THE FOURTH AMENDMENT: SEARCHES OF PROBATIONERS

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I. Searches of supervised offenders, generally

Many offenders on probation, parole, or other form of supervised release are subject to a condition requiring them to submit to warrantless searches by probation officers, law enforcement officers, or both. Courts generally uphold these conditions on the basic premise that offenders under community supervision "do not enjoy the absolute liberty to which every citizen is entitled." Griffin v. Wisconsin, 483 U.S. 868 (1987). As the leading cases below demonstrate, courts analyze such searches differently depending on the purpose of the search and who is doing the searching.

A. Supervisory searches by a probation officer: Special needs

Griffin v. Wisconsin, 483 U.S. 868 (1987). Probation officers searched a probationer's home without a warrant pursuant to a state administrative regulation that allowed such searches with "reasonable grounds" to believe the offender possessed contraband. The Court upheld the search, reasoning that a "State's operation of a probation system . . . presents 'special needs' beyond normal law enforcement." Because a probation officer not only enforces the law, but is also "supposed to have in mind the welfare of the probationer," the Court deemed it reasonable to dispense with the warrant requirement.

B. Investigatory searches by a law enforcement officer: Reasonableness

United States v. Knights, 534 U.S. 112 (2001). As part of a criminal investigation, a law enforcement officer searched the home of a man he knew to be on probation. The officer also knew the probationer was subject to a search condition that required him to submit to searches "at any time, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." The officer found evidence related to the criminal investigation, which the probationer then sought to suppress. He argued that the warrantless search was improper under *Griffin* because it was for investigatory rather than supervisory purposes.

The Court upheld the search, but not under a "special needs" rationale. Instead, it applied a traditional reasonableness inquiry, balancing "on the one hand, the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." As to the intrusion into the probationer's privacy, the Court noted that "[i]nherent in the very nature of probation is that probationers do not enjoy the absolute liberty to which every citizen is entitled." Moreover, the probation condition itself—of which Knights was "unambiguously informed"—further diminished his expectation of privacy. As to the governmental interest, the Court stressed that probationers are "more likely than the ordinary citizen to violate the law." The court held that the "balance of these considerations requires no more than reasonable suspicion to conduct a search of this probationer's house." Because the search at issue in the case was supported by individualized suspicion, the Court did not have to consider whether a suspicionless search by a law enforcement officer would be reasonable.

Samson v. California, 547 U.S. 843 (2006). With no individualized suspicion at all, a law enforcement officer searched a parolee who had agreed, as required by state law, "to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." The officer found drugs, which the parolee sought to suppress. Picking up where it left off in *Knights*, the Court upheld the search. As in *Knights*, the search condition itself further diminished the parolee's already-reduced expectation of privacy. Moreover, on the continuum of state-imposed punishments, "parolees have fewer expectations of privacy than probationers." Therefore, even a suspicionless search of a parolee is not unreasonable under the Fourth Amendment.

II. Search Conditions in North Carolina

A. Warrantless searches as a regular condition of probation

Legislation passed in 2009 made warrantless searches by probation officers and by law enforcement officers in certain circumstances default conditions of supervised probation under G.S. 15A-1343(b). S.L. 2009-372. The conditions apply unless the presiding judge specifically exempts the defendant by striking them from the form. This is a change from prior law, under which a warrantless search condition applied only if added by the judge as a special condition under G.S. 15A-1343(b1), and which authorized only probation officer searches.

*Old law: **Special** warrantless search conditions (offenses committed before December 1, 2009)*

G.S. 15A-1343(b1)(7). Submit at reasonable times to warrantless searches by a probation officer of his or her person and of his or her vehicle and premises while the probationer is present, **for purposes specified by the court** and ***reasonably* related** to his or her probation supervision, but the probationer may not be required to submit to any other search that would otherwise be unlawful. Whenever the warrantless search consists of testing for the presence of illegal drugs, the probationer may also be required to reimburse the Department of Correction for the actual cost of drug screening and drug testing, if the results are positive.

*New law: **Regular** warrantless search conditions (offenses committed on or after December 1, 2009)*

G.S. 15A-1343(b)(13). Submit at reasonable times to warrantless searches by a probation officer of the probationer's **person** and of the probationer's **vehicle** and **premises** while the probationer is present, **for purposes *directly* related to the probation supervision**, but the probationer may not be required to submit to any other search that would otherwise be unlawful. Whenever the warrantless search consists of testing for the presence of illegal drugs, the probationer may also be required to reimburse the Department of Correction for the actual cost of drug screening and drug testing, if the results are positive.

G.S. 15A-1343(b)(14). Submit to warrantless searches by a **law enforcement officer** of the probationer's **person** and of the probationer's **vehicle**, upon a **reasonable suspicion** that the probationer is engaged in criminal activity or is in possession of a firearm, explosive device, or other deadly weapon listed in G.S. 14-269 without written permission of the court.

1. The probation officer search condition

The new probation officer warrantless search provision uses nearly the same language as the old special condition, with minor (though perhaps not insignificant) changes. Under prior law, warrantless searches could only be conducted "*for purposes specified by the court* and *reasonably related* to the probation supervision." G.S. 15A-1343(b1)(7) (emphasis added). The new law broadens the search condition by dropping the limitation to searches conducted "for purposes specified by the court," eliminating the need for the judge to check the box on form AOC-CR-603 or AOC-CR-604 (next to what was previously special condition 13) to specify whether searches may be conducted for stolen goods, controlled substances, contraband, child pornography, or some other purpose. At the same time, the condition is narrowed by replacing the term "*reasonably* related" with "*directly* related."

The new law does not spell out a level of suspicion required for a probation officer to conduct a search without a warrant (it does for law enforcement searches, described below). Does silence in the probation officer search condition amount to tacit approval of suspicionless searches? There is no clear answer in North Carolina. In *State v. Robinson*, 148 N.C. App. 422 (2002), the court of appeals referred to and seemed to endorse the reasonable suspicion standard from *Knights*, even in the context of a warrantless search led by a probation officer. In *United States v. Midgette*, however, the Fourth Circuit suggested (albeit in dicta) that suspicionless searches are acceptable as part of a program that is, considered as a whole, reasonably tailored. 478 F.3d at 624 (4th Cir. 2007).

2. The law enforcement officer condition

The law enforcement officer warrantless search provision allows officers to search a probationer's person and vehicle with reasonable suspicion that the probationer is engaged in criminal activity or is in possession of a firearm, explosive device, or deadly weapon without court permission. Requiring probationers to submit to warrantless searches by a law enforcement officer is a new feature in North Carolina law—at least in the General Statutes. Prior to 1977, courts frequently added supervision conditions allowing searches by law enforcement officers. With the enactment of G.S. 15A-1343 in 1977, however, the legislature ended this practice, limiting warrantless searches to those conducted by a probation officer. *See* State v. Grant, 40 N.C. App. 58, 60 (1979) (invalidating on statutory grounds a probation condition allowing warrantless searches by any law enforcement officer).

The prior statutory prohibition on law enforcement searches was not, however, required as a constitutional matter. To the contrary, probation conditions allowing warrantless searches by law enforcement officers have generally been upheld, including by the Supreme Court in *Knights*. *See also* Wayne R. LaFave, *Search and Seizure*, Vol. 5, § 10.10(c). By design, North Carolina's new law enforcement warrantless search provision tracks the Court's holding in *Knights*: it limits law enforcement searches to circumstances in which an officer has reasonable suspicion that the probationer is engaged in criminal activity or has a weapon. In fact, it is more limited than the one at issue in *Knights* in that it does not allow officers to search a probationer's home without a warrant.

If either search condition (probation officer or law enforcement officer) is challenged, the State may argue that its reasonableness is beside the point, as it is consented to as a prerequisite to being on probation in the first

place. This contract theory view of probation may at one time have been appropriate in North Carolina; there are older cases analyzing probation searches as "consent searches." *See, e.g.*, State v. Mitchell, 22 N.C. App. 663 (1974). However, legislation passed in 1995 (S.L. 1995-429) removed from the law provisions allowing a defendant to "elect to serve" an active sentence. With that law repealed, a defendant probably cannot be said to consent to the conditions of his or her probation, and no rights should be deemed waived.

B. Law enforcement participation in probation officer searches

By policy, probation officers will seek the assistance of law enforcement officers to conduct a search when they feel their safety is in jeopardy. That practice is uniformly upheld. Sometimes, however, the police seek assistance from probation in conducting a search. Probationers occasionally argue that the police are improperly capitalizing on a probation officer's special search authority to evade the Fourth Amendment's usual warrant and probable cause requirements. Although a probation officer may not serve as a "stalking horse" for the police, the following cases illustrate that the presence and participation of police officers in a search conducted by a probation officer does not, standing alone, render the search invalid.

State v. Howell, 51 N.C. App. 507 (1981). A police sergeant contacted a probation officer to tell her that a probationer had drugs and stolen merchandise in her possession. The same day, the probation officer and four police officers searched the probationer's home. The court of appeals held that a probation officer's warrantless search is not necessarily invalid due to the presence, or even participation of, police officers in the search. The court noted that the probation officer had received a tip about the probationer's drug use a week before the sergeant contacted her, and that the probation officer testified that she would have asked for police help with the search in any event out of concern for her safety.

State v. Church, 110 N.C. App. 569 (1993). A warrantless probation search was initiated by SBI agents and conducted by nine law enforcement officers and only one probation officer. The court of appeals upheld the search noting that the probation officer did not commit to searching the premises until she saw marijuana plants growing outside the probationer's building, thus exercising her own independent judgment.

State v. Robinson, 148 N.C. App. 422 (2002). A law enforcement agent told a defendant's probation officer that the defendant was suspected of a crime and asked the probation officer to help search the defendant's home. The defendant argued that the agent improperly used the probation officer's search authority in lieu of obtaining a search warrant. The court of appeals disagreed. The information the agent provided to the probation officer was not only about a new crime—it would also have been a violation of probation. Therefore, it "clearly furthered the supervisory goals of probation." Moreover, the Fourth Amendment does not, after *Knights*, limit searches pursuant to probation conditions to those that have a "probationary purpose."

C. Drug screens as a warrantless search

On the old (pre–December 1, 2009) probation judgment forms, special condition #15 read "Supply a breath, urine and/or blood specimen for analysis of the possible presence of a prohibited drug or alcohol, when instructed by the defendant's probation officer." That condition is not on the new forms. It may certainly be

added in box #20, "Other," as an ad hoc condition. But does it need to be added? Drug testing is, after all, a kind of search. *See* Schmerber v. California, 384 U.S. 757 (1966). The new search condition even includes the following language: "Whenever the warrantless search consists of testing for the presence of illegal drugs, the probationer may also be required to reimburse [DOC] for the actual cost of drug screening and drug testing, if the results are positive." G.S. 15A-1343(b)(13). Thus, the condition clearly contemplates drug tests as one kind of search that may be done without a warrant. As discussed above, however, it is uncertain whether the regular warrantless search condition allows a probation officer to test for drugs *randomly*, or whether some form of individualized suspicion is required. Given this uncertainty, a court that intends for a probationer to be subject to *random* drug testing could say so explicitly in an ad hoc special condition.

D. Special conditions for sex offenders

Under G.S. 15A-1343(b2)(9), a special warrantless search provision applies for probations who are required to register as sex offenders or who committed "an offense involving the physical, mental, or sexual abuse of a minor." The condition is mandatory for offenders who fall in either category. Those offenders must:

> Submit at reasonable times to warrantless searches by a probation officer of the probationer's **person** and of the probationer's **vehicle** and **premises** while the probationer is present, **for purposes specified by the court** and **reasonably related** to the probation supervision, but the probationer may not be required to submit to any other search that would otherwise be unlawful. For purposes of this subdivision, warrantless searches of the probationer's **computer or other electronic mechanism** which may contain electronic data shall be considered reasonably related to the probation supervision. Whenever the warrantless search consists of testing for the presence of illegal drugs, the probationer may also be required to reimburse the Department of Correction for the actual cost of drug screening and drug testing, if the results are positive.

Page Two, Side Two of form AOC-CR-603 includes check-boxes for the court to impose this condition when required. Note that this condition is like the old warrantless search special condition in that the judge must specify the purposes for which the search may be conducted.

It is not clear which crimes involve the "physical, mental, or sexual abuse of a minor." The same language, likewise undefined, appears in the satellite-based monitoring law. G.S. 14-208.40. If cases arising in that context can be any guide, the following crimes involve sexual abuse of a minor: indecent liberties with children, State v. Morrow, __ N.C. App. __, 683 S.E.2d 754 (2009), *aff'd*, No. 461A09, 2010 WL 3934237 (N.C. Oct. 8, 2010); solicitation to commit indecent liberties, State v. Cowan, No. COA09-1415, 2010 WL 3965099 (N.C. Ct. App. Sept. 21, 2010); and statutory rape of a victim who is 13, 14, or 15 years old by a defendant who is at least 6 years older than the victim, State v. Smith, __ N.C. App. __, 687 S.E.2d 525 (2010).

III. The Exclusionary Rule and Probation Hearings

The exclusionary rule does not apply at probation revocation hearings in North Carolina. State v. Lombardo, 306 N.C. 594 (1982). In *Lombardo* the Supreme Court of North Carolina ruled that improperly obtained evidence that had been excluded from a criminal trial in Florida could nonetheless be admitted at a probation violation hearing in North Carolina. The court reasoned that excluding evidence from probation hearings would damage

the viability of the probation system "by allowing those like Lombardo, who show a total disregard for the system, to exclude evidence of their personal probation violations." The court also pointed out that excluding the evidence would not further the interest of deterring police misconduct when the Florida law enforcement officers who improperly seized the defendant were unaware of his supervision status. In a subsequent appeal by the same defendant, the court of appeals ruled that the latter rationale was not essential to the supreme court's holding. State v. Lombardo, 74 N.C. App. 460, 463 (1985) ("[T]he Court did not expressly qualify its holding to exclude the [exclusionary] rule's application to such proceedings upon the law enforcement official being unaware of the probationer's status."

Older Fourth Circuit case law held that the exclusionary rule applied in federal probation revocation hearings. United States v. Workman, 585 F.2d 1205 (4th Cir. 1978). That rule was overturned in United States v. Armstrong, 187 F.3d 392 (4th Cir. 1999) (refusing to apply the exclusionary rule in a federal supervised release hearing) on the basis of the Supreme Court's decision in Pennsylvania Bd. of Probation and Parole v. Scott, 524 U.S. 357 (1998) (holding that the exclusionary rule does not apply in a state parole revocation hearing).