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The Exclusionary Rule Is Not Applicable in a Parole Revocation Proceeding.

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In the light of the instant decision, there is little chance that *any act* committed during the perpetration of a felony will not be considered an act done with a conscious disregard for life and likely to result in death. It is hard not to agree with Justice Peters that the decision in *Taylor* in effect "reinstates the felony-murder rule in cases where the victim resists and kills."[42]

Remy J. Ferrario

PAROLE—DUE PROCESS—INADMISSIBLE EVIDENCE—THE EXCLUSIONARY RULE IS NOT APPLICABLE IN A PAROLE REVOCATION PROCEEDING. *United States ex. rel. Sperling v. Fitzpatrick*, 426 F. 2d 1161 (2d Cir. 1970).

Appellant was a mandatory releasee from federal prison. While on parole he was searched by two New York City policemen. Based upon evidence acquired from the search appellant was indicted in Supreme Court, New York County. The court dismissed the indictment after upholding a motion to suppress the evidence as unlawfully obtained. Shortly thereafter the federal parole board issued a warrant for the retaking of appellant, because of his confrontation with the New York police. At the parole revocation hearing, conducted by an examiner designated by the parole board, the unlawfully obtained evidence was received over appellant's objection. The parole board revoked parole. Appealing from a dismissal of a petition for writ of habeas corpus, appellant contends that the fruits of an unlawful search cannot be used to prove a violation of parole. Held—*Affirmed.* The exclusionary rule is not applicable in a parole revocation proceeding.

Denial of due proces to federal parolees initially occurred in 1935 with *Escoe v. Zerbst.*[1] Appellant's probation was suspended without a revocation hearing.[2] In his writ of habeas corpus appellant claimed that his constitutional rights had been invaded.[3] The Supreme Court ordered his release, holding that the revocation was void because of non-compliance with the probation statute[4] which required a hearing prior to revocation. The Court considered appellant's contention that as a probationer his constitutional rights had been transgressed and said:

Than The Felon—People v. Harrison (Cal. App. 1959); People v. Wood (N.Y. 1960), 48 CAL. L. REV. 847, 849 (1960).

42 Taylor v. Superior Court of Alameda County, 91 Cal. Rptr. 275, 280 (Cal. 1970).

1 295 U.S. 490, 55 S. Ct. 818, 79 L. Ed. 1566 (1935).
2 *Id.* at 491, 55 S. Ct. at 819, 79 L. Ed. at 1568.
3 *Id.* at 492, 55 S. Ct. at 819, 79 L. Ed. at 1568.
4 43 Stat. 1260; 18 U.S.C. § 725 (1925).

> In thus holding we do not accept the . . . contention that the privilege has a basis in the Constitution.[5]

The effect of this dicta has been twofold: the parolee has no rights under the Constitution, and the federal courts accept *Escoe* as authority to deny a parolee the right of due process.[6] As a result the federal parolee became a second-class citizen without the protection of due process.[7]

It was not until 1950 that a federal court reconsidered the dictum of *Escoe* and held a parolee entitled to Constitutional rights. In *Martin v. United States* a federal probation officer made detailed investigations of probationers suspected activities.[8] Searches of his property were conducted without a warrant. The court said that the fourth amendment of the Constitution protects all persons to *include probationers against unreasonable search and seizures.*[9] It appears that the effect of this case was very limited[10] and it was not until *Brown v. Kearney* that another positive application of due process to parole revocation arose.[11] The court in a per curiam decision ruled that "a parolee is entitled to constitutional protection for illegal search and seizures."[12] In application of this ruling the court declared that the parole board may not entertain "evidence of this nature when conducting revocation proceedings."[13]

Even though the majority of courts saw due process as inapplicable to federal parole revocations, a somewhat "analagous" protection arose with the concept of "basic fairness." This concept was designed to restrain the parole board in the exercise of its broad discretionary powers. In *Hyser v. Reed* five parole revocation proceedings were consolidated on appeal and in each case due process was held not to apply.[14] The

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5 295 U.S. 490, 492, 55 S. Ct. 818, 819, 79 L. Ed. 1566, 1568 (1935).

6 Comment, *Rights Versus Results: Quo Vadis Due Process for Parolees*, 1 PAC. L.J. 321 (1970).

7 Probation and parole revocation are governed by the same procedural requirements. "Congress, which is the source of both these penological devices has given no indication that the revocation of parole should be more difficult or procedurally different than revocation of probation." Hyser v. Reed, 318 F.2d 225, 236 (D.C. Cir. 1963), *cert. denied sub nom.* Jamison v. Chappell, 375 U.S. 957, 84 S. Ct. 447, 11 L. Ed.2d 316 (1963).

8 183 F.2d 436 (4th Cir. 1950), *cert. denied*, 340 U.S. 904, 71 S. Ct. 280, 95 L. Ed. 654 (1950).

9 *Id.* at 439.

10 In 1961 the right to have counsel offered to a parolee was recognized in Glenn v. Reed, 289 F.2d 462 (D.C. Cir. 1961). However, this recognition was limited to the right to have counsel provided the parolee retain one, not "that the presence of counsel is mandatory whenever a parolee appears before the Board or that parole revocation proceedings were to become adversary proceedings." Hyser v. Reed, 318 F.2d 225, 238 (D.C. Cir. 1963), *cert. denied sub nom.* Jamison v. Chappell, 375 U.S. 957, 84 S. Ct. 447, 11 L. Ed.2d 316 (1963).

11 Brown v. Kearney, 355 F.2d 199 (5th Cir. 1966).

12 *Id.* at 200.

13 *Id.*

14 Hyser v. Reed, 318 F.2d 225 (D.C. Cir. 1963), *cert. denied sub nom.* Jamison v. Chappell, 375 U.S. 957, 84 S. Ct. 447, 11 L. Ed.2d 316 (1963).

court did find however, a rationale to support the implementation of restraint upon parole revocation proceedings, without altering the *Escoe* dicta. The court reasoned that the parolee's rights rest solely with the statute granting his conditional freedom; and there had to be either an absence of compliance with the parole statute[15] or an abuse of discretion by the board to justify any judicial intervention on behalf of the parolee. The rationale behind this reasoning is evidenced by the statement, "The statutory scheme developed by Congress over many years intended that *some safeguards* be provided and that Congress left it to the board and the courts to shape such procedures."[16]

Hyser appears to be antithetical to the basic provisions of the firmly established *Escoe* dicta; because one could easily surmise that "basic fairness," however limited, would encompass some degree of constitutional protection for the parolee. However, *Hyser's* "concept of basic fairness" actually adds but another obstacle to the parolee's claims of due process. Because the court in *Hyser* chose to place "basic fairness" under the rigidly structured parole statutes and not under any constitutional provisos,[17] the parolee's rights of due process protection were again redenied in accordance with *Escoe.*

The instant case of *Sperling v. Fitzpatrick*[18] brings face to face an almost insurmountable collection of judicial precedent denying constitutional due process to a parole revocation hearing with "a massive re-examination of criminal law enforcement procedures on a scale never before witnessed."[19] The Second Circuit Court of Appeals in a case of first impression, considered the parolee's contentions that unlawfully obtained evidence could not be used against him in revoking his parole.[20] The court unequivocally held in keeping with all prior decisions that: "the exclusionary rule is not applicable in a parole revocation proceeding."[21] This ruling, by all standards, would in and of itself establish the traditional precedent for the Second Circuit by denying parolees any due process consideration in the revocation proceeding. However, the court went a step further and added to this holding the following:

> The Parole Board is thus vested with the broadest discretion *consistent with due process* to act upon reliable evidence in revoking parole.[22]

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15 18 U.S.C. § 4205-07 (1964).

16 318 F.2d 225, 246 (D.C. Cir. 1963), *cert. denied sub nom.* Jamison v. Chappell, 375 U.S. 957, 84 S. Ct. 447, 11 L. Ed.2d 316 (1963).

17 *Id.* at 243.

18 426 F.2d 1161 (2d Cir. 1970).

19 Miranda v. Arizona, 384 U.S. 436, 523, 86 S. Ct. 1602, 1653, 16 L. Ed.2d 694, 751 (1966). (Justice Harlan's dissenting opinion).

20 United States *ex. rel.* Sperling v. Fitzpatrick, 426 F.2d 1161, 1163 (2d Cir. 1970).

21 *Id.* at 1163.

22 *Id.* (emphasis added).

It is the addition of the phrase *"consistent with due process"* that establishes *Sperling* as an unprecedented hybrid. It appears that the court has attempted to establish constitutional guarantees of due process for the parolee and at the same time effectively denied petitioner these rights by its holding. The court in a subtle use of authority has undoubtedly taken the *Martin* and *Brown* exceptions to the *Escoe* dicta and established a viable precedent to be used in future cases of this nature.[23] It appears that the court in *Sperling* entertained thoughts of ruling in favor of due process for parolees, but decided that a ruling of this nature would be premature because "it would tend to obstruct the parole system in accomplishing its remedial purposes"[24] and it would force the parole officers "to spend more of their time personally gathering admissible proof."[25]

The effect of the court's recognition of due process is to provide a basis for future applications of constitutional protection to parole revocation proceedings. This is a progressive decision that can lead the way for much needed corrective procedures.

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[23] *Hyser* firmly stands for the established proposition that constitutional due process does not apply to a parole revocation hearing. *Hyser's* denial of due process specifically included evidentiary questions when that court said:

> As to the constitutional claim, it is sufficient to note that the Parole Board is not bound by the rules of evidence in considering information relating to parole violations.

However, the *Sperling* holding is not contrary to the recognition made in *Martin* and *Brown* that the parolee does have rights under the Constitution, but the court determined that *Martin* and *Brown* were limited to incidents involving police harassment.

[24] *Id.* at 1163.

[25] *Id.* at 1165.