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Home Sweet Home?! Maybe Not for Parolees and Probationers When It Comes to Fourth Amendment Protection

David M. Stout¹

INTRODUCTION

The founders of the United States Constitution developed the Fourth Amendment to bring an end to random intrusions by government, which the colonials experienced when they were under the oppressive rule of Great Britain.² This invasion of privacy by Great Britain acted as a catalyst for the American Revolution.³ To prevent a repeat of history under the new government of the United States, the Fourth Amendment established the following rights:

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.⁴

The Fourth Amendment protects fundamental rights and offers different levels of privacy protection based upon the context in which it is applied. Requiring probable cause and a warrant offers the highest level of privacy protection. Generally, both are required for entry into a home to search or to make an arrest.⁵ The Fourth Amendment authorizes a reduced level of protection, requiring probable cause but no warrant when there are exigent circumstances.⁶ For example, the search of an automobile is considered

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² See generally WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.1 (4th ed. 2004) (“The writ of assistance, seldom used in England, was utilized by customs officers to enter and search buildings for smuggled goods.... Controversy over the writs continued up to the Revolutionary War....”).

³ See id.

⁴ U.S. CONST. amend. IV.


an exigent circumstance because, for all practical purposes, only probable cause is required. When police stop and frisk an individual in public, privacy protection is reduced even further; only reasonable suspicion that criminal activity may be afoot is required. These are only a few examples of the various levels of protection offered by the U.S. Supreme Court's interpretation of the Fourth Amendment. The greatest protection is given to a citizen's residence. This is the context in which the Ninth Circuit decided United States v. Scott.

The defendant Scott was a pre-trial releasee. Although he was released on his own recognizance, he was subject to the conditions of his release agreement. This release agreement included a clause allowing for random drug testing and the freedom to search his home at any time, without a warrant requirement. The search condition that was imposed upon Scott is analogous to the search condition imposed upon the probationer in United States v. Knights and is similar to the search condition imposed upon the probationer in Griffin v. Wisconsin. The same type of search condition is also regularly imposed upon parolees. After Scott, we have the opportunity to re-evaluate the justifications for these conditions,

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10 See Karo, 468 U.S. at 714; Payton, 445 U.S. at 589–90.
11 United States v. Scott, 424 F.3d 888 (9th Cir. 2005), abrogated by 450 F.3d 863 (9th Cir. 2006) The 2006 decision completely resolved the original matter, and the court upheld its earlier ruling and logic. The author has chosen to continue to reference the 2005 opinion because the Ninth Circuit analyzed the Fourth Amendment issue in greater detail.
12 See Scott, 424 F.3d at 889–90. Scott had been arrested for drug crimes. He was released on his own recognizance subject to both search and drug testing conditions. Based upon a tip that was not sufficient to establish probable cause, officers went to Scott's home and administered a urine test. After failing the test, officers searched Scott's home, eventually turning up an unregistered shotgun. Scott was charged with possession of an unregistered shotgun, but challenged the search uncovering the shotgun based on his Fourth Amendment rights. See id.
13 See id. at 889 ("Among the conditions of his release was consent to 'random' drug testing 'anytime of the day or night by any peace officer without a warrant,' and to having his home searched for drugs 'by any peace officer anytime[,] day or night[,] without a warrant.'").
14 United States v. Knights, 534 U.S. 112 (2001) ("A California court's order sentencing respondent Knights to probation for a drug offense included the condition that Knights submit to search at anytime, with or without a search or arrest warrant or reasonable cause, by any probation or law enforcement office.").
15 Griffin v. Wisconsin, 483 U.S. 868 (1987) ("Wisconsin law places probationers in the legal custody of the State Department of Health and Social Services and renders them 'subject to . . . conditions set by the . . . rules and regulations established by the department.' One such regulation permits any probation officer to search a probationer's home without a warrant as long as there are 'reasonable grounds' to believe the presence of contraband.").
because all of the cases share a common thread—a reduced level of Fourth Amendment protection. There is also a renewed need to re-evaluate the conditions placed on probationers and parolees as evidenced by President Bush's acknowledgment of prisoner re-entry into society in his 2004 State of the Union Address. In his speech, the president proposed a four-year, $300 million initiative to help inmates return to society through community support. The recent decision of United States v. Booker, which ruled mandatory sentencing guidelines unconstitutional, further accentuates the need to re-evaluate what is necessary and, more importantly, what is effective for rehabilitation of parolees and probationers, because in the wake of the decision, the volume of both is likely to increase.

The purpose of this Note is to explore an alternative approach for dealing with the dichotomy between respecting a degree of privacy-rights protection granted to probationers and parolees under the Fourth Amendment and the right of society to exist free of recidivist violence. The Fourth Amendment analysis of residential searches of probationers and parolees begins with an overview of the relevant cases to establish their theoretical relationship to the decision in Scott. Furthermore, the primary focus is which Fourth Amendment interpretation is best suited for determining the rights of probationers and parolees and why courts apply these different interpretations. Detailed analysis of Scott and comparison with previous cases follows. A synopsis of the federal probation system, combined with current research in the areas of probation and parole, addresses how the courts and society as a whole should acknowledge the changing needs of probationer and parolee rehabilitation. By recognizing the changing needs, courts will be better able to determine whether potentially harsh Fourth Amendment limitations are actually necessary and whether they assist or inhibit the goals of rehabilitation. Alternatives to present Fourth Amendment protection are explored by applying the analysis from Scott. Finally, the importance of Fourth Amendment protection with respect to one's residence and how privacy relates to rehabilitation and reintegration

18 See id.
20 See infra notes 28–154 and accompanying text.
21 See infra notes 28–154 and accompanying text.
22 See infra notes 155–83 and accompanying text.
23 See infra notes 184–97 and accompanying text.
24 See infra notes 212–24 and accompanying text.
25 See infra notes 198–211 and accompanying text.
is addressed. Regardless of one's individual opinion as to what liberties should be granted to probationers and parolees, including Fourth Amendment protections, effective rehabilitation is an immediate and necessary goal to improve the quality of life of all concerned. Moreover, offering increased Fourth Amendment protection of a probationer's or parolee's residence, although not at the level enjoyed by normal citizens, will likely have benefits that outweigh the costs. This is the underlying theme throughout this Note.

I. The Initial Reduction of Fourth Amendment Protection

A. Administrative Searches and the "Special-Needs" Doctrine

The reduction of Fourth Amendment protection of one's residence began in *Camara v. Municipal Court*, which concerned a search aimed at assuring compliance with municipal housing codes. Instead of requiring probable cause, the Supreme Court applied a balancing test, weighing "the need to search against the invasion which the search entails." In *Camara*, the Court found that as long as "reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling," the need to search outweighs the minimal intrusion. The Court still required a warrant for the search, but as long as the physical characteristics of the dwelling to be inspected fell within those targeted by the reasonable inspection program, those physical characteristics were sufficient for probable cause to obtain a warrant. In later cases, as in *New Jersey v. T.L.O.*, the *Camara* balancing approach was used to justify warrantless searches.

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26 See infra notes 224–38 and accompanying text.
27 See supra notes 17–19 and accompanying text.
28 See Camara v. Municipal Court, 387 U.S. 523 (1967). The events of *Camara* arose in San Francisco. At the time, the San Francisco municipal code required an inspection once a year and as needed thereafter. The inspection was required before a permit of occupancy could be issued for an apartment building. Camara was the lessee of the ground floor of an apartment building. He was maintaining his residence in the rear of the ground floor, but the occupancy permit of the building did not allow for residential use of the ground floor. When the inspector attempted to gain entry and inspect the ground floor, Camara refused. Subsequent attempts to gain entry without a warrant by other inspectors were also refused by Camara, which ultimately brought the Fourth Amendment question in front of the United States Supreme Court. See id.
29 Id. at 537.
30 Id. at 538.
31 See id.
T.L.O. involved a search of a student's purse by the vice-principal after the student had been caught smoking in violation of school rules. The Supreme Court found that the vice-principal had reasonable suspicion to justify the initial search of the purse. During the inspection of the purse for cigarettes, the vice-principal found cigarette rolling papers. Subsequently, the vice principal found marijuana, a large amount of money, and a list of students. The Court held that the discovery of the cigarette rolling papers was sufficient to provide reasonable suspicion for extending the search of the purse to find marijuana. Although not willing to equate the school's authority to search with that of parents, the Court found the search reasonable with only a showing of reasonable suspicion by balancing the interest of the school in maintaining a learning environment against the interest of the student and her expectation of privacy.

The Camara balancing approach used by the Supreme Court was addressed in Justice Blackmun's concurrence: Justice Blackmun agreed with the decision but emphasized the limited context in which the Camara balancing approach has been applied. In writing his concurrence, Justice Blackmun produced a statement, cited by the majority in later "special needs" cases: "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers." The Court has since used Justice Blackmun's statement, as he had intended, to determine whether the special-need purpose is beyond those of normal law enforcement before balancing government's interests and individuals' privacy interests to determine the reasonableness of a search. The T.L.O. decision was different from Camara because it required only a showing of "reasonable grounds" for the search rather than a warrant. This difference made
an attractive choice for courts to analyze future warrantless search cases such as *Griffin v. Wisconsin*.\(^4\)

II. THE REDUCTION OF PROBATIONERS' FOURTH AMENDMENT PROTECTION

Although this topic is revisited later in more detail, there are basic differences between probationers and parolees.\(^4\) Both types of individuals have been convicted of crimes but have received different sentences. Probationers have had their sentences probated, which means they are under supervision of the state but usually spend no time under incarceration. Parolees, on the other hand, are incarcerated for their crimes but are released before the end of their sentences either due to statutory provisions or good behavior.\(^4\)

The Supreme Court views these two groups differently when justifying a reduction of Fourth Amendment protection of each class.\(^4\) Naturally, there are also different but equally important justifications for maintaining the respective levels of Fourth Amendment protection for each class.\(^4\)

A. Special Needs and Probationers

*Griffin v. Wisconsin* involved a Fourth Amendment challenge to the search of a probationer's apartment.\(^4\) The defendant Griffin had been convicted of a felony and subsequently released on probation.\(^4\) As a condition of his release, Griffin was placed in the custody of the Wisconsin State Department of Health and Social Services.\(^4\) Consequently, he was subject to their regulations, one of which "permits any probation officer to search a probationer's home without a warrant as long as his supervisor approves and as long as there are 'reasonable grounds' to believe the presence of contraband."\(^5\)

During his probation, the supervisor of Griffin's probation officer received a tip from a police detective that Griffin had or may have had guns in his apartment.\(^5\) After arriving at Griffin's apartment and informing Griffin of their intentions, Griffin's probation officer and the officer's supervisor

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\(^4\) See infra notes 155-57 and accompanying text.

\(^4\) See infra notes 155-57 and accompanying text.

\(^4\) See infra notes 47-154 and accompanying text.

\(^4\) See infra notes 47-154 and accompanying text.

\(^4\) See *Griffin*, 483 U.S. at 870.

\(^4\) See *id.*

\(^4\) See *id.*

\(^5\) *Id.* at 870-71.

\(^5\) See *id.* at 871.
searched his apartment and uncovered a handgun.\(^5^2\) Once Griffin's case made it to the Supreme Court, the Court found that the search did not violate Griffin's Fourth Amendment rights because the search was compliant with Wisconsin's regulation of his probation, which in turn satisfied the constitutional requirements of the Fourth Amendment.\(^5^3\)

In the *Griffin* opinion, the Court first acknowledged that traditionally the search of one's residence requires a warrant supported by probable cause.\(^5^4\) The Court then recognized that it allowed the reduction of this requirement in *T.L.O.* because of the special needs of the school system.\(^5^5\) Second, the Court combined the special-needs justification and the departure from a warrant requirement in *T.L.O.* with the departure from the probable cause requirements when there were "reasonable legislative or administrative standards" to replace them in *Camara v. Municipal Court.*\(^5^6\) Combining these two justifications, the Court likened the state's interest in running a school system to the state's interest in running a probation system—both present "special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements."\(^5^7\) The use of Justice Blackmun's concurrence, as well as the use of his reasoning, strongly suggests that there would have to be a finding of special needs beyond normal law enforcement before implementing the balancing of interests approach from *Camara.* After determining the state's operation of its probation system qualified as a special need, the Court balanced the interest of the government's ability to more easily search against that of the probationer's privacy.

In support of finding a reduced level of Fourth Amendment protection for a probationer's residence and a reduction in his privacy interest, the Court turned to the special restrictions imposed upon a probationer as a condition of his release.\(^5^9\) The Court stated two purposes of these restrictions: "to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large."\(^6^0\) The latter purpose seems to be a general goal of ordinary law enforcement, not just in the case of probationers, a point of greater importance later on in this Note.\(^6^1\)

\(^{52}\) *See id.*

\(^{53}\) *See id.* at 873–77.

\(^{54}\) *See id.* at 873.

\(^{55}\) *See id.*

\(^{56}\) *Id.*

\(^{57}\) *Id.* at 874.

\(^{58}\) *See id.* at 873.

\(^{59}\) *See id.* at 874.

\(^{60}\) *Id.* at 875.

\(^{61}\) *See infra* notes 66–96, 165–75, 212–16 and accompanying text.
The Court used the two purposes for probationers' privacy restrictions to justify a special need and to validate a reduction of Fourth Amendment protection of the probationer's residence down to the reasonable grounds standard, which was already accepted by Wisconsin law. The Court justified this result by citing a recent study claiming that intensive supervision helped reduce recidivism. Furthermore, the Court's search of Griffin's apartment based on a tip satisfied the reasonable grounds requirement of Wisconsin law, which subsequently satisfied the Constitutional requirement of the Fourth Amendment. The Court's approach in Griffin would be revisited in future cases challenging the validity of searches based on special needs.

B. The Continued Application of the Special-Needs Doctrine in other Contexts

An example of the Supreme Court's continued application and development of the special-needs doctrine is National Treasury Employees Union v. Von Raab. Von Raab involved a Fourth Amendment challenge by a federal employees' union and a union president against the United States Customs Service for requiring drug testing under certain circumstances. While this case did not address special needs in the context of probation, the same analysis was used to: (i) determine whether "a Fourth Amendment intrusion serves special governmental needs, beyond the need for law enforcement," and (ii) "balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." Using this analysis, the Court found that the government and the Customs Service had a special need to allow warrantless searches unsupported by probable cause in the form of suspicionless drug testing because drug interdiction was an important goal of the Customs Service. Under the balancing test, the Court considered the nature of the responsibility

62 See Griffin, 483 U.S. at 875.
63 See id.
64 The weight given to tips, in establishing probable cause, is determined based on the "veracity," "reliability" and "basis of knowledge" of the tip. Illinois v. Gates, 462 U.S. 213 (1983). In some cases, an affidavit based mainly on a tip from an informant who the affiant corroborated is sufficient to establish probable cause. Jones v. United States, 362 U.S. 257 (1960). This being the case, a tip from a police detective to a probation officer relayng on just the possibility of their being guns in the apartment of a probationer is unlikely to make a substantial contribution in establishing probable cause, much less reasonable grounds. See Griffin, 483 U.S. at 871.
65 See Griffin, 483 U.S. at 880.
67 See id.
68 Id. at 665-66.
69 See id. at 668-70.
bestowed upon the customs employees that would be subject to the drug testing. The Court also felt that it was necessary to confirm that these employees were free from narcotics since they were "the first line of defense" for the public against drug trafficking. Again, the Court found a special need to justify suspicionless searches and the analysis was the same, requiring a finding of special needs before balancing governmental and individual privacy interests, as used previously in *Griffin*, later in *Von Raab*, and subsequently in future cases.

The Supreme Court faced a different aspect of special needs in *City of Indianapolis v. Edmond*. In *Edmond*, the city of Indianapolis initiated a program to randomly pull over groups of vehicles and inspect them for narcotics. The standard for the searches in *Edmond* differed from that in *Griffin*. *Edmond* involved suspicionless random searches where *Griffin* involved individualized suspicion at the level of reasonable grounds to satisfy a Fourth Amendment search. The searches in *Edmond* also involved vehicles, a context in which Fourth Amendment protection is relatively low when compared to the search of one's residence, as in *Griffin*. Despite these differences, the Court in *Edmond* applied the same special-needs analysis as it had used in previous cases involving a claim of special needs to search. Here, the Court was unwilling to allow checkpoints that randomly stopped vehicles with no individualized suspicion. According to the Court, the stops did not serve a special need beyond that of ordinary law enforcement. After *Edmond*, Justice Blackmun's concurrence from *New Jersey v. T.L.O.* had been used in a number of decisions, effectively limiting the use of special needs to non-law enforcement purposes.

Even though *Griffin* involved individualized suspicion for the search, the special-needs analysis was based on the need for general supervision of the state's probation system which was, at least in part, based on the goal of protecting the community, a function of ordinary law enforcement. Because the greatest Fourth Amendment protection exists in an individual's

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70 Id. at 670-71.
71 See *Vernonia Sch. Dist.* 471 U.S. 646, 653 (1995) ("A search unsupported by probable cause can be constitutional, we have said, 'when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987))).
73 See id. at 34-36.
74 See id. at 39-40; *Griffin*, 483 U.S. at 875-76.
76 See *Edmond*, 531 U.S. at 40-44.
77 See id. at 44.
78 See id. at 41.
79 See *Griffin*, 483 U.S. at 875.
residence, it is not unreasonable that a special need, independent of ordinary law enforcement, must serve an important and necessary governmental purpose in order to outweigh an individual’s increased privacy expectations in his home. If such a purpose was not important or necessary, and the only other special-needs justification was in the nature of ordinary law enforcement, then it is not a stretch of reason to assume that the required showing would have to rise close to the level of probable cause to justify infringement on this area of increased privacy interest (an individual’s home) under the balancing test, even if special needs were found to exist. With the decision of Griffin using special needs as a justification for reducing the standard of suspicion needed to search a probationer’s home, and with the decision of Edmond narrowing the application of special needs by restricting its use for purposes other than ordinary law enforcement, the Supreme Court presumably faced the application of both of these decisions combined in United States v. Knights.

C. Skirting the Special-Needs Doctrine

The facts of Knights were similar to those of Griffin. Knights was arrested, convicted, and released on probation, with his condition of release stating, “Knights would ‘[s]ubmit his . . . person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer.’” After his release, Knights was under surveillance by a sheriff’s detective for his involvement in a crime unrelated to his previous conviction. Although the detective observed different pieces of evidence linking Knights with the suspected crimes, he was aware of Knights’s classification as a probationer and the search condition of his probation, upon which the detective relied when he made a warrantless search of Knights’s apartment. The search uncovered incriminating evidence. Knights was indicted, and he subsequently sought suppression of the evidence.

Judging from the Supreme Court’s approach in Griffin, it would seem that the next logical step would have been to start the Knights analysis with

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82 Id. at 114.
83 See id. at 114–15 (Knights had been convicted of a drug crime and was on probation due to that conviction. While on probation, Knights was being observed for his suspected involvement in vandalism and arson).
84 See id. at 115.
85 Id. (the search of Knights’s home “revealed a detonation cord, ammunition, liquid chemicals, instruction manuals on chemistry and electric circuitry, bolt cutters, telephone pole-climbing spurs, drug paraphernalia, and a brass padlock”).
86 See id. at 112.
regard to the special needs of the probation system and whether the warrantless search was justifiable in light of those special needs. However, this was not the approach taken by the Court. The Court instead opted to use the "totality of the circumstances" approach from Ohio v. Robinette to determine the reasonableness of the search.\footnote{87 Id. at 118 ("[W]e conclude that the search of Knights was reasonable under our general Fourth Amendment approach of 'examining the totality of the circumstances.'" (citing Ohio v. Robinette, 519 U.S. 33 (1996))).} It is logical to reason that the Court, through its use of totality of the circumstances approach in place of the special-needs doctrine, considered the search of Knights's apartment as a search for investigatory purposes, as the Ninth Circuit had found.\footnote{88 See id. at 122.} In *Knights*, the Court stated, "[o]ur holding rests on ordinary Fourth Amendment analysis ..."\footnote{89 Id.}

The Court's application of the totality of the circumstances approach focused on Knights's classification as a probationer, the search condition being a condition of his release, and Knights's lack of any expectation of privacy as a probationer, given his awareness of the search condition.\footnote{90 See id. at 119-20.} The reasonableness inquiry for the government's interest focused on justifying the judge's decision to require the search condition as part of Knights's probation.\footnote{91 See id. at 120.} The Court concluded that, given the totality of the circumstances, reasonable suspicion of criminal activity was the standard of suspected criminal activity that must be shown for the search to meet the constitutional requirements of the Fourth Amendment.\footnote{92 See id. at 121-22.} In closing, the Court acknowledged the holding of *Edmond* only a year earlier, where the Court limited the application of special needs to purposes other than that of ordinary law enforcement. The Court reasoned, however, that a challenge to the constitutionality of a Fourth Amendment search, based on the actual motivation of individual officers, would not be entertained.\footnote{93 See id. at 122.} Again, this specific indication by the Court that its approach did not involve the special-needs doctrine indicates that the search was investigatory for the purpose of detecting a different crime.\footnote{94 See id.}

An inherent flaw in this distinction in the context of probationers is that due to the availability of the special-needs aspect, a court may categorize a search in the light that is most advantageous to its goals. If a police search is truly performed in the interest of a "special need," then the search should be justified under special needs. If the police actions stray near the realm of normal law enforcement, preventing the availability of special needs and
potentially raising the level of suspicion needed, the search should be categorized as an “investigatory search” and justified by the totality of the circumstances approach. Another shortcoming in distinguishing investigatory searches from special-needs searches is that doing so could potentially lead to problems with consistency; especially when using a particular type of analysis in one case (totality of the circumstances in Knights) that is inconsistent with the type of analysis used in a previous case that addresses the same issue and contains very similar facts (Griffin using special needs). The concern about potential inconsistency is exacerbated since the fluctuation in analysis is occurring at the level of the United States Supreme Court. But, given a more recent decision, the totality of the circumstances approach may be signaling the death knell for the special-needs approach in searches of both probationers and parolees.

III. PAROLEES AND THE FOURTH AMENDMENT

A. The Reasonableness Approach

To this point, the focus of Fourth Amendment inquiry has been entirely on probationers. Parolees face even further reduced Fourth Amendment protections, some implemented through the same theories as applied to probationers, and some through different theories, with the most recent approach shadowing United States v. Knights. In Latta v. Fitzharris, the Ninth Circuit applied the traditional Fourth Amendment analysis to determine whether or not the challenged search passed Constitutional muster. While the defendant Latta was on parole, his parole officer validly arrested him at the home of an acquaintance while he was in possession of a pipe full of marijuana. After the arrest, Latta’s parole officer went to Latta’s residence and performed a search of the residence after the arrival of Latta’s stepdaughter. The search uncovered a four-and-one-half

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96 See infra notes 129–44 and accompanying text.
97 See Samson v. California, 126 S. Ct. 2193 (2006) (the Court used United States v. Knights as a template for its analysis; however, it applied it in the context of a parolee (Knights was a probationer), and held that a suspicionless search of a parolee, based on his status as such, was sufficient to satisfy the totality of the circumstances approach, thus satisfying the Fourth Amendment requirements); Pa. Bd. of Prob. v. Scott, 524 U.S. 357 (1998) (the Court does not decide whether the search of the parolee is reasonable and instead holds that even if there was an unconstitutional search of the parolee, parole boards are not required to apply the exclusionary rule); Latta v. Fitzharris, 521 F.2d 246 (9th Cir. 1975) (the Ninth Circuit used a reasonably necessary approach, but limited it to what is necessary and would not allow a full blown search).
98 See Latta, 521 F.2d at 248–52.
99 See id. at 247.
100 See id. Latta’s stepdaughter consented to the search after the parole officer told her
pound brick of marijuana. Latta challenged the search under the Fourth Amendment.

The Ninth Circuit began its Fourth Amendment analysis of the search by first stating that the Fourth Amendment applies to parolees. The Ninth Circuit analyzed the goals and purposes of the parole system, similar to the Supreme Court’s analysis in *Griffin*, and concluded that to meet these goals and purposes, “the parolee and his home are subject to search by the parole officer when the officer reasonably believes that such search is necessary in the performance of his duties.” The Ninth Circuit ultimately affirmed the search and Latta’s resulting conviction for marijuana possession.

This approach bears a strong resemblance to the special-needs doctrine because it recognizes the special needs of the parole system, like the analysis in *Griffin*, and the holding limits the search to the purposes of the parole system, like the holding in *Edmond*.

In addition to the Fourth Amendment challenge, Latta also argued that the evidence obtained in the search should be limited in use to his parole revocation hearing, but the Ninth Circuit rejected this argument.

The Ninth Circuit held that the evidence obtained in the search could be used in both parole revocation hearings and new criminal hearings. The use of the evidence obtained from probationer and parolee searches raises an interesting issue because there is now opportunity to use the evidence in a way that will result in the longest incarceration of the probationer or parolee. This vein of thought is discussed later in greater detail. Even though the Fourth Amendment challenge in *Latta* was decided by an approach very similar to that used to decide later cases of the same nature, the United States Supreme Court in *Pennsylvania Board of Probation v. Scott* used a different method of analysis in deciding a similar case involving the Fourth Amendment rights of parolees.

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101 See id.
102 See id. at 248.
103 See id.
104 Id. at 250.
105 See id. at 253.
106 See supra notes 47–65, 72–78 and accompanying text.
107 See *Latta*, 521 F.2d at 252–53.
108 See id.
109 See infra notes 233–34 and accompanying text.
B. The Exclusionary Rule Approach

In *Pennsylvania Board of Probation*, the United States Supreme Court addressed a search of a parolee’s residence without a warrant or consent.\(^{111}\) As a condition of his parole, the defendant Scott was required to sign a form consenting to warrantless searches of his home by agents of the Pennsylvania Board of Probation and Parole.\(^{112}\) Five months after he was paroled, a warrant was issued for Scott’s arrest based on multiple parole violations, and he was arrested by three parole officers at a diner.\(^{113}\) After his arrest, Scott gave the officers the keys to his residence, which he shared with his mother.\(^{114}\) The officers proceeded to search Scott’s residence without Scott’s consent but at his mother’s direction.\(^{115}\) The officers searched and obtained firearms and weapons in violation of Scott’s parole.\(^{116}\)

Initially, Scott’s parole was revoked, but the Commonwealth Court of Pennsylvania reversed and remanded the case because there was no consent to the search nor was it authorized by any statutory authority ensuring reasonableness.\(^{117}\) The Court also held the exclusionary rule was applicable because the deterrence benefits were outweighed by the costs.\(^{118}\) The Court affirmed, holding that Scott’s “Fourth Amendment right against unreasonable searches and seizures was ‘unaffected’ by his signing of the parole agreement . . . .”\(^{119}\) The Pennsylvania Supreme Court also held that the search was not supported by reasonable suspicion and that, in a case where the officers are aware of the parolee’s status as a parolee, the exclusionary rule is applicable to deter illegal searches to obtain evidence of parole violations.\(^{120}\) The latter issue, addressing the exclusionary rule, was ultimately the focus of the United States Supreme Court’s analysis.

Instead of addressing the special needs of the Pennsylvania parole system, balancing the needs of the state against the privacy expectations of the individual, and determining the reasonableness of the search, the Supreme Court focused on whether the exclusionary rule should apply to evidence used at a parole revocation hearing.\(^{121}\) The Court reasoned that once a Fourth Amendment violation has occurred, there is nothing that can cure

\(^{111}\) See id.

\(^{112}\) Id.

\(^{113}\) Id.

\(^{114}\) Id.

\(^{115}\) Id.

\(^{116}\) Id.

\(^{117}\) Id. at 361.

\(^{118}\) Id.

\(^{119}\) Id.

\(^{120}\) See id. at 361–62.

\(^{121}\) See id. at 363.
this violation. The Court cited its past reluctance to apply the exclusionary rule in any hearing other than criminal hearings. One aspect of this reasoning overlooks the fact that, unlike the other types of hearings where the Court has not applied the exclusionary rule, a revocation hearing, like a criminal trial, involves deciding whether an individual will be incarcerated. Although it would be difficult to apply the exclusionary rule in all revocation hearings due to constraints on time and resources, when making the decision to incarcerate there should at least be the option of scrutinizing evidence if the case demands it.

Next, the Court reasoned that the benefits of the evidence obtained, even if in violation of a parolee’s Fourth Amendment rights, outweighed the marginal deterrent effect on violating parole officers by suppressing the illegally obtained evidence. Thus, the exclusionary rule was found inapplicable at revocation hearings. The Court also reasoned that the application of the exclusionary rule may complicate parole hearings and that invoking it may work against the parolee in question because “the hearing body may be less tolerant of marginal deviant behavior and feel more pressure to reincarcerate than to continue nonpunitive rehabilitation.” Although the Court acknowledged that it was possible for the Fourth Amendment rights of a parolee to be violated, it felt that the deterrence of Fourth Amendment violations of parolees by parole officers would be adequately served through “departmental training and discipline and the threat of damages actions.” Based on the Court’s holding in Pennsylvania Board of Probation, it is safe to say that up to this point parolees enjoyed less Fourth Amendment protection of their homes than probationers did. If any uncertainty about this fact remained, Samson v. California laid it to rest.

Samson v. California involved a search of a parolee. Samson had been released on parole in California where he had been convicted for being a felon in possession of a firearm. A condition of his release was that he must “agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a

122 See id. at 362 (“[A] Fourth Amendment violation is ‘fully accomplished’ by the illegal search or seizure, and no exclusion of evidence from a judicial or administrative proceeding can cure the invasion of the defendant’s rights which he has already suffered.”).
123 See id. (the proceedings mentioned by the Court included grand jury proceedings, civil tax proceedings, and civil deportation proceedings).
124 See id. at 362–69.
125 See id.
126 Id. at 367 (quoting Gagnon v. Scarpelli, 411 U.S. 778, 788 (1973)).
127 Id. at 368–69.
129 Id. at 2196.
130 Id.
search warrant and with or without cause."131 While out on parole, a police officer, aware of Samson's parolee status, observed Samson walking with a woman and a child.132 The police officer stopped Samson on the belief that Samson was facing an at-large warrant, but the officer subsequently determined he was not.133 Nonetheless, the officer searched Samson, based solely on his status as a parolee (and the search condition of his parole), and found methamphetamine on Samson.134 At trial, the court denied Samson's motion to suppress, and he was sentenced to seven years.135 At the Supreme Court, Samson's case was not viewed as a special-needs search (which is not surprising) but rather was analyzed under the template of Knights136 and the "totality of the circumstances."137

The Court viewed Samson's case as picking up where Knights left off. Since there was a degree of individualized suspicion in Knights in addition to Knights' status as a probationer, the question remained whether a search based solely on one's status as a probationer was enough to satisfy the Fourth Amendment.138 Even though the Court used Knights as a template, it retained the distinction between probationers and parolees.139 This distinction limited the application of the holding, which allowed for suspicionless searches to satisfy the reasonableness of the Fourth Amendment, to parolees.140

Under the totality of the circumstances approach, the Court balanced Samson's expectation of privacy versus the state interest served by suspicionless searches of parolees.141 The Court reviewed a litany of case law analyzing the reduced privacy expectations of prisoners who were released subject to a suspicionless search condition in the release agreement.142 The case law supported the conclusion that Samson "did not have an expectation of privacy that society would recognize as legitimate."143 The Court also made a notable reference to what seems to be the new hierarchy in Fourth Amendment analysis. In a footnote, the Court explained why it did not use the special-needs doctrine: "our holding under general Fourth

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131 Id. (citing CAL. PENAL CODE § 3067(a) (West 2000)).
132 Id.
133 Id.
134 Id.
135 Id.
136 See supra notes 82–96 and accompanying text.
137 See Samson, 126 S. Ct. at 2197.
138 See id. at 2197–98.
139 See id. at 2198.
140 See id. at 2202.
141 See id. at 2197–2200 (the court listed a variety of conditions that parolees are subject to and concluded that parolees have "severely diminished expectations of privacy").
142 Id.
143 Id. at 2199.
Amendment principles renders such an examination unnecessary." Given this explanation, it is reasonably safe to assume that totality of the circumstances is the norm and the only time when special needs will be used is if a search fails under the totality of the circumstances approach. The Court seems to be giving the state a second bite at the apple, the basic approach being that if one cannot justify the search under the totality of the circumstances, then the special-needs doctrine should be used. Following this in-depth analysis of case law, it is important to remain aware of the underlying problem with this approach—it is another step in the continued and expansive reduction of traditional Fourth Amendment protection.

On the other side of the scale, the Court found overwhelming support for the state's interest in supervising parolees. And, as usual, the Court referenced high recidivism rates, the interest in protecting the public from repeat offenders, and the state's need to supervise parolees to promote reintegration of prisoners into society. But the state's interest is not supported only by case law. The Court has found support in "empirical evidence . . . [that] clearly demonstrates the significance of these interests to the State of California." But the Court misses the point. It only cites empirical work for statistics and not substance.

Joan Petersilia addresses a range of problems with the parole system, one of which is that parolee supervision is replacing parolee services. She also acknowledges the usefulness of a state initiative to increase surveillance of high-risk offenders but later notes that "such initiatives fail to consider parole and prisoner re-entry within a broader social context." In addition to these few examples, the Court also ignores even greater potential problems created by viewing increased supervision through suspicionless searches by itself and not in concert with all the other aspects of prisoner release that contribute to recidivism. Regardless, the Court held

144 Id. at 2199 n.3.
145 Id. at 2200.
146 See id.
147 Id.
149 See Samson, 126 S. Ct. at 2200 (the statistics cited by the court discuss the high recidivism rate).
151 Id.
152 See id. at *4.

More than 125,000 adult parolees are now returned to California communities each year. Most have been released to parole systems that provide few services and impose conditions that almost guarantee failure. Monitoring systems are getting better, and public tolerance for failure on parole is decreasing. The result is that many more parolees are being
that under the totality of the circumstances, a parolee's status as such was enough to satisfy the reasonableness standard of the Fourth Amendment, allowing the suspicionless search to be valid. The Court retained a safety valve-type standard for Fourth Amendment protection in extreme situations. They did allow de minimis Fourth Amendment protection for parolees against "arbitrary, capricious, or harassing" searches. But for all practical purposes, parolees enjoy no Fourth Amendment protection against suspicionless searches. Samson alone provides fodder for discussion of the Fourth Amendment as it pertains to probationers and parolees, but Scott includes yet another class along the Fourth Amendment continuum: pretrial releasees.

IV. PROBATIONERS, PAROLEES AND UNITED STATES V. SCOTT

The analysis of the previous cases is aimed at creating a general picture of the varied levels of Fourth Amendment protection given to probationers and parolees. The purpose is not to combine probationers and parolees in the same category. There are obvious differences between probationers and parolees as alluded to earlier. Probationers have been convicted of a crime and then released back into the community under the supervision of a probation officer instead of being incarcerated. A parolee has been convicted of a crime, incarcerated, and then released into the community to serve the rest of his sentence under the supervision of a parole officer. Nonetheless, both probationers and parolees are releasees living in communities, free from the confinement of prison, with the ultimate goal of rehabilitation. Therefore, even though United States v. Scott involved a pretrial releasee instead of a probationer or a parolee, the Court's analysis provides a good opportunity to re-evaluate the reduced Fourth Amendment protection afforded probationers and parolees by reviewing the purposes of the reduction.

153 Samson, 126 S. Ct. at 2202.
154 Id.
156 See id.
157 See United States v. Scott, 424 F.3d 888 (9th Cir. 2005), abrogated by 450 F.3d 863 (9th Cir. 2006).
A. United States v. Scott

*United States v. Scott* dealt with the legality of a search of a pretrial releasee’s home as a condition of his release. The defendant, Scott, was arrested for drug possession and then released on his own recognizance. As a condition of his release, Scott had to consent to warrantless, random drug testing and home searches at any time, day or night, by any peace officer. An informant told officers that Scott was using drugs. Instead of summoning Scott for a drug test, the officers opted to enter Scott’s home in order to test him for drugs. Scott failed the test, was arrested, and a search of his home followed, where the officers uncovered an unregistered shotgun, which is unlawful to “receive or possess.” Scott attempted to suppress the shotgun and the statements made about the shotgun because the officers did not have probable cause for the warrantless search. The district court granted the motion to suppress and the issue of what was required for the search of a pre-trial releasee’s home went to the Ninth Circuit Court of Appeals.

The Ninth Circuit first examined whether Scott’s consent as a condition of his release validated the drug test and the search of his home. According to the Ninth Circuit, Scott had not waived his Fourth Amendment rights by consenting to the search as a condition of his release and that the search would have to be reasonable “taking the fact of consent into account.” The government claimed two special needs to be served by allowing the warrantless search: “(1) protecting the community from criminal defendants released pending trial and (2) ensuring that defendants show up at trial.” To determine the reasonableness of the search, the Ninth Circuit turned to the special-needs doctrine set forth by the Supreme Court in *T.L.O.*, *Griffin*, and *Edmond*, among others.

Under the special-needs doctrine, the Ninth Circuit stated: “[b]ecause the subjective intent of the officers carrying out the search generally plays no role in assessing its constitutionality, special-needs analysis calls for an inquiry into programmatic purposes.” Analyzing the government’s claim

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158 See id. at 889–90.
159 See id. at 889.
160 See id.; supra note 64 and accompanying text.
161 See Scott, 424 F.3d at 889-90.
162 Id. at 890.
163 See id.
164 See id.
165 See id.
166 Id. at 893.
167 Id.
168 Id.
169 Id. at 894 (citing Whren v. United States, 517 U.S. 806, 813 (1996) and City of
that it was needed to protect the community, the Ninth Circuit presumed
that protecting the community from the criminal defendant meant "pro-
tecting it from the criminal activities of pre-trial releasees" and viewed this
need as a "compelling interest." Ultimately, however, the Ninth Circuit
found, "[c]rime prevention is a quintessential general law enforcement
purpose and therefore is the opposite of a special need." Furthermore,
the Ninth Circuit presumed that "the non-law-enforcement purpose—the
interest of judicial efficiency ..." was the primary purpose of the warrant-
less search. The Ninth Circuit's analysis was critical of the government's
claim that the prevention of drug use was sufficiently important to ensuring
an individual's appearance in court to justify reducing the Fourth Amend-
ment requirements of suspicion. The Ninth Circuit found that the gov-
ernment had not proved the connection between preventing drug use and
ensuring court appearances. Citing the Supreme Court, the Court cautioned
against claiming "special needs based on 'hypothetical' hazards." The
Ninth Circuit found the proof of this connection insufficient to establish a
special need to search for the purpose of ensuring appearance at trial.

The final determination to be made by the Ninth Circuit was Scott's
expectation of privacy and the effect of the consent form he signed pri-
or to his release on that expectation. Scott's privacy expectation in his
home was the focus of the inquiry. Generally, the home is afforded the
highest level of Fourth Amendment protection. The Court distinguished
between the privacy expectations of a pre-trial releasee and the privacy
expectations of a probationer as in Griffin. The distinction made by the
Ninth Circuit was that the pre-trial releasee was still under the presump-
tion of innocence while the probationer had been convicted of a crime and
was still under "a form of criminal sanction imposed by a court ...." For
the same reason, the Ninth Circuit found that the search of Scott was un-
reasonable under the totality of the circumstances, the test used in Knights,
even though Knights was a probationer and Scott was a pre-trial releasee.

In conclusion, the Ninth Circuit held that the asserted special needs were


170 Id.
171 Id. at 894-95.
172 Id. at 895.
173 See id.
174 Id. (quoting Chandler v. Miller, 520 U.S. 305, 318 (1997)).
175 See id. at 896.
176 See id. at 896-97.
177 See id. at 896.
178 See id.
179 Id. (quoting Griffin v. Wisconsin, 483 U.S. 868, 874 (1987) (internal citations omitted)).
180 See id. at 897.
not sufficient to justify the search and that the totality of the circumstances did not rise to the level of probable cause to support the search; specifically, a warrantless, legal search of a pre-trial releasee requires probable cause.\textsuperscript{181}

When determining the reasonableness of the search, the Ninth Circuit relied on the presumption of innocence to explain a heightened privacy expectation of pretrial releasees versus probationers and parolees.\textsuperscript{182} Under its special-needs analysis, however, it found that the search condition was not necessary to ensure Scott’s appearance at trial.\textsuperscript{183} This approach has logical appeal because it is targeted at what is necessary to achieve the stated purpose of the government, what is reasonable given the totality of the circumstances, and because it combines both methods of determining the legality of a search.

\textit{B. The Current Landscape of Probation and Parole Systems and Theories of Rehabilitation}

Before applying the analysis from \textit{Scott} in the context of probationers and parolees, a background of the overall probation and parole system conditions should prove helpful for determining what is actually necessary to achieve the government’s goals and purposes. As mentioned earlier, the president has shown concern for prisoners re-entering communities and initiated considerable funding to aid them.\textsuperscript{184} The goal of rehabilitation is a reoccurring theme in decisions where probationers and parolees are involved.\textsuperscript{185} With this as a concern, the next logical step is to evaluate how effectively the current system for rehabilitation is working, to inquire into the recommendations of the experts in that field, and then to evaluate whether the reduction of the Fourth Amendment rights of probationers and parolees are assisting in rehabilitation. If not, the next step is to evaluate whether they are necessary for the continued operation of probation and parole systems.

According to the Bureau of Justice Statistics, the total correctional population for 2004 was 6,996,500 people and of that number 4,151,125 were on probation and 765,355 were on parole.\textsuperscript{186} These statistics alone reinforce the importance of ensuring the probation and parole systems of the country are operating efficiently. In 2004, Kentucky had the highest increase of any

\textsuperscript{181} See id. at 888, 897-98.

\textsuperscript{182} See id. at 894-98.

\textsuperscript{183} See id.

\textsuperscript{184} See Petersilia, supra note 17, at 1.


In its probation population, fifteen percent, and the nation experienced a 2.7 percent increase in its parole population, "more than twice the average annual increase of 1.3% since 1995. If the current population of people under community supervision is not enough to stress the importance of probation and parole reform, its continued growth likely means that it is an issue that cannot be ignored for long.

In light of these increasing numbers, the United States and Canada took it upon themselves to determine what elements of rehabilitation and re-entry programs are working. The Canadian study found that psychological treatment was productive where "effective cognitive behavioral programs attempt to assist offenders to: (1) define the problems that led them into conflicts with authorities, (2) select goals, (3) generate new alternative pro-social solutions, and (4) implement these solutions. On the other hand, the Canadian study determined that "control-oriented programs—those seeking to deter offenders through surveillance and threats of punishment—were ineffective. Although the United States' study focused on programs as a whole, rather than on general principles that worked, the researchers came to a similar conclusion that, "increased monitoring in the community (e.g., intensive probation, electronic monitoring) did not alone reduce recidivism."

Some research determined that intensive supervision programs produce "equal to or higher rates of recidivism than regular probation or prison sentences. Technical violations associated with these programs are thought to be one cause, but proponents argue that detecting these technical violations prevent probationers or parolees from committing more criminal acts. Still other analysis found "technical violations to be a weak predictor of future criminality. With the concern focused on future crimes and recidivism as it usually is, the statistic of criminal case proceedings for 2002 reveals that: "[t]hirty-two percent of defendants had an active criminal status at the time of the current charged offense, including 15% who were on probation, 10% on pretrial release, and 5% on parole." Analyzing

187 Id. at 3.
188 Id. at 1.
189 See Petersilia, supra note 17, at 3-6.
190 Id. at 3-4.
191 Id. at 4.
192 Id. at 5.
194 See id.
195 Id.
the opposing views of intense supervision as related to successful rehabilitation and a reduction of recidivism makes the effectiveness of intense supervision at least questionable. It is logical to assume that under intense supervision, random home searches would be an available option. Since the effectiveness of intense supervision, including random searches, is questionable, the next inquiry is to determine whether intense supervision, including searches, is necessary.

The effectiveness of rehabilitation for probationers and parolees alike has suffered. The rehabilitative nature of probation or parole is declining in a number of states. Though the system's stated purpose is a goal of rehabilitation, "[the] parole services are almost entirely focused on control-oriented activities." Instead of focusing on these control-oriented activities, rehabilitation may be better served by making treatment programs and counseling a condition of release. At least for parolees, it is likely that rehabilitation could be better served if more focus was placed on providing employment and housing. Finding employment is difficult due to several factors for those with criminal records, but "finding housing for parolees is by far their [parole officers'] biggest challenge, even more difficult and more important than finding a job."

Aside from heavy case loads, the decreasing efforts of rehabilitation can be attributed to the increased conditions being placed on each new probationer or parolee. The problem within the problem is not the conditions themselves but the nature of those conditions and the frequency with which the conditions are being monitored. Drug testing is becoming a more common condition of release. Failure to submit to or pass a drug test may be a violation that results in revocation of probation or parole. However, since most narcotics stay in the bloodstream for at least one to

198 id.
199 See id. at 84.
200 See id. at 113 ("Holzer, Raphael, and Stoll (2002) note that, aside from their offender status, ex-prisoners have a number of other significant barriers to employment, including: very low levels of education and of previous work experience, substance abuse or other mental health issues, residing in poor inner-city neighborhoods that have weak connections to stable employment opportunities and are relatively removed from centers of job growth, a lack of motivation for and attitudes of distrust and alienation from traditional work.").
201 id. at 120.
202 See id. at 89.
203 See id. The problem with the current conditions imposed on parolees as opposed to conditions that would serve to help rehabilitate them are addressed broadly by Petersilia stating, "Feely and Simon (1992) argue that, over the past decades, a system of analysis approach to danger management has come to dominate parole, and it has evolved into a 'waste management' system, rather than one focused on rehabilitation." Id.
204 See id. at 83.
two days and up to weeks depending upon the substance, in many cases, weekly drug testing would be enough to reveal these violations without the need for a search condition. If the need for a more expedient test arises, the time it takes to get a warrant would not result in a would-be positive result turning negative. There is also newly developing GPS monitoring technology that can monitor the movements of a probationer or parolee to help protect prior victims and prevent future criminal acts. Two of the stated conditions placed on parolees were confirming completion of community service and compliance with restitution obligations. Although these are elements to their rehabilitation, they also seem to have a strong element of continued punishment. Again, if the focus for probationers and parolees was realigned with rehabilitation as a main goal, this technology and these resources could be used to better achieve that goal in lieu of more permissive home searches.

Although there is no guarantee that the proposed alternative conditions will result in detection of all criminal activity, it is likely that search conditions do not achieve this goal either, given the rates of recidivism. While costs are a likely impediment to these alternatives, the president’s initiative of $300 million over the next four years may help, but this funding must be justified with effective methods of rehabilitation. Increased awareness of effective alternatives for rehabilitation should also result in an increased willingness to fund these types of supervision while allowing probationers and parolees one more liberty in the form of increased privacy in their home. The questionable effectiveness of intensive supervision on probationers would seem to be an adequate motivator in favor of restoring their privacy protection.

The fact that parolees have been incarcerated may make the return of their privacy rights potentially more significant. The effects of incarceration on an individual’s ability to function upon re-entry to a community have been documented and acknowledged for some time, making the aspect of incarceration the primary difference between parolees and probationers. Although the lengths of their incarcerations vary, potential exists for both of them to become psychologically institutionalized. One aspect of this condition is a diminished sense of self worth which can occur because they are “denied their basic privacy rights” and “lose control over mundane aspects of their existence . . . .” The end result is that prisoners come to

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206 See PETERSILIA, supra note 197, at 91.
207 See id. at 89.
209 Id.
think of themselves as just that—prisoners. Restoring the greatest measure of privacy protection, while retaining only that level of supervision necessary for a parole system to operate effectively, would seem to be ideal for achieving effective rehabilitation. Using this reasoning as motivation to restore a portion of probationers' and parolees' privacy protection, *Scott* can be applied in a manner beneficial to all.

C. Revisiting the Reduced Fourth Amendment Rights of Probationers and Parolees After *Scott*

*Scott* addressed the Fourth Amendment rights of a pre-trial releasee. The releasee's rights, including Fourth Amendment protections, must be different in light of the presumption of innocence. But the analysis used in *Scott* is revealing when viewed against the justifications of prior decisions for the reduction of probationers' and parolees' Fourth Amendment protection. Both *Scott* and previously discussed decisions recognize that Fourth Amendment protection is greatest in an individual's home.

In *Griffin*, the Supreme Court determined that Griffin's privacy expectations were reduced based on the search condition of Griffin's release. *Griffin*, like *Scott*, utilized the special-needs doctrine in determining the reasonableness of the search. The Court looked at the two purposes of the supervision: (1) rehabilitation and (2) protecting the community. Using the analysis from *Scott*, only the first purpose would survive the "'special needs' beyond normal law enforcement" requirement from *Edmond* for special-needs searches. The non-law enforcement purpose on which to base special needs would have to be rehabilitation. In *Scott*, the Ninth Circuit found that a failure to appear in court was a crime, but the broader purpose was to ensure efficient functioning of the judiciary. The Ninth Circuit recognized this as a non-law enforcement purpose. The same could be said for the rehabilitation purpose of *Griffin*. While rehabilitation can involve a crime if there is a probation violation, the main purpose is to reform the probationer to a socially acceptable lifestyle, making rehabilitation a non-law enforcement purpose.

*Scott* made a connection between drug use and a failure to appear in court since the special-need search was for drug testing. Similarly, in *Grif-

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210 *Id.*
212 See *Griffin*, 483 U.S. at 875.
213 See *id*.
215 United States v. Scott, 424 F.3d 888, 895 (9th Cir. 2005).
216 *Id.*
217 *Id.*
The Supreme Court reviewed the need to search as it related to successful rehabilitation. The Supreme Court cited what was then recent research by Petersilia in the Federal Probation Journal from June 1985, which “suggest[ed] that more intensive supervision can reduce recidivism.”

The Court was very likely correct in finding for increased supervision, including search conditions of a probationer’s home, because the Court’s conclusion was based on the then-current research in the field, which was thought to increase the probability of successful rehabilitation. The problem is that the once-current research, relied on by the Griffin Court, is now twenty years old.

Petersilia has continued to do research on probation and parole and has more recent findings that contradict those used in Griffin. More recent findings by Petersilia in the same Federal Probation Journal state, “[intensive supervision program] ISP offenders were watched more closely, but ISP supervision did not decrease subsequent arrests . . . .” Petersilia goes on in the same article to describe how intensive supervision is based on the premise that the increased likelihood of detection will act as a deterrent, but then cites a University of Maryland project stating, “[e]xcept in a few instances, there is no evidence that these programs are effective in reducing crime as measured by official record data.”

Taking these more current findings into account, Scott’s linking empirical data to support a special-need purpose and similar search-to-purpose link in Griffin, it follows that deterrence in the form of a search condition does not serve the stated purpose of the special need. Using only a small piece of the empirical data, however, as in Samson, is not enough. The Court obviously values the opinion of Petersilia since it repeatedly uses her work in support of its opinions. Therefore, the Court should view her work in its entirety if the Court is truly interested in ascertaining the effectiveness of suspicionless searches in achieving the state’s interest in reducing recidivism. Ultimately, combining the Griffin analysis with up-to-date research conducted by the same source initially used in Griffin, the search of a probationer’s home, like that of a pre-trial releasee, should require probable cause as in Scott.

Affording probationers increased privacy protection will not lead to disaster for supervision and rehabilitation. First, if the threat of a search is not a deterrent, then there is no reason to deny probationers their Fourth Amendment rights on a special-needs basis. Second, requiring probable cause as in Scott.

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218 Griffin, 483 U.S. at 875.
219 Id.
221 Id.
222 See supra notes 145–49 and accompanying text.
223 See supra notes 145–49, 219, and accompanying text.
cause for the search of probationers would still not reach the same level of protection as that of pre-trial releasees. In United States v. Harris, the Supreme Court allowed the prior criminal activity of a suspect to confirm a tip along with other hard evidence in establishing probable cause. Because there was a tip in Griffin, with a small amount of investigation of the tip combined with Griffin's status as a probationer, the officers could have likely had probable cause. Probable cause is not an extremely high showing for the government to make, since "[p]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." Considering the relatively limited showing of suspicion required for probable cause combined with the ability to use prior criminal activity to meet this limited showing, it is likely that in many cases, with minimal investigation, the concerned authorities would have their suspicions dismissed or a probable cause requirement to search probationers would be met.

A probable cause requirement also adds to consistency covering situations that have proved troublesome. In Knights, there was the problem of whether the search was investigatory in nature or for the purpose of probation. Requiring probable cause prevents the need for this distinction. In Knights, the detective had been investigating the vandalism offense that led to the search, and it is likely he could have raised the level of suspicion from reasonable suspicion to probable cause if he had followed the analysis mentioned previously by corroborating a few more facts and combining Knights's status as a probationer. This type of analysis is more in line with the totality of the circumstances approach used by the Supreme Court in Knights. Moreover, the fact that the home of the probationer is the area in question weighs in favor of the need for greater privacy protection.

The application of Scott to parolees does not differ much from its application to probationers. The same lack of deterrence through threat of search as evidenced earlier should apply equally to parolees. The main difference is the analysis of the link between purpose and special need. In the case of parolees, it may be of greater benefit to afford them an increased level of privacy given their potential for a deteriorated level of self-worth. According to research, allowing parolees a greater level of privacy protection by requiring probable cause would likely help them adjust to society as opposed to impede their adjustment. Applying Scott is not much

228 Id. at 117–18.
229 Id. at 118.
230 See supra notes 208–10 and accompanying text.
different than applying the analysis in Latta from the Ninth Circuit. The Ninth Circuit employed an analysis very similar to that of Scott, but it used the same search-as-deterrence reasoning that the Supreme Court used in Griffin, which is at least questionable given more recent research. In light of this analysis, requiring probable cause would not afford too much privacy to parolees either.

The Supreme Court's approach to parolee searches in Pennsylvania Board of Probation is based on an analysis totally distinct from that concerning all the other cases in relation to level of privacy protection. The Court sought to bypass the question of whether the parolee's Fourth Amendment rights had been violated and instead focused on whether the exclusionary rule should be applied. Its justification was that they had chosen not to apply the exclusionary rule in other non-criminal proceedings. In the Court's efforts to find similarities between parole revocation hearings and other "non-criminal" hearings, the Court must have overlooked the main similarity between revocation hearings and criminal hearings—both involve the incarceration of a fellow human being.

This approach also presents the potential for abuse when the search of a parolee has rendered potential evidence of a crime. Earlier it was established that evidence obtained through the search of a parolee was not limited in use to parole revocation hearings. The potential for abuse is that there are basically two routes that can be pursued now to render the same result—incarceration of a parolee. If the search of a parolee is otherwise invalid, the route through the parole revocation hearing will be pursued so the evidence will not be subject to the exclusionary rule. If the search is considered valid, the route of criminal prosecution could possibly obtain a longer sentence than possible under parole revocation. It is difficult to understand the Court's reasoning that an individual's rights are protected the least at a time the individual needs them the most.

While Samson v. California follows precedent of United States v. Knights, albeit that Knights is from the probationer standpoint, the result is an unprecedented reduction of an unincarcerated person's Fourth Amendment protection. The token protection left by Samson, protection from a search that is "arbitrary, capricious, or harassing," is transparently thin given the relative ease with which the reasonableness of the search was determined in Knights; a case where a certain level of individual suspicion was still required. Again, allowing the parolee's status as such, like probationers, to count towards establishing probable cause would automatically reduce the net showing required to satisfy a probable cause requirement but would likely improve the reintegration efforts, resulting in a net benefit.

231 See Latta v. Fitzharris, 521 F.2d 246 (9th Cir. 1975).
232 See id.; supra notes 158-83 and accompanying text.
233 See Latta, 521 F.2d at 252-53.
Probationers and parolees can be allowed more privacy at home, because their release can be conditioned on meeting with their respective supervising officers, submitting to drug testing, and curfews. Given these conditions, and the likelihood of detecting violations, it is logical that the need to search for a violation of probation or parole is likely small. Affording a higher level of protection to their privacy interest would not be an impediment and would restore another portion of their rights. Allowing probationers and parolees increased privacy protection by requiring probable cause still, as a practical matter, involves a lower level of privacy protection than that afforded to unconvicted individuals and pre-trial releasees. This difference in privacy protection also maintains respect for the presumption of innocence given to unconvicted individuals and pre-trial releasees. Unconvicted individuals would enjoy Fourth Amendment protection requiring a warrant supported by probable cause. Pre-trial releasees would enjoy protection requiring probable cause only. Probationers and parolees would be afforded the protection through a requirement of probable cause subject to some reduction of showing given their status as probationers or parolees.

An individual's home receives the greatest degree of privacy protection under the Fourth Amendment. The goal of both probation and parole is to help individuals who have committed crimes adjust their lifestyles to become socially acceptable. The threat of search has been found not to be an effective deterrent to the commission of crimes or possession of contraband. The prolonged absence of privacy, as is necessary in prison, has left some parolees in the mindset of lowered self worth and, if re-entry into society is a goal, then they should be afforded as much privacy as possible. Since the effectiveness of the search conditions are questionable and the negative impact of these conditions are documented, affording probationers and parolees a level of privacy protection in their home by requiring probable cause for a search is reasonable, and in the words of the United States Supreme Court, the "touchstone of the Fourth Amendment is reasonableness."