



# U.S. v. KNIGHTS

## Supreme Court Rules on Searches of Probationers by Police

### Introduction

The United States Supreme Court has recently upheld the constitutionality of a warrantless search of a probationer's apartment by a police detective, where the search was based on the detective's "reasonable suspicion" that the probationer was engaging in criminal activity. In *U.S. v. Knights*, the Supreme Court reaffirmed that probationers do not enjoy the same degree of constitutional protection against searches or seizures that other citizens do.

This article will first review the rights, in general, of probationers in comparison both to the rights of citizens in the "free world" who are not

under probation supervision and to those of persons in penal incarceration. The article will then review the *Knights* decision and its implications concerning the powers of law enforcement officers to search (or seize) probationers and parolees. The article will conclude by discussing probation searches in the dual contexts of revocation proceedings and prosecutions for new criminal charges. It is the author's view that the *Knights* decision, in addition to furnishing helpful clarification and guidance to law enforcement officers, also reaffirms the message that probation and parole professionals have long been trying to get across to the public at large – that probation and parole enhance public safety by their ability to investigate suspected

**general, rules of probation and conditions of supervision may restrict the liberty of probationers to the extent necessary to further the dual purposes of probation supervision – assisting the rehabilitation of the probationer on the one hand and monitoring and enforcing the conditions of probation (if necessary through the sanction of probation revocation) on the other.**

unlawful behavior and take action against violators, quickly and with relative informality.

## **The Rights of Probationers in General and with Regard to Search and Seizure in Particular**

### **A. In general**

Just as prisoners do not leave all their rights at the prison gate when they begin serving a sentence of imprisonment, probationers similarly do not forfeit all their constitutional rights merely by virtue of their probation status. Probationers (and parolees, whose constitutional rights are virtually identical to those of probationers) occupy an intermediate status, somewhere between the much greater freedom and rights enjoyed by free world citizens and the greatly reduced measure of freedom and constitutional rights for prisoners.

At one time, prisoners incarcerated for commission of a felony were regarded as “slaves of the state,” who retained only those few rights that the state, in its grace, saw fit to afford them. Historically, prisoners forfeited their property and the right to sue, thus becoming virtual legal non-persons. The only limitations on the treatment of prisoners were under the Eighth Amendment prohibition against Cruel and Unusual Punishment.

In recent decades, however, the courts came to recognize that prisoners retain certain constitutional rights during incarceration, although necessarily in greatly diminished form. For example, prisoners retain certain First Amendment rights of free speech and exercise of religion, although correctional officials may greatly limit the exercise of these rights in the interest of institutional security. To that end, officials may inspect mail for contraband or escape plans and may regulate or limit prison religious exercises.

In the area of probation and parole, recent decades have seen a number of court cases that similarly flesh out the scope of various constitutional rights of probationers. As one might intuitively expect, probationers have a diminished expectation of privacy in comparison to ordinary citizens, but still a much greater expectation of privacy than do prisoners in the penal environment. Courts have held that the rights of prisoners in most all of their daily activities are necessarily greatly diminished in the penal setting. Probationers and parolees, in contrast, do not retain “the absolute liberty to which every citizen is entitled,” but still retain liberty that “includes many of the core values of unqualified liberty” (*Morrissey v. Brewer*, 408 U.S. 471 (1972)). In general, rules of probation and conditions of supervision may restrict the liberty of probationers to the extent necessary to further the dual purposes of probation supervision – assisting the rehabilitation of the probationer on the one hand and monitoring and enforcing the conditions of probation (if necessary through the sanction of probation revocation) on the other.

### **B. Probationers’ Fourth Amendment search and seizure rights.**

Two significant United States Supreme Court decisions, *Griffin v. Wisconsin*, 483 U.S. 868 (1987), and now the ruling in *U.S. v. Knights*, go a long way toward defining the extent (or the limitations) of probationers’ Fourth Amendment rights. The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. The kinds of searches and seizures courts have found to be reasonable have been different in both the prison setting and in the probation setting, in comparison to searches of free citizens.

To be considered reasonable, and therefore constitutional under the Fourth Amendment, a search of a free citizen’s home or property, must usually be justified by probable cause – a strong reason to believe that the search will turn up evidence of criminal activity – and in many situations must also be authorized in advance by a search warrant issued by a judicial officer.

Neither the probable cause requirement nor the warrant requirement, however, applies to searches of prisoners or probationers. Prisoners’ cells may be searched without probable cause to believe that they are in violation of prison rules, or even without any lesser degree of individualized suspicion (see, *Hudson v. Palmer*, 468 U.S. 517 (1984)). A typical prison cell “shakedown” may entail a thorough search of a prisoner’s cell and belongings for purely preventative purposes, without any personalized suspicion at all. Similarly, prisoners may be subjected to highly intrusive bodily searches without any individualized suspicion.

### **C. *Griffin v. Wisconsin***

Probationers, while not subject to such extensive suspicionless searches, do not have the protections of the probable cause and warrant requirements that free citizens enjoy. In



*Griffin*, probation officers accompanied by police officers, searched a probationer's apartment after receiving information from a police detective that the probationer might have guns in the apartment. The search turned up a gun, which led to both revocation of probation and the probationer's conviction of a new criminal charge of possession of a firearm by a convicted felon.

The Supreme Court affirmed the conviction, rejecting Griffin's contention that the search was unreasonable because it was not based on probable cause or supported by a search warrant. The court determined that a warrant requirement "would interfere to an appreciable degree with the probation system, setting up a magistrate rather than the probation officer as the judge of how close a supervision the probationer requires." In the same vein, the court considered that "the probation regime would also be unduly disrupted by a requirement of probable cause," especially with regard to the probation agency's ability to respond quickly to evidence or suspicion of misconduct by the probationer. Therefore, the court concluded:

In some cases – especially those involving drugs or illegal weapons – the probation agency must be able to act based upon a lesser degree of certainty than the Fourth Amendment would otherwise require in order to intervene before a probationer does damage to himself or society.

The search in *Griffin* was conducted pursuant to a Wisconsin probation regulation that permitted "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." Compared to a requirement of "probable cause," a much lesser degree of certainty, or probability, will satisfy the requirement of "reasonable grounds" or "reasonable suspicion." The tip from the police detective to the PO in *Griffin* is a good illustration of the kind of information that does not rise to the level of "probable cause" but still furnishes "reasonable suspicion" to search a probationer's residence. It is less than certainty or strong probability, but more than a mere hunch.

Although the *Griffin* case clearly established the authority of *probation officers* to search probationers and their property without a warrant and without full probable cause, later cases in the lower courts were divided as to whether or not a probation condition authorizing *police officers* to search probationers without warrant or probable cause would be constitutionally valid. That issue has now been resolved in the court's recent decision in the *Knights* case.

#### **D. U.S. v. Knights**

Mark Knights was on probation in California for a drug offense. The sentencing judge's probation order contained a condition that Knights would submit 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." This condition theoretically amounted to a complete waiver of all of Knights' Fourth Amendment rights to probation and police officers.

Three days after Knights was placed on probation, a power company transformer and adjacent telephone company communications vault were pried open and set on fire, causing over a million dollars in damage. Suspicion for this and other similar recent acts of vandalism fell on Knights because the power company had filed a theft-of-services complaint against Knights for failure to pay his bill, the acts of vandalism had coincided with Knights' court appearance dates on the theft charges, and a sheriff's deputy had stopped Knights and his friend a week earlier near a power company gas line and observed pipes and gasoline in the friend's pickup truck.

After the arson of the power company's transformer, a police detective set up surveillance outside of Knights' apartment. At 3:10 AM, police saw

the friend leave Knights' apartment building carrying three cylindrical items (which police believed to be pipe bombs) and walk across the street to a river bank. The detective then heard three splashes and saw the friend return to his truck without the cylinders. After approaching the truck and observing a Molotov cocktail, explosive items, a gas can and padlocks that had been taken from the transformer vault, the detective decided to search Knights' apartment. The detective was aware of both Knights' probation status and the search condition in Knights' probation order. The search revealed arson materials, ammunition, manuals on chemistry and electrical circuitry, bolt cutters, drug paraphernalia and a brass padlock belonging to the power company.

Knights was arrested and subsequently indicted for conspiracy to commit arson, possession of an unregistered destructive device and for being a felon in possession of ammunition. A Federal District Court judge granted Knights' motion to suppress all the evidence obtained during the search on the ground that the search was for investigatory rather than probationary purposes. The judge's reasoning, which had been shared by some state and federal courts,<sup>1</sup> was that the *Griffin* decision only applied to probation searches but not to investigatory searches by police for evidence of new crimes. After the Ninth Circuit Court of Appeals affirmed the suppression order, the case went to the Supreme Court on the issue of the constitutionality of searches made pursuant to the California probation condition.

In a unanimous opinion written by Chief Justice Rehnquist, the Supreme Court reversed the suppression order, characterizing the reasoning of the lower courts – that a warrantless search of a probationer satisfies the Fourth Amendment only if it is conducted to monitor whether the probationer is complying with probation conditions – as "dubious logic." The court, "examining the totality of the circumstances," determined that the search of Knights' apartment was reasonable under the Fourth Amendment.

Following well established principles from prior Fourth Amendment cases, the court balanced the degree to which the search intruded on Knights' privacy against the degree to which it was "needed for the promotion of legitimate governmental interests." The court acknowledged, "just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." The court found that probationers such as Knights have a diminished expectation of privacy in light of "the very assumption of the institution of probation . . . that the probationer is more likely than the ordinary citizen to violate the law." In support of this conclusion, the court cited statistics from the U.S. Department of Justice Bureau of Justice Statistics to the effect that the recidivism rate of probationers is significantly higher than the general crime rate, and that 43 percent of felons on probation in 17 states were rearrested for a new felony within three years while still on probation.

The Supreme Court stated its rationale for upholding Knights' search condition in terms that should be familiar to any experienced probation or parole officer:

*The state has a dual concern with the probationer. On the one hand is the hope that he will successfully complete probation and be integrated back into the community. On the other is the concern, quite justified, that he will be more likely to engage in criminal conduct than an ordinary member of the community. The view of the Court of Appeals in this case would require the state to shut its eyes to the latter concern and concentrate only on the former. But we hold that the Fourth Amendment does not put the state to such a choice. Its interest in apprehending violators of the*

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*criminal law, thereby protecting potential victims of criminal enterprise, may therefore justifiably focus on probationers in a way that it does not on the ordinary citizen.*

*We hold that the balance of these considerations requires no more than reasonable suspicion to conduct a search of this probationer's house. . . . Although the Fourth Amendment ordinarily requires the degree of probability embodied in the term "probable cause," a lesser degree satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable. . . . 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.*

**E. Unresolved questions and issues – May probation officers and/or police officers search probationers without any individualized suspicion at all?**

The *Knights* and *Griffin* decisions, read together, make clear that a warrantless search of a probationer or his property, pursuant to a rule or condition of probation, need not be based on full probable cause, regardless of whether the search is conducted by the probation officer who supervises the probationer, or by a police officer who is aware of the probationer's status and of the rule or condition requiring the probationer to consent to searches by law enforcement officers. Rather, a search of a probationer will be upheld if there are reasonable grounds to justify it, which is a much less demanding standard than the test of probable cause.

Since it was undisputed in the *Knights* case that the search was supported by reasonable suspicion (it could even be argued that the information known to the detective rose to the higher level of probable cause), the Supreme Court did not need to review every aspect of the broad ranging search-consent condition of Knight's probation. Courts decide cases on the basis of the facts presented, and therefore it was not necessary for the Supreme Court to decide whether or not a search of a probationer by his probation officer or by a police officer based on no individualized suspicion at all would be valid under the Fourth Amendment.

This unresolved question is of importance to probation officials, police officers and probationers alike. Probation and parole officers may routinely perform such acts as inspecting arms for needle tracks, directing probationers to empty their pockets to see if they are carrying a weapon or drugs, and inspecting probationers' residences to see if they are suitable environs for the probationer to live. It remains to be seen whether the courts would impose any requirement of individualized suspicion before such a probation officer may undertake such monitoring actions. In the author's opinion, a court would most likely uphold such actions because they are taken in furtherance of the legitimate purposes of probation supervision, and because probationers' privacy interests are not only diminished in comparison to free citizens, they are outweighed by the interest of the probation department in preventing and detecting violations of probation conditions.

Also unresolved by *Knights* and *Griffin* is the question of whether police, knowing that a person is on probation, may search the probationer or his property without any level of probable cause or reasonable suspicion at all.<sup>2</sup> The court concluded in *Knights* that under the Fourth Amendment, the detective needed "no more than reasonable suspicion to conduct a search of this probationer's house." But would the courts, after *Knights*, uphold a search based on less than reasonable suspicion? In other words, may a probationer constitutionally be required to waive all Fourth Amendment rights and protections against any law enforcement search, however intrusive or suspicionless that search might be? A police officer's search of a probationer's apartment without reasonable suspicion might present a tougher and closer case to the courts, despite the seemingly all-inclusive language of *Knights*' "search by any law enforcement officer, with or warrant or without reasonable cause" probation condition. I suspect courts would hold that even though a probationer's expectation of privacy is diminished, it is not extinguished altogether. Therefore, police might still have to meet the requirement of reasonable suspicion before searching a probationer, even though a probation officer might not need any level of individualized suspicion at all before performing routine monitoring functions like those discussed above.

**F. Searches and seizures of computers and computer files, documents, hard drives and disks.**

The subject of law enforcement searches of computer hardware and software is a hot topic these days. To the extent that a probationer's computer hardware or software may



contain evidence of violation of probation conditions or evidence of new crimes, searches of such items by probation or police officers, based on reasonable suspicion, would seem to be proper under the rationale of the *Griffin* and *Knights* cases. The only way in which such searches might arguably differ from, say, a search of a probationer's car or pants pockets, is the possibility that such searches might impinge on a probationer's First Amendment right of free speech.

Documents containing child pornography (which is clearly illegal), plans to commit terroristic acts, or admissions to the commission of crimes, would not be protected by the First Amendment. However, documents that merely express political or religious views, or are communications to family and friends, and which do not contain any evidence of criminal acts or plans, would be entitled to some First Amendment protection. Lines between protected and unprotected speech may sometimes be difficult to draw, but suffice it to say that in the context of probation searches, the medium in which data is contained (be it computerized or not) should make no difference. Child pornography on a computer disk or downloaded from an internet website is just as unlawful (and subject to search and seizure by probation or police officers) as it is in a magazine.

Probationers, however, do not forfeit all their First Amendment rights, even though like Fourth Amendment rights they may be limited to the extent necessary to carry out the rehabilitative and community protection purposes of probation supervision. What is a reasonable limitation on First Amendment rights may vary considerably from case to case. In the case of a convicted pedophile or child pornography peddler, routine surveillance of the probationer's computer and software, even without suspicion or direct evidence that the probationer has reoffended, would probably be found reasonable and constitutional. Surveillance of a probationer's letters to family and friends, however, might not be found constitutional in the absence of at least some reasonable suspicion that they might contain evidence of a crime or of violation of probation conditions. Once again, it would be the content of the document and the purpose of the search, not the medium in which the document is produced or stored, that would be the critical factor.

### Probation Searches, Probation Revocation Proceedings, and Prosecutions for New Crimes

A probationer who commits a new criminal act is subject to two separate possible sources of criminal jeopardy: possible revocation and incarceration on his original conviction and possible conviction and incarceration on new criminal charges, or both. Unlike a criminal trial, where guilt must be proven beyond a reasonable doubt, probation may be revoked on a lower standard of proof, usually "a preponderance of the evidence" (i.e., proof only that it is slightly more likely than not that the probationer violated the conditions of probation – a much less stringent standard than the test of proof beyond a reasonable doubt).

The same evidence obtained from a search or seizure of a probationer may be used in both a probation revocation hearing and a new criminal trial. What if a court were to determine in a new criminal trial that the evidence had been unlawfully seized (for example, if the court were to determine that police or probation officers did not even have reasonable suspicion to search)? In such a situation, the probation revocation proceedings would provide the officers with greater leeway than a criminal trial would. Evidence offered at a criminal trial is subject to the Exclusionary Rule: evidence seized illegally may generally (subject to several exceptions) be excluded from evidence and therefore may not be considered in determining a defendant's guilt or innocence. In the case of *Pennsylvania Board of Probation and Parole v. Scott*, 524 U.S. 357 (1998), however, a

closely divided Supreme Court ruled that the exclusionary rule does not apply in parole revocation hearings. Since constitutional standards governing probation and parole revocation are virtually identical, (see, *Gagnon v. Scarpelli*, 411 U.S. 778 (1973)) evidence that may be excluded in a criminal trial may still be presented at a probation revocation hearing and serve as the basis for revocation. Probation revocation proceedings may thus serve as a safety net to enforce the conditions of probation even in cases where, for whatever reason, the evidence is insufficient to prove the probationer guilty of new criminal charges beyond a reasonable doubt.

### Conclusion

The *Knights* decision has brought a greater degree of clarity than previously existed to the subject of searches of probationers. Either a probation officer or a police officer who is aware of a person's status as a probationer and of a condition of supervision that authorizes search by any law enforcement officer, may constitutionally search the probationer or his property based on reasonable suspicion rather than on the more stringent requirement of probable cause.

Given some of the uncertainties that still remain even after *Knights*, however, probation and parole staff should seek advance legal guidance from prosecutors or from agency counsel where possible in situations where they have doubts as to the legality of an intended search.

The *Knights* decision, in addition to clarifying the law governing search and seizure of probationers, is an affirmation of the public protection role of community supervision. The Supreme Court's opinion acknowledges that probation exists not only to rehabilitate but also to "protect society from future criminal violations." As discussed above, the outcome of this case was based in no small measure on the court's concern that in order for the state effectively apprehend violators of the criminal law, and thereby protecting potential victims of criminal enterprise, it may "justifiably focus on probationers in a way that it does not on the ordinary citizen." What the court is saying (whether it realizes it or not) is that effective community supervision is effective public safety. Through the imposition and enforcement of reasonable conditions of supervision, and through its ability to impose sanctions for misconduct without having to wait for all other the wheels of the criminal justice system to turn, probation (and parole) supervision enhances public protection. It behooves the leaders of our often besieged profession to get this message out to the public, and in this effort, the *Knights* decision cannot but help.

### Endnotes

<sup>1</sup> Some courts had held that police officers may not use probation or parole as a "stalking horse," to enable them to conduct a search of a probationer or parolee, without probable cause or warrant, that would have been unlawful if the subject of the search had not been on probation or parole.

<sup>2</sup> The court specifically stated in a footnote, "We do not decide whether the probation condition so diminished, or completely extinguished, *Knights*'s reasonable expectation of privacy (or constituted consent . . . ) that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment." □

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*Stanley E. Adelman, J.D.* is an attorney, criminal justice trainer and consultant, and professor of law at University of Arkansas and University of Tulsa law schools. He is a former New York State parole officer and former senior litigation counsel to the Massachusetts Parole Board and the Massachusetts Department of Correction.