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Note

PROBATION REVOCATION IN MARYLAND: THE EFFECT OF NONFINAL AND REVERSED CRIMINAL CONVICTIONS

I. INTRODUCTION

Probation is a process by which a convicted offender may avoid incarceration and effect his own rehabilitation under the supervision of a probation officer. After placing a convict on probation, a court may revoke his conditional liberty and impose custodial punishment for his original offense if he violates one or more conditions of his probation. These conditions vary, but one of the most common, and the subject of this Note, is that the probationer "obey all laws."

In two recent cases, Dean v. State and Hutchinson v. State, the

1. Escoe v. Zerbst, 295 U.S. 490, 492 (1935); Scott v. State, 238 Md. 265, 276, 208 A.2d 575, 581 (1965) ("all that is required is that the facts before him be such that the judge reasonably could be satisfied that the conduct of the probationer has not been what he agreed it would . . .."). See also Manning v. United States, 161 F.2d 827, 829 (5th Cir. 1947), cert. denied, 332 U.S. 792 (1947) ("All that is required is that the evidence and facts be such as to reasonably satisfy the judge that the conduct of the probationer has not been as good as required by the conditions of probation.").

Due process may require more than just proving a breach of a condition of supervision to justify revoking probation. A subjective determination of whether the violation warrants revocation is also contemplated. Prellwitz v. Berg, 578 F.2d 190, 193 n.3 (1978) (citing Morrissey v. Brewer, 408 U.S. 471, 490 (1972) and Canton v. Smith, 486 F.2d 733, 735 (7th Cir. 1973)). Accord, ABA STANDARDS FOR CRIMINAL JUSTICE, SENTENCING ALTERNATIVES AND PROCEDURES § 18-7.3 commentary at 513 (1980) ("incarceration should not automatically result from a violation of conditions and . . . it is, in all events, improper without detailed consideration of the importance of the violation and the risk that the defendant would pose were the defendant permitted to continue at large."). See generally Mutter, Probation in the Criminal Court of Baltimore City, 17 MD. L. REV. 309 (1957).


Maryland Court of Appeals has taken a confusing approach to the effect that a subsequent criminal conviction has on the probationer’s conditional liberty. With *Hutchinson*, Maryland joined the majority of jurisdictions that permit a conviction pending appellate review to serve as the sole basis for probation revocation. Yet in *Dean*, the Court of Appeals suggested that such a revocation may be vitiated when the subsequent conviction is reversed on appeal. Furthermore, the court in *Dean* held open this possibility even in cases where the revoking judge relied only in part on a criminal conviction pending appeal. Further analysis of these issues, however, will be more profitably undertaken against the background of some general principles governing probation revocation proceedings.

II. PROBATION REVOCATION

A. Background

Probation is not a punitive sanction; rather, it is a means of rehabilitating the offender.\(^5\) It is considered to be available as a matter of grace and discretion,\(^6\) but a trial judge enjoys considerably less freedom in revoking probation than he does in granting it.\(^7\) In this regard, Maryland’s probation law is typical. Before exercising his discretion to revoke probation, a revoking judge must be “reasonably satisfied”\(^8\) both that the probationer violated a condition of probation and that this violation did not result from circumstances beyond the probationer’s control.\(^9\) These findings are subject to reversal if clearly erroneous.\(^10\)

Constitutional requirements also restrict a judge’s discretion to revoke probation. In *Morrissey v. Brewer*,\(^11\) the Supreme Court set forth

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\(^5\) See Mutter, *supra* note 1, at 309.

\(^6\) In *Escoe v. Zerbst*, 295 U.S. 490, 492 (1935) the Supreme Court referred to the conditional freedom as a “privilege” or “an act of grace extended to one convicted of a crime.” This “privilege” rationale has been echoed by the courts. *See*, e.g., *Kaylor v. State*, 285 Md. 66, 75, 400 A.2d 419, 424 (1979).

\(^7\) *See infra* text accompanying notes 8–18.


a list of protections governing proceedings to revoke conditional liberty. It held that the judicial proceeding in which a court determines that a condition of parole has been violated must meet minimum due process standards under the fourteenth amendment. These include a written notice of the specific conditions of parole allegedly violated, a disclosure of evidence against the parolee, an opportunity to be heard, the right to confront and cross-examine adverse witnesses, a neutral and detached tribunal, and a written statement by the revoking court of the evidence relied on and reasons for revocation. In Gagnon v. Scarpelli, the Supreme Court held that revocation of probation is constitutionally indistinguishable from parole revocation. The Court also ruled that at probation revocation proceedings where the probationer may have difficulty presenting his version of disputed facts without examining or cross-examining witnesses, or presenting complex documentary evidence, the probationer has a right to the presence and assistance of counsel. In every case in which the assistance of counsel at revocation hearings is denied, the grounds for such refusal must be stated succinctly in the record. In Maryland, however, counsel may not be denied to a probationer who has not waived the right.

Despite the Morrissey-Gagnon minimum due process requirements, a probationer facing a revocation hearing is entitled to considerably less procedural protection than is a criminal defendant at trial. This informality is primarily a result of the state's lesser burden of proof and the absence of strict evidentiary rules in a revocation hearing. Evidence admissible in a revocation proceeding constitutionally

12. Id. at 489.
13. Id.
15. Id. at 782 n.3.
17. Id. at 791.
19. See supra notes 11-18.
20. See supra note 8.
21. Scott v. State, 238 Md. 265, 275, 208 A.2d 575, 581 (1965). The court drew an analogy between the imposition of original sentence and a revocation hearing: "In the determination of a proper sentence a judge may utilize information obtained outside the courtroom, information furnished by those not subject to cross-examination and sometimes hearsay . . . ." Id. See M.R.P. 761 (judge may consider pre-sentencing investigation report). See
may include evidence obtained through an illegal search and seizure, evidence obtained in violation of the *Miranda* rule, and most forms of hearsay evidence. The admissibility of such evidence is within the discretion of the trial court.

These relaxed rules and the lesser burden of proof streamline the probation revocation procedure, allowing hearings to consume much less judicial and prosecutorial resources, and thus promote a workable probation system. Without such informal procedures, a revocation judge would be unable expeditiously to take away a probationer's conditional liberty. Hence, requiring stricter procedural protections might make judges reluctant to grant probation in the first place, for fear that once granted, it will be difficult to revoke. This emphasis on efficiency, however, does not deprive the probationer of a level of fairness commensurate with the conditional nature of his freedom. As a convicted criminal, a probationer is not entitled to have his "liberty" protected by the full due process safeguards shielding unconditional

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25. Jurisdictions differ as to their willingness to accept controversial forms of evidence at revocation hearings. For example, the extent to which hearsay evidence may be used differs in many jurisdictions according to their interpretations of the *Gagnon* rule. At least one court holds that hearsay is not admissible unless the revocation judge can specifically justify its use. *See* *Commonwealth v. Davis*, 234 Pa. Super. 31, 45–46, 336 A.2d 616, 624 (1975). Some jurisdictions have gone a step further, holding hearsay evidence inadmissible provided a timely objection is made and the hearsay remains uncorroborated by the probationer himself. *See*, e.g., *Frazier v. State*, 600 S.W.2d 271, 274 (Tex. Crim. 1980).

26. *See* Note, supra note 22, at 528.
freedom.\textsuperscript{27}

\section*{B. Subsequent Criminal Convictions}

A probationer who fails to obey the law, or who is merely suspected of breaking the law, runs a considerable risk of losing his conditional liberty. This is because a judge revoking probation need be only reasonably satisfied\textsuperscript{28} that a probationer violated the condition that he "obey all laws."

Even in the absence of prosecution or conviction for a subsequent offense, a revocation judge may have sufficient independent evidence before him to conclude that a probationer committed a crime. Thus, prosecution for a subsequent criminal offense is not a prerequisite to revocation.\textsuperscript{29} Moreover, because the state's burden of proof at a criminal trial is much higher than at a revocation hearing, acquittal of criminal charges does not necessarily dictate that probation cannot be revoked on the ground that the probationer committed the crimes charged.\textsuperscript{30} In addition, if a criminal prosecution has been started based on a probationer's conduct, the probation court is not required to await conclusion of those proceedings before revoking probation based on that conduct.\textsuperscript{31}

Three variables can influence the use of a conviction as a basis for probation revocation. First, the conviction either can serve as sole evidence that the probationer broke the law, or it can be accompanied by independent evidence. Second, a conviction serving as evidence at a revocation hearing can be either nonfinal (pending appeal) or final (reversed, affirmed, or not appealed). Third, subsequent reversal of a

\begin{itemize}
\item \textsuperscript{27} See Morrissey v. Brewer, 408 U.S. 471, 480 (1971).
\item \textsuperscript{28} See supra note 8.
\item \textsuperscript{29} See, e.g., Scott v. State, 238 Md. 265, 276–77, 208 A.2d 575, 581 (1965); Riggs v. United States, 14 F.2d 5, 10 (4th Cir. 1926). The American Bar Association disagrees, saying that it is inappropriate to revoke probation "simply because the defendant has been arrested for another crime . . . to hold otherwise is effectively to adopt a principle of presumed guilt." ABA Standards for Criminal Justice § 18-7.3 commentary at 513 (1980).
\item \textsuperscript{31} Hutchinson v. State, 44 Md. App. 182, 184, 407 A.2d 359, 360 (1979), aff'd 292 Md. 367, 438 A.2d 1335 (1982) (either proof of a conviction or proof of the commission of acts constituting a crime is sufficient to support an order of revocation of probation); U.S. v. Markovich, 348 F.2d 238, 240 (2d Cir. 1965). At least one jurisdiction, however, has suggested that proceedings to revoke probation should be held in abeyance until after the conclusion of the criminal trial. See State v. Renew, 136 S.C. 302, 304, 132 S.E. 613, 614 (1926).
\end{itemize}
nonfinal conviction may affect the validity of a revocation based, in whole or in part, upon that conviction.

Although it is not clear what result will follow from each combination of these variables, the following principles can be stated with confidence. When a revocation hearing takes place during the time in which a criminal conviction is awaiting review, the overwhelming majority of jurisdictions hold that revocation need not await disposition of the appeal. Moreover, revocation may be based solely upon the nonfinal conviction; the trial judge need not consider independent evidence. A small minority of courts have taken a contrary view. See, e.g., Ledee v. State, 342 So.2d 100 (Fla. Dist. Ct. App. 1977); but see Stevens v. State, 397 So.2d 398 (Fla. Dist. Ct. App. 1981) (another panel of the same court disavowing Ledee and adopting majority rule); see also Stoner v. State, 566 P.2d 142, 143 (Cal. Crim. 1977); Long v. State, 590 S.W.2d 138, 141 (Tex. Crim. 1979).

An often-cited premise underlying the majority view is that because a criminal conviction is the end result of a trial at which the probationer was entitled to all the protections afforded a criminal defendant, the conviction is sufficient to satisfy a revocation judge that the probationer broke the law. Roberson v. State, 501 F.2d 305, 308 (2d Cir. 1974). A problem with this premise, however, is that it assumes that the defendant at trial did, in fact, receive "all the protections" entitled him under the Constitution. If a defendant has appealed his conviction on the ground that he was not given the opportunity to cross-examine a witness, for example, it is difficult to argue that he received all constitutional protections at trial. A more sensible rationale supporting sole reliance on a nonfinal conviction is the lesser burden of proof required at a revocation hearing as compared to a criminal trial. See supra note 8. See also State v. Roberson, 165 Conn. 73, 82, 327 A.2d 556, 560 (1973).

The practical effect of postponing revocation until the end of the appellate process on the conviction is to create a constitutional anomaly. A probationer found to have committed a felony on the basis of independent evidence introduced at an informal hearing can be immediately incarcerated, but a probationer who has been convicted after a full criminal trial may delay revocation through the appellate process. See Roberson, 501 F.2d at 308, 309. See also Gagnon, 411 U.S. at 782; Morrissey, 408 U.S. at 484-89.

minority of jurisdictions allow revocation to be based upon a conviction that is awaiting review only if there is independent, probative evidence tending to show that the probationer in fact committed the crime for which he was convicted.\(^{34}\) When a court revokes probation based on its finding of criminal conduct, then a reversal of a conviction resulting from the conduct ordinarily does not affect the revocation.\(^{35}\) If, however, a conviction by a different court forms the sole ground for revocation and that conviction is reversed, some courts hold that the basis for the revocation no longer exists.\(^{36}\) The theory is that a revoking judge may rely on the findings of another judicial tribunal that a probationer violated the law, but when those findings are vitiating, so are any determinations based upon them.\(^{37}\) It is thus the law in some jurisdictions that when a revoking judge places sole reliance upon a nonfinal conviction and the conviction is subsequently reversed, the revocation is rendered invalid and a new revocation hearing must be held.\(^{38}\) Less clear, however, is whether a reversed conviction may serve as a partial basis for probation revocation.\(^{39}\) This question arose in *Dean*, but as will be seen the court's opinion leaves it unresolved.

III. THE FACTS OF *DEAN* AND *HUTCHINSON*

Bruce Herbert Dean was sentenced to three years in the penitentiary on June 22, 1978 for receiving stolen goods.\(^{40}\) His sentence was suspended, and he was placed on probation subject to the

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38. *See supra* note 37.

39. In *Dean* v. State, 291 Md. 198, 203, 434 A.2d 552, 555 (1981), the Court of Appeals reversed a probation revocation order based only in part on a conviction subsequently determined to be invalid. As the analysis in Section IV of this Note will discuss, however, the presence of independent evidence supporting the revocation order in *Dean* may have been irrelevant to its decision to reverse the order. This is suggested, among other things, by the fact that the *Dean* court relied on cases in which reversal of the revocation order was based upon sole reliance on an invalid conviction. *See Dean*, 291 Md. at 203–04, 434 A.2d at 555 (1981) (citing cases).

40. *Id.*, 434 A.2d at 553.
condition, among others, that he "obey all laws." At a probation revocation hearing held February 27, 1980, the state alleged that the probationer had violated that condition.

The state introduced evidence that on November 16, 1979, the probationer was convicted of kidnapping. Dean's probation officer testified that the kidnapping conviction was at that time pending appeal to the Court of Special Appeals. The state also relied on the hearsay testimony of a police officer who had personally investigated the kidnapping case. The officer, relying on statements made by Dean's co-defendant and the alleged victims (but not upon his own personal observations), recounted the circumstances surrounding the alleged kidnapping. Additionally, the officer made an in-court identification of the probationer. Dean chose not to testify and no other evidence was presented. On the basis of this evidence, the trial court revoked Dean's probation.

Dean appealed the revocation of his probation to the Court of Special Appeals. While his revocation appeal was pending, the Court of Special Appeals reversed and remanded his 1979 kidnapping conviction on the ground that he was denied the constitutional right of informed and comparative challenge of veniremen. The Court of

41. Id.
42. Id.
43. Id.
44. Id. at 200, 434 A.2d at 553.
45. Id.
46. Id.
47. Id.
48. Id.
49. Id. at 201, 434 A.2d at 554.
50. Id.
51. Dean v. State, 46 Md. App. 536, 545-47, 420 A.2d 288, 194-95 (1980), cert. denied, 434 Md. 552 (1981). The Court of Special Appeals held that a bifurcated peremptory challenge procedure during the jury selection process denied him this constitutional right. Id. (citing Swain v. Alabama, 380 U.S. 202 (1965)). Briefly, the court reached this conclusion because of the following developments during the jury selection process: the defendant and the state agreed at the outset that the parties would be permitted 80 and 40 peremptory challenges, respectively. (This was actually 60 challenges more than the defendant was permitted and 30 more than the state was permitted under Maryland Rule 753 a 1). Thus, at least 132 veniremen were necessary to enable the defense and the state to exercise the number of challenges that had been agreed upon. The clerk of the court, however, furnished only 101 veniremen; as a result, the list of 101 was exhausted before the defense had exercised its agreed upon peremptory challenges. In allowing the defense to exercise its remaining challenges from an unknown list of prospective jurors, the trial court denied Dean his right of comparative rejection, "an important aspect of the right to peremptory challenges . . . ." Dean, 46 Md. App. at 547, 420 A.2d at 295 (citing Swain v. Alabama, 380 U.S. 202 (1965)).

It may be argued that because Dean was given 60 more peremptory challenges than
Special Appeals subsequently affirmed the lower court's judgment revoking probation, while acknowledging that Dean's kidnapping conviction had been reversed.\textsuperscript{52} The court reasoned that although sole reliance upon a judgment that is pending on appeal or has been reversed would not be proper in revoking probation, the evidence before the trial court in this case included more than just Dean's kidnapping conviction.\textsuperscript{53} The Court of Appeals reversed this decision, holding that "fundamental fairness" requires that a trial court's revocation order be reversed when based in part on a conviction subsequently reversed on appeal.\textsuperscript{54} The court did not order a new revocation hearing.\textsuperscript{55}

Frederick Hutchinson was convicted of murder in the second degree on August 14, 1976\textsuperscript{56} and, like Dean, was placed on probation for a prescribed period upon the condition that he "obey all laws."\textsuperscript{57} During the probationary period, he was convicted of rape, and he appealed.\textsuperscript{58} On June 21, 1978, the Criminal Court of Baltimore City, relying solely on this conviction, determined that Hutchinson had violated the condition of his probation that he "obey all laws" and consequently revoked his probation.\textsuperscript{59} Hutchinson appealed this revocation to the Court of Special Appeals, contending that because his conviction was pending on appeal, it could not serve as the basis for revocation of probation.\textsuperscript{60} That court held that probation may be revoked solely on the basis of a subsequent conviction, notwithstanding the pendency of an appeal.\textsuperscript{61} This decision was affirmed by the Court of Appeals.\textsuperscript{62}

In both \textit{Dean} and \textit{Hutchinson}, the revoking court had before it a criminal conviction awaiting appellate review as evidence that the probationer broke the law. At this level, the only distinction between the
two cases was that in *Dean*, unlike *Hutchinson*, the revoking judge heard independent evidence of the probationer's alleged failure to obey the law. A more important distinction between *Dean* and *Hutchinson* developed after the revocation hearing. In *Dean* the probation revocation order was on appeal to the Court of Special Appeals when that court reversed the conviction which had constituted one of the grounds for the order. In *Hutchinson*, on the other hand, the Court of Appeals considered the appeal of the revocation order before any appellate court had an opportunity to decide the appeal of the subsequent conviction which formed the sole basis for revocation.

**IV. Analysis of Dean and Hutchinson**

In *Hutchinson*, the later of the two cases, the Court of Appeals simply embraced the majority rule that a nonfinal conviction may serve as the sole basis for revocation of probation. The Court of Appeals' holding in *Dean* is less clear. Limited strictly to its facts, *Dean* holds that when a conviction is reversed because the offender's right to an informed and comparative challenge of veniremen has been violated, a probation revocation based in part upon that conviction also must be reversed, and no new hearing held, at least where the only other evidence produced at the hearing is hearsay testimony. Further understanding of *Dean* must await analysis of the following issues: a) Does *Dean* create a retroactive exclusionary rule for reversed convictions? b) If so, does *Dean* provide any guidance for the situation in which the relied-upon conviction is reversed on grounds dissimilar to the basis for reversal of *Dean*'s kidnapping conviction? c) To what extent does the *Dean* court's failure to order a new revocation hearing require that no new hearing be held in similar cases? Although *Dean* and *Hutchinson* do not provide clear answers to these questions, a useful rule nevertheless may be constructed from these two cases.

**A. Does Dean Create a Retroactive Exclusionary Rule?**

Although the court in *Dean* did not spell out the basis for its holding, several possibilities suggest themselves. First, the court may have believed that a reversed conviction, combined with hearsay testimony, simply did not constitute sufficient evidence for revocation. The opinion suggests, however, that this reading is improbable. Although the

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64. *Id*.
66. *Id*.
Court of Appeals acknowledged the trial court’s partial reliance on independent evidence, in discussing the basis for its reversal of Dean’s probation revocation it spoke only of the convictions’ reversal: “In light of the trial court’s reliance on the kidnapping conviction subsequently determined to be invalid, fundamental fairness required the Court of Special Appeals to reverse the trial court’s judgment.” The court did not discuss the sufficiency of the independent evidence and the reversed conviction combined, contrary to what one would expect were insufficiency of the evidence the basis for the court’s holding.

A second possibility is that the court regarded the conviction’s reversal as a new and material fact unavailable to the revoking judge. There are no formal rules of evidence at revocation hearings, so it may be appropriate for a revoking judge to accept a reversed conviction with the understanding that it may not be very probative. In Dean, however, the revoking judge had before him a conviction pending appeal, not a reversed conviction. Because convictions are reversed in only a small percentage of cases, the finding of guilt in a conviction pending appeal is probative evidence that the probationer broke the law. Thus, at the time of Dean’s revocation hearing, the judge probably accorded much greater weight to Dean’s kidnapping conviction than it ultimately proved to be worth. When these facts came to light before the Court of Special Appeals, “fundamental fairness” required reversal of Dean’s conviction.

The remaining possibility is a retroactive exclusionary rule. Under this view, reversed convictions are inadmissible at revocation hearings. Because the reasons for reversing the conviction existed (albeit latently) at the time of the revocation hearing, the conviction will be treated as having been reversed at that time. The revocation, if based upon the reversed conviction, must be reversed unless the conviction’s admission did not prejudice the probationer’s case.

68. Id.
69. It strains the text of Dean to read the decision as implicitly holding that because the independent evidence itself was insufficient to support revocation, the revocation order had to be reversed. The Dean court said in a footnote that in light of its holding, it did not have to consider the question of whether the probationer was denied his constitutional right to confrontation of witnesses. Dean, 291 Md. at 203–204, 434 A.2d at 555. It would be odd for the Court of Appeals to implicitly hold that hearsay evidence is insufficient to support a violation of probation because it cannot effectively be challenged and, at the same time, disclaim any opinion on the fairness of denying the probationer such a challenge.
70. See supra notes 22–25 and accompanying text.
71. The Office of the Public Defender during fiscal year 1980–81 handled 663 cases on behalf of appellants in the Court of Special Appeals. Of those, only 79 (12%) resulted in reversal. Brief for Appellant at 5, Hutchinson v. State, 292 Md. 367, 438 A.2d 1335 (1982).
72. The revocation order would have to be reversed in this event because the revoking
The court's opinion in *Dean* does not indicate clearly which of these last two readings is correct.\(^7\) It is submitted, however, that *Dean* should be interpreted as establishing a retroactive exclusionary rule, subject to certain qualifications which are discussed below.\(^7\)

Failure to recognize an exclusionary rule might cause probation to be revoked unfairly. Without such a rule, a revoking judge would be permitted to consider any reversed conviction for what it is worth and to rely on it, at least in part, in determining that a probationer broke the law. But the conviction, even if reversed before the revocation hearing, may prejudice the judge against the probationer. A prior finding of the probationer's guilt beyond a reasonable doubt may prove irresistibly persuasive to a revoking judge. On appeal, absent a rule making reliance on such evidence "error," the probationer would be forced to show that the evidence below was not sufficient for the revoking judge to be reasonably satisfied of the probationer's guilt. The presence of independent evidence at the hearing may make that burden almost impossible to carry, even though the revoking judge might have reached a contrary conclusion had he not been unduly influenced by the conviction. To permit the revocation to stand under these circumstances plainly would be unfair. A retroactive exclusionary rule would avoid this unsatisfactory result by rendering invalid a revocation based upon a subsequently or previously reversed conviction. Under the rule as applied, an appellate court would have a legal basis for addressing the crucial issue of whether such evidence prejudiced the probationer's case.

court's reliance on the reversed conviction would not be harmless error. In Maryland, the harmless error rule requires reversal if inadmissible evidence has been admitted, unless the record indicates that the factfinder was not influenced by that evidence in making its determination. Vocci v. Ambrosetti, 201 Md. 475, 484, 94 A.2d 437, 441 (1952). *See also* Conservation Co. v. Stimpson, 136 Md. 314, 333, 110 A. 495, 502 (1920). In the context of a subsequent reversal of a conviction which formed a partial basis for probation revocation, the conviction, although technically admissible into evidence while awaiting appellate review, Hutchinson v. State, 292 Md. 367, 370, 438 A.2d 1335, 1337 (1982), will be regarded as having been inadmissible at the time the revocation court received it into evidence.

73. Which of these two readings is preferable depends upon where one chooses to place the emphasis in the discussion of the only factor mentioned by the court as the basis for its holding: "the trial court's reliance on the kidnapping conviction subsequently determined to be invalid . . . ." *Dean v. State*, 291 Md. 198, 203, 434 A.2d 552, 555 (1981) (emphasis supplied). It is unclear whether the court meant to emphasize the invalidity of the conviction or the fact that its invalidity was determined subsequent to the revocation hearing.

74. *Cf.* Brown v. State, 4 Md. App. 623, 628, 244 A.2d 471, 474 (1968) (conviction unconstitutionally obtained by failure to afford defendant counsel or proper opportunity to intelligently and understandingly waive right to counsel cannot provide proper basis for revocation of previous grant of probation).
B. Grounds for Reversal: Two Rationales

An additional question raised by Dean and Hutchinson is whether a probation revocation order must be reversed in all cases when the relied-upon conviction has been reversed. It is well recognized that a distinction exists between reversal of a conviction on grounds that question the accuracy of a guilty verdict and grounds based upon police conduct that a reversal seeks to deter. For example, in many criminal cases in which a conviction is reversed, it is highly probable that the defendant broke the law. A clear case is a conviction reversed because evidence seized in violation of the fourth amendment was admitted at trial. In these cases, there is no question as to the accuracy of a guilty verdict; rather, reversal is premised on collateral policy grounds.

The court in Dean said nothing about this distinction. In noting the reversal of Dean's kidnapping conviction, however, the court specifically cited the Court of Special Appeals opinion reversing his kidnapping conviction because of a constitutional defect in the jury selection process. This reversal did not further a collateral policy goal such as deterring unlawful police conduct, but rather was based on the possible inaccuracy of the verdict.

Although Dean does not delimit the reach of its exclusionary rule, a narrow reading exempting convictions reversed for collateral policy reasons provides a workable rule. Maryland has not yet decided whether and to what extent it wants to deter illegal police conduct by not allowing unconstitutionally seized evidence to be admitted at revocation hearings. Obviously, if Maryland decided to deter investigatory excesses in this fashion, Dean should be read as creating a limitless retroactive exclusionary rule. If, on the other hand, Maryland follows the lead of other jurisdictions that have not sought to control police conduct through evidentiary rules at revocation hearings, then there is no reason to exclude convictions, retroactively or otherwise, that

76. Id. In Stone, the Supreme Court held that where the state has provided an opportunity for full and fair litigation of a fourth amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at his trial. Id. at 482. The Court noted that the exclusionary rule is "calculated to prevent, not to repair. Its purpose is to deter — to compel respect for the constitutional guaranty . . . ." Id. at 484 (citing Elkins v. United States, 364 U.S. 206, 217 (1960)). The Court also noted that this deterrence goal was "a more pragmatic ground" for the rule's justification than its prevention of the "contamination of the judicial process." Id. at 484.
78. See supra note 22 and accompanying text.
have been reversed for collateral policy reasons. Unlike convictions reversed on grounds that impugn the accuracy of the guilty verdict, these convictions are highly reliable. There is thus no danger that a revoking judge will be unduly influenced by them, whether they are reversed before the hearing or after it. To deny a trial court the access to such highly probative evidence cheats society's interest in incarcerating a probationer who has failed to obey the law.  

Limiting the retroactive exclusionary rule in this fashion may create a problem. If a probationer-defendant appeals his subsequent conviction, both on grounds that question the accuracy of the guilty verdict and grounds such as admission of evidence seized in violation of the fourth amendment, an appellate court may reverse on the latter grounds alone. Strict adherence to the modification of Dean's exclusionary rule proposed above would appear to cost the probationer his liberty based upon a determination by another tribunal which may be unreliable.

79. It may be contended that the Court of Special Appeals, in Brown v. State, 4 Md. App. 623, 244 A.2d 471 (1968), impliedly held that a conviction reversed on any constitutional grounds cannot form the basis for probation revocation (a "limitless" retroactive exclusionary rule). The court held that "if appellant's shoplifting conviction were unconstitutionally obtained, and the sole reason for the revocation of probation was the fact of that conviction, then the conviction cannot of itself provide a proper basis upon which to revoke probation." Id. at 628, 244 A.2d at 474.

Although the holding is broadly stated, the facts of the case suggest that such a broad rule should not be derived from it. The probationer in Brown had her probation revoked on the sole basis of a shoplifting conviction. Id. The record of the conviction failed to disclose, however, whether the probationer-defendant had knowingly and intelligently waived her right to counsel on the shoplifting charge before pleading guilty. Id. The court remanded for further proceedings so that the probationer could be afforded the opportunity to produce evidence that she did not knowingly and intelligently waive her right to counsel. Id. at 629, 244 A.2d at 474.

At first glance the alleged constitutional infringement may not seem to draw into question the accuracy of the finding of her guilt. The fact that a guilty plea is voluntarily made, however, does not foreclose the possibility that it is inaccurate. A defendant who has not been given the opportunity knowingly and effectively to waive the right to counsel may elect to plead guilty for reasons other than his actual guilt. For example, a defendant might plead guilty to protect a culpable relative or acquaintance. Thus, the constitutional infringement in Brown arguably bore upon the integrity of the guilty verdict and the decision should not be read as creating a limitless retroactive exclusionary rule.

80. The holding in Brown appears to resolve this problem by allowing a trial court reviewing a probation revocation order to examine the basis for the criminal conviction which formed a basis for the order. The Brown court remanded for further proceedings to let the revoking court look into the constitutionality of the subsequent conviction. Id. at 629, 244 A.2d at 474. This suggests that an unconstitutionally obtained conviction may not serve as a basis for revocation even if an appellate court has failed to reverse on grounds questioning the accuracy of the guilty verdict. The revoking judge should make the determination of constitutionality himself.

The facts in Brown make it an exceptional case and one in which it was proper for the revoking judge to look into possible constitutional problems with the conviction forming
Despite this unacceptable result, Dean's retroactive exclusionary rule need not be accorded limitless reach. That reading unnecessarily would require new revocation hearings, involving lengthy presentations of independent evidence, which would waste scarce judicial resources. A convenient solution to this dilemma is to consolidate the appeals from both the subsequent conviction and revocation, and to require the appellate court to rule at least on all challenges to the accuracy of the conviction. The appellate court, after disposing of these challenges, could apply the Dean rule with certainty. Consolidation of the criminal and revocation appeals is current practice in other jurisdictions and nothing in current Maryland procedural rules and laws prevents adoption of the practice.82

One objection to requiring an appellate court to decide all questions involving the conviction's accuracy is that such a requirement might conflict with an appellate court's own considerations of prudence and economy which normally may motivate it to avoid probing the validity of a conviction's factual basis unless necessary. If the appeals were consolidated, however, resolution of these issues could be dispositive of the companion revocation appeal. Hence the court would not be forced to make potentially unnecessary holdings.

When the conviction appeal reaches an appellate court before the revocation hearing, consolidation of appeals will not be possible. In that event it probably goes too far to require the appellate court to pass on the alleged errors impugning the accuracy of the guilty verdict when the court wants to reverse solely on collateral policy considerations. In rare cases such as these, the reversed conviction should not be admitted.

Consolidation of appeals would prevent the situation in which a conviction relied upon in a revocation proceeding is reversed after the revocation has been affirmed. This is the situation troubling Judge Davidson in her Hutchinson dissent.83 Even without consolidation of ap-

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81. See cases cited supra note 37.

82. In other contexts, appeals in Maryland criminal cases are consolidated routinely. See, e.g., State v. Priet, 289 Md. 267, 424 A.2d 349 (1981) (three separate criminal appeals challenging the trial courts' acceptance of guilty pleas consolidated by the Court of Appeals).

peals, however, there is little cause for concern. If the conviction's reversal fits the *Dean* rule, then the probationer's continuing custody would be unlawful despite the revocation's affirmance. Under these circumstances, the probationer would have a remedy under Maryland's habeas corpus statute, which provides for a de novo hearing when a prisoner's detention appears to be unlawful.

C. *The Dean Court's Failure to Remand for a New Hearing*

So far it has been possible to construct a workable rule from *Dean*. The court's unexplained failure to order a new hearing, however, especially in light of independent evidence in the case, creates a difficulty that cannot be resolved without going beyond *Dean* itself. *Hutchinson* appears to offer a solution.

Maryland Rule 874 a provides that the Court of Appeals, when it reverses a judgment, must remand for a new trial whenever "it shall appear to [the court] that a new trial ought to be had . . . ." Thus, the

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84. The Maryland habeas corpus statute, MD. CTS. & JUD. PROC. CODE ANN. §§ 3-701 to 3-707 (1980). Section 3-702 provides:

§ 3-702. Person who may apply for writ.

(a) Petition. — A person committed, detained, confined, or restrained from his lawful liberty within the State for any alleged offense or under any color or pretense or any person in his behalf, may petition for the writ of habeas corpus to the end that the cause of the commitment, detainer, confinement, or restraint may be inquired into.

(b) Procedure upon receiving petition. — Upon receiving the petition, a judge shall grant the writ of habeas corpus immediately, if it appears that the petitioner is entitled to the relief.

Federal habeas corpus is also available under 28 U.S.C. § 2254(b) (1976), provided that state remedies are exhausted. See *Hunt v. Warden*, 335 F.2d 936, 942 (4th Cir. 1964). In *Hutchinson v. State*, 44 Md. App. 182, 186 n.2, 407 A.2d 359, 361 n.2 (1979), the Court of Special Appeals acknowledged the proper use of either habeas corpus or post conviction procedures to collaterally attack a probation revocation order. In *Clay v. Wainwright*, 470 F.2d 478 (5th Cir. 1972), and *State ex rel. Roberts v. Cochran*, 140 So. 2d 597 (Fla. 1962), relief from revocation orders was achieved through habeas corpus, though it was necessary in these two cases first to establish that the subsequent convictions were invalid.

The habeas corpus remedy will not be barred by res judicata: although the issue of propriety of revocation will have been finally, and presumably fairly, litigated, a new fact will have arisen which will have altered the legal relations between the parties involved, i.e., the state and the probationer. *State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 162-63 (1945). See also *State v. Aeseman's Estate*, 18 Mich. App. 91, 104-05, 170 N.W.2d 503, 509 (1969). This new fact is the reversal of the conviction upon which the probation revocation is based.

85. M.R.P. 874 a provides:

Affirmance or Reversal With New Trial — Removal.

a. Remand for New Trial

Where the judgment from which the appeal was taken shall be affirmed or reversed by this Court and it shall appear to this Court that a new trial ought to be had, such new trial will be awarded and the case remanded to the lower court therefor.

86. *Id.*
court's failure to order a new hearing, if accorded precedential effect, may create a "no new hearing rule." Such a rule would have consequences beyond the Dean holding. Moreover, reversal without remand for a new hearing might bar, as res judicata, subsequent efforts to revoke probation based on the offense in question. This possibility would discourage the state from admitting into evidence, and the court from relying on, nonfinal convictions. That this result was intentional is suggested by the fact that Judge Davidson, who wrote the majority opinion in Dean, indicated in her dissent in Hutchinson that trial judges ought never to rely solely on a conviction pending appeal.\(^{88}\)

Despite this evidence of the court's intent, Dean's "no new hearing rule" is inconsistent with the later case of Hutchinson, which specifically held that trial courts may rely solely on a conviction pending appeal.\(^{89}\) Although Hutchinson did not address the issue of whether a new revocation hearing should be held when the relied-upon conviction was reversed, the decision suggests that a new hearing would be in order. It would make no sense to allow trial courts, and consequently the state, to rely solely on nonfinal convictions if a reversal without remand for a new hearing in effect would punish such reliance. It is true that a new hearing would give the state a "second bite at the apple" in cases where the revoking court relied solely on the conviction. But such a result is compatible with the balance struck by the probation system between societal protection and fairness to the probationer,\(^{90}\) and double jeopardy is not generally held to apply to probation revocation.\(^{91}\) A new hearing a fortiori should be held in cases like Dean, where the state proffered probative independent evidence at the first

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87. It is an open question in Maryland whether res judicata would operate as a bar under these facts. The general law of res judicata, however, suggests that the state would be unable to bring a new revocation hearing based upon the same alleged criminal conduct. This is because the parties were the same in both cases (the probationer and the state), the causes of action were the same in both cases (revocation of probation based upon committing the crime of kidnapping), and there was a final judgment on the merits in the first case. M.R.P. 870 provides that a reversed conviction is "final and conclusive." See Cook v. State, 35 Md. App. 430, 438, 371 A.2d 433, 438 (1977), aff'd, 281 Md. 665, 381 A.2d 671 (1978), cert. denied, 439 U.S. 839 (1978). In the context of probation revocation, the reversal of a probation revocation order is analogous to a reversed conviction.

In Texas, however, res judicata has been held not to bar successive attempts to revoke probation based upon the same probationary violation and fact situation. See Davenport v. State, 574 S.W.2d 73, 76 (Tex. Crim. 1978).


89. Id. at 370, 438 A.2d at 1337.

90. See supra text accompanying notes 26–27.

revocation hearing. *Hutchinson* thus implies that to the extent *Dean* established a "no new hearing rule," this rule is no longer viable.

V. CONCLUSION

The Court of Appeals' decisions in *Dean* and *Hutchinson* fail to articulate a coherent system for weighing the effect of a later conviction on probation revocation in Maryland. As the foregoing analysis suggests, however, it is possible to harmonize the two decisions and draw from them a rational system.

In this system, *Dean* stands for the proposition that if a criminal conviction is reversed on grounds bearing on the integrity of the guilty verdict, a probationer cannot be incarcerated if the revoking judge was influenced by that conviction. *Hutchinson* emphasized that this did not preclude a trial court from relying, even solely, on a nonfinal conviction. *Hutchinson* thus implies that because reliance on nonfinal convictions should be encouraged to expedite revocation proceedings, new hearings necessarily must accompany the reversal of revocation orders in the event relied-upon convictions are reversed on grounds questioning the accuracy of the trial court's finding of guilt. The burden of considering independent evidence, *Hutchinson* suggests, need be undertaken by the court and the state only in the rare event a nonfinal conviction forming a basis for revocation is overturned. *Hutchinson*'s implicit approval of streamlined revocation hearings suggests, moreover, that *Dean* should be read narrowly to reduce the amount of necessary rehearings; this result would be accomplished by forcing reversal of revocation only where the relied-upon conviction was reversed on grounds bearing on the accuracy of the trial court's verdict.

Finally, neither *Dean* nor *Hutchinson* mention the possibility of consolidating appeals of probation revocation with criminal convictions already pending appeal. In view of the difficulties ameliorated by this approach, consolidation is perhaps the missing cornerstone to an effective system suggested by these two perplexing decisions.