer be supervised or rehabilitated in the community.

Indeed, this is the situation here. Petitioners have conceded that the record is silent as

to whether Judge Whipple in this case considered alternatives to incarceration at the revocation hearing, but the record does say something very interesting, and that is at the sentencing hearing Judge Whipple told Jim Romano in no uncertain terms that he was prepared to revoke the probation for any violation.

We suggest that while that possibly may have been hyperbole on the judge's part, if indeed Judge Whipple thought that was the law, it violated Morrissey and Gagnon and deprived Romano of his due process rights, because on the face of it his conduct involved in the probation violation had no rational relationship to the underlying crime. It did not compel the conclusion that his probation had failed.

QUESTION: Why as a matter of federal constitutional law should a decision to reimpose sentence be initially supported by a conclusion that you are compelled to find that probation has failed? Where do you get that from in our cases? You say the conclusion was not compelled that probation had failed. Is that language in our cases?

MR. CHERRICK: No, Your Honor, that language was from the Eighth Circuit opinion, but our basic point is that there is a requirement that the trial judge look at the facts or the probation violation and see whether

it indicated that the probationer could no longer be rehabilitated or supervised in the community.

We are not -- this is a very limited, limited issue. We are not stating that due process mandates a result in a specific case. The only issue here is whether due process requires that the court make a finding or a statement of reasons which an appellate court can review to determine that this Court focused on the proper criteria, that it made a rational decision, a non-arbitrary decision.

QUESTION: And the proper criteria in your view, I guess, are mandated by the federal Constitution.

MR. CHERRICK: The process is mandated by the due process clause.

QUESTION: Well, but the criteria, too. In other words, a state court judge may never say that I find that you have violated your probation, and therefore under the policy of the Supreme Court of Missouri or a statute of the State of Missouri, I am sending you to jail because we say once your probation is violated you don't get another chance. That is prohibited by the federal Constitution.

MR. CHERRICK: Because, Justice Rehnquist, under Morrissey and Gagnon, the probationer has a

significant liberty interest. When Judge Whipple restored that liberty to Romano at the sentencing hearing and said, this court as a matter of law does not think that you need to be incarcerated, that you can be rehabilitated or supervised in the community, that liberty interest which is so strong cannot be taken away upon arbitrary reasons.

QUESTION: Well, but that liberty interest was always freighted with the conditions of parole. Certainly that liberty interest was burdened with the conditions of parole from the very beginning, wasn't it?

MR. CHERRICK: That is true, and the only -- and the condition of parole or probation in this case that was relevant was the general condition in which Romano stated, I will obey all the laws of the state of Missouri.

If this Court does not hold that reasons or alternative be considered, this Court in effect will be saying that if a person runs a stop sign or gets a speeding ticket, and a judge decides that he should automatically revoke probation, that that is fundamentally fair.

QUESTION: Let me ask you a hypothetical question quite close to this. Suppose that after the

verdict of guilt on his drug charge but before the sentence, he had then been involved in this hit and run situation, and that on the sentencing then the judge said to him, I was giving serious consideration to putting you on probation, but here within weeks after this verdict you committed this other offense, and I just want you to know that that is one of the reasons I am not going to put you on probation. You are hereby sentenced to whatever the sentence was.

Would you have a constitutional question, do you think?

MR. CHERRICK: Mr. Chief Justice, no, because under the facts which you state, that is the classic sentencing situation of which a person is not entitled to significant due process rights.

A person who has been convicted of a crime has been constitutionally deprived of his due process rights, and therefore we accept the traditional rule, and we are not asking, as the state suggests, to extend this rule that sentencing judges state reasons on the record or state alternatives.

But when Judge Whipple --

QUESTION: How do you --

MR. CHERRICK: Pardon me?

QUESTION: Go ahead, finish.

MR. CHERRICK: But when Judge Whipple then restored Romano's liberty by saying, we, the state believes you can be rehabilitated in the community, that significant liberty interest which, Mr. Chief Justice, you explained and developed in the Morrissey case, that significant liberty interest cannot be taken away without some fundamental due process which protects against arbitrary decisions.

QUESTION: Well, do I take it that it would not satisfy you if the judge said, I have considered alternatives and find them unsatisfactory, and 20 years?

MR. CHERRICK: Justice White --

QUESTION: Would that satisfy you or not?

MR. CHERRICK: We do not think that there can be any specific formulistic standard as to --

QUESTION: Well, I know, but let's assume that he made it clear that he has considered alternatives. Does he have to then go on and say what the alternatives are and why he rejected them?

MR. CHERRICK: Not necessarily. As long as the --

QUESTION: Not necessarily? Is that part of your case or isn't it?

MR. CHERRICK: Well, under the facts of this

case --

QUESTION: I understood from your colleague on the other side that the court below said he must explain his reasons, not just consider alternatives, but he must explain.

MR. CHERRICK: We believe that reasons and --

QUESTION: Is that right or not?

MR. CHERRICK: Yes, and we believe that reasons and alternatives are nearly synonymous, because probation is by definition an alternative to incarceration.

QUESTION: Well don't run the two things together so fast. I asked you first, would it be enough if he said, I have considered alternatives, and I thought you said it probably would.

MR. CHERRICK: It would if the appellate court based on the record thought that the judge had considered the proper criteria, understood the purposes of probation in his decision --

QUESTION: Are you familiar with this statement in a case, Townsend against Seay? It says this. "Furthermore, the coequal responsibilities of state and federal judges in the administration of federal constitutional law are such that we think the district judge may in an ordinary case in which there

has been no articulation of a legal standard properly assume that the state trier of fact applied correct standards of federal law to the facts."

Here is a silent record. The judge didn't say what legal standard he was applying in revoking, but this statement in Townsend against Seay says that we may assume that he applied the right legal standard. So may we assume that he said to himself, I know I must consider alternatives? I have read Gagnon and Morrissey. I have considered alternatives. I just don't think they are -- they are just not a satisfactory -- shculd we -- can we assume that, or must we put on the record the legal standard he is applying?

MR. CHERRICK: Justice White, we believe that there must be a record. As Justice Cardoza wrote over 50 years ago, we must know what a decision means before the duty becomes ours to say whether it is right or wrong.

QUESTION: Well, that may be so, but Townsend against Seay was long after that.

MR. CHERRICK: That is true, but the words of Justice Cardoza, I believe, still have the same force and the same relevance to this case, because in the --

QUESTION: Well, suppose the judge says, you were paroled, you committed a felony while on parole,

and I therefore revoke it. That wouldn't be enough?

MR. CHERRICK: Excuse me. I didn't understand the question.

QUESTION: The judge says, you were up for consideration of revocation of your parole, you have been convicted of committing a felony while on parole, therefore your parole is revoked.

MR. CHERRICK: Justice Marshall, the fact that a person commits a felony is not necessarily dispositive. What is important, we believe, is the conduct, not the fact that it was a crime, because probation revocation -- in the probation revocation --

QUESTION: Very well. You were paroled, and you are up for revocation of parole, and you have been convicting of killing your mother, we revoke your parole.

MR. CHERRICK: Under those facts, we think that there would be no question that the parolee could not be supervised in the community, that he indeed would be a dangerous individual, but that could easily be resolved by a harmless error test on review -- on appeal, and in fact --

QUESTION: Wouldn't you be better off if you argued this case instead of 47 others?

MR. CHERRICK: That is true, but --

QUESTION: Well, you have invited it.

MR. CHERRICK: We do not think that there can be any line drawn as to when under any specific facts alternatives should be considered. We think that the rule --

QUESTION: And you don't know how much is needed. You don't know how much explanation is needed.

MR. CHERRICK: We think -- we are confident as has occurred in the last 12 years that courts on a case by case basis, which is exactly what has happened, have looked at the facts of each case and determined whether there was prejudicial error, whether there was -- whether the probation violation reflected that the probationer could no longer be supervised or rehabilitated in the community.

QUESTION: That is what you read out of Morrissey and Gagnon?

MR. CHERRICK: Yes, Your Honor, we --

QUESTION: Well, I have just looked at both of them, and one of us needs to reread them again, because I don't find anything in either of those cases that you have been arguing here.

MR. CHERRICK: In Gagnon the Court stated that the second step of a prohibition revocation hearing is

that the judge should determine whether the probationer should be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation.

Later in the Gagnon decision the Court stated as part of the due process requirements that a court must state its evidence relied on and reasons for revoking probation. There were no reasons that were articulated by the trial judge in this case on the record.

QUESTION: What do you think his reasons were on this record? Was it not the commission of a subsequent offense within weeks after he was put on probation?

MR. CHERRICK: But we --

QUESTION: Yes, but you are not complaining about the revocation, are you? You are complaining about what they did to him after they revoked it.

MR. CHERRICK: At the revocation --

QUESTION: You are not saying prohibition shouldn't have been revoked.

MR. CHERRICK: We are saying that it was simply -- we don't know what the judge did in this case. The record is silent. And the great possibility exists --

QUESTION: You are not making any factual dispute that he did commit this particular offense. There is no disagreement there, is there?

MR. CHERRICK: We are willing to defer to the state finding that he committed the offense in question.

QUESTION: Well, didn't he plead guilty?

MR. CHERRICK: No, he pled not guilty subsequently to the offense and was convicted of careless driving.

MR. CHERRICK: You are not fighting about the careless driving conviction, are you?

MR. CHERRICK: No, but the fact that it was a careless driving conviction reflects the fact that this was not a substantial probation violation. It was not a significant violation, and therefore --

QUESTION: And that in your view is a federal question in every case?

MR. CHERRICK: What is a federal question --

QUESTION: Can you answer my question? Is it a federal question in every case?

MR. CHERRICK: The process?

QUESTION: No, whether it is a substantial -- I use your language, I believe, a substantial probation violation.

MR. CHERRICK: Yes, that the judge should focus on that criteria --

QUESTION: Is that a federal question in every case?

MR. CHERRICK: A constitutional question?

QUESTION: Yes.

MR. CHERRICK: Yes. The basis for the rule in Gagnon is the Court balanced the various interests. The Court in a due process balancing context looks at the individual's interest, the state's interest, and society's interest, and we submit that all of these interests are identical in that they -- that all these interests feel that -- have an interest in probations not being revoked for arbitrary reasons.

If this Court -- this Court in Gagnon and Morrissey talked about the informed use of discretion.

QUESTION: Well, what do you say, Mr. Cherrick, the trial judge should have put on the record here before he pronounced, I revoke?

MR. CHERRICK: In this case --

QUESTION: Exactly what do you think he should have said?

MR. CHERRICK: I think he should have said Romano was driving this car, he hit his friend and drove away. Despite the fact that he let people out to take

care of this friend, and was in the hospital room, nevertheless we feel that he can no longer be rehabilitated in the community, that he is a danger to the community, that probation has failed.

If we knew that, then I think --

QUESTION: If he had said that much --

MR. CHERRICK: That would be sufficient.

QUESTION: -- you wouldn't be here now.

MR. CHERRICK: That's true, but the fact is that we don't know what he said, and moreover, we have some indication that he was prepared to revoke probation for any violation.

QUESTION: Even if he had thought all of these things without expressing them, you would not be satisfied. You would want him to state that on the record.

MR. CHERRICK: Yes, because if there is no record, there can be no appellate review.

QUESTION: So you think that Chief Justice Warren in his statement in Townsend against Seay was just wrong. You should never assume that a state judge knows what the law is. You should always assume that -- you will assume the contrary unless he states it.

MR. CHERRICK: If there is a significant liberty interest involved, I think that there must be

some protection.

QUESTION: Well, there certainly was in Townsend against Seay.

MR. CHERRICK: Well, there is so much discretion that is given to the judge in a probation revocation hearing. The Court has stated that all types of evidence can come in. There is a great deal of discretion in terms of the evidentiary proceedings.

There is not the criminal standard of review. The burden of proof is much less significant. Therefore there must be some protection of the decisionmaking process to know that the judge focused on the proper criteria..

QUESTION: Mr. Cherrick, may I ask you a question that keeps running through my mind? Supposing this judge had said, I told you at the original sentencing hearing that if you violate any condition of parole, no matter how trivial, the original sentence will be imposed.

I think that is good policy, because if I enforce that strict rule, people in general are more apt to obey the conditions of parole, and that is all I am doing is carrying out my threat. And then he went ahead.

Would that comply with the Constitution?

MR. CHERRICK: No, because while that may have the force of a threat or a deterrent effect, nevertheless if that were the rule in each case, then courts would be prepared to revoke probation for any violation, and that is against the fundamental policies of probation, which is to rehabilitate and supervise people in the community.

And once the decision was made to put someone on probation, that liberty interest involves and constitutes that decision that this person can't be --

QUESTION: Do you think at the time of sentencing that the defendant is entitled to know that the conditions are not absolute, that if it is a minor violation, that will be taken into account? Should he know what the exact facts are, or should he be misled by being told it is an absolute condition? What is the proper thing for the trial judge to do at sentencing?

MR. CHERRICK: At sentencing? I don't think there is any constitutional requirement as to what he must tell the individual. It is only once the judge has put the individual on probation that the liberty interest attaches. We also stress --

QUESTION: Mr. Cherrick, I am just curious about one more point. I don't think I agree with your position on the merits, but even if I did, do you think

that the Court of Appeals below was correct in not even giving the court, the state court an opportunity to place its findings on the record instead of just dismissing the whole proceeding?

MR. CHERRICK: Justice O'Connor, as to the remedial question, first, it is supported under Missouri law, and under Missouri law once a probation term has expired, the court must release the probationer from all custody. As that original probation hearing was unconstitutional, Romano spent the maximum term of probation is five years in jail.

The trial judge in this case, District Judge Cahill, an experienced judge -- sat on the state bench for five years, and in the same position as Judge Whipple, sat as a state judge in St. Louis -- was well familiar with this law and ruled that the probation term had expired.

So, first, we think it is a question of state law which this Court traditionally defers to lower courts to interpret state law. We would agree that -- we feel that this is the rare case. Certainly in the typical case the simple remedy is to remand for a new hearing which would comply with due process, and we do not dispute this.

The remedy in this case is unique because of

the time that has elapsed, the five and a half years in jail, the eight years between the probation violation and the revocation hearing. So this is really a unique case.

QUESTION: Counsel, what is this memorandum of findings of Judge Whipple on Page 107? He makes a whole lot of findings there.

MR. CHERRICK: Yes, but all those findings are as to the evidence. There is no discussion of the reasons. He certainly made a lot of findings as to what the evidence was of the probation violation.

QUESTION: The court further bases its decision upon the appearance and demeanor of the witnesses and the interests of the witness in the outcome of the trial, and found the victim's mother, father, and sister to be truthful and straightforward in their answers. The court further finds that while" -- what else do you want him to say?

MR. CHERRICK: I want Judge Whipple to say that, yes, there has been evidence of a violation, and now we must consider whether this probationer can no longer be maintained on probation, can he no longer be supervised in the community, is he too dangerous to be --

QUESTION: And if he just says that, that's it?

MR. CHERRICK: That's correct.

QUESTION: That's enough?

MR. CHERRICK: That's enough, because then we know his decision is not arbitrary, because then --

QUESTION: But he did all he could to say that it wasn't arbitrary. He said, I gave careful consideration.

MR. CHERRICK: We believe and we think there is a strong possibility that this judge thought that all he needed to do was find a probation violation, that he need not discuss the second --

QUESTION: Well, he didn't say that. Don't charge the judge with something that he didn't say.

MR. CHERRICK: Well, he -- the record is silent. We don't know.

QUESTION: The judge did not use the words you wanted him to use. That is your complaint.

MR. CHERRICK: Yes, but those words are important, because they reflect whether the judge focused on the proper criteria, and a decision -- if decisions -- we need a record to be certain that arbitrary decisions are not made.

QUESTION: What was not allowed in the record?

MR. CHERRICK: What was not allowed in terms

of what?

QUESTION: Yes, you complain that something wasn't in the record.

MR. CHERRICK: Right, there was no --

QUESTION: What did you offer that wasn't allowed?

MR. CHERRICK: Well --

QUESTION: What? What?

MR. CHERRICK: -- no evidence was offered, but this is -- we are --

QUESTION: Well, you didn't offer it, so what are you complaining about?

MR. CHERRICK: Because we believe it is the duty of the sentencing judge. This is part of the decisionmaking process. Under Morrissey and Gagnon the requirement to --

QUESTION: Did you file a motion for that?

MR. CHERRICK: Pardon?

QUESTION: Did you file a motion to that effect before Judge Whipple?

MR. CHERRICK: No, but --

QUESTION: Is there anything in the record that says you mentioned it to Judge Whipple?

MR. CHERRICK: It wasn't mentioned because the alternatives were in this case fairly obvious. There

really would not have been a point to tell Judge Whipple that he could have given alternatives to incarceration. The mitigating evidence was presented to Judge Whipple.

QUESTION: You want us to tell him.

MR. CHERRICK: We at least want to know that the judge focused on this criteria.

QUESTION: Did you tell him that?

MR. CHERRICK: No, we didn't tell him that, but that was the law under Morrissey and --

QUESTION: Where is that in the record?

MR. CHERRICK: Where is --

QUESTION: Where is what you told him about what Morrissey says in the record?

MR. CHERRICK: No, we did not inform him about what Morrissey said.

CHIEF JUSTICE BURGER: Do you have anything further?

ORAL ARGUMENT OF JOHN M. MORRIS, III, ESQ.,
ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. MORRIS: Just one point, Your Honor. There has been some persistent questioning about what it is that respondent in the lower court expects in the way of findings. Just in addition to what has been said and the questions that have been asked, I would like to direct the Court's attention to the District Court's

opinion, and it says -- and oddly the court says if this issue is raised there needn't be a finding.

But if it isn't raised, the court says, the trial court must express a rudimentary explanation for the rejection of alternatives. A record devoid of anything but a mere recital that alternatives have been considered and denied does not comport with justice.

So, I do dispute respondent's assertion that all one has to -- this seems to be an open-ended requirement. Not only you cannot say, well, I considered alternatives, but you have got to say, by my inference, at least, that you considered a certain number of alternatives and presumably if someone comes up with some new ones later, like apologizing in the town square, that is going to be a violation of the Constitution.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:01 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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84-465 - LEE ROY BLACK, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS AND HUMAN RESOURCES ANI

DICK D. MOORE, CHAIRMAN, MISSOURI BOARD OF PROBATION AND PAROLE, Petitioners V.

NICHOLAS J. ROMANO

id that these attached pages constitutes the original
anscript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)