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Parolee Not Protected Against Unreasonable Searches and Seizures by His Parole Officer

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to produce the information is not great.[34] However, when nonemployees are admitted to production areas of the plant, the possibility of interference with production and disruption of employee discipline is always present. Whenever the threat of such disruption has been significant, the Board has been reluctant to allow union activities it might otherwise permit.[35] Therefore, in future cases the Board should not take the language of *Fafnir* at face value. Rather, it should weigh the more substantial employer interests involved and be more reluctant to permit time studies than it has been in granting information requests.

Roy J. Schmidt

Parolee Not Protected Against Unreasonable Searches and Seizures by His Parole Officer

PAROLE—SEARCH AND SEIZURE—CONSTITUTIONAL LAW.—Acting on information received from an informer whose identity was never revealed, defendant's parole officer and four narcotics agents met defendant and searched his car. The search was made without a warrant and not incident to defendant's arrest. The officers discovered heroin and arrested defendant who was thereafter convicted of unlawful possession of heroin.[1] On appeal, defendant claimed that the officers proceeded without probable cause and thus subjected him to an unreasonable search and seizure. The California District Court of Appeal for the Third District affirmed, holding that the fourth and fourteenth amendment protection against unreasonable search and seizure[2] does not extend to a parolee. *People v. Hernandez*, 229 Adv. Cal. App. 188, 40 Cal. Rep. 100 (3d Dist.), *petition for hearing denied*, 61 Adv. Cal. No. 21, Minutes 3 (1964).

In *People v. Cahan*[3] the California Supreme Court expressly incorpo-

34. Where requiring the employer to furnish the information would result in a substantial burden on the employer, the Board has been hesitant to require him to do so. See note 11 *supra*.

35. Thus, no-solicitation rules are valid when applied to employees in the selling area of a department store but are invalid when applied to nonselling areas. Maxam Buffalo, Inc., 139 N.L.R.B. 1040 (1962); Meier & Frank Co., 89 N.L.R.B. 1016 (1950). Such rules are presumed valid if they apply to working time, Peyton Packing Co., 49 N.L.R.B. 828 (1943) (dictum) (cited with approval in Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803–04 (1945)), but are invalid if they apply to nonworking time unless shown to be necessary for discipline. NLRB v. Illinois Tool Works, 153 F.2d 811 (7th Cir. 1946). A similar distinction is drawn between employees and nonemployees distributing literature on the assumption that employees are less likely to disturb plant discipline. 40 MINN. L. REV. 726 (1956); 65 YALE L.J. 423 (1956).

1. Possession of narcotics violates CAL. HEALTH & SAFETY CODE § 11500.

2. See also CAL. CONST. art. I, § 19.

3. 44 Cal. 2d 434, 282 P.2d 905 (1955). *Cahan* adopted the exclusionary rule for California six years before the United States Supreme Court extended the rule to the states in Mapp v. Ohio, 367 U.S. 643 (1961).

rated the provisions of the fourth amendment under the due process aegis of the fourteenth,[4] and adopted the rule that evidence seized by unreasonable search and seizure will be excluded to preserve due process. Until *Hernandez* the question whether the fourth amendment guarantee (and hence the *Cahan* exclusionary rule) extended to parolees remained unanswered. *People v. Denne*[5] assumed arguendo that the fourth amendment applied but held that because of the "unique relationship" between a parole officer and his parolee, a parole officer's search of a parolee's home was not an unreasonable search when the officer acted on information of parole violation obtained from an identified informer. Three subsequent district court of appeal cases reached similar results and dealt only with the reasonableness of the search involved;[6] two of these, like the instant case, involved unidentified informers. In 1958, however, the California Supreme Court held in *Priestly v. Superior Court*[7] that the identity of an informer must be disclosed to the defendant at the preliminary hearing or testimony regarding his information, necessary to establish probable cause for the search, will be inadmissible.[8]

The *Hernandez* court thought it necessary to reach a détente between the *Priestly* rule, which would exclude the evidence gathered during the search because the informer was not identified, and the rule of the *Denne* group of cases, which would make the search reasonable. Rather than distinguishing *Priestly* as not involving a parolee, the court held that a parolee is not protected against his parole officer by the fourth amendment guarantee against unreasonable search and seizure. Therefore, reasonable cause was not required, and the *Priestly* rule requiring identification of informers was inapplicable.

The court, in an opinion by Justice Friedman, rejected the doctrine of probable cause by analogizing a parolee to prison inmates who do not have the usual federal and state constitutional rights guaranteed to non-incarcerated citizens. Prison inmates may be subjected to intense surveillance and search in spite of the fourth amendment.[9] The court rea-

4. "Although this amendment, like each of the other provisions of the original Bill of Rights, applies only to the federal government . . . , '[t]he security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' . . . and as such enforceable against the states through the Due Process Clause [of the Fourteenth Amendment.]'" 44 Cal. 2d 434, 438, 282 P.2d 905, 907 (1955).

5. 141 Cal. App. 2d 499, 297 P.2d 451 (2d Dist. 1956).

6. People v. Contreras, 154 Cal. App. 2d 321, 315 P.2d 916 (3d Dist. 1957) (unidentified informer); People v. Robarge, 151 Cal. App. 2d 660, 312 P.2d 70 (2d Dist. 1957); People v. Triche, 148 Cal. App. 2d 198, 306 P.2d 616 (1st Dist. 1957) (unidentified informer).

7. 50 Cal. 2d 812, 330 P.2d 39 (1958).

8. The federal standard requires that the informer's identity be revealed unless there was enough evidence apart from his confidential communication to establish probable cause for the search. Roviaro v. United States, 353 U.S. 53 (1957). The *Priestly* rule is substantially the same, and the *Priestly* opinion describes the federal rule as "sound and workable." 50 Cal. 2d at 817, 330 P.2d at 42.

9. *Cf.* Lanza v. New York, 370 U.S. 139, 143 (1962).

soned that a parolee, although outside prison walls, is still constructively a prisoner. Even though his apprehension resembles arrest, it is in fact simply a return to custody. The court adopted this strict view of parole, reasoning that close surveillance is necessary to guard against criminal acts by parolees. Such acts cause great public outcry and endanger the parole system.

Recognizing that a parolee is still constructively a prisoner of the state does not compel utilization of the *Hernandez* approach. The court could have achieved the same result more properly by approaching the problem as one involving the reasonableness of the search rather than by denying the applicability of a constitutional guarantee. The latter approach is of questionable validity both in the immediate context and in its possible implications.

The supreme court's opinion in *In re Jones*[10] suggests the sounder approach. *Jones* involved a prisoner who complained of cruel and unusual punishment and hindrance of access to the courts. Writing for the court, Mr. Justice Peters pointed out that the fourteenth amendment applies to "persons." "A person is not deprived of all his constitutional rights by reason of his incarceration for a felony. . . . A convicted felon, although civilly dead . . . is nevertheless a 'person' entitled to the protection of the Fourteenth Amendment."[11] Thus, the California Supreme Court has recognized that the basic constitutional structure remains intact even where the rights of incarcerated prisoners are involved. Read in the light of *People v. Cahan*, *In re Jones* would lead to the conclusion that the *Hernandez* court erred in removing the constitutional right to be free from unreasonable searches and seizures from the felon Hernandez and that his conviction based upon evidence obtained through such a search deprived him of liberty without due process of law.

The presence of a constitutional guarantee to be free from unreasonable searches and seizures does not mean, however, that the content of that guarantee should be inflexible. A prison inmate could be subjected to searches and seizures to which a parolee ought not to be subjected. A parolee is a "constructive" prisoner of the state,[12] not a detained one. The extraordinary incursions of individual rights that take place in prison are justified by the necessity of keeping order in a society of criminals.[13] A parolee is a criminal who has shown "a disposition to reform

10. 57 Cal. 2d 860, 22 Cal. Rep. 478, 372 P.2d 310 (1962).

11. *Id.* at 862, 22 Cal. Rep. at 479–80, 372 P.2d at 311–12. See Cochran v. Kansas, 316 U.S. 255 (1941); *Ex parte* Hull, 312 U.S. 546 (1941).

Mr. Justice Peters opposed the California Supreme Court's denial of hearing in the *Hernandez* case. 61 Adv. Cal. No. 21, Minutes 3.

12. *In re* Marzec, 25 Cal. 2d 794, 154 P.2d 873 (1945).

13. See *In re* Ferguson, 55 Cal. 2d 663, 12 Cal. Rep. 753, 361 P.2d 417, *cert. denied*, 368 U.S. 864 (1961).

and whose reformation may reasonably be expected . . . ."[14] He lives in a normal society. The rationale that justifies complete freedom of prison officials to search an inmate does not apply as between a parole officer and his parolee. The question should be whether the search is reasonable under the circumstances.

Had it recognized that constitutional guarantees apply to all persons, the court could have noted, as did the *Denne* court, that the application of constitutional guarantees varies with the situation; it could then have considered the "unique relationship between a parole officer and his prisoner"[15] in determining the reasonableness of the search. The court could have concluded that the very nature of the relationship furnished probable cause for a parole officer's search of his parolee. This "unique relationship" could also have been employed to distinguish *Priestly*, a non-parole case, which would require identification of the parole officer's source of information. The *Hernandez* court could have found that a search by a parole officer of his parolee requires only a good faith belief on the part of the officer that parole has been violated to avoid being unreasonable. The reasoning of the court which led it to deny the applicability of the search and seizure guarantee might have been employed with equal force in holding the search of Hernandez to have been reasonable.

Denying a constitutional right to Hernandez, rather than recognizing the existence of the right and its inherent flexibility, may have serious and far-reaching implications. It is true that the court limited its decision to the situation where the parole officer is instrumental in the search and seizure; it is also true that a subsequent California Supreme Court decision has indicated that fourth amendment rights cannot be denied when a defendant's parole status is not relied upon in conducting a search.[16] Nevertheless, the *Hernandez* decision may be a dangerous precedent, for denial of one right may indicate a willingness to deny additional rights to parolees—surely a result to be discouraged. The circumstances which might be considered as making the *Hernandez* search reasonable—*e.g.*, the fact that the parole officer, not the police, conducted the search—may well be absent in future cases. By removing a constitutional guarantee, the courts have lost the flexibility necessary to preserve even the slightest semblance of privacy to the parolee.

In part, the approach in this case seems to be based on a one-sided view of parole which leaves unfulfilled underlying policies of the parole system. The importance of this system to the administration of criminal

14. Roberts v. Duffy, 167 Cal. 629, 634, 140 Pac. 260, 262 (1914).
15. 141 Cal. App. 2d at 509, 297 P.2d at 457.
16. People v. Gallegos, 62 Adv. Cal. 177 (1964) (granting fourth amendment protection where defendant's parole status not established or relied on).

justice has been stressed by the Chief Justice of the United States.[17] He believes that an enlightened prison system and an understanding parole system are the best and cheapest security against crime the nation can provide for its citizens. He has also pointed out that without an effective parole system, our prisons would be swamped, and in a few years "we would need many times the number of prisons with many times the capacity of those we have today."[18] Similarly, both case and commentary recognize that the parole system is designed to be humanitarian and reformatory.[19] Conditional liberty is granted to reform prisoners and make decent citizens out of them. The *Hernandez* court seemed to acknowledge this, pointing out that half of all parolees "reach the goal of rehabilitation."[20]

But to treat the parolee only slightly better than he was treated in prison would seem to make reform unnecessarily difficult. The court maintained that the parolee "has at least as much protection [against invasion of privacy] as he had within the prison walls."[21] This answer is unsatisfactory. A parolee is not within prison walls. He has been released because his conduct under close prison surveillance has led to the belief that if released he may become a decent citizen.[22] Why then cripple his chances to reform "as much as a cast on his leg . . . would weaken him for running"?[23] No persuasive reason appears, yet removing from a parolee one of the most basic rights of citizenship, the right to privacy and protection from unreasonable search and seizure, must inevitably handicap him in learning to exercise properly the rights and duties of free citizenship. One cannot be expected to learn to behave responsibly while his every movement is watched and restricted. A parolee should be given maximum freedom consonant with his progress; he must be given some degree of privacy in the management of his own possessions. To deprive him of this essential protection is to undermine the parole system as a valuable reformatory instrument and to subvert an individual right long considered basic to our free society.

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17. Address by Mr. Chief Justice Warren, in NATIONAL CONFERENCE ON PAROLE, PAROLE IN PRINCIPLE AND PRACTICE 26 (1957).
18. *Id.* at 29.
19. *E.g.*, People v. Denne, 141 Cal. App. 2d 499, 507–08, 297 P.2d 451, 456 (2d Dist. 1956) (dictum); *Workshop X*, in NATIONAL CONFERENCE ON PAROLE, PAROLE IN PRINCIPLE AND PRACTICE 127–34 (1957).
20. 229 Adv. Cal. App. at 194, 40 Cal. Rep. at 104.
21. *Id.* at 195, 40 Cal. Rep. at 104.
22. See Roberts v. Duffy, 167 Cal. 629, 634, 140 Pac. 260, 262 (1914).
23. Address by Mr. Chief Justice Warren, *supra* note 17, at 29.