Fourth Amendment Rights of Probationers: The Lack of Explicit Probation Conditions and Warrantless Searches

Taylor S. Rothman
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I. INTRODUCTION

A 2014 report by the Chicago Tribune found that Cook County probation officers had teamed up with law enforcement officials over a period of years to enter probationers’ homes without warrants.¹ Warrantless searches of probationers may violate the Fourth Amendment. Further, the Tribune’s report revealed that searches of probationers created distrust and led to suspicion that officers deliberately planted incriminating evidence or seized probationers’ property to obtain greater bargaining power over probationers.² The Tribune’s report triggered a reevaluation in the public and academic spheres of police treatment of probationers in Chicago, as the problem might be more widespread than originally thought.³ The now-prominent question of law enforcement’s ability to enter probationers’ homes without warrants demands an inquiry into the actual scope of probationers’ Fourth Amendment rights.

In 2013, an estimated 3,910,600 adults were on probation and 853,200 were on parole in the United States.⁴ The primary purpose of probation and parole is to rehabilitate an offender by placing him or her back into the community, with various conditions restricting behavior accompanying the release.⁵ Probation is a judicial act whereby, in lieu of incarceration, a convicted criminal offender is released into the

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² See id.
³ See id.
⁵ See Berman v. United States, 302 U.S. 211, 213 (1937).
community under the supervision of a probation officer.\(^6\) Administratively, this release may be accomplished either by suspending the prison sentence or by not imposing the sentence in the first place.\(^7\) The Supreme Court has described probation as a "reforming discipline,"\(^8\) restoring offenders to society when courts deem them to be "good social risks."\(^9\) By way of contrast, a parolee is released under the supervision of a parole officer for the remainder of his sentence after serving a portion of his judicially-imposed sentence in a penal institution.\(^10\) Parole is an administrative act within the exclusive discretion of correctional authorities.\(^11\)

In varying contexts, the Court has given mixed guidance on whether there is a difference in the constitutional status of probationers and parolees.\(^12\) In *Gagnon v. Scarpelli*,\(^13\) the Court, in applying the due process clause to probation revocation proceedings, stated that, "[R]evocation of probation... is constitutionally indistinguishable from the revocation of parole."\(^14\) In practice, however, the Court treats probationers and parolees differently under the Fourth Amendment. Probationers are subjected to fewer restrictions than parolees, who are treated as more akin to prisoners.\(^15\) It is important to note that when addressing difficult balancing issues between a defendant's right to privacy and the government's interest in protecting society and encouraging rehabilitation, the Court held that the formal distinction between parolees and probationers causes them to hold different expectations of privacy.\(^16\)

Supreme Court precedent on the Fourth Amendment rights of probationers and parolees consists of three main cases. In *Griffin v. Wisconsin*,\(^17\) the Supreme Court upheld warrantless searches of

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\(^{7}\) *Id.*

\(^{8}\) *Korematsu v. United States*, 319 U.S. 432, 435 (1943).

\(^{9}\) *Id.; see Roberts v. United States*, 320 U.S. 264, 272 (1943) (describing the purpose of probation as "to provide an individualized program offering a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement under the tutelage of a probation official and under the continuing power of the court to impose institutional punishment for his original offense in the event that he abuse this opportunity").

\(^{10}\) *See Task Force Report, supra* note 6, at 164–65.


\(^{12}\) *See United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265–66 (9th Cir. 1975).

\(^{13}\) 411 U.S. 778 (1973).

\(^{14}\) *Id.* at 782 n.3.


\(^{16}\) *See, e.g., id.* (using the difference in status on continuum of state-imposed punishments between parolee and probationer to explain a parolee's lesser expectation of privacy).

probationers' homes under the "special needs" doctrine of the Fourth Amendment. The special needs doctrine provides an exception to the warrant and probable cause requirements during situations in which special needs beyond the ordinary needs of law enforcement render these requirements impractical. In United States v. Knights, the Court reaffirmed that a warrantless search of a probationer's home that is supported by reasonable suspicion and authorized by a condition of the probation is permissible under the Fourth Amendment. To determine the reasonableness of a search, Knights established a balancing test weighing the intrusion upon individual privacy against the promotion of legitimate government interests. In both Griffin and Knights, however, the Supreme Court noted that the sentencing court explicitly set out a probation condition allowing police to conduct a warrantless search of the probationer's home. Most recently, in Samson v. California, the Supreme Court extended the Knights balancing test to suspicionless searches in the context of parolees. The Court left open the question of whether the constitutionality of a warrantless search depended on the explicit search condition in the defendant's probation agreement, or whether the non-law enforcement purpose of parole—rehabilitation—and reduced privacy interests of probationers or parolees alone was sufficient to permit such searches.

There is a circuit split over whether an officer's warrantless search of a probationer's home violates the Fourth Amendment when the terms of probation do not explicitly authorize warrantless searches. A warrantless search condition typically provides that a defendant will submit to a search "by any probation officer or law enforcement officer" as a condition of his or her probation. The Fifth and Eleventh Circuits have held that probationers cannot object to warrantless searches of their homes even without such an explicit condition in their probation. In United States v. Keith, the Fifth Circuit held that a warrantless residence search supported by reasonable suspicion was permissible under the Fourth Amendment. In United States v. Carter, the Eleventh Circuit applied the Knights balancing test to similarly hold

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18 Id. at 873, 880.
20 Id. at 121–22.
21 See id. at 119–21.
22 See id. at 114; Griffin, 483 U.S. at 870–71.
24 Id. at 857.
25 See Knights, 534 U.S. at 116.
26 375 F.3d 346 (5th Cir. 2004).
27 Id. at 350–51.
28 566 F.3d 970 (11th Cir. 2009).
that reasonable suspicion of criminal conduct was a constitutionally sufficient basis for the warrantless search of the probationer’s home.\textsuperscript{29}

The Fourth Circuit has taken a different approach. In\textit{ United States v. Hill},\textsuperscript{30} the Fourth Circuit declined to use the\textit{ Knights} balancing test, holding that reasonable suspicion that a probationer is violating conditions of probation is insufficient to justify a warrantless search; an officer must have a warrant supported by probable cause.\textsuperscript{31} In contrast to the viewpoint of the Fifth and Eleventh Circuits, the Fourth Circuit pointed out that the probationer’s knowledge of the warrantless search conditions in the respective probation agreements in\textit{ Griffin} and\textit{ Knights} was “critical” to the Supreme Court’s determination that the probationers had diminished expectations of privacy.\textsuperscript{32} The Sixth and Second Circuits, while not directly addressing the circuit split, likewise have put forth the view that searches of probationers require adherence to the Fourth Amendment warrant requirement, such that warrantless searches by probation officers when there is no probation agreement or state regulation authorizing them are presumptively unreasonable. The other circuits are largely silent on the issue, most likely because they have not yet been presented with the issue of warrantless searches in the absence of probation agreements explicitly allowing them.

This circuit split impacts an important area of criminal law. A probationer’s constitutional protection against warrantless searches is of the utmost importance, especially because proposed initiatives to curtail mass incarceration could increase the total number of probationers.\textsuperscript{33} Furthermore, resolving the circuit split will significantly impact how law enforcement personnel conduct their searches, and will affect the basic interactions between probation officers and police officers.\textsuperscript{34} Additionally, because probationers, the ones who would benefit from the resolution of this circuit split in favor of the Fourth Circuit, constitute too small of a political group and are profoundly disenfranchised, they will not have the requisite power to

\textsuperscript{29} Id. at 975.
\textsuperscript{30} 776 F.3d 243 (4th Cir. 2015).
\textsuperscript{31} Id. at 249–50.
\textsuperscript{32} Id. at 249.
\textsuperscript{34} See Dizikes & Lighty, supra note 1.
lobby legislators for their rights. Because those affected by the split are politically powerless, the split is unlikely to be addressed by Congress, and the Supreme Court may need to grant certiorari to resolve it.

Part II of this Comment will describe the doctrinal development of the warrant requirement and its exceptions. Part III will then discuss the application of the warrant requirement in the context of probationers' Fourth Amendment rights. Specifically, Part III will outline the relevant Supreme Court jurisprudence on the issue. Part III will then discuss the unique relationship between a probationer and probation officer that underlies these cases, explaining how the dual role of probation officers can make it difficult to determine whether a probationer's constitutional rights have been violated. Part IV will discuss the different approaches that courts take when analyzing this question, and will suggest how best to understand the circuit split. Part V subsequently will describe the two distinct solutions that one could take to resolve the circuit split: the legal solution and the policy solution. The Comment will argue that both approaches favor applying the Fourth Circuit's analytical framework. The Fourth Circuit's approach—requiring officers to have probable cause before conducting a warrantless search when the terms of the probation do not explicitly permit it—is more meritorious because it is grounded in case-based analysis, is truest to the spirit of the Fourth Amendment, and adequately balances the policy concerns regarding probationers without limiting their fundamental right to privacy.

II. DEVELOPMENT OF THE WARRANT REQUIREMENT AND ITS EXCEPTIONS

The Fourth Amendment's warrant requirement is an important shield against impermissible searches. This section will proceed by analyzing the warrant requirement jurisprudence with respect to the Fourth Amendment, and the recognized exceptions that have followed.

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See Angela Behrens, Voting—Not Quite A Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disfranchisement Laws, 89 MINN. L. REV. 231, 239 (2004) (stating that felon disenfranchisement laws remove the right to vote based on a felony conviction); Jason Belmont Conn, Felon Disenfranchisement Laws: Partisan Politics in the Legislatures, 10 MICH. J. RACE & L. 495, 499 (2005) (stating that disenfranchisement while serving a sentence—which includes while incarcerated, on parole, or on probation—is typical of state disenfranchisement regimes. In fact, "[a]lmost three-quarters of the disfranchised population are no longer in prison but are on probation, parole, or have completed their sentences.").

See Behrens, supra note 35, at 241 ("Without [the right to vote], the governed population has no opportunity to challenge laws to which they are subjected. The loss of voting rights . . . shifts a citizen to a second-class status.") (internal citations omitted).
A. Law Enforcement Searches and the Warrant Requirement

The Fourth Amendment to the United States Constitution states that:

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.\(^{37}\)

While the text offers a seemingly absolute shield against warrantless searches, the Supreme Court has repeatedly emphasized that "reasonableness" is the touchstone of the Fourth Amendment.\(^{38}\) Reasonableness of a search is determined by "assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."\(^{39}\) Much of the Fourth Amendment protection derives from the Warrant Clause, which requires that "absent certain exceptions, police obtain a warrant from a neutral and disinterested magistrate before embarking upon a search."\(^{40}\) Unless there are exigent circumstances, warrantless searches and seizures inside a home are presumptively unreasonable and, therefore, unconstitutional.\(^{41}\) Further, to obtain a judicial warrant, a law enforcement officer must show probable cause.\(^{42}\) Probable cause, in turn, requires more than a mere suspicion of wrongdoing.\(^{43}\) Therefore, where probable cause is required, a finding of reasonable suspicion alone will not suffice.

The Supreme Court's decision in *Katz v. United States*\(^{44}\) provides the test for determining what constitutes a "search" within the meaning of the Fourth Amendment.\(^{45}\) Finding that the placement of a bug on the outside of a phone booth in an effort to eavesdrop constitutes a search, *Katz* marked the first time that the Court did not require a physical invasion by the government to invoke the Fourth Amendment

\(^{37}\) U.S. CONST. amend. IV.
\(^{39}\) Id. (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999)).
\(^{44}\) 389 U.S. 347 (1967).
\(^{45}\) Id. at 353.
successfully. In *Katz* and subsequent decisions, the courts have held that electronic monitoring, eavesdropping, and intentional video surveillance fall within the meaning of a Fourth Amendment "search," and thus require warrants supported by probable cause.

Furthermore, if a person has a "reasonable expectation of privacy," the government cannot conduct the search without a warrant. The standard for reasonableness has two prongs. First, a person must exhibit an actual expectation of privacy. Second, the expectation must be one that society is prepared to recognize as objectively "reasonable." In assessing the reasonableness of a privacy expectation, courts must either predict whether a reasonable third party would have a privacy expectation in a given setting, or as recent scholarship argues, draw upon surveys of public opinion to determine if people expect privacy in a given context. If both of these requirements are met, any warrantless search by police is "presumptively unreasonable."

B. Exceptions to the Warrant Requirement

In general, warrantless searches are per se unreasonable under the Fourth Amendment. There are, however, a few well-delineated exceptions. First, under the "plain view" doctrine, if something is in "plain view," the officer did not have to search to find it and, therefore, may immediately seize the incriminating evidence without a warrant. Second, the "open fields" doctrine states that open fields or spaces do not receive Fourth Amendment protection because they are not among the delineated spaces receiving Fourth Amendment protections in the Constitution, and there can be no reasonable expectation of privacy in

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46 See id.
48 See *Katz*, 389 U.S. at 353.
49 See United States v. Biasucci, 786 F.2d 504, 508–12 (2d Cir. 1986); United States v. Torres, 751 F.2d 875, 882–83 (7th Cir. 1984).
50 See United States v. Jacobsen, 466 U.S. 109, 120 n.17 (1984) ("A container which can support a reasonable expectation of privacy may not be searched, even on probable cause, without a warrant.").
51 See California v. Greenwood, 486 U.S. 35, 39 (1988) ("The warrantless search and seizure . . . would violate the Fourth Amendment only if respondents manifested a subjective expectation of privacy . . . that society accepts as objectively reasonable.").
52 See id.
54 See *Katz*, 389 U.S. at 361 (Harlan, J., concurring).
55 Id. at 357.
56 Id.
open fields.\textsuperscript{58} Third, the government may randomly search a person without a warrant when boarding a plane or entering a courthouse.\textsuperscript{59} The justification for the aforementioned exception is the limited search doctrine of \textit{Terry v. Ohio},\textsuperscript{60} in which the officer perceives a danger and searches solely to disarm the suspect, or where the search is in response to exigent national circumstances or imminent threats.\textsuperscript{61} Other general exceptions to the warrant requirement have been made for investigative detentions,\textsuperscript{62} searches incident to arrest,\textsuperscript{63} consent searches,\textsuperscript{64} inventory searches,\textsuperscript{65} and administrative searches.\textsuperscript{66}

In the probationary context, the “special needs” doctrine is a highly relevant exception to the warrant requirement. The Court has held that there are “limited circumstances in which the usual rule [of requiring individualized suspicion] does not apply.”\textsuperscript{67} One such circumstance is special needs cases.\textsuperscript{68} The Court applies this test when “special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.”\textsuperscript{69} The exception “grew out of the need to conduct programmatic investigations of areas where individualized suspicion was precluded by the circumstances.”\textsuperscript{70} The test proceeds by first determining whether the search furthers a special need outside of general law enforcement purposes. For example, special needs have been found in the regulatory context, such as ensuring compliance with municipal housing inspections, and in nonregulatory contexts, such as in roadside checkpoints, borders, schools, and employee drug tests.\textsuperscript{71} The special needs in these settings concerned

\textsuperscript{59} See United States v. Skipwith, 482 F.2d 1272, 1276 (5th Cir. 1973); United States v. Epperson, 454 F.2d 769, 770–72 (4th Cir. 1972); Downing v. Kunzig, 454 F.2d 1230, 1233 (6th Cir. 1972).
\textsuperscript{60} 392 U.S. 1 (1968).
\textsuperscript{61} Id. at 20, 26–27.
\textsuperscript{66} See Wyman v. James, 400 U.S. 309, 326 (1971).
\textsuperscript{68} See, e.g., Illinois v. Lidster, 540 U.S. 419, 428 (2004) (holding search to be constitutional when roadblock was set up to question passing motorists about crime that recently had occurred on that road because the purpose of the search was not general crime prevention, but the gathering of information).
\textsuperscript{69} New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).
\textsuperscript{71} See, e.g., Michigan Dep’t of State Police v. Sitz, 496 U.S. 444, 447, 455 (1990) (roadside
public health, education, immigration considerations that are unique to border enforcement, and school and workplace safety, respectively. Next, the government’s interest in the search must be weighed against the individual’s interest in not being searched. The ordinary goals of law enforcement cannot be used to establish a special need—the special need must be the “immediate objective” of the proposed search. If the primary purpose of a search is to detect evidence of ordinary wrongdoing, rather than promote any special need, it will not be upheld as constitutional under the special needs doctrine.

**III. Probationers’ Expectations of Privacy**

The status of the warrant requirement is generally clear in regards to ordinary citizens, though that is not true with respect to probationers. The two main tests used to determine whether an impingement occurred on probationers’ rights under the Fourth Amendment are the special needs test and the totality of the circumstances balancing test. These approaches contemplate the unique circumstances surrounding a probationer’s rights as divergent from those of ordinary citizens, as well as the specific purposes underlying probation as a corrective mechanism. In the following sections, I will lay out how the Supreme Court has applied these two tests and then discuss how the unusual relationship between a probationer and a probation officer has influenced the Court’s jurisprudence.

**A. Supreme Court Jurisprudence**

In the case of probationers, the special needs doctrine holds that the dual purposes of probation—rehabilitation of the probationer and protecting society from further criminal violations—might, in certain circumstances, be sufficiently important to trump the probationer’s privacy interests that citizens with greater expectations of privacy otherwise enjoy. In *Griffin v. Wisconsin*, the Court extended the

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73 See id. at 83.
74 See, e.g., City of Indianapolis v. Edmond, 531 U.S. 32, 35–36, 41 (2000) (striking down police program that stopped motorists and checked them for possession of narcotics because it did not promote any special needs; rather, its “primary purpose was to detect evidence of ordinary criminal wrongdoing”).
special needs doctrine to state operation of probation systems.\textsuperscript{76} Griffin was convicted of resisting arrest, disorderly conduct, and obstructing an officer.\textsuperscript{77} The court placed him on probation subject to a number of restrictions, including the requirement that he submit to searches of his home without a warrant as long as there were reasonable grounds to believe the presence of contraband existed.\textsuperscript{78} Acting on a police officer's tip that Griffin had guns in his apartment, his probation officer conducted a search, which uncovered a handgun.\textsuperscript{79} The Court articulated that certain "special needs" would sometimes render the warrant and probable cause requirement impracticable.\textsuperscript{80} In affirming Griffin's conviction, the Supreme Court thus held that the special needs of the Wisconsin probation system justified the departure from the usual warrant and probable cause requirement.\textsuperscript{81} The Court reasoned that supervision of probationers was a "special need" of the State that "permit[ted] a degree of impingement upon privacy that would not be constitutional if applied to the public at large."\textsuperscript{82} The Griffin Court did not decide whether warrantless searches of probationers were permissible in the absence of a state regulation that explicitly authorized them.\textsuperscript{83}

The constitutional parameters of warrantless searches of probationers' homes were not entirely clear following Griffin. The next probation and parole issue that the Court decided was in Pennsylvania Board of Probation and Parole v. Scott,\textsuperscript{84} where the Court was presented with the question of whether to apply the exclusionary rule to evidence offered at a parole revocation hearing.\textsuperscript{85} Five months after his release from serving the minimum prison term for murder, Scott had five firearms in his home, which his parole officer uncovered during a search.\textsuperscript{86} The Pennsylvania Board of Probation and Parole admitted

\textsuperscript{76} Id. at 875–76.
\textsuperscript{77} Id. at 870.
\textsuperscript{78} Id. at 870–71.
\textsuperscript{79} See id. at 871.
\textsuperscript{80} See id. at 873 (citing New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)).
\textsuperscript{81} See id. at 874.
\textsuperscript{82} Id. at 875.
\textsuperscript{83} See id. at 880 ("The search of Griffin's residence was 'reasonable'... because it was conducted pursuant to a valid regulation governing probationers. This conclusion makes it unnecessary to consider whether... any search of a probationer's home by a probation officer is lawful when there are 'reasonable grounds' to believe contraband is present.") (emphasis added).
\textsuperscript{84} 524 U.S. 357 (1998).
\textsuperscript{85} Id. at 359, 362–63 (defining the exclusionary rule as a judicially created means of deterring illegal searches and seizures, whereby evidence obtained in violation of a defendant's Fourth Amendment rights is excluded from the subsequent criminal trial).
\textsuperscript{86} Id. at 360.
evidence of this violation of parole at Scott’s revocation hearing. The lower courts held that the search of the defendant’s home violated the Fourth Amendment because the parole officers lacked “reasonable suspicion” of a violation before making the search. On appeal, however, the Supreme Court reversed, holding that even if the search were assumed unreasonable, the Fourth Amendment exclusionary rule should not apply at a revocation proceeding. The Court thus sidestepped the issue of whether any level of suspicion was constitutionally required to search a probationer who had agreed to suspicionless searches.

The Supreme Court, however, did provide some guidance in United States v. Knights. In Knights, the defendant was placed on probation for a drug conviction. A term of the defendant’s probation authorized warrantless, suspicionless searches and seizures by any peace officer. When a detective investigating arson developed a reasonable suspicion that the defendant was involved in these acts, he searched the defendant’s apartment, finding explosives and arson equipment. The Knights Court upheld the constitutionality of the warrantless searches of probationers’ homes on the ground that “reasonable suspicion” alone is sufficient to render an officer’s search legal. The Court explained: “When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer’s significantly diminished privacy interests is reasonable.” Probationers have significantly diminished privacy interests because “by virtue of their status alone” “probationers do not enjoy the absolute liberty to which every citizen is entitled.” The Court also justified the reduction in absolute liberty by identifying two legitimate government interests: the integration of probationers back into the community and combating recidivism.

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87 Id. at 360–61.
88 See id. at 361–62.
89 See id. at 369 (explaining that other deterrents, such as “departmental training and discipline and the threat of damages actions,” makes the harsh deterrent of exclusion unwarranted).
91 Id. at 114.
92 Id.
93 Id. at 114–15.
94 See id. at 121.
95 Id.
97 Knights, 534 U.S. at 119.
98 See id. at 121.
established the now traditional balancing test that considers the totality of the circumstances in weighing individual interests against government interests.\textsuperscript{99} Examining the circumstances, the Court found that the search was reasonable in balancing the governmental interests in crime prevention and public safety with the individual interest in freedom from overbroad searches.\textsuperscript{100} Here, the fact that there was "reasonable suspicion" to justify the search of the defendant was important. Due to prior investigation, police had reasons for suspecting that the defendant was engaging in illegal conduct.\textsuperscript{101} The Court thus found that this suspicion satisfied the Fourth Amendment's reasonableness requirement, given the defendant's reduced privacy expectation as a probationer.\textsuperscript{102}

Importantly, in both \textit{Griffin} and \textit{Knights} the terms of the probation explicitly stated that the probationer's home was subject to warrantless searches. Specifically, the \textit{Knights} Court described the defendant's probation search condition as a "salient circumstance"\textsuperscript{103} affecting the "balance of [the] considerations [which] require[d] no more than reasonable suspicion to conduct a search of [the] probationer's house."\textsuperscript{104} Neither Court addressed whether these searches would be constitutionally permissible if the terms of the probation did not include a warrantless search condition.

More recently, in \textit{Samson v. California},\textsuperscript{105} the Supreme Court addressed a similar issue in the context of a parolee's Fourth Amendment rights. In \textit{Samson}, an officer approached the defendant who he knew was on parole after observing the defendant walking down a street with a woman and child.\textsuperscript{106} Based solely on the defendant's status as a parolee, the officer searched him and found a cigarette box containing a plastic baggie of methamphetamine.\textsuperscript{107} The \textit{Samson} Court extended the \textit{Knights} balancing test to suspicionless searches of parolees, holding that the suspicionless search of the defendant did not violate the Fourth Amendment.\textsuperscript{108} Thus, it appears officers may subject parolees to a warrantless stop and search at any time even if the officer has no grounds to suspect wrongdoing at all, so

\textsuperscript{99} See \textit{id.} at 119–21.
\textsuperscript{100} See \textit{id.}
\textsuperscript{101} See \textit{id.} at 114–15 (describing activity of long-time suspect Simoneau and surveillance that linked the defendant's home to Simoneau's potentially criminal activities).
\textsuperscript{102} See \textit{id.} at 121.
\textsuperscript{103} \textit{Id.} at 118.
\textsuperscript{104} \textit{Id.} at 118–21.
\textsuperscript{105} 547 U.S. 843 (2006).
\textsuperscript{106} \textit{Id.} at 846–47.
\textsuperscript{107} \textit{Id.}
\textsuperscript{108} See \textit{id.} at 857.
long as this condition is disclosed to the prisoner prior to his release on parole. The Court reasoned that California had an “overwhelming interest” in supervising parolees, and that interest warranted privacy intrusions that courts would otherwise not tolerate under the Fourth Amendment. The government’s interest included preventing future crimes committed by recidivist parolees. The Samson Court, like the Knights Court in the context of probationers, pointed out that the defendant’s parolee status was “salient,” and was a “point on a continuum of possible punishments,” which alone was enough to justify his reduced access to liberty in comparison to ordinary citizens. The Court further reasoned that, unlike probationers, “parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment.” While the Samson Court pointed out this distinction between parolees and probationers, it does not appear to have changed the Court’s Fourth Amendment analysis. As in Knights, the Court references a “continuum” of punishments to justify why there is a diminished expectation of privacy. Therefore, it is not clear whether this “no suspicion required” rule also applies to probationers, who seem, in practice, to have greater constitutional rights than parolees.

B. The Role of a Probation Officer

Underlying the rationale of much of the Supreme Court jurisprudence above lies the unique relationship between a probationer and probation officer. In Griffin, a probation officer—not an ordinary law enforcement officer—conducted the search, which was supported by reasonable suspicion. Griffin did not imply that a probationer might be subjected to full search at the whim of any law enforcement officer he happens to encounter. With a probation officer, “there is an ongoing supervisory relationship—and one that is not, or at least not entirely, adversarial—between the object of the search and the decisionmaker.” In fact, based on this reasoning, the Court in Knights forwent any reliance on the special needs doctrine when it upheld the search of a probationer by a law enforcement officer.

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109 See id. at 853.
110 See id. at 853–54.
112 Samson, 547 U.S. at 848, 850.
113 Id. at 850.
115 Id. at 879.
116 Samson, 547 U.S. at 859–60 (Stevens, J., dissenting).
Knights Court instead relied on an interest balancing test. In his Samson dissent, Justice Stevens argued that the special role of probation officers was critical to the analysis in Griffin because it meant that the State’s “special need” was the interest in supervising a probationer’s assimilation into society, rather than just law enforcement’s general goal of detecting crime. This move away from the special needs doctrine in Knight and Samson was essential because in both cases law enforcement personnel conducted the warrantless searches, and none of the Court’s special needs precedents have endorsed the “routine inclusion of law enforcement, both in the design of the policy and in using arrests . . . to implement the system designed for the special needs objectives.”

The role of a probation officer is akin to that of “a social therapist in an authoritative setting” because of his or her dual role both to prohibit “behavior that is deemed dangerous to the restoration of the individual into normal society” and to give probationers guidance. This dual role complicates the determination of whether a probation officer impinges on a probationer’s constitutional rights. For instance, routine inspections and home visits allow the probation officer to obtain information about the probationer’s habits and lifestyle, furthering the officer’s ability to construct an effective rehabilitation program. These visits, however, also further the probation officer’s responsibility to the public, in that if he sees anything impermissible, he should use his authority to prevent the probationer from engaging in further criminal activity. As such, the responsibility to both give guidance and enforce the law creates a conflict in the relationship between probationer and probation officer.

The broad authority bestowed upon a correctional officer can also become “simply a means of circumventing normal constitutional procedures in a criminal investigation.” As a probation officer moves further from the guidance approach and closer to the enforcer approach, the broad discretion that allows the probation officer to intrude upon the privacy of the probationer seemingly becomes less justified. This broad discretion becomes even more dangerous when

118 Samson, 547 U.S. at 859 (Stevens, J., dissenting).
122 See id. at 77.
123 See id.
124 See id. at 78.
correctional officers and police work together, with police relying on correctional officers for investigational support. There are important safeguards to prevent abuses by probation officers, but these safeguards have generally been watered down by the above line of cases. Most important is the warrant requirement, which limits the discretion exercised by the officer by substituting the judgment of a neutral magistrate for that of the officer. A court may, as seen in *Griffin*, excuse the warrant requirement when the government has “special needs,” which make the warrant requirement impractical. And even if the search falls into an exception to the warrant requirement, the government must still show probable cause. With that said, probable cause is a flexible standard that courts typically evaluate in the totality of the circumstances. Lastly, under the exclusionary rule, trial courts exclude from trial evidence gathered in violation of a defendant's Fourth Amendment rights. The exclusionary rule, however, only applies in criminal trials, not in probationary revocation hearings. Therefore, while there are important tools that could be used to curtail the broad discretion afforded to probation officers, there is still plenty of room for courts to give back such discretion through various exceptions or interpretative tools.

**IV. THE CIRCUIT SPLIT**

Some time passed before the circuit courts had an opportunity to implement the Court’s decisions regarding the Fourth Amendment rights of probationers. The circuits have since split over the proper treatment of warrantless searches of a probationer’s home when the probationer was not put on notice that he or she would be subject to these searches as part of the probation sentence. Going forward, I will discuss how different circuits have interpreted the above Supreme Court jurisprudence. In an effort to understand the circuit split, I will address the implications of the circuits’ differing opinions.

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125 See Dizikes & Lighty, *supra* note 1.
128 See United States v. Ortiz, 422 U.S. 891, 896 (1975).
A. Circuits Supporting Warrantless Searches of Probationers

The Fifth and Eleventh Circuits have held that warrantless searches of probationers' homes are permissible, regardless of whether warrantless searches are provided as a term of probation. In *United States v. Keith*, a defendant was on probation for possessing a destructive device when his probation officer, on a tip from a local retailer that the defendant had purchased bomb-making materials, searched the defendant's home and found said materials. There was no written condition of probation or state regulation explicitly authorizing warrantless searches of the defendant's home. Instead, the court pointed to the consistent line of case law in Louisiana that approved of the practice of searching probationers' homes based on reasonable suspicion. Based on this, the Fifth Circuit held that a warrantless residence search supported by reasonable suspicion was permissible. The court reasoned that the presence or absence of an explicit term within the probation sentence was immaterial because under *Griffin v. Wisconsin* and *United States v. Knights*, "the needs of the probation system outweigh the privacy rights of the probationers" who do not enjoy the same expectation of privacy as ordinary citizens. Accordingly, given the probationers' diminished privacy expectations, officers can search their homes without warrants and without violating their Fourth Amendment rights.

While not explicitly stating what test it applied, the Fifth Circuit appeared to adopt the *Knights* balancing test. The court, however, described the government's interest with language seen in the *Griffin* special needs test, such that the "needs" of the probation system outweigh the privacy rights of probationers. In an attempt to validate the search, given the lack of a probation condition or state regulation allowing it, the court confounds the two tests—by apparently using the special needs exception as a factor in balancing the totality of the circumstances. There is no Supreme Court case that supports the combination of the two tests. Further, it predisposes the balancing test
in favor of the government. The special needs analysis here is used to increase the weight of the government's interest, thereby decreasing the weight of the probationer's.

The Eleventh Circuit has also held that warrantless searches of probationers' homes are permissible, regardless of whether warrantless searches are provided as a term of probation. In *United States v. Carter*, the defendant was on probation for possession with intent to distribute crack cocaine and possession of a firearm by a felon. The defendant's probation officer planned and executed a warrantless search of the defendant's home on the intuition that the defendant's recent "lifestyle," such as moving to his own townhome and purchasing three cars, could not be supported by his newly formed business. The terms of the defendant's probation did not contain an explicit condition authorizing warrantless searches. The Eleventh Circuit applied the balancing test from *Knights* to hold that reasonable suspicion, not probable cause, was an appropriate standard, given a probationer's diminished expectation of privacy. Here, the government had a high interest in preventing drug and violence-related crimes—the defendant was on probation for both a violent and a drug-related felony, and thus, may have had a higher propensity to commit more crimes and hide the evidence of them. Further, although the defendant did not have a condition of probation that required him to submit to warrantless searches of his home, a condition of probation required him to submit to home visits by his probation officer. The Eleventh Circuit reasoned that this condition created a reduced expectation of privacy. Submitting to home visits, however, does not equate to submitting to warrantless searches of one's home—the use of the phrase "warrantless" in the latter, and the constitutional implications it carries categorically distinguishes the two. Nevertheless, the Eleventh Circuit reasoned that "[w]hen a probationer has a condition of probation reducing his expectation of privacy, and the government has a higher interest in monitoring the probationer due to the nature of his criminal history, a search can be permissible when supported only by reasonable suspicion."
Prior to Carter, in United States v. Yuknavich, the Eleventh Circuit decided a case that dealt with the search of a probationer's computer who was convicted of possessing child pornography. The Eleventh Circuit held that the warrantless search of the computer by the probation officers was a reasonable means of enforcing the specific probation condition restricting Internet usage, despite the absence of a probation condition authorizing searches generally. The court reasoned that, "assuming the lack of a search condition heightened [the defendant's] expectation of privacy, it did not sway the Knights balancing test such that the probation officers needed more than reasonable suspicion to conduct a search of [the defendant's] computer." The Eleventh Circuit believed that the lack of an explicit search condition was permissible because of the government's more significant interest in supervising probationers. By this view, a probationer is entitled to such a low expectation of privacy, that even when the search is conducted in the absence of a search condition, he is still not entitled to relief.

B. Circuits Against Warrantless Searches of Probationers

The Fourth Circuit disagreed with the Fifth and Eleventh Circuits' conclusions concerning the constitutionality of warrantless searches when the probationer is not put on notice by a state statute or during sentencing. In United States v. Hill, the defendant's home was searched without a search warrant or an explicit probation condition authorizing warrantless searches of his home. The law enforcement officers conducted a search with the assistance of a drug dog and found narcotics behind a ceiling tile in the bathroom. The supervision condition to which the defendant agreed required him to submit to a probation officer's visit and allowed the officer to confiscate "contraband observed in plain view." None of the conditions of the defendant's supervised release, however, authorized warrantless searches.

\[147\] 419 F.3d 1302 (11th Cir. 2005).
\[148\] Id. at 1306–07.
\[149\] See id. at 1310–11.
\[150\] Id. at 1311.
\[151\] See id. at 1309.
\[152\] 776 F.3d 243 (4th Cir. 2015).
\[153\] Id. at 245–46.
\[154\] Id.
\[155\] See id. at 246–47 (describing Standard Condition of Supervision No. 10, which required each defendant to "permit a Probation Officer to visit him or her at any time, at home or elsewhere, and [to] permit confiscation of any contraband observed in plain view of the Probation Officer").
\[156\] See id. at 248.
court thus held that an officer must have a warrant supported by probable cause when the terms of the probation condition do not subject the probationer to warrantless intrusions on his or her property.\textsuperscript{157}

In reaching its holding, the Fourth Circuit did not apply the \textit{Knights} balancing test because, unlike \textit{Knights}, there was no probation condition here allowing warrantless searches.\textsuperscript{158} Therefore, the terms of the probation did not create a lesser expectation of privacy on the part of the defendant to balance against the government's interest in monitoring probationers.\textsuperscript{159} Instead, the court reasoned that the Fourth Amendment requires that a probationer consent to warrantless searches, and that a probationer's diminished expectation of privacy under the law is not dispositive.\textsuperscript{160} The Fourth Circuit further stated that, regardless of whether the probationer previously consented to unannounced home visits, he did not consent to the warrantless search.\textsuperscript{161} Additionally, the Fourth Circuit declined to apply the \textit{Griffin} special needs approach. The \textit{Hill} court distinguished \textit{Griffin} by stating that the \textit{Griffin} decision was confined to the facts before it, that there was an express state regulation authorizing that warrantless search, and that the Court there had declined "to approve searches of a probationer's home predicated solely on reasonable suspicion."\textsuperscript{162}

The \textit{Hill} court reached its decision by analogizing to \textit{United States v. Bradley},\textsuperscript{163} an earlier, factually similar case in which the Fourth Circuit held that the reduced privacy interest of a parolee coupled with society's interest in having the parolee closely supervised did not excuse the parole officer from complying with the Fourth Amendment's warrant requirement.\textsuperscript{164} The \textit{Bradley} court thus specified that a parole officer may not search a parolee's home without a warrant when no regulation or individual parole condition explicitly allows for such a search.\textsuperscript{165} The \textit{Hill} court, using \textit{Bradley} as precedent, reasoned that, "\textit{Bradley} controls the outcome here unless intervening case law from

\textsuperscript{157} \textit{See id.} at 249.

\textsuperscript{158} \textit{See id.} (quoting United States v. Knights, 534 U.S. 112, 119–20 (2001)) ("Relevant to both [sides of the balancing test] was Knights's 'status as a probationer subject to a search condition.' On the intrusion side, the Court concluded that '[t]he probation condition... significantly diminished Knights'[s] reasonable expectation of privacy.").

\textsuperscript{159} \textit{See id.}

\textsuperscript{160} \textit{See id.} at 248.

\textsuperscript{161} \textit{See id.}

\textsuperscript{162} \textit{Id.} (citing Griffin v. Wisconsin, 483 U.S. 868, 872, 880 (1987)).

\textsuperscript{163} 571 F.2d 787 (4th Cir. 1978).

\textsuperscript{164} \textit{Id.} at 789–90.

\textsuperscript{165} \textit{Id.}
our court sitting en banc or the Supreme Court has explicitly or implicitly overruled it."166 They found no intervening law.

Crucially, the Fourth Circuit solidified its split with the Fifth and Eleventh Circuits when it noted that the probationer's knowledge of the warrantless search condition in *Griffin* and *Knights*, and the parolee's notice of an express warrantless search condition in *Samson*, were "critical" to the Supreme Court's determination that they had a diminished expectation of privacy.167 At a minimum, absent such a condition, law enforcement officers cannot conduct a search of a probationer's home without a warrant supported by probable cause.168 Other sister circuits have reached a similar conclusion. In *United States v. Rea*,169 a case that predated *Griffin*, the defendant was on probation for conspiracy to engage in the business of dealing in firearms without a license when probation officers received an anonymous tip.170 The search of the defendant's apartment led to the discovery of a loaded pistol and ammunition, holsters, knives, tear gas pellets, marijuana, and a triple beam scale.171 The defendant had not previously consented to warrantless searches of his apartment as part of his probation conditions, nor did any of the recognized exceptions to the warrant requirement apply.172 The Second Circuit took what would later become the view of the Fourth Circuit in *Hill*, holding that the Fourth Amendment's warrant requirement presumptively applies to the search of a probationer's home where no state law or condition of probation authorizes a warrantless search of the probationer.173 The *Rea* court reasoned that there had been "no showing that upholding the warrant requirements for searches of probationers' homes [would] seriously impede the accomplishment of the dual law enforcement and rehabilitative goals of probation."174

Additionally, the Sixth Circuit, in *United States v. Carnes*,175 dealt with a case that had a similar factual pattern and holding as the Fourth Circuit's decision in *Bradley*. The case concerned a parolee who was convicted of possession of firearm and ammunition by a felon, illegal wiretapping, and witness tampering.176 The Sixth Circuit, also

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166 *Hill*, 776 F.3d at 248 (internal citations omitted).
167 See id. at 248–49.
168 See id. at 249–50.
169 678 F.2d 382 (2d Cir. 1982).
170 *Id.* at 383.
171 *Id.* at 385.
172 *Id.* at 387–88.
173 See id.
174 *Id.*
175 309 F.3d 950 (6th Cir. 2002).
176 *Id.* at 953.
consistent with the Fourth Circuit, held that the warrantless search by parole and police officers was unreasonable where neither the parole agreement nor state regulation authorized searches without a warrant.177

C. Understanding the Competing Stances

The circuit split over whether a probation officer's warrantless search of a probationer's home violates the Fourth Amendment when there is no explicit search condition can be explained by a few critical differences in legal interpretation and policy rationale between the courts on both sides. Those courts holding that officers may conduct a warrantless search of probationers' homes without violating the Fourth Amendment, even absent an explicit probation condition in the terms of their probation that permits such a search, have taken a narrower view of what the Fourth Amendment prohibits. The Fifth and Eleventh Circuits rely on Samson and Knights to uphold warrantless searches of a probationer's home even without explicit authority stated in the probation agreement, so long as there is reasonable suspicion. This is despite the fact that, in Knights, the Court upheld a probation agreement provision that explicitly allowed searches of a probationer's home,178 and that in Samson, the Court upheld a parole agreement condition that specifically authorized warrantless and suspicionless searches of a parolee's person.179 The Fifth and Eleventh Circuits' rationale centers solely on policy concerns, such that the combination of a probationer's reduced expectation of privacy, and the government's interest in keeping society safe from the probationer's potential future actions render a search of a probationer's home reasonable under the Fourth Amendment.

Conversely, those courts that reject this formulation of law, and instead require officers to have a warrant based on probable cause before conducting a warrantless search when the terms of the probation do not explicitly permit it, take a broader view of the Fourth Amendment protections. The Fourth Circuit reads Knights and Griffin to critically rest upon the specific probation condition in those cases that authorized warrantless searches. As the next section will demonstrate, instead of taking solely a policy approach, the Fourth Circuit also relied on a legal basis for its holding, citing to a pre-Griffin case, Bradley, which distinguished an agreement to home visits from

177 See id. at 962–63.
an agreement to warrantless searches. The Fourth Circuit then noted that the Supreme Court has never since explicitly overruled the holding in Bradley.

V. SOLUTIONS TO THE SPLIT

There are two distinct ways to solve the split: (1) a legal solution, and (2) a policy solution. Understanding the policy implications can help illuminate what path the law should take, given the policy objectives and concerns that the Supreme Court discussed, but these implications need to be understood within the legal context of Fourth Amendment case law. Ultimately, the policy and legal concerns regarding probationers’ Fourth Amendment rights demonstrate that the proper resolution of the circuit split is to adopt the Fourth Circuit’s broader formulation of the Fourth Amendment protections.

A. The Legal Solution

From the perspective of a legal solution, the question of whether an officer’s warrantless search of a probationer’s home violates the Fourth Amendment when there is no explicit search condition hinges upon the Supreme Court’s decisions in Griffin, Knights, and Samson. These cases each stress the Court’s emphasis on a specific term that authorizes warrantless searches of a probationer, whether in the probation agreement or in a relevant statute.

*Griffin* was the first case that posited that certain “special needs” led to a recognition of less exacting Fourth Amendment standards to search probationers. While *Griffin* held that supervision, being a “special need” of the State, permitted a degree of infringement upon privacy, it also clarified that it upheld the search at issue “because it was carried out pursuant to a published administrative regulation that itself satisfies the Fourth Amendment’s reasonableness requirement under well-established principles.” Thus, the Court emphasized that its analysis was focused on the reasonableness of the specific state regulation at issue, upholding the search because the “regulation . . . itself” satisfied the Fourth Amendment. The *Griffin* Court confined its decision to the facts before it—a warrantless search pursuant to an express regulation authorizing the same—and neither approved nor disapproved the notion that searches of probationers’ homes can be

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183 Id. at 873.
184 Id.
based solely on reasonable suspicion. The Court stated it was unnecessary to "embrace a new principle of law, as the Wisconsin court evidently did" that holds that any search of a probationer's home is constitutional as long as law enforcement officers possessed "reasonable grounds" to believe contraband was present. Thus, the Court, while not outright rejecting warrantless searches without probation conditions, is nonetheless strongly signaling its hostility to this principle by rejecting the Wisconsin court's approach.

Following Griffin, the Supreme Court relied on a different test in Knights. Unlike in Griffin, where the search was conducted by a probation officer, the search in Knights was conducted by a police officer for the purpose of a general criminal investigation. Therefore, the Court declined to follow the special needs approach, as under that doctrine the search must involve a purpose other than "to detect evidence of ordinary criminal wrongdoing," in favor of what Knights termed "[their] general Fourth Amendment approach" of examining the totality of the circumstances and balancing the interests. The Court concluded that the "probation order clearly expressed the search condition," and the "probation condition thus significantly diminished [the defendant's] reasonable expectation of privacy." Given the implicit signals the Court has given, along with its reluctance to issue sweeping proclamations about the status of probationers, the Fourth Circuit's broader view of the Fourth Amendment protections is the stronger position.

Lastly, in Samson, the Court went beyond Knights to hold that, in the case of parolees, searches may be conducted without any suspicion and without any administrative framework supplying neutral criteria. The Samson Court relied on the fact that parolees had fewer expectations of privacy than probationers, that the State had a strong interest in supervising parolees, and that the parole search condition was clearly expressed to the defendant. Therefore, there was significant weight given, once again, to the explicit search condition being clearly expressed to the defendant, suggesting that, in the absence of such an explicit condition, it would likely be unconstitutional.

186 Id. at 872, 880.
187 Id.
190 Knights, 534 U.S. at 118 (quoting Ohio v. Robinette, 519 U.S. 33, 39 (1996)).
191 Id. at 119–20.
193 Id. at 850–53.
Additionally, a strict reading would likewise distinguish the privacy expectations of parolees from the privacy expectations of probationers, making it more difficult to analogize *Samson* to cases involving probationers. The *Griffin* and *Knights* Courts only spoke of probationers, not parolees, when discussing the diminished expectation of privacy continuum.\(^{193}\) In contrast, the *Samson* Court mentioned both parolees and probationers, stating that parolees have lower expectations of privacy than probationers because probationers are lower on the continuum of punishment than parolees.\(^{194}\) Therefore, although the Supreme Court has previously suggested there is no difference in the constitutional status of probationers and parolees, in practice, the Court appears to treat these statuses differently under the Fourth Amendment, as seen in *Samson*. This could be of importance if the parolee's lesser expectation of privacy made enough of a difference as to change the outcome had the defendant in *Samson* been a probationer. Yet, while the Court has not clearly spoken on whether this "no suspicion required" rule also applies to probationers, because the Court in practice treats probationers as having greater constitutional rights than parolees, a narrow interpretation of *Samson* would result in its holding not being applied to probationers at this time.

1. The Fifth and Eleventh Circuit mischaracterize the Supreme Court’s legal precedent.

The Fifth Circuit mischaracterizes Supreme Court precedent. Most importantly, it conflates the *Griffin* and *Knights* precedents. In *United States v. Keith*, the Fifth Circuit stated that, “The core reasoning of the Court in both cases is directed at explaining why the needs of the probation system outweigh the privacy rights of the probationers[.]”\(^{195}\) The *Keith* court then used this as a rationale to apply both the *Griffin* special needs test and the *Knights* balancing test to the case at hand, an approach that appears in no Supreme Court precedent.

The Fifth Circuit reasoned that the consistent line of case law in Louisiana approving the practice of searching probationers' homes based on reasonable suspicion served as a substantially equal replacement for a *Griffin*-like state regulation.\(^{196}\) While case law provides sufficient notice, a statute or an explicit condition would provide even better notice. Yet, even assuming, *arguendo*, that the two

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\(^{194}\) *Samson*, 547 U.S. at 850.

\(^{195}\) *United States v. Keith*, 375 F.3d 346, 350 (5th Cir. 2004).

\(^{196}\) *Id.*
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situations are analogous, the Fifth Circuit then used this “Griffin-like” substitute to create a diminished expectation of privacy. Based on this contrived diminished expectation of privacy, the court then held that the warrantless searches of probationers was lawful. Nowhere in *Griffin* does the Court hold that the warrantless search was justified because the state regulation created a diminished expectation of privacy. Instead, the *Griffin* Court used the “special needs” of the probation system to uphold the state regulation that itself authorized warrantless searches of the probationer’s home. Not the other way around, and not through a balancing approach. As to *Knights*, the Fifth Circuit is not entirely wrong to conclude that a core rationale of the holding was based on the probationer’s diminished expectation of privacy. This, however, followed from the explicit probation condition allowing warrantless searches. It did not derive from explaining why the “needs” of the probation system outweigh the privacy rights of probationers, as the *Knights* Court declined to use the *Griffin* special needs test when the search was by law enforcement. Ultimately, then, the Fifth Circuit’s interpretation of *Griffin* and *Knights* is incorrect, and there is no legal precedent that supports the conflation of the two tests. It is clear that the *Keith* court attempted to combine the two tests in an effort to affirm the conviction in the absence of a legal justification for doing so.

The Eleventh Circuit makes an equally erroneous determination. In *United States v. Carter*, the court sought a substitute for an explicit probation condition allowing warrantless searches which would create a diminished expectation of privacy. The probation condition in *Carter*, however, only required the defendant to “submit to visits by the probation officer at his home, workplace, or elsewhere.” It did not require him to submit to warrantless searches of his home, as agreeing to submit to visits by a probation officer in the home does not equate to agreeing to submit to warrantless searches of the home—the latter being a far more intrusive invasion. In contrast, the conditions in both *Griffin* and *Knights*, to which the *Carter* court compares this case, explicitly allowed warrantless searches of the probationer’s home. In attempting to equate the probation condition at hand with the one in

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197 *Id.* at 350–51.
198 *Griffin*, 483 U.S. at 875–76.
201 *United States v. Carter*, 566 F.3d 970, 974 (11th Cir. 2009).
202 See *United States v. Reyes*, 283 F.3d 446, 462 (2d Cir. 2002) (upholding the constitutionality of a warrantless “visit” to the home of a person on supervised released, but emphasizing that warrantless home “visits” were specifically authorized by statute, and that home “searches” raise different issues, as “a home visit is far less intrusive than a probation search”).
Griffin and Knights, the Eleventh Circuit departed from legal precedent. It even admits to the fact that "none of [their] binding precedent holds that a probationer is subject to reasonable suspicion searches solely because he is a probationer[]."

The Eleventh Circuit then unsuccessfully attempted to overcome this inadequacy in precedent by relying heavily on policy rationales.

Furthermore, the Eleventh Circuit misinterprets the Knights balancing test. The test does not start off presumptively in favor of the government. Rather, it starts out as an even playing field, and then particular circumstances sway it either way. As in Knights, the most relevant circumstance would be the defendant’s awareness of an explicit search condition, which would lessen his expectation of privacy and tilt the scale in favor of the government. That is clearly not the situation in Carter, as there was no explicit search condition. Therefore, there is no basis in law for the Eleventh Circuit’s approach.

2. The Fourth Circuit correctly characterizes the Supreme Court’s legal precedent.

In stark contrast, the Fourth Circuit’s approach adheres to legal precedent. In United States v. Hill, the Fourth Circuit relied on a factually and legally similar past circuit case, United States v. Bradley, to hold that a probation officer must secure a warrant prior to conducting a search of a probationer’s place of residence, even where the probationer consented to periodic and unannounced visits by the probation officer. The Fourth Circuit reasoned that, “Since Bradley, the Supreme Court has decided three cases dealing with privacy interests of individuals on probation or parole. None calls into question Bradley’s core holding.” In so holding, the Fourth Circuit correctly read Griffin as not expanding the special needs doctrine. Therefore, Griffin does not reach the issue of whether an officer may search a probationer’s home without a warrant when no regulation or individual probation condition allows it. Likewise, the Fourth Circuit appropriately recognized Knights to hold that an explicit probation condition acts to diminish a probationer’s expectation of privacy on the “intrusion” side of the balancing test. Therefore, the Fourth Circuit logically reasoned that, because there is no probation condition allowing warrantless searches in Hill, there is nothing on the

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203 Carter, 566 F.3d at 973.
204 United States v. Hill, 776 F.3d 243, 248 (4th Cir. 2015).
205 Id.
206 Id.
207 Id. at 248–49.
"intrusion" side of the reasonableness test to make the *Knights* legal analysis analogous to the case at hand. Also, in this regard, the Fourth Circuit correctly read *Samson*'s legal analysis, like *Knights*, to depend on the parolees' notice of an express warrantless search condition. In contrast, the Eleventh Circuit, even though its decision came after *Samson*, does not attempt to reconcile its holding with the *Samson* decision.

Beyond most closely adhering to legal precedent, the Fourth Circuit's broader reading is also more in line with the intent of the Fourth Amendment. The totality of the circumstances balancing test "is not a talisman in whose presence the Fourth Amendment fades away and disappears." The protection of the Fourth Amendment "consists in requiring that those [reasonable inferences made by law enforcement] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." The Fourth Amendment thus states that "no warrants shall issue, but upon probable cause." Such a requirement ensures that when the right of privacy must yield to the right of a search, it should be done by a neutral judicial officer, and not by the discretion of law enforcement officers. Therefore, as the Fourth Circuit rightly held, without a condition implicating a warrant exception, a warrantless search violates the Fourth Amendment.

Taken together, the legal approach thus leads to resolving the circuit split in favor of the Fourth Circuit. The legal approach, as compared to the policy-based approach of other circuits, cautions us to respect the words of the Fourth Amendment and not allow it to be used to conduct excessive searches of probationers, leading reasonable minds to find the Fourth Circuit's analysis the most compelling. Ultimately, the Fourth Circuit follows precedent in a way that most closely resembles the intent of the Fourth Amendment, recognizing the protections in place that stem from the requirement of a warrant and probable cause are a nullity in the hands of complete law enforcement discretion in this area. The Fifth and Eleventh Circuits instead gloss over the Supreme Court's emphasis on the probationer or parolee's knowledge of the warrantless search condition in *Griffin*, *Knights*, and

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208 *Id.* at 249.
211 U.S. CONST. amend. IV.
212 *See Johnson*, 333 U.S. at 14 ("Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the [Fourth] Amendment to a nullity.").
Samson, thus extending the right to search beyond what legal precedent allows, and what good policy would counsel.

B. The Policy Perspective

The dual policy concerns regarding probation are rehabilitation of the individual and protecting society from future criminal violations.213 These concerns further support the notion that probationers have a lower expectation of privacy.214 The Fourth Circuit’s approach correctly considers the policy implications and gives them the appropriate weight.

It is possible that the Fourth Circuit’s approach will make it more difficult for probation officers to facilitate rehabilitation and prevent recidivism. As both the Fifth and Eleventh Circuits addressed, probationers do not enjoy “the absolute liberty to which every citizen is entitled,” and the government has a significant interest in preventing future criminal violations.215 Adopting the Fifth and Eleventh Circuits’ rationale furthers some of the goals of probation set forth by the Supreme Court: it allows officers to better protect society from a possibly violent probationer, and it rehabilitates probationers by encouraging them to assimilate into society and refrain from violating their probation conditions.216 By allowing officers to conduct warrantless searches of probationers’ homes even absent an explicit probation condition, officers have greater authority over individuals that they decide pose a high danger to society. Further, the threat and uncertainty of whether a probationer’s home will be searched at any moment without a warrant encourages probationers to follow the rules and refrain from engaging in criminal activity, acting as an effective deterrent to recidivism.217 Limiting the scope of these searches thus arguably hinders the effectiveness of probation as an alternative to incarceration.

While these concerns are legitimate, one can consider rehabilitation and recidivism without sacrificing probationers’ Fourth

214 See id. at 119–20.
215 See United States v. Keith, 375 F.3d 346, 350–51 (5th Cir. 2004); United States v. Carter, 566 F.3d 970, 974–75 (11th Cir. 2009).
Amendment rights. For example, in the context of the First Amendment, when crafting hate crimes legislation, it would certainly be easier to completely ban people’s ability to use hate speech. Yet, in an attempt to protect people’s constitutional liberties, the Court instead chooses to restrict only their ability to use hate speech when it invokes violent conduct.218 There are countless other situations where the Court could see maximal enforcement at the cost of liberty and privacy, but declines to do so. This is one of those situations.

The Supreme Court clearly articulated that the primary purpose of the warrant requirement in the Fourth Amendment is to guard against unlawful searches and seizures inside a home: “It is axiomatic that the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.”219 The Court has thus held that searches and seizures inside a home without a warrant are presumptively unreasonable.220 It is from this presumption the Fourth Circuit balances the policy concerns against a probationer’s Fourth Amendment rights. While recognizing that the governmental interest in supervision is great, that the probationer has a diminished expectation of privacy, and that society has an interest in having the probationer closely supervised, the Fourth Circuit still held that these considerations do not excuse an officer from complying with the Fourth Amendment’s warrant requirement.221 Searches of a probationer’s home are not a necessary ingredient of every probationer’s supervision.222 Rather, the decision to search without a warrant rests on an officer’s discretion. How much discretion should these officers have, and whether officers use the right factors in exercising such discretion is an unanswered, yet important, question.

Supporters of warrantless searches of probationers fail to explain why the ordinary warrant requirement cannot work for probationers.223 Probable cause and the warrant process are not inflexible. The warrant requirement acts to protect probationers’ Fourth Amendment rights without unreasonably restricting officers’ supervisory roles.

Furthermore, the idea that rehabilitative goals of probationers are impeded by a warrant requirement is erroneous. In fact, indiscriminate searches could undermine the rehabilitative process.224 The

222 See Latta v. Fitzharris, 521 F.2d 246, 256 (9th Cir. 1975) (Hufstedler, J., dissenting).
223 See Bradley, 571 F.2d at 789 (citing Latta, 521 F.2d at 256).
rehabilitation process depends on trust and respect between the probationer and probation officer, and "[r]esponsibility and respect for the rights of others presuppose certain reasonable expectations that one's own privacy will be respected." Thus, "[w]hen a [probation] officer indiscriminately searches his [probationer's] person, home, or effects, rehabilitation is thwarted because earlier patterns of resentment and distrust of law-enforcement officials are reinforced." This type of invasion of privacy only diminishes the probationer's confidence and trust in either his probation officer or in the rule of law. On the other hand, fair treatment will enhance the chance of rehabilitation of probationers by avoiding reactions to the arbitrariness of the probation officers. As the goal of rehabilitation is a large rationale behind the Fifth and Eleventh Circuit's holdings, these findings challenge their legal arguments for warrantless searches.

Additionally, there are alternative options other than warrantless searches to promote the policy of rehabilitation, such as requiring a drug test three to four times a week for those convicted of drug-related crimes. In that regard, the rationale for rehabilitation might not be as potent for those on probation for conduct such as white-collar crimes, as drug tests likely are not an effective monitoring device for non-drug offenders on probation. A categorical bar on searches of both classes of probationers will prevent officers from making arbitrary decisions on which probationers warrant a "heightened interest," and instead require officers to go through the court system to rule on such a determination. The underlying concern of the Fourth Circuit hinges on what measures officers may undertake in protecting the public. While proponents of the Eleventh and Fifth Circuits' approach argue that officers can only conduct warrantless searches for those in whom the government has a "heightened interest," the question of whether officers should have complete discretion to decide what exactly is worthy of increased scrutiny is still a concern. For instance, who decides what is a victimless crime or not and, thus, whether the government would have a heightened interest in protecting society?

Lastly, it is worth noting that appellate courts should not be the party addressing this policy concern in the first place. If the police or

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225 Id. at 134 (internal citation omitted).
226 See id. at 134–35.
227 See Griffin v. Wisconsin, 483 U.S. 868, 886 (1987) (Blackmun, J., dissenting) ("I fail to see how the role of the probation agent in fostering growth and development of the client... is enhanced... by the ability to conduct a search without the checks provided by prior neutral review. [T]he power to decide to search will prove a barrier to establishing any degree of trust.") (internal citations omitted).
228 See TASK FORCE REPORT, supra note 6, at 83, 88.
229 See Ryan, supra note 216.
probation officer already had the opportunity to put in a specific condition in the probation agreement authorizing warrantless searches, but chose not to, the policy concern should be considered addressed, and deference should be given to that decision. Appellate courts should not be making ex post decisions on a probationer’s “dangerousness” when the probation hearing already offered the opportunity to make a decision one way or the other. Furthermore, decisions regarding a probationer’s “dangerousness” status are fact-intensive inquiries, and appellate courts generally are not in a good position to make such fact-specific determinations.

Ultimately, the potential policy concerns regarding probationers do not excuse law enforcement officers from complying with the Fourth Amendment. Although the state’s interest in protecting society by rehabilitating probationers is compelling, limitations of Fourth Amendment rights are unnecessary to achieve that end. Home visits, where probation officers may use general observations made during a visit and the “plain view” doctrine to seize evidence, reporting requirements, and normal law enforcement methods, along with the built-in flexibility of the probable cause and warrant requirement, are sufficient to meet the state’s interests. Probation serves as a substitute for the incarceration of convicted criminals. Courts favor probation for offenders of less serious crimes because it represents a healthy alternative to incarceration. Probation seeks to maximize the liberty of the offender while still protecting the public from that individual’s potential future violations of the law. Courts and probation officers should not treat probationers like prisoners. When a probation officer conducts a warrantless, suspicionless, or otherwise random search of a probationer to deter criminal conduct, the officer actually undermines the trust between herself and the probationer. Thus, impermissible and intrusive searches may injure, rather than promote, the state’s interests.

Deciding the circuit split in favor of the Fourth Circuit will strike a better balance of these interests by allowing for warrantless searches when the exceptions that are carved out in legal jurisprudence allow
them, while at the same time protecting probationers' Fourth Amendment rights. Although unlimited search powers would increase the number of violations that police can detect, "[the] fundamental Fourth Amendment rights need not and should not be abridged in the name of more efficient law enforcement."235

VI. CONCLUSION

The purpose of a probation search is to advance the goals of an individual's probation and should not be used as a "subterfuge" for a criminal investigation.236 The realistic goals of probation justify the conclusion that some Fourth Amendment rights of probationers are not protected to the same extent as other citizens. These exceptions, however, should strike a fair balance between the needs of the probation system and the privacy interests of those persons on probation, and this requires a more careful analysis than the Fifth and Eleventh Circuits have undertaken. Despite the Supreme Court's strong language concerning the "fundamental nature" of these rights,237 most courts have failed to carefully scrutinize encroachments on probationers' Fourth Amendment rights. This is due in part to the Supreme Court's move from a special needs analysis in Griffin v. Wisconsin, to a broader totality of the circumstances balancing analysis in United States v. Knights and Samson v. California.

From this Supreme Court jurisprudence, the Eleventh and Fifth Circuits have held that police officers may conduct a warrantless search of probationers' homes without violating the Fourth Amendment, even though there is no explicit condition in the terms of their probation that permits such a search. The Fourth Circuit, by contrast, has rejected this formulation of the law. Instead, it requires officers to have probable cause before conducting a warrantless search when the terms of the probation do not explicitly permit warrantless searches.

Courts confronting this question had to determine the proper construction of probation conditions when they are silent on the officer's ability to search the probationer's home without a warrant.

235 Koshy, supra note 232, at 476 (internal citations omitted).
236 See Latta v. Fitzharris, 521 F.2d 246, 249 (9th Cir. 1975).
Does the absence of a clear statement mean this practice is allowed under the Fourth Amendment? The Fourth Circuit’s response is the proper interpretation of the silence, finding that the needs of the probation system are not of such great importance as to override an individual’s privacy rights when the probationer has not previously consented to the invasion of his privacy through warrantless searches. The Fourth Circuit changes the conversation not by asking what probationers expect in regard to privacy, but rather, what justification there is for departing from the normal Fourth Amendment protections. Such an interpretation adequately emphasizes the fundamental nature of one's Fourth Amendment rights. Ultimately, then, the circuit split should be resolved in favor of the Fourth Circuit’s broader approach to the Fourth Amendment protections: absent an explicit probation condition stating the probationer will be subject to warrantless searches, law enforcement officers cannot conduct a search of a probationer’s home without a warrant or probable cause.

See Koshy, supra note 232, at 471.