1-1-1995

The Fourth Amendment Rights of Probationers: What Remains After Waiving Their Right to be Free from Unreasonable Searches and Seizures?

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COMMENTS

THE FOURTH AMENDMENT RIGHTS OF PROBATIONERS: WHAT REMAINS AFTER WAIVING THEIR RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES?

I. INTRODUCTION

In May 1991, Tyrell was placed on probation as the result of a criminal conviction. As a condition of probation, Tyrell consented to submit to a search of his person and property, at any time with or without a warrant, by any law enforcement officer, probation officer or school official.

Five months later, Tyrell and two of his friends attended a football game. Tyrell carried marijuana and one of his friends carried a long fixed blade knife. Police officers attended the game because the previous week there had been a gang fight where a shooting had occurred. Tyrell and his friends drew the attention of the officers because they were wearing heavy clothes in weather that exceeded eighty degrees. Upon learning that Tyrell and his friends were members of the gang involved in the shooting the previous week, the officers stopped and searched individuals in the group. They discovered the blade on Tyrell’s friend and found the marijuana on Tyrell.

These facts are similar to those recently considered by the California Supreme Court in In re Tyrell J. In Tyrell J., the court considered whether the search violated the Fourth Amendment due to the fact that the searching officer had no knowledge of Tyrell’s probation condition. It held that the search of Tyrell was constitutional due to Tyrell’s probation

1. 876 P.2d 519, 521 (Cal. 1994). The only material distinction is that in Tyrell J., the defendant was a minor. Id. In California, adult probationers have the option of rejecting the option of probation, whereas juveniles do not. Id. at 527.

2. Id. at 521.
condition. In analyzing this issue, this comment also concludes that such searches are constitutional. In reaching this conclusion, the comment first considers the extent to which probationers may consent to waive their Fourth Amendment rights as a condition of probation. Second, this comment examines the relevance of the searching officer's knowledge of such consent.

Currently, conflicting authority exists at both the state and federal levels as to whether probationers may completely waive their Fourth Amendment Rights. Relying on the United States Supreme Court decision of Griffin v. Wisconsin, the Courts of Appeals for the Fifth and Ninth Circuits have found that all searches of probationers must be supported by, at least, a showing of reasonable cause. Reaching the opposite conclusion, the California Supreme Court has held that the search of a probationer is only limited by the scope of a probationer's "search condition."

Only California has addressed the second issue, the relevance of a searching officer's knowledge of a probationer's search condition. In Tyrell J., the California Supreme Court held that a searching officer's knowledge was irrelevant and instead focused on the validity of the probationer's search condition. Several California Courts of Appeal have reached the same conclusion.

This comment begins with a brief summary of the Fourth Amendment. This section focuses on the aspects which apply to probationers who have consented to waive their Fourth Amendment rights as a condition of probation.

3. Id.
5. United States v. Davis, 932 F.2d 752, 758 (9th Cir. 1991); United States v. Giannetta, 909 F.2d 571, 575-76 (1st Cir. 1990).
6. People v. Bravo, 738 P.2d 336, 339-40 (Cal. 1987), cert. denied, 485 U.S. 904 (1988). A "search condition" is a condition of probation where a defendant agrees to submit to searches which would otherwise be prohibited by the Fourth Amendment. In California, adult probationers must consent to search conditions in order to receive probation. See, e.g., id. at 341. Therefore, the language of the search condition equivocates the scope of the probationer's consent.
8. See In re Bihn L., 6 Cal. Rptr. 2d 678, 679 (Cal. App. 1992) (holding that a police officer need not know of a probationer's search condition for the search to be valid); In re Marcellus L., 279 Cal. Rptr. 901, 902 (Cal. App. 1991) (holding that a probationer's search condition left him with no expectation of privacy even though the searching officer had no knowledge of the probationer's search condition).
9. See infra part II.A.
Amendment rights. It explains the "expectation of privacy" test, and proceeds to give a brief overview of the Fourth Amendment's warrant and probable cause requirements. The consent and special needs exceptions to the warrant and probable cause requirements are then discussed.

The comment next addresses how the Fourth Amendment applies specifically to probationers. As an introduction, the purposes and policy considerations underlying probation are discussed. Next, the comment explores limits on the imposition of probation conditions. In particular, this section focuses on court decisions which have considered whether probationers should be able to consent to waive their Fourth Amendment rights.

Part VI proceeds to analyze the issues presented by Tyrell J. In this section, this comment contends that probation searches should not be limited to reasonable cause when a search condition provides otherwise. In addition, it asserts that a searching officer's knowledge should be irrelevant to determine the validity of a search when a probationer has previously agreed to waive his Fourth Amendment rights. Finally, Part V of the comment concludes by offering recommendations for courts to consider in resolving these issues.

10. See infra part II.A.
11. See infra part II.B.
12. See infra part II.B.
13. See infra part II.B.
14. See infra part II.B.
15. See infra part IV.
16. See infra part IV.A.
17. See infra part IV.B.
18. See infra part V.
II. BACKGROUND

A. Fourth Amendment Analysis

1. Reasonable Expectation of Privacy

a. Searches

The Fourth Amendment controls all searches conducted by governmental agents. A search is an invasion of a constitutionally protected area. Historically, the Supreme Court held that the only constitutionally protected areas were those enumerated in the Fourth Amendment. However, that interpretation changed in 1967 with the Supreme Court's decision in Katz v. United States. In Katz, the Court found that the Fourth Amendment protects people and not places. Therefore, the Court held that the focus of any Fourth Amendment inquiry should be on a person's reasonable expectation of privacy and not on the particular area where one is located.

The Supreme Court has since relied on the two-part test set forth in Justice Harlan's concurrence in Katz to determine the existence of a reasonable expectation of privacy. First, the individual must have exhibited an actual, subjective ex-

19. The Fourth Amendment provides:

[The right of the people to be secure in the 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.


States may afford greater protection than those provided for in the Federal Constitution. See Pruneyard Shopping Center v. Robins, 447 U.S. 74, 76 (1980). As a result, a search or seizure considered valid under the United States Constitution may still violate a state constitution.

20. The Fourth Amendment applies only to searches and seizures which are the product of government action. See Burdeau v. McDowell, 256 U.S. 465, 467 (1921) (holding that the Fourth Amendment was "intended as a restraint upon the activities of the sovereign authority, and was not intended to be a limitation upon other than governmental agencies.").


22. See, e.g., Stoner v. California, 376 U.S. 483, 490 (1964) (interpreting "houses" to include hotel rooms).


24. Id. at 351.

25. Id. at 360 (Harlan, J., concurring).

26. Id. at 361 (Harlan, J., concurring).
pectation of privacy.\textsuperscript{27} Second, society must recognize that expectation of privacy as objectively reasonable.\textsuperscript{28} For example, Justice Harlan indicated that the home is a place where privacy is reasonably expected.\textsuperscript{29} However, he indicated that items which are in the public's "plain view" may not be protected because exposition to the public indicates a lack of an expectation of privacy.\textsuperscript{30} In addition, the Supreme Court has since ruled that the defendant has the burden of establishing under the totality of the circumstances, that the search violated her expectation of privacy in a particular place.\textsuperscript{31}

b. Seizures

The Fourth Amendment also protects against all unreasonable seizures conducted by governmental agents.\textsuperscript{32} A seizure of a person occurs when that person believes she is not free to leave an encounter with an agent of the government.\textsuperscript{33} Not every encounter with a police officer or other government official is considered a seizure. A person has been seized within the meaning of the Fourth Amendment if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.\textsuperscript{34} The Supreme Court expanded this rule in \textit{Florida v. Bostick},\textsuperscript{35} holding that the test for a seizure is an objective one which "presupposes an innocent person"\textsuperscript{36} and does not vary with the particular state of mind of the individual.\textsuperscript{37}

\begin{itemize}
  \item \textsuperscript{27} \textit{Id.}
  \item \textsuperscript{28} Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).
  \item \textsuperscript{29} \textit{Id.}
  \item \textsuperscript{30} \textit{Id.} See also California v. Ciraolo, 476 U.S. 207, 215 (1986) (finding no legitimate expectation of privacy for marijuana plants growing in backyard to planes flying overhead); United States v. Miller, 974 F.2d 953, 957-58 (8th Cir. 1992) (finding that the Fourth Amendment does not protect abandoned suitcase where owner indicated to police that it was not hers).
  \item \textsuperscript{31} Rawlings v. Kentucky, 448 U.S. 98, 104 (1980).
  \item \textsuperscript{32} U.S. CONST. amend. IV.
  \item \textsuperscript{33} United States v. Mendenhall, 446 U.S. 544, 554 (1980).
  \item \textsuperscript{34} \textit{Id.}
  \item \textsuperscript{35} 111 S. Ct. 2382 (1991).
  \item \textsuperscript{36} \textit{Id.} at 2388.
  \item \textsuperscript{37} \textit{Id.} (quoting Michigan v. Chesternut, 486 U.S. 567, 574 (1988)). The Court was responding to the defendant's argument that no reasonable person would freely consent to a search of luggage which contained illegal drugs. \textit{Id.} The defendant was a passenger on a bus who had been approached by two police officers who asked him if they could search his luggage. \textit{Id.} at 2384-85.
\end{itemize}
2. Probable Cause

Probable cause is the degree of knowledge necessary to justify an intrusion under Fourth Amendment protection. This standard is enumerated in the Warrant Clause of the Fourth Amendment.38 The probable cause analysis must be conducted on a case by case basis.39 It cannot be reduced to a neat set of legal rules, but must be determined by the totality of the circumstances surrounding each particular search or seizure.40 As a general rule, information establishing probable cause must amount to more than mere suspicion.41 There must be objective, articulable facts that would lead a prudent person to believe that contraband would be found in a particular location.42

3. The Warrant Requirement

The Fourth Amendment requires that: "no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation . . ."43 In Katz v. United States,44 the Court held that searches conducted without a warrant were "per se unreasonable . . . [and] subject only to a few specifically established and well-delineated exceptions."45 In addition, the Supreme Court has found that a "neutral and detached magistrate" must determine whether the police have established probable cause for a search.46 Those seeking a search warrant must provide a magistrate with the specific facts necessary to allow him to independently determine whether suffi-

38. See supra note 19 for the text of the Fourth Amendment.
40. Id. at 238.
41. Id.
43. U.S. Const. amend. IV.
44. 389 U.S. 347 (1967).
45. Id. at 357; see also Coolidge v. New Hampshire, 403 U.S. 443, 453 (1971) (plurality opinion).
46. Johnson v. United States, 333 U.S. 10, 14 (1948). A magistrate is preferred over law enforcement officials because law enforcement officials "may lack sufficient objectivity to weigh correctly the strength of the evidence supporting the contemplated action against the individual's interests in protecting his own liberty." Id. In Coolidge, the Court ruled that a state attorney general, acting as a justice of the peace, could not issue a warrant as a neutral magistrate. Coolidge, 403 U.S. at 453. The Court found that "there could hardly be a more appropriate setting than this for a per se rule of disqualification rather than a case-by-case evaluation of all of the circumstances." Id. at 450.
cient probable cause exists. Great deference should be given to the magistrate’s decision on appeal.

4. Exceptions to the Warrant Requirement

The requirement that a search or seizure be conducted pursuant to a warrant supported by probable cause is riddled with exceptions. These exceptions 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. Because this comment focuses on the Fourth Amendment rights of probationers, only consent searches and special needs searches are germane. Therefore, this comment only addresses those exceptions to the warrant requirement.

a. Consent Searches

A well-settled exception to the warrant requirement involves searches conducted pursuant to consent. Consent is a voluntary waiver of a person’s Fourth Amendment rights.

48. Id. at 236.
56. See infra text accompanying notes 108-114.
57. Zap v. United States, 328 U.S. 624, 628 (1946), vacated, 330 U.S. 800 (1947) (per curiam). As discussed below, consent searches are frequently used to limit probationers’ Fourth Amendment rights. See infra part II.B.3. For example, in California, defendants are often required to either agree to submit to be searched by any law enforcement official, at any time, or undergo their sentence in prison. See infra part II.B.3. As a result, probation conditions have become a very powerful law enforcement tools because after defendants consent to these conditions, they may be searched by any law enforcement official, for any reason, whether or not the official has knowledge of the search condition. In re Tyrell J., 876 P.2d 519, 521 (Cal. 1994).
It can be given expressly, impliedly, or pursuant to a prior agreement.\textsuperscript{59} In Schneclloth v. Bustamonte,\textsuperscript{60} the Supreme Court distinguished consent to search from consent to waive other constitutional protections.\textsuperscript{61} It reasoned that the strict test of a "knowing and intelligent waiver," as set down by Johnson v. Zerbst,\textsuperscript{62} did not apply to the waiver of Fourth Amendment rights.\textsuperscript{63} Instead, the Supreme Court held that consent to search must only be voluntary and not the product of duress or coercion.\textsuperscript{64} The Court clarified its position that the determination of voluntary consent involves a question of fact which must be considered in light of all the circumstances.\textsuperscript{65} When resolving a question of fact, trial courts are given great deference by reviewing courts.\textsuperscript{66} Their findings are not to be overturned unless clearly erroneous.\textsuperscript{67}

Some of the factors the Court considers when determining whether voluntary consent exists include age, education, intelligence, knowledge of constitutional rights, length of the detention, and the level and nature of the questioning.\textsuperscript{68} Although each of these factors weighs into the Court's decision, no single factor is controlling.\textsuperscript{69} Each decision reflects a careful analysis of the surrounding circumstances.\textsuperscript{70}

In addition to being voluntary, any search or seizure must fall within the scope of the consent.\textsuperscript{71} The scope of con-

\textsuperscript{59} Zap, 328 U.S. at 628.
\textsuperscript{60} 412 U.S. 218 (1973).
\textsuperscript{61} Id. at 235-46.
\textsuperscript{62} 304 U.S. 458, 464 (1938).
\textsuperscript{63} Schneclloth, 412 U.S. at 241. The Court stated: "[n]othing, either in the purposes behind requiring a 'knowing' and 'intelligent' waiver of trial rights, or in the practical application of such a requirement suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures." Id.
\textsuperscript{64} Id. at 248-49.
\textsuperscript{66} See United States v. Twomey, 884 F.2d 46, 51 (1st Cir. 1989) (finding the trial court's determination not clearly erroneous where officers testified defendant's parents voluntarily consented), cert. denied, 496 U.S. 908 (1990).
\textsuperscript{67} Id.
\textsuperscript{68} Schneclloth, 412 U.S. at 226.
\textsuperscript{69} Id. As long as the requirements set forth in Schneclloth are met, anyone may consent to a warrantless search. See United States v. Varona-Algos, 819 F.2d 81, 83 (5th Cir. 1987) (indicating that the only limit on consent is coercive tactics by government officials), cert. denied, 484 U.S. 929 (1987).
\textsuperscript{71} Washington v. Chrisman, 455 U.S. 1, 9-10 (1982) (holding that a search conducted pursuant to a valid consent does not violate the Fourth Amendment unless the search exceeds the scope of that consent).
sent is determined by what a reasonable person in similar circumstances would understand to be the limits of the consent given. For example, if a defendant consents to a search of a container in her possession, the police may search any container within that container without exceeding the scope of consent. Only if the defendant expressly limits her consent do such searches exceed the scope of that consent. In addition, normally, the scope of consent is limited by the object of the search.

b. Special Needs Exception

Another exception to the warrant requirement occurs when "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirements impractical." When determining whether a special need exists, courts consider the extent to which the warrant and probable cause requirements interfere with the government's objective. Courts proceed to balance the burden on the government against the degree of intrusion into the individual's right to privacy. For example, in New Jersey v. T.L.O., the United States Supreme Court upheld a warrantless search of a student's purse, finding that the burden of obtaining a warrant unduly interfered with the school's need to maintain order. Likewise, in O'Connor v. Ortega, the Court justified the warrantless search of an employee's office.

72. Florida v. Jimeno, 500 U.S. 248, 251 (1991) (finding that consent to search a vehicle included implicit authorization to open a paper bag on the floor board).
73. E.g., United States v. Gutierrez-Mederos, 965 F.2d 800, 803-04 (9th Cir. 1992) (finding that consent to search a vehicle implied consent to search locked box within the vehicle), cert. denied, 113 S. Ct. 1315 (1993).
74. Jimeno, 500 U.S. at 251. Any container may be searched if it is reasonable to believe that the container could be concealing the object of that search. United States v. Doherty, 867 F.2d 47, 65-66 (1st Cir. 1989), cert. denied, 492 U.S. 918 (1989).
75. Jimeno, 500 U.S. at 251.
78. Id.
79. Id.
80. Id. at 325.
for work-related purposes. It held that the state had a special need to maintain an efficient and proper workplace.\textsuperscript{82}

In 1987, the Supreme Court decided \textit{Griffin v. Wisconsin},\textsuperscript{83} holding that the state of Wisconsin had demonstrated a "special need" to dispose of the warrant and probable cause requirements for its probationers.\textsuperscript{84} In that case, the Court upheld a Wisconsin regulation which allowed "reasonable" searches of all persons who were placed on probation.\textsuperscript{85} The Court found that the warrant requirement would appreciably interfere with Wisconsin's probation system because the delay in getting a warrant would make it more difficult to respond to evidence of probation violations.\textsuperscript{86} As a result, the Court felt it was constitutionally acceptable for Wisconsin, by administrative regulation, to lower the probable cause standard for probation searches to that of "reasonable cause."\textsuperscript{87} As discussed below, \textit{Griffin} represents the most central United States Supreme Court decision relevant to the proposal of this comment.\textsuperscript{88}

5. \textit{The Exclusionary Rule}

Courts use the exclusionary rule as the primary tool in deterring unconstitutional searches conducted by government officials.\textsuperscript{89} It requires the suppression of evidence at

\textsuperscript{82} Id. at 720.
\textsuperscript{83} 483 U.S. 868 (1987).
\textsuperscript{84} Id. at 875-76.
\textsuperscript{85} Id. at 871. Note that Wisconsin imposed this condition of probation without requiring that the court obtain the probationer's consent. Id.

This is material in that California's probation searches are based on the consent exception to the Fourth Amendment, whereas probation searches not based on consent are based on the "special needs" exception to the Fourth Amendment. See \textit{Griffin}, 483 U.S. at 873-75.

\textsuperscript{86} \textit{Griffin}, 483 U.S. at 876.

\textsuperscript{87} Id. Reasonable cause is defined as "[a] basis for arrest without warrant, is such state of facts as would lead men of ordinary care and prudence to believe and conscientiously entertain honest and strong suspicion that person sought to be arrested is guilty of committing a crime." BL\textsc{ack's} \textsc{law} \textsc{dictionary} 1265 (6th ed. 1991).

\textsuperscript{88} See infra part III. The \textit{Griffin} decision remains central because the First and Ninth Circuits have interpreted this decision as requiring knowledge constituting a "reasonable suspicion" of criminal activity to support the search of any probationer, regardless of whether the probationer has previously consented to be searched. See infra text accompanying notes 119-139. In contrast, California courts impose no such limitation and limit a search to the scope of a probationer's consent. See infra text accompanying notes 141-152.

\textsuperscript{89} Mapp v. Ohio, 367 U.S. 643, 655 (1961). The California State Constitution no longer affords "independent state grounds for excluding relevant evi-
trial obtained through government violations of the Fourth Amendment.\textsuperscript{90} The Supreme Court characterized the rule in \textit{Linkletter v. Walker}\textsuperscript{91} as an “effective deterrent to illegal police action.”\textsuperscript{92}

Since use of the rule often leads to the loss of highly probative evidence, courts limit its application to situations where it has the maximum deterrent effect.\textsuperscript{93} When determining whether the rule applies, the Court balances the cost and benefits of using the illegally obtained evidence.\textsuperscript{94} In the context of a criminal trial, the Court weighs the deterrent effect of future Fourth Amendment violations against the probative value of the evidence sought to be excluded.\textsuperscript{95}

B. \textit{Probationers and the Fourth Amendment}

1. \textit{Purposes of Probation}

Probation serves as a substitute for the incarceration of convicted criminals. It is defined as “a sentence imposed for commission of crime whereby a convicted criminal offender is released into the community under the supervision of a probation officer in lieu of incarceration.”\textsuperscript{96} Probation has been favored for offenders of less serious crimes because it represents a healthy alternative to incarceration.\textsuperscript{97} Probation seeks to maximize the liberty of the offender while still protecting the public from that individual’s future violations of the law.\textsuperscript{98} It emphasizes the goal of rehabilitation and is less
costly to administer than incarceration.\textsuperscript{99} In addition, it tends to avoid some of the negative effects of confinement. For instance, it avoids the transition problems ex-convicts have in assimilating back into society and removes the adverse impact incarceration has on the innocent dependents of the offender.\textsuperscript{100}

Virtually every jurisdiction in this country uses probation as an alternative to incarceration. Jurisdictions vary, however, as to the manner in which probation is imposed. In California, for example, the grant of probation is usually conditioned with the requirement that the offender consent to adopt certain behavior and waive certain fundamental rights.\textsuperscript{101} Federal courts, however, generally may impose probation, and its appurtenant conditions, without the consent of the individual probationer.\textsuperscript{102} Common conditions of probation include requirements to obey all laws, refrain from drug or alcohol use, avoid associating with other convicts, report any change in employment or home address to a probation officer, and consent to waive Fourth Amendment rights.\textsuperscript{103}

2. \textit{Limits on Conditions of Probation—Generally}

Courts have broad discretion when imposing restrictive conditions on the grant of probation.\textsuperscript{104} However, since the purpose of probation seeks to deter probationers from future criminality, conditions of probation must reasonably relate to

\textsuperscript{99} Id.
\textsuperscript{100} Id.
\textsuperscript{101} See supra note 6.
\textsuperscript{102} This distinction is a material one in that this comment turns on the fact that probationers in California voluntarily consent to waive their Fourth Amendment rights. See infra part IV. As such, the discussion of federal authority below is relevant only to the extent that the author disagrees with the First and Ninth Circuit Courts of Appeals' finding that Griffin v. Wisconsin requires that all probation searches must be supported by reasonable cause. See infra part IV.
\textsuperscript{104} See Pierson v. Grant, 527 F.2d 161, 164 (8th Cir. 1975) (requiring the appellant to execute a waiver of extradition held valid as a condition of probation); In re Bushman, 463 P.2d 727, 732-33 (Cal. 1970) (holding that courts have broad discretion to impose probation conditions which foster rehabilitation and protect public safety).
the crime which the defendant has been convicted of. For example, in *People v. Kay*, the court struck down, in part, a probation condition which required the defendant to submit to warrantless searches. The court reasoned that the defendant's conviction of assault had nothing to do with a search, and therefore, invalidated the condition because it did not reasonably relate to deterring the defendant's future criminality.

3. The Validity of Search Conditions

As discussed above, probation conditions must reasonably relate to the defendant's crime in order to be valid. One of the most common probation conditions involves probationers' consent to submit to warrantless searches. The majority of jurisdictions have upheld these conditions pursuant to either the "consent" or "special needs" exceptions to the Fourth Amendment. In California, adult probationers may choose to refuse to accept a condition of probation and instead serve his or her sentence in prison. As a result, the

105. *E.g.*, United States v. Consuelo-Gonzales, 521 F.2d 259, 264 (9th Cir. 1975) (finding that the only permissible conditions were those that contributed both to the rehabilitation of the probationer and the protection of the public) (quoting Porth v. Templar, 453 F.2d 330, 333 (10th Cir. 1971)); *People v. Mason*, 488 P.2d 630, 632-33 (Cal. 1971) (holding that a condition of probation that required a prior narcotics offender to submit to warrantless searches was valid because it was aimed at deterring or discovering subsequent criminal offenses), *cert. denied*, 405 U.S. 1016 (1971); see also United States v. Sharp, 931 F.2d 1310, 1311 (8th Cir. 1991); State v. Gallagher, 675 P.2d 429, 431 (N.M. Ct. App. 1984); State v. Moore, 247 S.E.2d 250, 251-52 (N.C. Ct. App. 1978).


107. *Id.*

108. *Id.*

109. See United States v. Shoenrock, 868 F.2d 289 (8th Cir. 1989) (upholding probation condition that required probationer to submit to warrantless search if he possessed drugs or alcohol); United States v. Johnson, 722 F.2d 525, 527 (9th Cir. 1983) (upholding probation condition that required probationer to submit to search at the reasonable request of any police officer); *Mason*, 488 P.2d at 632-33 (finding that a condition requiring a narcotics offender to submit to warrantless search at any time did not violate the Fourth Amendment), *cert. denied*, 405 U.S. 1016 (1972); State v. Mitchell, 207 S.E.2d 263, 264-65 (N.C. Ct. App. 1974) (upholding a probation condition which required probationer to submit to warrantless search at a reasonable time for illegal liquor).

110. See *supra* part II.A.4 for a brief discussion of the "consent" and "special needs" exceptions to the Fourth Amendment.

California courts uphold these conditions pursuant to the probationer's advance consent to the search.\textsuperscript{112} Although some jurisdictions find this consent coerced and therefore invalid,\textsuperscript{113} the California courts have found a probationer's consent to a search condition "no less voluntary than the waiver of rights by a defendant who pleads guilty to gain the benefits of a plea bargain."\textsuperscript{114} Other jurisdictions justify these search conditions as a "special needs" exception to the Fourth Amendment.\textsuperscript{116}

4. Differing Interpretations of Griffin

As indicated above, the Supreme Court upheld the constitutionality of a Wisconsin regulation that allowed "reasonable" searches of all persons who were placed on probation.\textsuperscript{116} Pursuant to the "special needs" exception to the Fourth Amendment, the Court in Griffin upheld the statute, in part because the regulation only authorized searches that were conducted with "reasonable cause."\textsuperscript{117} As a result of the Griffin decision resting solely on the "special needs" exception to the Fourth Amendment, the Court did not address the issue of the validity of probationers' consent.\textsuperscript{118} In recent years, however, some jurisdictions have read Griffin to require all probation search conditions to be supported by reasonable

\textsuperscript{112} For constitutional requirements of voluntary consent, see supra discussion accompanying notes 57-75. Some jurisdictions have found such consent invalid on the grounds that probationers are unable to make a voluntary choice. \textit{E.g.}, People v. Peterson, 233 N.W.2d 250, 254-55 (Mich. Ct. App. 1975) (finding unconstitutional a "blanket search and seizure" condition); State v. Thomas, 575 P.2d 171, 171-72 (Or. Ct. App. 1978) (finding a probation condition invalid which required a defendant to submit to warrantless searches and seizures). These courts have found the threat of impending incarceration to be coercive. \textit{Peterson}, 233 N.W.2d at 254-55. For example, in \textit{People v. Peterson}, a Michigan Court of Appeals found the legal effect of a warrantless search condition to be coerced and rendered it invalid. \textit{Id.} at 255.

\textsuperscript{113} See supra note 112.

\textsuperscript{114} \textit{Bravo}, 738 P.2d at 341, \textit{cert denied}, 485 U.S. 904 (1988). \textit{See also} Bordenkircher v. Hayes, 434 U.S. 357, 360-65 (1978) (finding a defendant's consent to waive his fundamental right to trial valid even though he plead guilty in order to be guaranteed a more lenient sentence).

\textsuperscript{115} \textit{E.g.}, Griffin v. Wisconsin, 483 U.S. 868 (1987). California recently upheld the imposition of mandatory probation conditions for juveniles as a "special needs" exception to the Fourth Amendment. \textit{See Tyrell J.}, 876 P.2d at 526-27.

\textsuperscript{116} See supra text accompanying notes 84-87.

\textsuperscript{117} See supra text accompanying notes 84-87.

\textsuperscript{118} See Griffin, 483 U.S. at 872-80.
cause, regardless of the language of the search condition, and regardless of whether a probationer previously consented to waive his Fourth Amendment rights.\textsuperscript{119}

Other jurisdictions have limited \textit{Griffin} to its facts, finding that the Court merely upheld one state's regulation restricting probationer's rights pursuant to a specific statutory scheme. As such, these jurisdictions have found that \textit{Griffin} does not apply to probation conditions imposed by the trial court.\textsuperscript{120}

\textbf{a. Federal Courts' Interpretation}

The U.S. Courts of Appeal for the First and Ninth districts have determined that \textit{Griffin} requires that all probation searches be based on a "reasonable suspicion" of criminal activity, regardless of the specific language of the "search condition."\textsuperscript{121} For example, in \textit{United States v. Giannetta},\textsuperscript{122} the defendant-appellant, a probationer with a "search condition," objected to the search of his apartment by his probation officer pursuant to that condition.\textsuperscript{123} The "search condition" required the defendant to "readily submit to a search of his residence and of any other premises under his domination and control, by his supervising probation officer, upon the officer's request."\textsuperscript{124} Giannetta, the defendant, argued that his probation officer needed probable cause to search his residence regardless of his search condition.\textsuperscript{125} The court disagreed and upheld the search pursuant to the probation condition.\textsuperscript{126}

In reaching its conclusion, however, the court indicated that the search was valid only because it was based on the probation officer's reasonable suspicion of criminal activ-

\begin{itemize}
    \item \textsuperscript{119} See \textit{United States v. Giannetta}, 909 F.2d 571, 575-76 (1st Cir. 1990) (finding that \textit{Griffin} limits all probation searches to reasonable cause). See also \textit{United States v. Davis}, 932 F.2d 752, 758 (9th Cir. 1991).
    \item \textsuperscript{120} See supra text accompanying notes 143-164.
    \item \textsuperscript{121} \textit{Giannetta}, 909 F.2d at 576.
    \item \textsuperscript{122} \textit{Id.}
    \item \textsuperscript{123} \textit{Id.} at 574. The defendant was placed on probation as part of a plea bargain where he plead guilty to "conspiracy to possess with intent to distribute approximately two kilograms of cocaine and conspiracy to import approximately 8,000 pounds of hashish." \textit{Id.} at 573.
    \item \textsuperscript{124} \textit{United States v. Giannetta}, 909 F.2d 571, 573 (1st Cir. 1990).
    \item \textsuperscript{125} \textit{Id.} at 575.
    \item \textsuperscript{126} \textit{Id.}
\end{itemize}
The court interpreted this as a limitation set down by Griffin: "the condition allows a search by a probation officer with or without reasonable suspicion, which would appear to conflict with the dictates of Griffin."\textsuperscript{128}

In \textit{United States v. Davis},\textsuperscript{129} the Ninth Circuit also indicated that \textit{Griffin} requires that all probation searches be supported by "reasonable suspicion."\textsuperscript{130} The primary issue in \textit{Davis} was whether the scope of a probationer's search condition had been violated.\textsuperscript{131} Citing \textit{Giannetta}, the court determined that the appropriate standard of review for a probation search was one of reasonable cause: "[w]e therefore conclude that police must have a reasonable suspicion . . . to fall within the permissible bounds of a probation search."\textsuperscript{132} The court also indicated that this limit existed regardless of whether or not a probationer consented to his or her search condition.\textsuperscript{133} In sum, the \textit{Davis} and \textit{Giannetta} courts held that the search of a probationer must be supported by a reasonable cause even if that probationer's search condition requires him to submit to searches at any time for any reason.\textsuperscript{134}

The Court of Appeals for the Eighth Circuit, however, came to a different conclusion. In \textit{United States v. Shoenrock},\textsuperscript{135} the defendant had been placed on probation for conspiracy to distribute cocaine.\textsuperscript{136} As a condition of probation, the defendant was required to submit to random searches of his premises.\textsuperscript{137} After being placed on probation, the court found:

\begin{quote}
[W]e recognize that California draws a distinction between probationers and parolees . . . . [a] probationer unlike a parolee, consents to the waiver of his Fourth Amendment rights . . . . [However, w]e do not believe the distinction . . . is constitutionally significant . . . . We therefore conclude that the police must have a reasonable suspicion . . . to fall within the permissible bounds of a probation search.
\end{quote}

\textit{Id.} Applying the reasonable suspicion standard, the court concluded that the search did not exceed the scope of the probationer's search condition. \textit{Id.} at 760.

\begin{itemize}
  \item \textsuperscript{127} \textit{Id.} at 576. Reasonable suspicion of criminal activity has been equated with reasonable cause.
  \item \textsuperscript{128} \textit{Id.}
  \item \textsuperscript{129} 932 F.2d 752 (9th Cir. 1991).
  \item \textsuperscript{130} \textit{Id.} at 758.
  \item \textsuperscript{131} \textit{Id.} at 758-59.
  \item \textsuperscript{132} \textit{Id.} at 758.
  \item \textsuperscript{133} \textit{Id.} The court found:
  \begin{quote}
  \begin{center}
  [W]e recognize that California draws a distinction between probationers and parolees . . . . [a] probationer unlike a parolee, consents to the waiver of his Fourth Amendment rights . . . . [However, w]e do not believe the distinction . . . is constitutionally significant . . . . We therefore conclude that the police must have a reasonable suspicion . . . to fall within the permissible bounds of a probation search.
  \end{center}
  \end{quote}
  \textit{Id.}
  \item \textsuperscript{134} \textit{Id.} at 290.
  \item \textsuperscript{135} United States v. Davis, 932 F.2d 752 (9th Cir. 1991); United States v. Giannetta, 909 F.2d 571, 576 (1st Cir. 1990).
  \item \textsuperscript{136} 868 F.2d 289 (8th Cir. 1989).
  \item \textsuperscript{137} \textit{Id.}
\end{itemize}
a warrantless search was conducted of the defendant's home which revealed evidence of several probation violations.\textsuperscript{138} The officers who conducted the search relied on the probation terms alone to justify the search.\textsuperscript{139} Citing \textit{Griffin}, the defendant argued that the search violated the Fourth Amendment.\textsuperscript{140} The court found \textit{Griffin} inapplicable and held that the search did not violate the Fourth Amendment.\textsuperscript{141} The court held that \textit{Griffin} stood for "the proposition that reasonableness for probationary searches may be established by statute rather than by warrant."\textsuperscript{142}

\textbf{b. California's Interpretation}

Two weeks after \textit{Griffin}, the California Supreme Court decided \textit{People v. Bravo}.\textsuperscript{143} The issue in \textit{Bravo} was the constitutionality of a warrantless search conducted pursuant to a probation condition that required the probationer to "[s]ubmit his person and property to search or seizure at any time of the day or night by any law enforcement officer with or without a warrant."\textsuperscript{144} Relying on \textit{Schneckloth v. Bustamonte},\textsuperscript{145} the court held that since the search was conducted pursuant to the probationer's voluntary consent, it would only violate the Fourth Amendment if it exceeded the scope of that consent.\textsuperscript{146} The court reasoned that a plain reading of the search condition expressly waived "whatever claim of privacy [the probationer] might have otherwise had."\textsuperscript{147} As a limitation on its holding, the court stated that probation searches could only be conducted for "legitimate law enforcement purposes" which were not "undertaken for harassment or . . . arbitrary or capricious reasons."\textsuperscript{148} How-

\begin{itemize}
\item \textsuperscript{138} Id.
\item \textsuperscript{139} Id.
\item \textsuperscript{140} United States v. Schoenrock, 868 F.2d 289, 292 (8th Cir. 1989).
\item \textsuperscript{141} Id.
\item \textsuperscript{142} Id.
\item \textsuperscript{143} 738 P.2d 336 (Cal. 1987), \textit{cert. denied}, 485 U.S. 904 (1988).
\item \textsuperscript{144} Id. at 337 n.1.
\item \textsuperscript{145} 412 U.S. 218 (1973).
\item \textsuperscript{146} \textit{Bravo}, 738 P.2d. at 338-40.
\item \textsuperscript{147} Id. at 340 (quoting \textit{People v. Mason}, 488 P.2d 630, 634 (Cal. 1971), \textit{cert. denied}, 405 U.S. 1016 (1972)). The court's only reference to the \textit{Griffin} decision was in a footnote which appeared to distinguish it as a case only having to do with searches conducted pursuant to administrative regulations.
\end{itemize}
ever, the court explicitly stated that probation searches conducted pursuant to valid consent did not require a showing of "reasonable cause," as was required by the federal courts in *Davis* and *Giannetta*.149

Relying on *Bravo*, California courts have distinguished *Griffin* as applying only to searches conducted pursuant to a regulatory scheme.150 For example, the California Supreme Court found in *In re Tyrell J.* that "[t]he [United States Supreme] court [sic] also suggested that its reasoning was limited to searches based on a state regulation requiring reasonable cause."151 Similarly, in *In re Marcellus L.*,152 the Court of Appeal for the First District found that *Griffin* does not apply when a defendant specifically agrees to submit to warrantless searches: "[t]he authority to search [in *Griffin*] existed by way of [Wisconsin's] regulation, not because the defendant specifically agreed to submit to warrantless, unexpected searches."153 Therefore, California has found that *Griffin* applies to a different exception to the Fourth Amendment's warrant requirement, namely the "special needs" exception.154

In addition to finding that *Griffin* does not read in a constitutional "reasonable suspicion" limitation on all probation search conditions, the California courts have held that a searching officer need not know of a probationer's search condition for a search to be valid.155 Instead, the courts focus on the probationer's reasonable expectation of privacy.156 In *Tyrell J.*, the probationer was required to submit to be searched by "any" law enforcement officer.157 The California

149. *Id.*

150. *In re Tyrell J.*, 876 P.2d 519, 524 (Cal. 1994). *See also In re Marcellus L.*, 279 Cal. Rptr. 901, 904 (Ct. App. 1991); cf. *In re Bihn L.*, 6 Cal. Rptr. 2d 678, 681 (Ct. App. 1992) (finding, contrary to *Griffin*, that once adult probationers waive their Fourth Amendment rights, they can only object to searches done for harassment purposes or for arbitrary or capricious reasons). *Griffin* is based on the special needs exception to the Fourth Amendment. *See* *Griffin v. Wisconsin*, 483 U.S. 688, 873-75.


153. *Id.* at 940.


157. *Id.* *See* the fact pattern in part I which is based on the facts of *Tyrell J.*
Supreme Court reasoned that because the probationer was subject to a valid condition of probation which required that he submit to "any" police officer, and not only those who had knowledge of his search condition, that he had no reasonable expectation of privacy. The court held that a probationer's reasonable expectation of privacy was not altered by the searching officer's lack of knowledge of the probation condition.

Two California Courts of Appeal had reached this conclusion prior to the supreme court's holding in Tyrell J. In Marcellus L., a police officer stopped a minor for truancy and searched him for safety reasons. The minor turned out to be on probation, but the police officer had no knowledge of the minor's probationary status. Conceding that "there were no articulable facts to justify the pat search," the court upheld the search because there was no harassment by the police officer and the search condition restricted the probationer's Fourth Amendment rights. The court indicated that the search condition would pass constitutional muster under both Bravo and Griffin: "[i]t goes without saying that a search undertaken pursuant to [the probation] clause for monitoring or other probation purposes would pass review under Griffin and Bravo." The court added: "[w]e do not think the validity of [probationer's] search condition is dependent upon the searching officer's knowledge of that condition."

III. IDENTIFICATION OF THE PROBLEM

The problem in determining the Fourth Amendment rights of probationers is twofold. First, the degree to which a probationer may waive his Fourth Amendment rights must be resolved. The Court in Griffin reviewed a Wisconsin regul-
lation that limited the rights of all probationers by statute. The statute in *Griffin* applied regardless of the specific probation conditions to which probationers agreed. However, the Courts of Appeals for the First and Ninth Circuits have read *Griffin* to imply a "reasonable suspicion" limitation on all probation searches. California, on the other hand, has taken *Griffin* on its face and applied its holding only to situations where searches are conducted pursuant to an administrative regulation. In doing so, the California courts have held that these searches should only be limited by the scope of probationers' search conditions.

The second hurdle arises when a police officer conducts a search without knowledge of a probationer's search condition. As discussed above, California courts have upheld these searches on the basis of the language of the probationer's search condition even though it would otherwise be illegal. California has found a police officer's knowledge irrelevant when determining a probationer's reasonable expectation of privacy. No other jurisdiction has addressed this issue.

IV. ANALYSIS

A. Standard of Review for Probationary Searches

The conflict that *Griffin* created is understandable considering society's traditional reluctance to compromise fundamental constitutional rights. It is surprising, however, that in jurisdictions where probationers must consent to probation conditions, more courts have not addressed the issue of whether a probationer's consent is not voluntary but coerced under the test set down by *Schneckloth*. Relying on *Schneckloth*, courts could easily find that the threat of incarceration precludes a defendant from making a free and unconstrained choice. After all, few prospects could be more coercive than the threat of incarceration and all of the evils that accompany life in prison. However, with a few excep-

165. See supra text accompanying notes 84-87.
167. See supra text accompanying notes 121-142.
168. See supra text accompanying notes 143-164.
169. See supra text accompanying notes 143-164.
170. See supra text accompanying notes 143-164.
171. See supra text accompanying notes 143-164.
172. See supra text accompanying notes 58-70 for a discussion of the Court's holding in *Schneckloth*.
tions, it has been held that it is not coercive for a probationer to consent to submit to warrantless searches in exchange for a reduced sentence. As a result, because a probationer's consent has been generally held valid, and because the United States Supreme Court has explicitly stated that prior consent is constitutional, the issue of the validity of this type of consent appears to have been resolved.

Instead of addressing the consent issue, some federal courts have relied on Griffin to limit the scope of all probation searches. A close reading of Griffin, however, indicates that this extension was not the intent of the Court. Griffin clearly applies only to situations where probationers' rights are universally circumscribed by statute. In Griffin, the Court upheld the Wisconsin statute in part because it was limited to searches conducted with reasonable cause. The Court was swayed by the reasonable cause limitation only because the statute was such a broad restriction on probationers' Fourth Amendment rights. That is, the statute applied to all probationers, without their consent, and regardless of the crime they committed.

Furthermore, the Court explicitly found the Wisconsin statute constitutional based on the "special needs" exception to the Fourth Amendment's warrant and probable cause requirements. The Court refused to carve out any new principal of law as some of the lower federal courts have done: "[w]e think the Wisconsin Supreme Court correctly concluded that this warrantless search did not violate the Fourth Amendment. To reach that result, however, we find it unnecessary to embrace a new principal of law, as the Wisconsin court evidently did . . . ."

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173. See supra text accompanying notes 109-115.
176. United States v. Davis, 932 F.2d 752, 758 (9th Cir. 1991); United States v. Giannetta, 909 F.2d 571, 576 (1st Cir. 1990).
178. Id.
179. Id. at 875.
180. Id. at 870.
181. Id. at 875-76 ("We think it clear that the special needs of Wisconsin's probation system make the warrant requirement impractical and justify replacement of the standard of probable cause by 'reasonable grounds' . . . .").
had held that, regardless of the statute, a search of any probationer need only be supported by reasonable cause. 183 The United States Supreme Court expressly disagreed, stating that its holding was based on the fact that there was a statute:

The search of Griffin’s residence was “reasonable” within the meaning of the Fourth Amendment because it was conducted pursuant to a valid regulation governing probationers. This conclusion makes it unnecessary to consider whether, as the court below held and the State urges, any search of a probationer’s home by a probation officer is lawful when there are “reasonable grounds” 184

The attempt by the Courts of Appeals for the First and Ninth District to extend Griffin beyond its limited holding is clearly erroneous. These courts have tried to apply Griffin beyond its facts. They have ignored the fact that the Wisconsin Supreme Court and the State urged the Court to extend the Griffin holding beyond the statute provided. 185 The Court expressly refused. 186

In sum, the First and Ninth Circuits have incorrectly tried to expand the Griffin holding in two ways. First, by arguing that the Court, in finding the Wisconsin regulation constitutional, created a new “reasonable suspicion” limitation on all probation searches. 187 Second, by attempting to use this holding (which was clearly based on the “special needs” exception) to limit probation searches that are conducted pursuant to the probationer’s voluntary consent. 188

The correct view has been adopted by the Eight Circuit Court of Appeals, California Supreme Court, and California Courts of Appeal. 189 These courts reason that a search conducted pursuant to a probation condition is only limited by the scope of that condition. 190 This rationale is even more

183. Id.
184. Id. at 880.
185. Id.
186. Id.
188. Davis, 932 F.2d at 758.
persuasive in jurisdictions such as California where adult probationers must consent to their search conditions in order for the conditions to be valid. Ruling otherwise would give probationers special protection by limiting their ability to consent even though courts have held one can voluntarily consent to waive their Fourth Amendment rights.\(^{191}\)

Furthermore, the *Griffin* decision indicates that the Fourth Amendment rights of probationers should be narrower, and not broader, than the rights guaranteed to other citizens. *Griffin* upheld a statute which restricts the Fourth Amendment rights of all probationers.\(^{192}\) The statute even includes those who have not voluntarily consented to waive their rights.\(^{193}\) In addition, it applies regardless of the crime the probationer committed.\(^{194}\) Therefore, *Griffin* stands for the proposition that probationers may be afforded less Fourth Amendment protection than other citizens. Reaching the opposite conclusion, the Courts of Appeal for the First and Ninth Circuits have mistakenly provided probationers with more.

B. *Relevance of the Government Agent's Knowledge*

The second issue in this analysis is to determine whether a police officer’s knowledge is necessary for a search to be valid where such knowledge is not required by a probationer’s search condition. This issue arises in situations where it is clear that, but for the existence of the probationer’s search condition, the search would violate the Fourth Amendment. The California courts have found that when a search is conducted pursuant to a valid search condition which requires a probationer to submit to be searched by “any” police officer, the searching officer’s knowledge of that condition is irrelevant.\(^{195}\)

1. Legal Considerations

First, the permissible scope of the search must be determined. That is, what a reasonable person would understand

193. *Id.*
194. *Id.*
the scope to be, from the language of the condition itself, must be determined.\textsuperscript{196} If a reasonable person would understand the language of a probationer's search condition to include a police officer who had no knowledge of the search condition, then the controlling authority indicates that the search is valid. For example, the defendant in \textit{In re Bihn L.}\textsuperscript{197} was a probationer whose search condition required that he submit to be searched by "any peace officer or school official."\textsuperscript{198} Understandably, the court determined that the reasonable person would understand the phrase "any police officer" to encompass all police officers, whether or not they had knowledge of the defendant's search condition.\textsuperscript{199}

The second reason for supporting these decisions is the long-standing notion that the validity of a search has always been an evaluation of objective facts which could not be altered by an officer's state of mind. For example, in \textit{Anderson v. Creighton},\textsuperscript{200} the United States Supreme Court held that probable cause to sustain a search could not be established by showing that a searching officer subjectively believed he had grounds for his action.\textsuperscript{201} Similarly, in determining if a "plain view" search is valid, courts consider whether the defendant has exhibited an actual expectation of privacy.\textsuperscript{202} This is demonstrated by objective facts such as where the property is located and from where it is seen.\textsuperscript{203} The searching officer's state of mind is irrelevant to making this determination.\textsuperscript{204}

Since an officer's state of mind has never before been relevant to Fourth Amendment searches, it should not now become a relevant factor.\textsuperscript{205} If an unconstitutional search cannot be justified by a police officer's state of mind, the state of mind of the police officer should not subject the fruits of a constitutional search to the exclusionary rule.

\textsuperscript{196} See supra notes 71-75.
\textsuperscript{197} 6 Cal. Rptr. 2d 678 (Ct. App. 1992).
\textsuperscript{198} Id. at 679.
\textsuperscript{199} Id. at 681.
\textsuperscript{200} 483 U.S. 635 (1987).
\textsuperscript{201} Id. at 638-41; see also Maryland v. Garrison, 480 U.S. 79, 87 (1987); Beck v. Ohio, 379 U.S. 89 (1964).
\textsuperscript{202} 489 U.S. 347, 361 (1967) (Harlan, J., concurring).
\textsuperscript{204} Id.
\textsuperscript{205} \textit{In re Marcellus L.}, 279 Cal. Rptr. 2d 901, 906 (Ct. App. 1991).
2. Policy Considerations

In addition to the legal justifications, there are several policy considerations that support allowing probation searches. First, limiting the scope of these searches would hinder the use of probation as an alternative to incarceration. Public policy demands that any restriction on the use of probation should be discouraged. Probation is a healthy attempt to rehabilitate rather than punish criminals. Unlike incarceration, it gives criminals a second chance to demonstrate that they can contribute positively to society. The alternative would be confinement where these convicted criminals would suffer even more severe restrictions on their freedom. Many of the benefits of this rehabilitative approach to punishment would be lost.

The benefits of expanding the use of probation are many. Probation is currently a useful incentive for criminals to cooperate with law enforcement officials thereby increasing the government’s ability to counter crime.\(^{206}\) In addition, courts have always had broad discretion when granting probation.\(^{207}\) This has allowed judges who are familiar with a particular case to apply probation conditions which they feel are best suited to a particular defendant. Judicial discretion has resulted in a more creative, flexible approach to managing the crime problems in the United States.\(^ {208}\) Any restriction on this flexible approach should be discouraged.

A second important justification is the public safety considerations of probation. When granting probation, judges are required to factor in the public safety considerations of allowing convicted criminals out on the street.\(^ {209}\) If the condition exception applied only to the limited number of police officers who have knowledge of a probationer’s search condition, the condition would be less of an incentive to act lawfully. Under this line of reasoning, the increased threat to public safety may also cause probation to be used less fre-

\(^{206}\) See, e.g., United States v. Giannetta, 909 F.2d 571, 573 (1st Cir. 1990) (granting probation in lieu of a sentence to state prison due to the defendant’s extensive cooperation with law enforcement authorities in a drug trafficking investigation).

\(^{207}\) See supra notes 96-103.

\(^{208}\) E.g., United States v. Williams, 787 F.2d 1182, 1185 (7th Cir. 1986) (approving a urinalysis and drug screening condition).

quently, leaving sentencing judges with only incarceration as an option.

Third, limiting the scope of probationers' search conditions would circumscribe the use of a valid means of reducing recidivism. Convicted criminals who are put on probation are less likely to violate the law again if they know that they may be searched by law enforcement officials at any time. For example, the California Supreme Court found in People v. Bravo, that a narcotics offender "[w]ith knowledge he may be subject to a search by law enforcement officers at any time . . . will be less inclined to have narcotics or dangerous drugs in his possession." The deterrent effect will be increased by a search condition that allows probationers to be searched by any police officer and not only the few who happen to have knowledge of the probationer's search condition.

In addition, the purpose of an unexpected search is not only to ascertain whether a probationer is disobeying the law, but whether he is obeying the law as well. Information obtained from these searches is a valuable measure of whether the rehabilitative purposes of probation are having an effect. If probationers are limited to being searched by the relatively few officers who have knowledge of the search condition, then the search condition will have an extremely limited effect. The fact that probationers have advance notice that they will be subject to ardent monitoring by all police officers will decrease the likelihood of future criminality. This is precisely the purpose the probation system has been designed to serve.

3. Effect on Police Harassment

Critics of the California decisions have several concerns. First, some argue that allowing the introduction of

211. 738 P.2d 336 (Cal. 1987).
212. Id. at 342.
213. Id.
214. In re Bushman, 463 P.2d 727, 732-33 (Cal. 1970) (finding that courts have broad discretion to impose probation conditions which foster rehabilitation and protect public safety).
215. See supra text accompanying notes 96-103.
216. See generally In re Tyrell J., 21 Cal. App. 4th 1243, 1255 (Ct. App. 1992) (holding that a searching officer's knowledge of a probationer's search condition
evidence from these searches will reward unlawful police behavior and therefore encourage this undesirable activity in the future.\textsuperscript{217} This argument fails on several grounds. First, it assumes that the rule creates an incentive for police officers to violate the Fourth Amendment rights of all citizens. The logic underlying this assumption dictates that police officers would begin to randomly and unconstitutionally search unsuspecting citizens. The purpose, the theory goes, is the hope that they will have the fortuity of coming across an unsuspecting probationer who happens to have a probation condition requiring him to submit to warrantless searches. The chances of coming across a probationer with such a search condition, the fact that any incriminating evidence found on the non-probationers will be suppressed, and the consequences of being convicted of police harassment make the likelihood of such behavior doubtful.

Second, this proposition disregards the limitation that the California courts have placed on these searches. As discussed above, all evidence which is the product of searches that are conducted for arbitrary, capricious, or harassment purposes will be subject to the exclusionary rule—the same remedy afforded all other unconstitutional searches.\textsuperscript{218} Therefore, there will be no new rewards for police officers to act in an unconstitutional manner. The evidence of these searches will only be admitted when they are acting in good faith.

Third, the proposition assumes that police officers will act in bad faith. However, there have been no charges of harassment or bad faith in the California cases that have evaluated these searches. For instance, in \textit{Marcellus L.}, a police officer stopped a minor for truancy which the trial and appellate courts found reasonable.\textsuperscript{219} The minor was found in front of a known crack house which was located in area known for dealing drugs.\textsuperscript{220} For safety reasons, the police of-

\textsuperscript{217} Marcellus L., 279 Cal. Rptr. at 904.

\textsuperscript{218} See supra text accompanying notes 89-95 for a brief discussion of the exclusionary rule.

\textsuperscript{219} Marcellus L., 279 Cal. Rptr. at 903 n.2.

\textsuperscript{220} Id. at 902.
ficer conducted a brief pat search to look for weapons.\textsuperscript{221} Both the trial and appellate courts found that a truancy stop did not justify a pat down search for weapons.\textsuperscript{222} The court found, however, that the police officer had a legitimate reason to detain the defendant.\textsuperscript{223} In addition, the defendant made no claim that the officer was acting for arbitrary, capricious, or harassment purposes.\textsuperscript{224}

Similarly, in \textit{Tyrell J.}, a police officer was patrolling a high school football game because of a shooting that had occurred the previous week.\textsuperscript{225} The defendant and his friends drew the suspicion of the police officer because they had been identified as members of the gang involved in the previous shooting and because they were wearing heavy bulky coats on a hot summer night.\textsuperscript{226} A search of the group produced marijuana and a long fixed blade knife.\textsuperscript{227} The court found the facts would have been insufficient to support the search had the defendant not been subject to the probation condition.\textsuperscript{228}

These cases illustrate that the situations where this rule is being applied are not those where police officers are harassing citizens at random. The rule only applies when police officers have arrived at incorrect legal conclusions as to the factual basis required to justify a temporary seizure. As discussed above, these legal determinations are very fact specific.\textsuperscript{229} Courts must engage in very imprecise considerations of the totality of the circumstances surrounding each search.\textsuperscript{230} Police officers cannot be expected to apply the correct legal analysis to every situation in the field. In addition, nowhere has it been contended that police activity which is arbitrary, capricious or for harassment purposes may be justified by a probationer's search clause.

The fourth reason that allowing this evidence will not contribute to illegal police activity is the safeguards which already exist. Evidence from searches that are the product of

\begin{itemize}
\item \textsuperscript{221} \textit{In re Marcellus L.}, 279 Cal. Rptr. 901, 903 (Ct. App. 1991).
\item \textsuperscript{222} \textit{Id.} at 903 n.2.
\item \textsuperscript{223} \textit{Id.}
\item \textsuperscript{224} \textit{Id.} at 904.
\item \textsuperscript{225} \textit{In re Tyrell J.}, 876 P.2d 519, 521-22 (Cal. 1994).
\item \textsuperscript{226} \textit{Id.}
\item \textsuperscript{227} \textit{Id.}
\item \textsuperscript{228} \textit{Id.}
\item \textsuperscript{229} See supra text accompanying notes 38-42.
\item \textsuperscript{230} See supra text accompanying notes 38-42.
\end{itemize}
arbitrary police behavior will not be admissible.\textsuperscript{231} In addition, victims of police harassment will still have the legal remedies of bringing suit for police harassment and civil rights violations.

4. Balancing Considerations Warrant Invasion of Constitutional Rights

The public policy considerations warrant this limitation of a citizen's Fourth Amendment rights.\textsuperscript{232} As discussed above, \textit{Schneckloth} stands for the proposition that the right to be free from unwarranted searches and seizures is not subject to the same strict scrutiny as other constitutional protections.\textsuperscript{233} On balance, public policy concerns underlying the need for probation outweigh the cost of less limited searches and seizures. Encouraging rehabilitation, discouraging recidivism and protecting the public from future criminal activity all justify a more intense monitoring of probationers who have voluntarily waived their Fourth Amendment rights.

Further, a limit for this broad probation condition is already in place.\textsuperscript{234} Courts must adhere to the rule that a probation condition must reasonably relate to the prevention of future criminal activity.\textsuperscript{235} As the cases have illustrated, this limitation prevents the abuse of overly broad probation conditions.\textsuperscript{236} Therefore, a condition requiring probationers to submit to warrantless searches will only be used in the circumstances where it relates to preventing future violations of the law.

V. PROPOSAL

The United States Supreme Court must revisit \textit{Griffin} to clarify the ambiguity created by the First and Ninth Circuit Courts of Appeal. In so doing, the Court should be guided by the following three principles.\textsuperscript{237} First, the federal courts of appeals' holdings which require that all probation searches be supported by reasonable cause\textsuperscript{238} should be expressly re-

\textsuperscript{231} See supra text accompanying note 148.
\textsuperscript{232} See discussion supra part IV.B.2.
\textsuperscript{233} See supra notes 60-64 and accompanying text.
\textsuperscript{234} See discussion supra part II.B.2.
\textsuperscript{235} See discussion supra part II.B.2.
\textsuperscript{236} See discussion supra part II.B.4.a.
\textsuperscript{237} See discussion supra part II.B.4.a.
\textsuperscript{238} See discussion supra part II.B.4.a.
jected. Such an exception to the test for consent has never been recognized by the United States Supreme Court and goes against the dictates of Schneckloth v. Bustamonte. In addition, Griffin provides no authority for this exception because such a finding goes beyond the scope of its holding.

Second, the limit of a probation search should be determined by the language of the search condition. In addition, courts should find in all search conditions an implicit refusal to consent to any police behavior which is arbitrary, capricious, harassing or conducted in bad faith. This limitation is simply a recognition that no reasonable person should consent to this sort of government action.

Finally, the court should find that a searching officer's knowledge of a search condition is irrelevant when determining the validity of a search. The scope of a search should be determined by the language of the search condition alone. The Supreme Court does not consider relevant the searching officer's subjective belief that he has grounds for his action. Probable cause and its exceptions have always been determined by objective facts which are considered in light of all the circumstances. Public policy considerations demonstrate there is no reason to deviate from this general rule.

VI. CONCLUSION

The United States Supreme Court must revisit Griffin in order to clarify the scope of its holding. Conflicting interpretations of Griffin make unclear the validity and scope of probationary search conditions and a probationer's ability to consent to waive her Fourth Amendment rights. In California, the same search condition provides a defendant with different Fourth Amendment protections depending on whether she is sitting in state or federal court. This arbitrary application of what should be settled Fourth Amendment principals demands the United States Supreme Court's consideration.

The California Supreme Court has taken the first step in resolving these issues in Tyrell J. Hopefully, the Tyrell J. decision will draw the United States Supreme Court's attention to the current conflicting applications of Griffin in the lower courts' decisions. This comment's proposal provides a clear

239. See supra text accompanying notes 172-193.
240. See supra notes 200-205 and accompanying text.
241. See supra text accompanying notes 38-42.
and simple resolution to the conflicting interpretations that currently exist. Applying existing Fourth Amendment precedent is preferred because it unambiguously puts probationers on notice of their Fourth Amendment rights. The federal courts of appeals' holdings are an ad hoc effort to provide probationers with more Fourth Amendment protection than the Constitution, as interpreted by the Supreme Court, provides. The appropriate legal analysis and the public policy concerns discussed above require that these rulings be abandoned.

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