

COME BACK WITH A WARRANT: PROTECTING THE FOURTH AMENDMENT RIGHTS OF PROBATIONERS FROM WARRANTLESS SEARCHES ABSENT THEIR CONSENT AS A CONDITION OF PROBATION

By: Jennifer Lancaster*

I. INTRODUCTION

Imagine a woman who is arrested for a traffic offense. She is a single mother with three children, and she cannot afford to pay the court-ordered costs. Since she cannot pay, the court imposes probation on her and requires her to consent to a set of conditions. One afternoon, her probation officer arrives at her home and demands to search the residence for drugs. She is home with her three small children and is immediately frightened by the officer's demand. The woman recalls the conditions she is required to follow as part of her probation and a warrantless search is not one of them. Still, the officer searches her home without a warrant because he claims to have reasonable suspicion. If this woman were living in the Eleventh Circuit, this search would be protected. However, to protect the Fourth Amendment rights of probationers who are already facing a diminished expectation of privacy, this approach should not be adopted.

Courts use probation as an alternative to incarceration.¹ The Supreme Court has emphasized the importance of establishing the conditions of probation to help prevent recidivism.² Probation affects low income persons, including a form of probation known as “pay only” probation.³ In these cases, the court gives persons the decision to either pay all of their court costs immediately or be subject to probation.⁴ These individuals have their rights

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1. Sean M. Kneafsey, *The Fourth Amendment Rights of Probationers: What Remains After Waiving Their Right to be Free from Unreasonable Searches and Seizures?*, 35 SANTA CLARA L. REV. 1237, 1248 (1995).
2. Edward J. Loya, Jr., *Probationers, Parolees, and the Fourth Amendment: Addressing Unanswered Questions*, 35 CUMB. L. REV. 101, 102 (2004).
3. HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA'S "OFFENDER-FUNDED" PROBATION INDUSTRY 25 (FEB. 2014).
4. *Id.*

taken away solely because they cannot afford to pay court costs.⁵ Thus, as a policy concern, it is important for courts to impose the most stringent standard to protect the limited rights probationers possess.

Currently, there is a circuit split regarding the Fourth Amendment standard of reasonableness that must exist when conducting a search of a probationer who has not expressly consented to warrantless searches as a condition of probation. The Eleventh Circuit determined a probationer who has not consented to warrantless searches as a condition of probation can still be subjected to a search with only minimal suspicion.⁶ Alternatively, the Fourth Circuit determined a probationer who has not consented to warrantless searches as a part of probation can only be subjected to a search based on probable cause, unless an exception to the warrant requirement applies.⁷ A standard should be adopted to enforce only the conditions explicitly provided in the probation agreement, as applied by the Fourth Circuit, to protect the Fourth Amendment rights of probationers.

First, this Comment examines the background of the Fourth Amendment and the test of reasonableness for the search of a person's home. It examines the two exceptions to the reasonableness test: the special needs exception and the consent exception. The special needs exception was developed by the Supreme Court in *Griffin v. Wisconsin*.⁸ The Supreme Court subsequently developed the consent exception in *United States v. Knights*, requiring both a consent to warrantless searches and a search based on reasonable suspicion.⁹

After an in-depth examination of *Griffin* and *Knights*, the discussion turns to exploring the Eleventh Circuit's narrow interpretation of the reasonableness standard to apply to probationers who have not consented to warrantless searches and the Fourth Circuit's holding that absent an express condition to the contrary, Fourth Amendment protections apply to probationers. Finally, the analysis discusses the reasons to follow the Fourth Circuit's approach and proposes a standard for the Supreme Court to adopt if it grants certiorari to resolve the split.

II. BACKGROUND

Probation has been used as a form of punishment for decades.¹⁰ In 1841, John Augustus, considered as the first true probation officer, began

5. *Id.*

6. *United States v. Carter*, 566 F.3d 970, 975 (11th Cir. 2009).

7. *United States v. Hill*, 776 F.3d 243, 249 (4th Cir. 2015).

8. *Griffin v. Wisconsin*, 483 U.S. 868, 875 (1987).

9. *United States v. Knights*, 534 U.S. 112, 121 (2001).

10. Marc R. Lewis, *Lost in Probation: Contrasting the Treatment of Probationary Search Agreements in California and Federal Courts*, 51 UCLA L. REV. 1703, 1707 (2004).

rehabilitating convicts by paying their bail and assisting with their transition back into society.¹¹ As the twentieth century approached, probation was widely accepted as a form of rehabilitation throughout the United States.¹² In 1948, Congress passed the Federal Probation Act, which prompted states to create their own probation systems.¹³

The Sentencing Reform Act of 1984 governs the use of probation as an alternative form of punishment imposed by courts throughout the United States.¹⁴ In 2014, the estimated average probation sentence was 21.9 months.¹⁵ As to the type of offense, 56% of probationers had felony convictions and 42% had misdemeanors.¹⁶ Only 19% of individuals were on probation for violent crimes.¹⁷ Other crimes included property damage, drug-related offenses, and traffic offenses.¹⁸

The Bureau of Justice Statistics annually publishes the percentage of individuals on probation, parole, and participation in community supervision each year.¹⁹ At the end of 2014, approximately 3,864,100 offenders were on probation, and the estimate number of individuals beginning probation totaled 2,067,100.²⁰ According to the Bureau, 25% of probationers were female, 54% non-Hispanic white, 30% non-Hispanic black, and 13% Hispanic.²¹

Probationers must follow a list of conditions, and a violation of one condition can result in serious consequences.²² The Sentencing Reform Act recommends conditions of probation for different offenses and gives courts discretion in determining which conditions to apply as part of the probationary sentence.²³ More generally, probation imposes various limits on the rights of probationers, such as a limitation on traveling outside of the state, submitting to drug tests and lie detector tests, having psychological

11. N.Y. CITY DEP'T OF PROBATION, HISTORY OF PROBATION (2016), <http://www.nyc.gov/html/prob/html/about/history.shtml>. John Augustus acted as a volunteer probation officer for a span of eighteen years. *Id.* When deciding whether to supervise an individual for probation, he considered their character, age, and the offense they committed. *Id.* The first offender he assisted was charged as a common drunkard, and he was to appear for sentencing three weeks after his release. *Id.* During that time, he was assisted by Augustus and returned to the sentencing as a sober man. *Id.*

12. Lewis, *supra* note 10, at 1707.

13. *Id.* at 1708.

14. *Article IV. Sentencing*, 44 GEO. L.J. ANN. REV. CRIM. PROC. 781, 781 (2015).

15. DANIELLE KAEBLE ET AL., PROBATION AND PAROLE IN THE UNITED STATES, 2014, 4 U.S. DEP'T OF JUSTICE 4 (Nov. 2015), <http://www.bjs.gov/content/pub/pdf/ppus14.pdf>.

16. *Id.* at 5.

17. *Id.*

18. *Id.*

19. BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2014 U.S. DEP'T OF JUSTICE 4 (Nov. 2015), http://www.bjs.gov/content/pub/pdf/ppus14_sum.pdf.

20. *Id.*

21. *Id.*

22. HUMAN RIGHTS WATCH, *supra* note 3, at 12.

23. *Article IV. Sentencing*, *supra* note 14, at 814–17.

counseling, and requirements involving certain disclosures.²⁴ Among these limits is a constraint on probationers' Fourth Amendment rights that requires probationers to consent to warrantless searches.²⁵

A. Basic Fourth Amendment Doctrine

It is important to first understand the protections provided by the Fourth Amendment before exploring how these rights are limited for probationers. The Fourth Amendment protects individuals from unreasonable searches and seizures.²⁶ However, probationers' Fourth Amendment rights can be limited if they agree to a condition allowing warrantless searches.²⁷ The Fourth Amendment of the U.S. Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.²⁸

When conducting a search, the government must comply with the Fourth Amendment.²⁹ The Supreme Court has established the "reasonableness standard" to determine if an individual's Fourth Amendment rights have been violated.³⁰ The reasonableness standard examines the "totality of the circumstances" and uses a balancing test that weighs the interests of the public against the interests of the government.³¹

1. *The Right to Privacy Protected by the Fourth Amendment*

To search a citizen, law enforcement must have probable cause.³² Probable cause is determined on a case-by-case basis³³ and is generally defined as, "a fair probability that contraband or evidence of a crime will be

24. Jaimy M. Levine, "Join the Sierra Club!": *Imposition of Ideology as a Condition of Probation*, 142 U. PA. L. REV. 1841, 1858–59 (1994).

25. *Id.*

26. *Id.*

27. *Id.*

28. U.S. CONST. amend. IV.

29. Kneafsey, *supra* note 1, at 1240.

30. Rachael A. Lynch, *Two Wrongs Don't Make a Fourth Amendment Right: Samson Court Errs in Choosing Proper Analytical Framework, Errs in Result, Parolees Lose Fourth Amendment Protection*, 41 AKRON L. REV. 651, 656 (2008).

31. *Id.* at 657.

32. Matthew S. Roberson, "Don't Bother Knockin' . . . Come on in!:" *The Constitutionality of Warrantless Searches as a Condition of Probation*, 25 CAMPBELL L. REV. 181, 187 (2003).

33. Kneafsey, *supra* note 1, at 1242.

found.”³⁴ The standard of probable cause is included within the Fourth Amendment’s warrant clause.³⁵

Warrantless searches, without probable cause, are allowed in limited circumstances.³⁶ Searches following a lawful arrest, for example, are constitutional because law enforcement has a need at the time of an arrest to secure their safety and the public’s safety.³⁷ This exception is referred to as the special needs exception.³⁸ Exceptions to searches based on probable cause also include “investigative detentions, searches incident to arrest, seizure of items in plain view, consent searches, inventory searches, administrative searches, and searches in which the special needs of law enforcement make the probable cause requirement impractical.”³⁹

2. *Special Needs Exception to the Fourth Amendment’s Reasonableness Standard*

The special needs doctrine is an exception to the standard of probable cause.⁴⁰ The reasonableness of a search is defined by the “level of suspicion” the specific search requires.⁴¹ The search of a person’s home, for example, requires the highest level of suspicion and probable cause.⁴² The Supreme Court has recognized the permissibility of searches based only on reasonable suspicion, rather than probable cause.⁴³ In *Griffin v. Wisconsin*, the Supreme Court applied the special needs doctrine to recognize a lower level of suspicion for certain situations.⁴⁴

Under the special needs doctrine, the Supreme Court used a balancing test to analyze whether the search was itself lawful, and whether it was reasonably conducted in relation to the circumstances of the particular situation.⁴⁵ The Supreme Court in *Griffin* balanced the interests of the government with the interests of the public.⁴⁶ It held that the search must be narrowly tailored to achieve a specific purpose.⁴⁷ This is a difficult burden

34. *Id.*

35. *Id.*

36. Roberson, *supra* note 32, at 188.

37. *Id.*

38. *Id.* at 189.

39. Kneafsey, *supra* note 1, at 1243.

40. *Griffin v. Wisconsin*, 483 U.S. 868, 874–75 (1987).

41. Roberson, *supra* note 32, at 189.

42. *Id.*

43. *Id.*

44. *Id.*

45. Hae Won Paik, *The Fortuity of a Search Condition: Revisiting the Fourth Amendment Rights of Juvenile Probationers and the Viability of the “Search First, Ask Questions Later” Rule*, 7 U.C. DAVIS J. JUV. L. & POL’Y 331, 336 (2003).

46. *Id.*

47. Lynch, *supra* note 30, at 660.

for a defendant to meet, who must show that his “liberty and privacy interests outweigh the state’s interest.”⁴⁸ In cases involving searches of probationers, the Supreme Court recognized special needs in situations when public safety was at risk.⁴⁹ If a special need does not exist, and the probationer has not consented to a warrantless search as part of the probation agreement, the probable cause standard for searches and seizures should still apply.

B. Searches of Probationers

Probationers have been convicted of a crime and are viewed by society as more likely to engage in future criminal activity.⁵⁰ The Sentencing Guidelines permit a court to impose a sentence of probation “if the minimum prison term in the applicable Guidelines is zero months.”⁵¹ Because they have been convicted and given probation in lieu of prison, probationers receive a diminished expectation of privacy as compared to others.⁵² *Griffin* refers to this as “conditional liberty.”⁵³

Probation is a form of “criminal sanction,” to punish individuals for their actions.⁵⁴ There can be conflicting interests between protecting the welfare of society and protecting the constitutional rights of probationers.⁵⁵ If a probationer consents to a warrantless search, less suspicion is needed to conduct the search, and probable cause is no longer required.⁵⁶ However, when a search condition is not in the probation agreement, courts disagree on the requisite level of suspicion to conduct the search.

1. Consent Exception to the Fourth Amendment’s Reasonableness Standard

Individuals on probation can consent to warrantless searches by voluntarily waiving their Fourth Amendment rights.⁵⁷ Courts have the authority to impose conditions that have the purpose of rehabilitation and

48. *Id.*

49. *Griffin*, 483 U.S. at 875.

50. Roberson, *supra* note 32, at 190.

51. *Article IV. Sentencing*, *supra* note 14, at 862. The Sentencing Guidelines are advisory for the courts to consider at their discretion. *Id.* If the prison term is recommended at ten months or longer, it is advised that probation not be considered. *Id.*

52. Roberson, *supra* note 32, at 190–91.

53. *Griffin*, 483 U.S. at 874.

54. *Id.* (quoting G. Killinger, H. Harper & P. Cromwell, *PROBATION AND PAROLE IN THE CRIMINAL JUSTICE SYSTEM* 14 (1976)).

55. Kneafsey, *supra* note 1, at 1247. There is disagreement among the circuits about whether probationers can sign away their Fourth Amendment rights to be protected from unlawful searches and seizures. *Id.* at 1238.

56. *United States v. Knights*, 534 U.S. 112, 121 (2001).

57. *Id.* at 1243.

protecting the welfare of society on probation sentences, and probationers have the right to consent or reject the conditions.⁵⁸ The conditions of probation must “reasonably relate to the crime which the defendant has been convicted of.”⁵⁹ For example, a probationer convicted of possession of drugs may be subjected to blood or urinalysis testing on a regular basis.⁶⁰ If probationers violate a condition of probation, they can be subjected to an extended period of probation or jail time.⁶¹

Consent to a warrantless search is an exception to the Fourth Amendment reasonableness standard.⁶² Probationers can consent to warrantless searches as part of their probation, and for law enforcement, the consent acts as an exception to the requirement of obtaining a warrant based on probable cause.⁶³

The arguments in favor of consent agreements as a requirement of probation emphasize the importance of monitoring probationers—to “promote the rehabilitation of the probationer, reduce recidivism, and help protect the community.”⁶⁴ Reducing recidivism is a main concern of the judicial system, and thus, there is a need to monitor probationers to discourage them from committing future crimes.⁶⁵

In *Griffin*, dissenting Justice Blackmun discussed the disadvantages of imposing strict conditions on probationers.⁶⁶ The purpose of probation officers is to act in furtherance of the probationers’ welfare and to assist probationers with their transition back into society.⁶⁷ Rehabilitation is the most important benefit of probation.⁶⁸ Furthermore, there are disadvantages to searches of a probationer’s home without any Fourth Amendment limit because it creates “a barrier to establishing any degree of trust between agent and ‘client.’”⁶⁹

In the past, courts have held that probationers’ consent to warrantless searches precludes a finding of a constitutional violation.⁷⁰ The Fourth Amendment’s standard of consent is “that of objective reasonableness.”⁷¹

58. TRIAL JUDGES CRIMINAL BENCHBOOK, *Probation and Probation Revocation*, Chapter 31 (2007), http://www.courts.mo.gov/hosted/resourcecenter/TJCB%20Published%20April%202008.2011/TJBB.htm#CH_31_Probation_files/CH_31_Probation.htm.

59. Kneafsey, *supra* note 1, at 1248–49.

60. Leonore H. Tavill, *Scarlet Letter Punishment: Yesterday’s Outlawed Penalty Is Today’s Probation Condition*, 36 CLEV. ST. L. REV. 613, 618–19 n.40 (1988).

61. TRIAL JUDGES CRIMINAL BENCHBOOK, *supra* note 58.

62. Lynch, *supra* note 30, at 657.

63. Roberson, *supra* note 32, at 192.

64. Paik, *supra* note 45, at 335.

65. *Griffin v. Wisconsin*, 483 U.S. 868, 875 (1987).

66. *Id.* at 881 (Blackmun, J., dissenting).

67. *Id.* at 886.

68. *Id.*

69. *Id.*

70. Roberson, *supra* note 32, at 192.

71. *Id.*

Courts examine whether a reasonable person would have understood the particular terms of the probation agreement, including the consent to warrantless searches.⁷²

In addition, the use of the consent to search is interpreted strictly by courts.⁷³ For example, the Ninth Circuit held that consent to warrantless searches as a part of probation cannot be used to induce a criminal investigation.⁷⁴ The consent to search provision must only be utilized when it directly relates to the terms of probation.⁷⁵ Thus, a search must be justified before law enforcement can impose a warrantless search on a probationer. If a probationer has consented to warrantless searches, a stringent standard should be applied to determine when searches can be conducted and whether there is reasonable suspicion based on surrounding circumstances.

2. *Supreme Court's Establishment of the "Special Needs" Doctrine in Griffin*

In *Griffin v. Wisconsin*, the Supreme Court held that a warrantless search of a probationer's home did not violate his Fourth Amendment rights because it was conducted pursuant to a condition of his probation, and the search was conducted based on reasonable grounds to believe the probationer violated his probation.⁷⁶ In *Griffin*, the petitioner was placed on probation and subjected to a condition that his home could be searched by a probation officer at any time as long as the officer had reasonable grounds to believe contraband was present.⁷⁷ The court examined several factors to determine if there were reasonable grounds for the search, including:

[I]nformation provided by an informant, the reliability and specificity of that information, the reliability of the informant (including whether the informant has any incentive to supply inaccurate information), the officer's own experience with the probationer, and the 'need to verify compliance with rules of supervision and state and federal law.'⁷⁸

The Supreme Court recognized the traditional view that a probationer's home is protected under the Fourth Amendment from unreasonable searches.⁷⁹ However, there are instances when law enforcement is not able

72. *Id.*

73. Lewis, *supra* note 10, at 1706.

74. *Id.*

75. *Id.*

76. *Griffin v. Wisconsin*, 483 U.S. 868, 872-73 (1987).

77. *Id.* at 870-71.

78. *Id.* at 871 (quoting WIS. ADMIN. CODE H.S.S. § 328.21(7) (1981)).

79. *Id.* at 872.

to obtain a warrant.⁸⁰ Under the special needs doctrine, the Court recognized there are circumstances in which it is impossible or impractical for law enforcement to obtain probable cause before conducting a search.⁸¹ The Court reasoned that requiring a warrant in every circumstance would impair a court's ability to closely supervise the probationer.⁸²

Thus, the Court held a warrant is unnecessary if the probation officer approves the search, and there are reasonable grounds to believe the search is warranted.⁸³ The Court found the search of the probationer's home was reasonable because the probationer agreed to the search as a condition of probation.⁸⁴ After *Griffin*, the Ninth and Fifth Circuits held that warrantless searches must at least be supported by "reasonable suspicion."⁸⁵

3. Supreme Court's Most Recent Standard for Warrantless Searches of Probationers

In *United States v. Knights*, the Supreme Court determined the standard of suspicion necessary for a search if the probationer consents to warrantless searches.⁸⁶ In that case, the defendant, Knights, signed a probation order stating that he would "submit his person, property, place of residence, vehicle, personal effects" to a search at any time without a search warrant or probable cause.⁸⁷ After law enforcement searched Knights' apartment without a warrant, Knights argued the search must be related to a condition of his probation and that this was an unrelated search.⁸⁸ Alternatively, the Government argued Knights' acceptance of the warrantless search condition of his probation was voluntary because he had the choice to either accept it or serve his time in prison.⁸⁹

To determine if the search was reasonable under the Fourth Amendment, the Court examined the totality of the circumstances.⁹⁰ In examining the totality of the circumstances, the search condition of Knights' probation diminished his "reasonable expectation of privacy."⁹¹ The Court held the search of his apartment was authorized by the search condition and supported by reasonable suspicion.⁹² Additionally, the Court held, "the

80. *Id.*

81. Roberson, *supra* note 32, at 190.

82. *Griffin*, 483 U.S. at 876.

83. *Id.* at 872.

84. *Id.* at 880.

85. Kneafsey, *supra* note 1, at 1238.

86. *United States v. Knights*, 534 U.S. 112, 114 (2001).

87. *Id.* at 114.

88. *Id.* at 116–17.

89. *Id.* at 118.

90. *Id.*

91. *Id.* at 119–20.

92. *Id.* at 121.

balance of these considerations requires no more than reasonable suspicion to conduct a search of [the] probationer's [home]."⁹³

In *Knights* the Court failed to address the issue of whether probationers' consent to warrantless searches should represent a complete waiver of their Fourth Amendment rights.⁹⁴ Instead, the Court reemphasized the standard of the totality of the circumstances and the use of the consent as a significant circumstance for inclusion in the balancing test.⁹⁵

In recent years, circuit courts have applied varied interpretations of the Supreme Court's decision in *Knights*. The Seventh Circuit relied on *Knights* and held that a search may be conducted with only reasonable suspicion if the probationer consents to warrantless searches as part of probation.⁹⁶ In *United States v. Hagenow*, petitioner was sentenced to probation and signed a condition to his probation, stating, "[y]ou shall waive any and all rights as to search and seizure during your period of probation, and submit to search of your person or property by any police officer if a search is requested by a probation officer of this court."⁹⁷

The Seventh Circuit addressed the issue that was undecided in *Knights*, namely, whether a conditional consent by a probationer to warrantless searches completely eliminated any "reasonable expectation of privacy."⁹⁸ The court cited a recent Seventh Circuit case, *United States v. Barnett*, in which the court held that a similar waiver of a probationer's Fourth Amendment rights justified a search of the home without reasonable suspicion.⁹⁹ Thus, in *Hagenow*, because the petitioner signed a waiver, the court held the special needs doctrine did not apply.¹⁰⁰

Finally, the Seventh Circuit, citing *Knights*, determined that when there is a waiver and reasonable suspicion that contraband will be found in a home, a warrant is not needed.¹⁰¹ However, the court found it difficult to define reasonable suspicion.¹⁰² The court attempted to define it as more than a hunch, based on "common-sense judgements" of how a person behaves and with some objective indication that the probationer has engaged in unlawful activity.¹⁰³

93. *Id.*

94. *Id.* at 118.

95. *Id.*

96. *United States v. Hagenow*, 423 F.3d 638, 640 (7th Cir. 2005).

97. *Id.* at 641.

98. *Id.* at 643.

99. *Id.* (citing *United States v. Barnett*, 415 F.3d 690 (7th Cir. 2005)).

100. *Id.* at 643.

101. *Id.* at 642 (citing *United States v. Knights*, 534 U.S. 112, 122 (2001)).

102. *Id.*

103. *Id.*

C. Searches When There Has Been No Express Consent to Warrantless Searches in the Probation Agreement

Since the Supreme Court's decision in *Knights*, circuit courts have disagreed on how to apply the test absent an explicit condition of probation allowing warrantless searches. The Eleventh Circuit adopted an approach expanding the use of warrantless searches to incidents in which the probationer has not expressly consented.¹⁰⁴ The Fourth Circuit, on the other hand, adopted a more defined approach that requires probable cause, unless the probationer has expressly consented to a warrantless search as a condition of probation.¹⁰⁵

Other circuits have addressed the level of suspicion needed to conduct a search of a probationer. In *United States v. Baker*, the Third Circuit held that although the probationer had explicitly consented to warrantless searches as a condition of his probation, the officers who searched the trunk of his car did not have reasonable suspicion to do so.¹⁰⁶ Mere suspicion that the probationer's trunk contained stolen items was not enough to justify the warrantless search.¹⁰⁷

Additionally, in the Sixth Circuit case of *United States v. Loney*, the defendant had expressly consented to warrantless searches as a condition of probation.¹⁰⁸ The court found there was enough evidence for the officers to reasonably suspect there was contraband in the home to conduct the search based on "multiple failed drug tests" and defendant's "extensive drug past."¹⁰⁹ The Sixth Circuit held reasonable suspicion requires, "'articulable reasons' and 'a particularized and objective basis' for their suspicion of a parole violation."¹¹⁰ In the Third and Sixth Circuit cases, the probationers agreed to a warrantless search condition, and only then did the courts allow a standard of reasonable suspicion as a basis to conduct the search. Under the Eleventh Circuit's approach, a condition within the probation agreement is not needed to conduct a warrantless search of a probationer. Instead, the Eleventh Circuit uses a diminished reasonableness standard, requiring only reasonable suspicion even when the probationer has not consented to warrantless searches as a condition of probation.

104. *United States v. Carter*, 566 F.3d 970, 975 (11th Cir. 2009).

105. *United States v. Hill*, 776 F.3d 243, 249 (4th Cir. 2015).

106. *United States v. Baker*, 221 F.3d 438, 444-45 (3rd Cir. 2000).

107. *Id.* at 445.

108. *United States v. Loney*, 331 F.3d 516, 518 (6th Cir. 2003).

109. *Id.* at 523.

110. *Id.* at 521 (quoting *United States v. Payne*, 181 F.3d 781, 788 (6th Cir. 1999)). Under the *Griffin* analysis, there is a special need to reduce the level of suspicion in cases involving probationers to only require reasonable suspicion to conduct a search. *Id.* at 520-21.

1. *Diminishing the Privacy Rights of Probationers*

The Eleventh Circuit has applied a narrow interpretation of *Knights*. In *United States v. Yuknavich*, the Eleventh Circuit extended searches based only on reasonable suspicion to every person on probation, even when there was not an express condition in the probation agreement.¹¹¹ Additionally, in the Eleventh Circuit case of *United States v. Carter*, the petitioner, Carter, argued that the search of his home could not be based solely on reasonable suspicion without a condition of probation that reduces his expectation of privacy.¹¹² The court agreed that mere probationary status is insufficient to subject probationers to searches based only on reasonable suspicion.¹¹³ However, the court applied the balancing test used in *Knights* and held the search did not violate Carter's Fourth Amendment rights.¹¹⁴

In *Carter*, the Eleventh Circuit extended *Knights'* reasoning, determining that the government interests outweighed the probationer's privacy interests.¹¹⁵ Additionally, the court placed emphasis on the condition that Carter submit to visits by the probation officer as part of his probation; the court failed, however, to consider Carter's lack of consent to warrantless searches of his home.¹¹⁶ Instead, the Eleventh Circuit relied on the "home visits" condition to diminish Carter's privacy rights and allow the warrantless search, supported solely by the government's interest in supervising an individual on probation.¹¹⁷

2. *A Focus on Protecting the Fourth Amendment Rights of Probationers Who Have Not Consented to Warrantless Searches*

Recently, the Fourth Circuit refused to allow a standard of reasonable suspicion in a case involving a probationer who did not expressly consent to warrantless searches as a condition of probation.¹¹⁸ In *United States v. Hill*, defendant, Eric Barker, was on probation; as part of his probation, he agreed to notify his probation officer of any change of residence and consented to a condition permitting his probation officer to visit his home and take items of contraband in plain view.¹¹⁹ Law enforcement suspected Barker was attempting to move without notifying his probation officer, and

111. *United States v. Carter*, 566 F.3d 970, 974 (11th Cir. 2009) (citing *United States v. Yuknavich*, 419 F.3d 1302 (2005)).

112. *Id.* at 973.

113. *Id.*

114. *Id.*

115. *Id.* at 974.

116. *Id.*

117. *Id.* at 975.

118. *United States v. Hill*, 776 F.3d 243, 245 (4th Cir. 2015).

119. *Id.*

subsequently, law enforcement completed a protective sweep of Barker's apartment and a full walk-through, allowing a drug dog to sniff around.¹²⁰ Barker claimed the walk-through and the use of the drug dog violated his Fourth Amendment right to protection from warrantless searches.¹²¹

The Fourth Circuit cited its decision in *United States v. Bradley*, which held that "a parole officer must secure a warrant prior to conducting a search of a parolee's place of residence even where, as a condition of parole, the parolee has consented to periodic and unannounced visits by the parole officer."¹²² The defendant in *Hill* only consented to home visits in his probation agreement; he did not, however, consent to random warrantless searches of his home.¹²³

The Fourth Circuit analyzed whether *Griffin* and *Knights* overruled its prior holding on this issue.¹²⁴ The court determined it did not because *Griffin* and *Knights* both involved an explicit condition that allowed warrantless searches of the probationer's home.¹²⁵ The Fourth Circuit ultimately held that law enforcement may not search a probationer's home when there is no probation condition to warrantless searches, unless "they have a warrant supported by probable cause."¹²⁶ The Fourth Circuit's ruling adequately addressed both the needs of law enforcement in protecting society and the needs of probationers in protecting their Fourth Amendment right from unlawful searches and seizures.

III. ANALYSIS

The main purpose of probation is to "rehabilitate the offender."¹²⁷ To infringe on the probationer's fundamental rights, the infringement must be precisely related to the purpose of probation.¹²⁸ Conditions are applied as part of the contract theory of probation.¹²⁹ Under this theory, probationers must sign a contract, which acts as a "stipulation agreeing to certain terms in return for conditional liberty."¹³⁰ These terms set out their rights within the

120. *Id.*

121. *Id.*

122. *Id.* at 248 (quoting *United States v. Bradley*, 571 F.2d 787, 789 (4th Cir. 1978)).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 249.

127. Tavill, *supra* note 60, at 623.

128. Levine, *supra* note 24, at 1846.

129. HOWARD ABADINSKY, PROBATION AND PAROLE: THEORY AND PRACTICE 46 (Pearson Education, Inc. ed., 10th ed. 2009).

130. *Id.*

period of probation.¹³¹ Conditions of probation should be related to the protection of members of society and the rehabilitation of probationers.¹³²

The Supreme Court held that the conditions of probation act to “prohibit, either absolutely or conditionally, behavior that is deemed dangerous to the restoration of the individual into normal society.”¹³³ As prisons and jails become overcrowded and funding to run these facilities diminish, other forms of sentences, such as parole, are used more often as a form of punishment and supervision.¹³⁴ For this reason, it becomes more important for courts to carefully draft the conditions of each individual on parole and probation.¹³⁵ Realistic provisions lead to less violations and more attainable goals in completing sentences.¹³⁶

On the other hand, vague conditions make it difficult for probationers to comply with the terms of their probation agreements.¹³⁷ When drafting conditions, courts need to clearly set out each condition so individuals know exactly what is expected of them and exactly how to comply with each condition to successfully complete their probation.¹³⁸ The conditions must be clear enough to guide the probationer during the probationary sentence, and the conditions should not be extremely difficult to meet.¹³⁹

Vague conditions increase the risk of recidivism and contribute to the issue of overcrowded prisons and jails.¹⁴⁰ There are a variety of factors that have contributed to the increase in revocation of probation. One of the major factors is “an increase in the number of conditions of probations.”¹⁴¹ The probationers with more conditions as part of their probation typically have

131. *Id.*

132. Tavill, *supra* note 60, at 622.

133. *Morrissey v. Brewer*, 408 U.S. 471, 478 (1972).

134. *Id.* at 477–78.

135. Pamela M. Casey et al., USING OFFENDER RISK AND NEEDS ASSESSMENT INFORMATION AT SENTENCING: GUIDANCE FOR COURTS FROM A NATIONAL WORKING GROUP 17 (Nat’l Center for State Courts ed. 2011), <http://www.ncsc.org/~media/Microsites/Files/CSI/RNA%20Guide%20Final.ashx>.

136. *Id.*

137. Tavill, *supra* note 60, at 630.

138. Mackenzie Doris Layton, *Probation and Parole: History, Goals, and Decision-Making*, ENCYCLOPEDIA OF CRIME AND JUSTICE (2002), <http://www.encyclopedia.com/doc/1G2-3403000205.html>.

139. Levine, *supra* note 24, at 1857.

140. Layton, *supra* note 138.

141. *Id.* The factors of increased revocation include:

- (1) the shift toward control-oriented practices of community supervision; (2) the law-enforcement background of new probation/parole officers (as opposed to the social work background of the past); (3) an increase in the number of conditions of probation; (4) improvement in the methods of monitoring violations; (5) the more serious offender placed on community supervision caseloads; and (6) an increase in probation and parole caseloads.

Id.

more violations.¹⁴² This evidence shows the importance of carefully drafting conditions and tailoring those conditions to the individual who is required to follow them.¹⁴³ If certain conditions are not included within the carefully drafted probation sentence, additional conditions should not later be implied.

A. The Eleventh Circuit's Application of *Knights* to the Absence of a Consent to Warrantless Searches is Against Public Policy

An individual's fundamental rights should not be infringed unless it is absolutely necessary to protect the public.¹⁴⁴ If a court decided not to include a warrantless search condition of the probationer's home or personal belongings, it can be inferred that the condition was deemed unnecessary because each condition in the probationary sentence should be narrowly tailored to the individual needs of the probationer.¹⁴⁵ Although probationers do not have the same extent of rights as an ordinary citizen, they are still afforded protection of their Fourth Amendment rights.¹⁴⁶

1. *The Eleventh Circuit's Approach Violates the Fourth Amendment Rights of Probationers*

Under the standard established in *Knights*, warrantless searches of a probationer must include both a search based on reasonable suspicion and be included as a condition of the defendant's probation.¹⁴⁷ However, the Eleventh Circuit determined a search can still be conducted on the basis of reasonable suspicion, even when a probationer's sentence does not include a condition to warrantless searches.¹⁴⁸ This approach is in direct conflict with the Supreme Court's decision in *Knights*.¹⁴⁹

The purpose of probation is to reintroduce individuals back into society with the goal of serving their probationary sentence, while preventing recidivism.¹⁵⁰ The conditions of probation are carefully drafted and considered with respect to the probationers' needs as part of their sentence.¹⁵¹

142. *Id.*

143. *Id.*

144. Levine, *supra* note 24, at 1859.

145. CASEY, *supra* note 135, at 17.

146. Sunny A. M. Koshy, *The Right of (All) the People to Be Secure: Extending Fundamental Fourth Amendment Rights to Probationers and Parolees*, 39 HASTINGS L.J. 449, 466 (1988).

147. Jeff Welty, *Warrantless Searches of Computers and Other Electronic Devices*, 12 (April 2011), <http://www.ncids.org/Defender%20Training/2011SpringConference/WarrantlessSearchesComputers.pdf>.

148. *Id.*

149. *United States v. Knights*, 534 U.S. 112, 121 (2001).

150. Wayne A. Logan, *The Importance of Purpose in Probation Decision Making*, 7 BUFF. CRIM. L. REV. 171, 177 (2003).

151. Layton, *supra* note 138.

If a condition is not directly included within the probationer's sentence, the condition should not later be implied by law enforcement or the judicial system. The probation system should not further reduce the probationer's rights unless there is proper justification.¹⁵² If there is no direct consent, and law enforcement lacks probable cause for a warrant, then an officer must have the proper grounds to use one of the additional exceptions to the warrant requirement.¹⁵³ These safeguards are put in place to protect the safety and welfare of society, while protecting the rights of the probationer, even though those rights may be diminished as a result of probation.¹⁵⁴

In addition, requiring probable cause to obtain a warrant before searching a probationer's home would not be an overly strenuous obstacle for law enforcement.¹⁵⁵ Law enforcement officers would only need to show the facts and circumstances that would "lead a prudent person to believe that seizable evidence" will be found if a search is conducted.¹⁵⁶ The evidence is used by a court to examine the totality of the circumstances and determine if a search is proper.¹⁵⁷

Furthermore, there is a wide-range of evidence that can be used to obtain probable cause, including prior contact with the probationer, "hearsay reports," and "personal observations" by law enforcement.¹⁵⁸ The probable cause standard for the warrant requirement provides full protections for probationers' Fourth Amendment rights if they have not consented to warrantless searches as part of their probation agreement, and it provides the necessary protection for members of society.¹⁵⁹

B. The Fourth Circuit Correctly Balances the Interests of the Public with the Fourth Amendment Rights of the Probationer

1. If Consent is Not Given, an Exception to the Warrant Requirement Should Be Required

Under the Fourth Circuit's approach, a parole officer must obtain a warrant to search a probationer's home if there is no applicable exception to the warrant requirement, and the probationer has not given consent as a condition of probation.¹⁶⁰ When granting probation as a sentence, a judge considers several different factors, including the crime committed, the

152. Koshy, *supra* note 146, at 471.

153. *Id.* at 476.

154. *Id.* at 466.

155. *Id.* at 478.

156. *Id.* at 454.

157. Paik, *supra* note 45, at 338.

158. Koshy, *supra* note 146, at 456.

159. *Id.* at 480.

160. *United States v. Hill*, 776 F.3d 243, 249 (4th Cir. 2015).

defendant's criminal record, rehabilitation, age, and remorse, and the community's view on the crime committed.¹⁶¹

Additionally, the conditions of probation are carefully drafted after a judge grants a sentence of probation.¹⁶² The conditions of probation should be tailored to the individual needs of the defendant.¹⁶³ A condition requiring the probationer to consent to a warrantless search of the home or private possessions is a condition that may be included within a probationer's sentence, but it is not a required condition of every individual on probation.¹⁶⁴

In drafting the individual conditions of probation, an additional factor to consider is that the typical duration of probation generally ranges from two to five years.¹⁶⁵ Thus, probationers' privacy is diminished for an extended period of time.¹⁶⁶ The probationer's individual needs are considered when deciding which conditions to enforce during the probation sentence.¹⁶⁷ Thus, if a probationer has not consented to warrantless searches as a part of probation, a probation officer should not be able to enter a probationer's home without either a warrant or an applicable exception to the warrant requirement.¹⁶⁸

2. Conditional Consent to Warrantless Searches Should Not Act as a Waiver of a Probationer's Fourth Amendment Rights

Searches performed pursuant to a conditional consent of probation should be "directly related" to supervising the individual on probation.¹⁶⁹ The Fourth Amendment protects people from unreasonable searches and seizures.¹⁷⁰ The warrant requirement ensures law enforcement has proper justification before encroaching on an individual's Fourth Amendment rights.¹⁷¹ A conditional consent to a warrantless search should only be allowed if explicitly stated in a probation agreement.¹⁷²

Unless the search applies under one of the specific exceptions to the warrant requirement, courts require a warrant supported by the presence of probable cause.¹⁷³ Although the Supreme Court has stated that probationers

161. ABADINSKY, *supra* note 129, at 31.

162. *Id.*

163. *Id.* at 34.

164. *Id.*

165. *Id.* at 35.

166. *United States v. Hill*, 776 F.3d 243, 249 (4th Cir. 2015).

167. ABADINSKY, *supra* note 129, at 34.

168. *Hill*, 776 F.3d at 249.

169. Welty, *supra* note 147, at 12 (quoting G.S. 15A-1343(b)(13)).

170. U.S. Const. amend. IV.

171. Koshy, *supra* note 146, at 454.

172. *Hill*, 776 F.3d at 249.

173. Koshy, *supra* note 146, at 462.

are subject to a diminished expectation of privacy, they are still guaranteed some level of privacy.¹⁷⁴ The Supreme Court refers to the Fourth Amendment as the “very essence of constitutional liberty.”¹⁷⁵

Thus, when a condition to warrantless searches exists, there must still be a standard of reasonableness applied before conducting that search.¹⁷⁶ When determining whether reasonableness exists, the court should consider, “the purposes of probation, the extent to which the full constitutional guarantees available to nonprobationers should be accorded probationers, and the legitimate needs of law enforcement.”¹⁷⁷ Before conducting a search, reasonable suspicion must exist to prevent deprivation of probationers’ Fourth Amendment rights.¹⁷⁸ If the condition is interpreted as a complete waiver of their Fourth Amendment rights, then it may open the flood gates and deprive probationers of additional Constitutional rights, including the right to privacy, the right to free speech, and the right of freedom of association.¹⁷⁹

Additionally, there is doubt as to whether the probationer can refuse to consent to the warrantless searches without fear of incarceration, which suggests the consent is not truly voluntary.¹⁸⁰ Therefore, consent to this condition should not further imply a complete waiver of probationers’ Fourth Amendment rights. Probationer rights should only be limited to the extent explicitly provided within the probation agreement. The conditions provided are designed to assist probationers in completing their sentences, while simultaneously protecting the public from future criminal activity.¹⁸¹

3. The Fourth Circuit’s Approach Encourages Trust and Helps Strengthen the Relationship Between Probationers and their Probation Officers to Prevent Recidivism

The relationship between a probationers and their probation officer should be one of trust and guidance, as well as reinforcement to assist in the completion of probation.¹⁸² Probation officers have a “quasi-judicial role,” in that they have a large role in deciding which violations to report.¹⁸³

174. *Id.* at 471.

175. *Id.* at 462 (quoting *Gouled v. United States*, 255 U.S. 298, 304 (1921)).

176. Roberson, *supra* note 32, at 188-89.

177. Levine, *supra* note 24, at 1861; *see also* *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 262 (9th Cir. 1975).

178. Paik, *supra* note 45, at 345.

179. Tavill, *supra* note 60, at 632-33.

180. Koshy, *supra* note 146, at 468.

181. Kneafsey, *supra* note 1, at 1247.

182. Julie S. Williamson, *Search and Seizure Rights of Parolees and Probationers in the Ninth Circuit*, 44 *FORDHAM L. REV.* 617, 636 (1975), <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2199&context=flr>.

183. ABADINSKY, *supra* note 129, at 38.

Largely, a probationer officer's attitude towards a probationer can influence a probationer's interactions and successful completion of the probationary sentence.¹⁸⁴ The probation officer is to act as a guide throughout the probationary period.¹⁸⁵ This role encourages both a positive relationship and frequent communication.¹⁸⁶

In recent years, there has been an increase in violations of conditions by probationers.¹⁸⁷ When probationers commit minor violations, the matter can be handled by their probation officer, rather than by the sentencing judge.¹⁸⁸ Generally, when there is a technical violation of one of the conditions, the sentencing judge will incarcerate the defendant.¹⁸⁹ However, a probation officer can address the violation and help prevent the probationer from committing future violations.¹⁹⁰ In some states, when a serious violation occurs that is still not severe enough to warrant a hearing before the sentencing judge, the probation officer conducts hearings with the defendant.¹⁹¹ If a hearing is warranted, it is generally easier to prove a probationer violated a condition of probation than to prove an individual committed a crime, and thus, probationers are frequently found guilty of the violation.¹⁹²

By allowing warrantless searches to apply to probationers in a way that diminishes their Fourth Amendment rights, probationers are discouraged from respecting the legal process.¹⁹³ Warrantless searches also distort trust and confidence in the probation officer who, despite the absence of a condition to warrantless searches, can give themselves the authority to search the probationer's home under the approach established by the Eleventh Circuit.¹⁹⁴ The Supreme Court stated, "[t]he parole officers are part of the administrative system designed to assist parolees and to offer them guidance."¹⁹⁵ The Eleventh Circuit's approach eliminates the trust that should exist between probationers and their probation officers, and contributes to recidivism by not encouraging an open line of communication during the completion of the probationary sentence.

184. *Id.*

185. Williamson, *supra* note 182, at 636.

186. *Id.*

187. Layton, *supra* note 138.

188. ABADINSKY, *supra* note 129, at 36–37.

189. *Id.* at 37.

190. *Id.*

191. *Id.*

192. *Id.* at 38.

193. Koshy, *supra* note 146, at 478–79.

194. *Id.* at 478.

195. *Morrissey v. Brewer*, 408 U.S. 471, 478 (1972).

C. The Supreme Court Should Adopt a Similar Approach on the Standard of Reasonableness as Adopted by the Fourth Circuit

If the Supreme Court grants certiorari to address the circuit split on the standard of reasonableness that should be applied in the absence of an explicit condition to warrantless searches, the Court should adopt an approach similar to the Fourth Circuit's to protect both society and the rights of probationers.¹⁹⁶ When a condition allowing warrantless searches is not expressly stated in the probation agreement, the standard of reasonable suspicion should not apply. Rather, an officer should have probable cause and be held to the Fourth Amendment warrant requirement before conducting a search, unless a justifiable exception to the warrant requirement applies. Alternatively, when there is a condition explicitly stated in the probation agreement, an officer may only use reasonable suspicion to conduct the search, as established by the Supreme Court in *Knights*.¹⁹⁷

The presence of a condition to warrantless searches should not be interpreted as a waiver of probationers' Fourth Amendment rights. Although they receive a diminished expectation of privacy, probationers should receive Fourth Amendment protection from unreasonable searches and seizures.¹⁹⁸ This provides protection to low income defendants who may be placed on probation because they cannot afford to pay court costs. There must be a clear standard to inform probationers of their limitations while on probation. If the court does not deem a condition important enough to include within the probation agreement, it should not later be applied. As a policy reason, this approach would encourage judges to carefully consider the conditions to include as part of probation to assist probationers in completing their sentence and prevent recidivism.

IV. CONCLUSION

While on probation, probationers are subjected to a diminished right of privacy and must follow the conditions set forth in their probation agreement. The Eleventh Circuit has further diminished probationers' Fourth Amendment rights by adopting an approach that allows a warrantless search based on reasonable suspicion, without an explicit condition included in the probationary agreement. The probable cause requirement in the absence of a consent to warrantless searches acts as both a way to supervise a probationer and protect society. The Fourth Circuit's approach encourages open communication and trust among probationers and their probation

196. *United States v. Hill*, 776 F.3d 243, 249 (4th Cir. 2015).

197. *United States v. Knights*, 534 U.S. 112, 121 (2001).

198. *Hill*, 776 F.3d at 248.

officers. Additionally, it encourages courts to carefully decide and tailor the conditions of probation to the individual. Thus, if a probation agreement does not explicitly include a condition to consent to warrantless searches, officers should not have the authority to enter probationers' homes at any time during the probationary sentence for the sole reason that they are on probation.

