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GRIFFIN V. WISCONSIN* WARRANTLESS PROBATION SEARCHES—DO THE STATE'S NEEDS WARRANT SUCH STRICT MEASURES?

The fourth amendment to the United States Constitution protects individuals from unreasonable searches.¹ The Supreme Court has interpreted this amendment to forbid government officials from searching an individual's home without first obtaining a search warrant.² This restriction on the state's police power reflects the great importance this country places on personal privacy.³ While these fourth amendment protections are required for most individuals, the same is not true for all types of people. A prisoner, for example, may not claim a violation of his fourth amendment rights if a prison official searches him without a warrant.⁴ The rule is less clear, however,

* 107 S. Ct. 3164 (1987).

1. The fourth amendment to the United States Constitution states:

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.

U.S. CONST. amend. IV.

The fourth amendment is most often invoked in the course of a criminal trial. See 1 W. LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT, § 1.1 (2d ed. 1987). The defendant typically asserts that the government has seized evidence in violation of his fourth amendment rights. The traditional remedy for such a violation is for the court to exclude at trial, any evidence seized during the violative search. This procedure is known as the exclusionary rule. The Supreme Court originated the rule in *Boyd v. United States* by mixing elements of the fourth and fifth amendments. 116 U.S. 616, 634-35 (1886). Originally, the fourth amendment applied only to the federal government, *Smith v. Maryland*, 59 U.S. (18 How.) 71, 76 (1855); W. LAFAVE, *supra* at § 1.1 (d), but in *Mapp v. Ohio*, the Court extended its application to the states as well. 367 U.S. 643, *reh'g denied*, 368 U.S. 871 (1961).

2. *Silverman v. United States*, 365 U.S. 505, 511 (1961) (the right of a citizen to retreat into her own home and be free from unreasonable searches stands at the core of the fourth amendment).

3. The fourth amendment protects an individual's privacy and security. *New Jersey v. T.L.O.*, 469 U.S. 325, 361-62 (1985) (Brennan, J., concurring in part and dissenting in part). The fourth amendment rests on a person's "right to be let alone" which is one of the most basic rights of civilized society. *Id.* (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1929) (Brandeis, J., dissenting)). See also *Payton v. New York*, 445 U.S. 573, 587 (1979) (fourth amendment's privacy protection frees people from unconsented intrusions into their homes); *Camara v. Municipal Court*, 387 U.S. 523, 528 (1966) (fourth amendment's basic purpose is to safeguard the privacy of individuals against arbitrary government searches).

4. *Bell v. Wolfish*, 441 U.S. 520, 558 (1978) (warrantless body cavity searches, not based upon probable cause, do not violate prison inmates' fourth amendment rights).

with a person on probation.⁵ Several courts have considered the question of whether a warrant and probable cause⁶ are required to search a probationer's home, and have arrived at substantially different conclusions.⁷ In *Griffin v. Wisconsin*,⁸ the Supreme Court fi-

5. Although *Griffin* dealt with a probationer, the general rule is that for fourth amendment purposes probationers and parolees are the same. *Roman v. State*, 570 P.2d 1235, 1237 n.3 (Alaska 1977); *State v. Pinson*, 104 Idaho 227, 230, 657 P.2d 1095, 1099 (1983); *State v. Velasquez*, 672 P.2d 1254, 1258 n.2 (Utah, 1983); 4 W. LA FAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 10.10(c), 138 n. 49 (2d ed. 1987); *Contra People v. Burgener*, 41 Cal. 3d 505, 714 P.2d 1251, 224 Cal. Rptr. 112 (1986) (parolees pose a greater risk to society than probationers). See also *People v. Guzman*, 45 Cal. 3d 915, 755 P.2d 917, 248 Cal. Rptr. 467 (1988) (declining to extend the *Burgeuer* holding).

6. The United States Supreme Court has defined probable cause as a situation where the facts and circumstances within the officer's knowledge are based on reliable information, and these facts would warrant a reasonable man to believe that an offense has been or is being committed. *Texas v. Brown*, 460 U.S. 730, 742 (1983); *Brinegar v. United States*, 338 U.S. 160, 175-76 *reh'g denied*, 338 U.S. 839 (1948); *Carroll v. United States*, 267 U.S. 132, 162 (1924).

7. The decisions of the state and lower federal courts have ranged from one end of the spectrum to the other. Some courts have held that a probationer has the same rights as the average citizen, and therefore, no probationer exception exists. See, e.g., *United States v. Rea*, 678 F.2d 382 (2d Cir. 1982) (although probationers are subject to certain conditions which tend to diminish their expectations of privacy, they nonetheless retain all of their fourth amendment rights; therefore, a warrantless search is invalid); *United States v. Workman*, 585 F.2d 1205 (4th Cir. 1978), *reh'g denied*, 617 F.2d 28 (1980) (warrantless search of probationer's home is unconstitutional in the absence of a judicially recognized exception); *United States v. Bradley*, 571 F.2d 787 (4th Cir. 1978) (even where parolee, as a condition for parole, has consented to periodic searches, a warrantless search is unconstitutional). As the Court held in *Workman*, the warrant requirement serves an important function, and even when probable cause is not required to obtain a warrant, the warrant requirement should be retained. *Workman*, 585 F.2d at 1207. See *infra* notes 67-94 and accompanying text for a discussion of the warrant requirements.

The majority of the courts, however, have held that a probation officer may search a probationer's home without a warrant or probable cause. See, e.g., *Owens v. Kelly*, 681 F.2d 1362 (11th Cir. 1982) *reh'g denied*, 697 F.2d 1094 (11th Cir. 1983) (warrantless searches of probationers are constitutional); *United States v. Scott*, 678 F.2d 32 *reh'g denied*, 683 F.2d 1373 (5th Cir. 1982) (parole officer can search parolee without probable cause and without a warrant); *Latta v. Fitzharris*, 521 F.2d 246 (9th Cir.) (en banc), *cert. denied*, 423 U.S. 897 (1975) (warrantless search of parolee's home does not violate fourth amendment); *State v. Fields*, 67 Haw. 268, 686 P.2d 1379 (Haw. 1984) (parole officers do not need a warrant to search parolees, nor do they need probable cause); *State v. Perbix*, 331 N.W.2d 14 (N.D. 1983) *reh'g denied*, 349 N.W.2d 403 (N.D. 1984) (law enforcement officers do not need a warrant or probable cause to search probationer); *State v. Velasquez*, 672 P.2d 1254 (Utah 1983) (although parolees do retain certain fourth amendment rights, parole officers do not need to obtain a warrant before conducting a search).

Some courts have reasoned that because of his status, a probationer has a diminished expectation of privacy, and therefore, the warrant and probable cause requirements may be excused. See, *State v. Velasquez*, 672 P.2d 1254 (Utah 1983). Many courts have also concluded that because a probationer signs a "consent-to-be-searched form" as a condition of probation, there is actual consent for any search by probation officers or the police. E.g., *People v. Bravo*, 43 Cal. 3d 600, 738 P.2d 336, 238 Cal. Rptr. 282 (1987), *cert. denied*, 108 S.Ct. 1074 (1988) (a probationer who submits to searches at any time as a condition of probation generally waives his fourth amendment rights); *People v. Mason*, 5 Cal. 3d 759, 488 P.2d 630, 97 Cal. Rptr. 302 (1971) *cert denied*, 405 U.S. 1016 (1972) (probationer who agrees to be

nally resolved the dispute when it held that a probation officer does not need a warrant or probable cause to search a probationer's home.⁹

On September 4, 1980, a Wisconsin state court convicted Joseph G. Griffin of resisting arrest, disorderly conduct, and obstructing an officer.¹⁰ As punishment for these violations, the Court placed Griffin on probation.¹¹ On April 5, 1983, while Griffin was still on probation, Michael Lew, Griffin's probation officer's supervisor,¹² received a telephone call from a detective on the Beloit, Wisconsin police force.¹³ The detective told Lew that "there were or might be guns" in Griffin's apartment.¹⁴ Unable to locate Griffin's probation officer, Lew enlisted the aid of another probation officer, Ms. Johnson, and three plainclothes police officers to search the apartment.¹⁵ When Griffin answered the door, Lew identified himself, Johnson, and the police officers, and told Griffin that they were going to search the apartment.¹⁶ While searching through a drawer in a living room ta-

searched at any time has no expectation of the traditional fourth amendment protections); *State v. Gawron*, 112 Idaho 841, 736 P.2d 1295 (1987) (condition of probation which allows searches at anytime serves as a waiver of fourth amendment rights). See also Holtzoff, *The Power of Probation and Parole Officers to Search and Seize*, 31 FED. PROB. 3 (Dec. 1967) (the right of the probation officer to search should be made a condition to probation, which would then act as a waiver of fourth amendment rights).

The waiver theory however, has been subject to severe criticism. For example, professor LaFave stated that this "waiver" is just a fiction. *LaFave, supra* note 5, at 135. He noted that the only alternative a probationer has to agreeing to the condition is to spend time in prison. *Id.* LaFave stated that incarceration is actually a form of coercion, and thus, the waiver is not voluntary. *Id.* For an in depth discussion of the waiver theory, see *id.* at 132-36; Note, *Striking the Balance Between Privacy and Supervision: The Fourth Amendment and Parole and Probation Officer Searches of Parolees and Probationers*, 51 N.Y.U. L. REV. 800, 803-13 (1976) [hereinafter *Striking the Balance*]; and N. COHEN & J. GOBERT, *THE LAW OF PROBATION AND PAROLE* § 8.03 (1983) [hereinafter COHEN].

8. 107 S. Ct. 3164 (1987).

9. *Id.* at 3167.

10. *Id.* at 3166.

11. *Id.* In Wisconsin, probationers are placed in the legal custody of the State Department of Health and Social Services and as such are subject to its conditions and regulations. Brief for the State of Wisconsin at 6, *Griffin v. Wisconsin*, 107 S. Ct. 3164 (1987) (No. 86-5324).

12. Griffin's probation officer could not be located at the time the detective called. *Id.* at 7. Lew waited "two or three hours" for the officer before he went to search Griffin's apartment." *Id.*

13. Lew testified that he could not recall the name of the detective who provided the information, but he believed that it was detective Truett Pitner. Brief for Joseph G. Griffin at 3, *Griffin v. Wisconsin*, 107 S. Ct. 3164 (1987) (No. 86-5324). Detective Pitner, however, testified that he did not remember making the telephone call. *Id.*

14. *Griffin*, 107 S. Ct. at 3166.

15. *Id.* at 3166-67.

16. While Griffin, the police officers, and the two other occupants of the apartment waited in the living room, Lew and Johnson searched the apartment. *Id.*

ble, Lew found a handgun.¹⁷ Because possession of a firearm by a convicted felon is both a felony¹⁸ and a probation violation,¹⁹ Lew directed the police officers to arrest Griffin.

At trial, Griffin moved to suppress the evidence on the ground that the search was illegal because it was not conducted pursuant to a warrant nor based upon probable cause.²⁰ The trial court denied the motion and convicted him of a firearms violation.²¹ The court then sentenced Griffin to two years imprisonment.²² Griffin appealed to the Wisconsin Appellate Court. He contended that his conviction should be overturned because it was based on evidence illegally seized during the search of his apartment.²³ The appellate court affirmed the trial court, holding that the probation officer did not need probable cause or a warrant to search Griffin's residence.²⁴ The

17. One of the police officers pointed to a drawer as Lew walked into the living room. Brief of Joseph G. Griffin at 4. Griffin claimed that the act combined with the presence of the other officers allowed the police to accomplish indirectly what they could not accomplish directly. *Id.* at 5. The Wisconsin Supreme Court, however, affirmed the trial court, holding that this was not a police search. *State v. Griffin*, 131 Wis. 2d 41, 63, 388 N.W.2d 535, 543 (1986). Professor LaFave has noted that searches of probationers that generally would not conform to fourth amendment standards have been upheld even though there was cooperation or joint participation between the police and probation officer. *LaFave*, *supra* note 5, at 155-56. This is especially true when the probation officer enlists the aid of the police. *Id.* However, LaFave does cite a case which helps support Griffin's argument. *Id.* at 156 n.116. In *Commonwealth v. Brown*, 240 Pa. Super. 190, 361 A.2d 846 (1976), a parole officer asked the police to help search a parolee's house. The court held that because he relied on the police to assist in the arrest, he had ceased being an administrator of the parole system, and lost his special search authority. *Id.* LaFave points out, however, that the parole officer was working with a witness who wanted to initiate criminal charges, and implies that this fact makes the case an exception rather than the rule. *LaFave*, *supra* note 5, at n.116.

18. WIS. STAT. § 941.29 (1987) provides that any person who has been convicted of a felony in Wisconsin and possesses a firearm is guilty of a Class E felony. In Wisconsin, the penalty for a Class E felony is "a fine not to exceed \$10,000 or imprisonment not to exceed 2 years, or both." WIS. STAT. § 939.50(3)(e) (1987).

19. WIS. ADMIN. CODE HHS § 328.04 (1981) provides that a probationer must obtain permission from his probation officer to purchase, own, or carry a firearm. A probation officer may not, however, give permission to a probationer who is a convicted felon. *Id.*

20. *Griffin*, 107 S. Ct. at 3167.

21. *Id.*

22. *Id.*

23. *State v. Griffin*, 126 Wis. 2d 183, 376 N.W.2d 62 (Ct. App. 1985).

24. The appellate court based its reasoning on a Wisconsin Supreme Court case, *State v. Tarrell*, 74 Wis. 2d 647, 247 N.W.2d 696 (1976). *Tarrell* involved a warrantless personal search of a probationer rather than a warrantless search of a probationer's home. *Id.* That court concluded that because of the nature of probation, the court could create an exception to the warrant requirement. *Id.* at 654, 247 N.W.2d at 701. It reasoned that the imposition of rules and regulations on a probationer "demonstrates that while a probationer has a conditional liberty, this liberty is neither as broad nor as free from limitations as that of persons who have not committed a crime." *Id.*

Although this may be true, it does not explain why the state needs to strip the probationer of his fourth amendment rights. Arguably, a probationer may have fewer

court concluded that all the officer needed were "reasonable grounds to believe" that Griffin was violating his probation.²⁵

On a petition for review, the Wisconsin Supreme Court affirmed the appellate court's decision.²⁶ It stated that because of the nature of probation, the probationer has a lesser expectation of privacy.²⁷ This lesser standard created an exception to the general rule that warrantless searches are *per se* unreasonable.²⁸ In addition, the court held that probable cause was not necessary for such a search.²⁹ The court concluded that as long as the search was reasonable, it was constitutional.³⁰

The United States Supreme Court granted certiorari to review the Wisconsin Supreme Court's decision.³¹ The issues it addressed were whether a warrant is required for a probation officer to search a probationer's residence, and whether probable cause is necessary

rights than the average citizen, but rights only should be taken away upon sufficient justification. The court did not suggest any reason for eliminating the warrant requirement. It only explained why it might have the right to do so. Since the warrant requirement is a very important right, it only should be dismissed when there is a very good reason for doing so. *See also Striking the Balance*, *supra* note 7, at 806. A court uses faulty reasoning when it suggests that:

when the government acts in derogation of a person's fourth amendment rights, it also lessens his expectation of such rights, and thus reduces the level of rights that the person can legitimately assert. To accept that reasoning is to allow the diminution of constitutional rights to serve as its own justification.

Id. (footnote omitted).

25. The court concluded that since other courts have held that a search may be constitutionally made on less than probable cause, or even when no grounds exist, then the Wisconsin standard of "reasonable grounds to believe" is also constitutional. *State v. Griffin* at 200-201, 376 N.W.2d at 70-71. *See also Latta v. Fitzharris*, 521 F.2d 246 (9th Cir. 1975); *People v. Anderson*, 189 Colo. 34, 536 P.2d 302 (1975); and *State v. Fields*, 67 Haw. 268, 686 P.2d 1379 (1984) which held that a probation officer may search a probationer's apartment with less than probable cause). *See Owens v. Kelley*, 681 F.2d 1362 (11th Cir. 1982), *People v. Mason*, 5 Cal. 3d 759, 97 Cal. Rptr. 302, 488 P.2d 630 (1971), *cert. denied*, 405 U.S. 1016 (1972), and *State v. Morgan*, 206 Neb. 818, 295 N.W.2d 285 (1980) which held that no grounds whatsoever were needed for a probation officer to search a probationer's residence.

26. *State v. Griffin*, 131 Wis. 2d 41, 388 N.W.2d 535 (1986).

27. *Id.* at 55, 388 N.W.2d at 540. Both the Appellate Court and the Wisconsin Supreme Court based its reasoning on *Tarrell*. For a discussion of the appellate court's reasoning, see *supra* note 24.

28. *Griffin*, 131 Wis. 2d 41, 55, 388 N.W.2d 535, 540.

29. *Id.* at 57, 388 N.W.2d at 541.

30. *Id.* at 58, 388 N.W.2d at 541. In *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950), the Court stated that the test to determine whether a search is constitutional is whether the search itself is reasonable. This view, however, seems to be an anomaly. In *Chimel v. California*, 395 U.S. 752, *reh'g denied*, 396 U.S. 869 (1969), the government, relying on *Rabinowitz*, argued that the search should be judged on whether it was reasonable. The Court noted that *Rabinowitz* has been the subject of critical comment for many years, and it fails to take into account the demands of the fourth amendment. *Chimel*, 395 U.S. at 768. Therefore, the Court stated that *Rabinowitz* should no longer be followed. *Chimel*, 395 U.S. at 768. *See also United States v. United States Dist. Court*, 407 U.S. 297, 315-316 (1971) (noting that the *Rabinowitz* view is not accepted).

31. *Griffin v. Wisconsin*, 107 S. Ct. 3164 (1987).

to justify such a search.³² The Supreme Court, with four justices dissenting,³³ held that in this situation, neither a warrant nor probable

32. *Id.* at 3167.

33. Justice Blackmun dissented and was joined by Justice Marshall. Justice Brennan joined parts I-B and I-C of Blackmun's dissent, while Justice Stevens joined part I-C. Justice Stevens also authored a dissent which Justice Marshall joined. In part I-A, Justice Blackmun stated that because of a probation officer's need to adequately supervise his probationer, a "reasonable grounds" standard should replace the probable cause standard in probation officer searches. *Griffin*, 107 S. Ct. at 3172-73 (Blackmun, J., dissenting). In part I-B of his dissent, Blackmun stated that a probation officer must obtain a search warrant before searching a probationer's home. *Id.* at 3173-75. (Blackmun, J., dissenting).

Part I-C is the only part of Justice Blackmun's dissent which all four dissenting justices joined. The thrust of part I-C is that even if the regulation authorizing warrantless searches is constitutional, the probation officer in this case, Lew, did not comply with the regulation, and therefore, the case should be reversed on the facts. *Id.* at 3175-76 (Blackmun, J., dissenting). The regulation which probation officers were to follow is WIS. ADMIN. CODE HHS § 328.21(7) (1981) which reads:

(7) In deciding whether there are reasonable grounds to believe a client possesses contraband, or a client's living quarters or property contain contraband, a staff member should consider:

- (a) The observation of a staff member;
- (b) Information provided by the informant;
- (c) The reliability of the information relied upon (in evaluating reliability, attention should be given to whether the information is detailed and consistent, and whether it is corroborated);
- (d) The reliability of an informant (in evaluating reliability, attention should be given to whether the informant has reason to supply inaccurate information);
- (e) The activity of the client that relates to whether the client might possess contraband;
- (f) Information provided by the client which is relevant to whether the client possesses contraband;
- (g) The experience of a staff member with that client or in a similar circumstance;
- (h) Prior seizures of contraband from the client; and
- (i) The need to verify compliance with the rules of supervision and state and federal laws.

This regulation was repealed and re-promulgated under a slightly different numbering system and without substantial change. See *State v. Griffin*, 131 Wis. 2d 41, 60, 388 N.W.2d 535, 542 n.7. This note uses the former version of the statute which was in effect at the time of the search.

As the dissent pointed out, there was a patent failure by the probation officers to comply with any of the provisions of the regulation. *Griffin*, 107 S. Ct. at 3175-76 (Blackmun, J., dissenting). When presented with the factual problems of the case, the majority stated that "the procedures followed . . . may have violated Wisconsin state regulations, [but it] is irrelevant to the case before us." *Id.* at 3171 n.8. The Court stated that the Wisconsin Supreme Court was the ultimate authority on issues of Wisconsin law. *Id.* at 3169. The Court stated that if the Wisconsin Supreme Court found that the facts in this case constituted the requisite reasonable grounds, then it is bound by that ruling. *Id.* Justice Blackmun, in his dissent, said that the "conclusion that the existence of a facial requirement for the 'reasonable grounds' automatically satisfies the constitutional protection that a search be reasonable can only be termed tautological. The content of a standard is found in its application and, in this case, I cannot discern the application of any standard whatsoever." *Id.* at 3175 (Blackmun, J., dissenting).

Justice Stevens' short dissent summarized part I-C of Justice Blackmun's dissent. He stated that it is inconceivable that five members of the Court could conclude that "speculation by a police officer that a probationer may have had contraband in

cause were necessary.³⁴ Justice Scalia, writing for the majority, concluded that because of the "special needs" of the probation system, a probationer has a diminished expectation of privacy.³⁵ These special needs, he stated, justify a departure from the usual warrant and probable cause requirements.³⁶

The Court began its analysis by stating that it will permit an exception to the fourth amendment warrant and probable cause requirements when the "special needs" of the government make these requirements impracticable.³⁷ As authority for this proposition, the Court cited *New Jersey v. T.L.O.*³⁸ and *O'Connor v. Ortega*.³⁹ In *T.L.O.*, the Court allowed a school official to search a student's purse without first obtaining a warrant and without probable cause.⁴⁰ Similarly, in *O'Connor*, the Court permitted a government supervisor to search an employee's desk without a warrant or probable cause.⁴¹ In both of these cases, the Court relied on the fact that compliance with the fourth amendment would severely obstruct the goals of the searches.⁴² The Court further reasoned that it has permitted a similar exception for administrative searches.⁴³ It concluded, therefore,

his possession" could provide sufficient basis for a non-consensual search of a private home. *Id.* at 3177 (Stevens, J., dissenting).

34. *Griffin*, 107 S. Ct. at 3167.

35. *Id.* at 3168.

36. *Id.*

37. *Id.*

38. 469 U.S. 325 (1985).

39. 107 S. Ct. 1492 (1987).

40. In *T.L.O.*, a teacher caught a 14 year old student smoking in the washroom. 469 U.S. at 328. The assistant principal called the student to his office and looked in her purse. *Id.* He removed a pack of cigarettes from the purse which uncovered a package containing marijuana. *Id.* The Court stated that the school setting required an easing of the fourth amendment standards. *Id.* at 340. It stated that when "the burden of obtaining a warrant is likely to frustrate the ultimate governmental purpose behind the search," the court will dismiss the warrant requirement. *Id.* at 340, 341 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 532-33 (1966)). A warrant requirement, the court stated, "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." *Id.* at 340. Therefore, the court stated, in a school setting, a school official is not required to obtain a warrant before searching a student's purse. *Id.*

41. In *O'Connor*, a public hospital employee's desk was searched while he was away on leave. 107 S. Ct. at 1495-96. The Court, relying on *T.L.O.*, noted that "the realities of the workplace . . . suggest that a warrant requirement would be unworkable." *Id.* at 1500, 1501. It held, therefore, that it would not require a warrant in non-investigatory, work-related searches. *Id.* at 1502.

42. See *supra* notes 40 and 41 for a discussion of *O'Connor* and *T.L.O.*

43. The Court has held that when a business has a long history of pervasive governmental regulation, a search is necessary to further a regulatory goal, and that goal would be frustrated by a warrant requirement, it will not require the government officials to obtain a warrant. See, e.g., *United States v. Biswell*, 406 U.S. 311 (1971) (warrantless, non-forcible search of a locked storeroom in a pawn shop to check compliance with the federal Gun Control Act); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (federal inspection of a catering company's storeroom to check for illegal liquor). *Contra* *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978) (where warrants will not impose serious burdens upon OSHA inspectors, the court will not

that if the state's probation system created a "special need" so that the fourth amendment requirements would be impracticable, then it would permit a probation officer search exception.⁴⁴

In determining whether the state's probation system created a "special need," the Court looked at the dual goals of probation: protection of the community and rehabilitation of the probationer.⁴⁵ In order to meet these goals, the Court noted that the state must place certain restrictions on the probationer.⁴⁶ The Court then stated that if a probation officer is to determine whether a probationer is obeying the rules, the officer must be able to adequately supervise the probationer.⁴⁷ Therefore, the Court concluded that supervision was a special need of the state's probation system.⁴⁸ The Court noted, however, that it would not create a fourth amendment exception merely because a special need exists.⁴⁹ The special need must make the warrant and probable cause requirements impracticable.⁵⁰ Consequently, the Court concluded that, in this case, the fourth amendment requirements substantially interfered with the probation system.⁵¹

The Court determined that the warrant requirement was impracticable for four reasons. First, the Court held that a warrant requirement would interfere with the probation system by having a magistrate, rather than the probation officer, decide how closely a probationer must be supervised;⁵² second, such a requirement would cause unreasonable delay which would make it more difficult to respond to evidence of misconduct;⁵³ third, it would reduce the deterrent effect which warrantless searches would create;⁵⁴ and fourth, a

waive warrant requirement); See *v. City of Seattle*, 387 U.S. 541 (1967) (warrantless search of locked storehouse by firemen to check for safety code violations is unconstitutional); *Camara v. Municipal Court*, 387 U.S. 523 (1966) (a warrant is required for city inspectors to search residence for housing code violations).

44. *Griffin*, 107 S. Ct. at 3168.

45. *Id.* See also *COHEN*, *supra* note 7, at 183, 184 (goals of probation are the rehabilitation of the probationer and the protection of the community); *LAFAVE*, *supra* note 5, at 139 (interest of the state in probation system is reformation and rehabilitation of the probationer).

46. *Griffin*, 107 S. Ct. at 3168.

47. *Id.* The Court notes recent research which suggests that more intensive supervision can result in reduced rates of recidivism (likelihood of committing another crime). *Id.* See also *White, The Fourth Amendment Rights of Parolees and Probationers*, 31 U. PITT. L. REV. 167, 184 (1969) (close supervision of parolees tends to reduce recidivism).

48. *Griffin*, 107 S. Ct. at 3168.

49. *Id.*

50. See text accompanying note 36 (when the goals of a search would be frustrated by fourth amendment requirements, the court will allow an exception).

51. *Griffin*, 105 S. Ct. at 3169.

52. *Id.*

53. *Id.*

54. *Id.* The Court makes an analogy between a probation officer's search of a probationer's home and a parent's search of a minor child's room. *Id.* The dissent

warrant requirement would hinder the rehabilitative relationship between the probationer and the probation officer.⁵⁵ The Court concluded therefore, that a warrant requirement is inappropriate for a probation officer search.⁵⁶

Similar to the warrant requirement, the Court held that a probable cause standard also interferes with the probation system, and therefore the standard must be lowered.⁵⁷ The Court suggested two reasons for its conclusion. First, a probable cause requirement would reduce the deterrent effect of the supervisory relationship.⁵⁸ Second, the relationship between probationer and probation officer is quite different from the relationship between a police officer and the usual search suspect.⁵⁹ The Court stated that the probation relationship is non-adversarial, and is intended to help the probationer reform his ways.⁶⁰ It stated that because of the probationer's proclivity toward crime, the probation officer must be able to intervene at an earlier stage to protect the probationer from harming himself or society.⁶¹ Therefore, because of the supervisory nature of the probation officer-probationer relationship, the Court concluded that it would not require probable cause to search.⁶²

The Supreme Court's ruling that the fourth amendment warrant requirement could be disregarded is incorrect for four reasons. First, a neutral and detached magistrate can best decide when a search meets the appropriate reasonableness standard. Second, any delay in obtaining a warrant is either negligible or covered by a previously recognized exception to the warrant requirement. Third, the relationship between a probationer and a probation officer does not justify a warrantless search. Finally, allowing a probation officer to search without a warrant is an invitation to abuse and harassment by both probation officers and police. The Court, however, was correct in concluding that because of the nature of probation and the

notes, however, that the differences between a probation officer-probationer relationship and a parent-child relationship are too numerous to mention. *Id.* at 3175 (Blackmun, J., dissenting). The simple fact that one is a private familial relationship, and the other a governmental one, regulated by state statute, renders the analogy worthless. *Id.*

55. *Griffin*, 105 S. Ct. at 3169. The court states that a probation officer is like a counsellor who is supposed to have the welfare of the probationer in mind. *Id.* In fact, the court notes that the probationer is called a client in the regulation. *Id.*

56. *Id.*

57. *Id.* at 3170.

58. *Id.* The Court said that with a probable cause requirement, all a probationer has to do to escape detection is to keep his illegal activities sufficiently concealed so as to give rise to no more than reasonable suspicion. *Id.*

59. The Court states that the relationship between a probation officer and a probationer involved an "ongoing supervisory relationship." *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

importance of supervision, a probation officer's search does not have to be based upon a strict probable cause standard. The idea of a warrant without probable cause may seem facially contrary to the fourth amendment, yet it is consistent with prior Supreme Court decisions.

The fourth amendment warrant requirement was designed to protect one of the most basic rights of American citizens, "the right to be let alone."⁶³ The right to a warrant, therefore, can only be taken away when there is an important governmental need which can only be fulfilled in the absence of a warrant requirement.⁶⁴ In *Griffin v. Wisconsin*,⁶⁵ the Supreme Court aptly demonstrated that supervision was an important need of the Wisconsin probation system.⁶⁶ The Court's conclusion, however, that the only way probation officers can adequately supervise their charges is to do away with the warrant requirement, is unpersuasive.

The Supreme Court has held on numerous occasions that to give substance to fourth amendment rights, the decision to search must be made by an objective and disinterested magistrate.⁶⁷ To do otherwise would leave the decision to search solely to the discretion of the searching officer. Because of the natural bias of the officer conducting the search, a neutral third party must judge whether the officer has sufficient grounds to search. In *Griffin*, the Court stated that having a warrant requirement would interfere with the proba-

63. *New Jersey v. T.L.O.*, 469 U.S. 325, 368 (1985) (Brennan, J., concurring in part and dissenting in part).

64. *O'Connor v. Ortega*, 107 S. Ct. 1492, 1511 (1987) (Blackmun, J., dissenting); *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).

65. 107 S. Ct. 3164.

66. For a discussion of the court's "special need" analysis, see *supra* notes 45-48 and accompanying text.

67. *Griffin v. Wisconsin*, 107 S. Ct. 3164, 3174-75 (1987) (Blackmun, J., dissenting); *Payton v. New York*, 445 U.S. 573, 586 n.24 (1979) (the fourth amendment's protection comes from requiring that a neutral and detached magistrate decide whether there is sufficient evidence to warrant a search. To allow the officers conducting the search to judge the evidence would reduce the amendments to a nullity); *Marshall v. Barlow's, Inc.* 436 U.S. 307, 331 (1977) (Stevens, J., dissenting) (the function of the fourth amendment warrant requirement is "the interposition of a neutral magistrate between the citizen and the presumably zealous law enforcement officer . . ."); *United States v. United States District Court*, 407 U.S. 297, 318 (1971) ("[p]rior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights"); *Camara v. Municipal Court*, 387 U.S. 523, 529 (1966) (the decision of when the right to privacy must yield to the state's need to search must be decided by a neutral magistrate, not the government official conducting the search); *McDonald v. United States*, 335 U.S. 451, 455-56 (1948) (the fourth amendment is not a formality, nor is it a means to provide a safe haven for criminals. It was enacted so that an objective mind could weigh the need to invade a person's privacy. Therefore, the constitution requires that a neutral magistrate decide when a government official search the home); *Latta v. Fitzharris*, 521 F.2d 246, 257 (1975) (Hufstedler, J., dissenting) ("[t]he Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised") (quoting *United States v. United States District Court*, 407 U.S. at 317).

tion system by allowing a magistrate, rather than the probation officer, to determine how much supervision the probationer requires.⁶⁸ The implicit assumption of this argument is that because the probation officer is better acquainted with the probationer's situation, the officer should be the one to determine the level of supervision.⁶⁹ But the Court's argument is wholly irrelevant. The magistrate does not determine the level of supervision. She only applies the facts to the appropriate standard to determine whether there are sufficient grounds to search. The Court is therefore incorrect in concluding that a magistrate would interfere with the probation system.

The Supreme Court has allowed exceptions to the warrant requirements when exigent circumstances make obtaining a warrant impracticable.⁷⁰ The Court has held that when an officer believes evidence will be destroyed,⁷¹ or that for some reason the actual delay in obtaining a warrant would render the search useless,⁷² the officer may proceed without a warrant. The rationale behind the exigent circumstance exception is that if the officer was forced to obtain a warrant, too much time would be wasted, and the search would be useless.⁷³

The *Griffin* Court argued that the delay inherent in obtaining a warrant would decrease the probation officer's ability to quickly respond to acts of misconduct.⁷⁴ However, the facts of this case showed that Lew waited two or three hours before deciding to search Griffin's apartment.⁷⁵ Clearly, there was sufficient time to obtain a warrant. All Lew needed to do was pick up the telephone and call a judge for a warrant.⁷⁶ If he had sufficient grounds to search, he

68. 107 S. Ct. at 3169.

69. This note does not dispute the fact that the probation officer knows better than anyone else how much supervision the probationer requires.

70. When the press of time makes obtaining a warrant either impossible or impracticable, the Court will waive the warrant requirement. *United States v. Place*, 462 U.S. 696, 701-02 (1983).

71. *Schmerber v. California*, 384 U.S. 757 (1966). In *Schmerber*, the Court held that because a person's blood-alcohol level decreases over time, the police did not have to obtain a search warrant before conducting a blood test. *Id.* at 770-71. See also *Preston v. United States*, 376 U.S. 364, 367 (1963) (warrantless searches are justified to prevent the destruction of evidence of a crime).

72. *United States v. Santana*, 427 U.S. 38 (1976). In *Santana*, the Court found that police, who were in hot pursuit of a fleeing felon, did not violate the fourth amendment rights of a suspect when they entered the suspect's home and searched her without a warrant. *Id.* The Court held that if the officers had to obtain a warrant, the suspect could have destroyed the evidence making the search worthless. *Id.* See also *Maryland Penitentiary v. Hayden*, 387 U.S. 294, 298 (1967) (search warrant not required because the delay in obtaining a search warrant could result in harm to the police and the public).

73. *Maryland Penitentiary*, 387 U.S. at 298.

74. *Griffin*, 107 S. Ct. 3164, 3169.

75. *Id.* at 3174 (Blackmun, J. dissenting).

76. WIS. STAT. § 968.12(3) provides that "a judge may issue a warrant based upon sworn oral testimony communicated by telephone, radio or other means of elec-

would have received one.

Even beyond the facts in this case, the complaint that the warrant requirement causes an intolerable delay is unpersuasive. Even in states in which a probation officer may not get a search warrant over the telephone, they are not difficult to obtain.⁷⁷ More importantly, if for some reason the probation officer could not obtain a warrant, and he was afraid that the evidence might disappear, he would be justified in proceeding without a warrant due to the exigent circumstances exception.⁷⁸ Obviously the warrant requirement makes it slightly more difficult for the probation officer to search a probationer's residence. It is only an inconvenience, however, and the Court should not expunge the warrant requirement for administrative convenience.⁷⁹ Thus, there could be no delay which would sufficiently interfere with the goals of the probation system and justify the abrogation of the warrant requirement.

The Court also incorrectly concluded that a warrant requirement would substantially interfere with the probationer-probation officer relationship. The Court seemed to imply that their relationship was a friendly and helping one.⁸⁰ This idea, however, is naive. Most probationers think of their probation officers more as policemen than as friends.⁸¹ The probation officer is the government official who is in charge of enforcing all the rules, and who will send the probationer to jail if he violates them.⁸² In any event, even if the

tronic communication. . . ."

77. Normally all an officer needs to do to obtain a warrant is give the magistrate an affidavit stating the person or place to be searched and the things to be seized, *e.g.* ILL. REV. STAT. ch. 38, para. 108(3) (1985); S.C. CODE ANN. §17-13-140 (Law. Co-op. 1976).

78. For a discussion of the exigent circumstances exception, see *supra* notes 70-79 and accompanying text.

79. McDonald v. United States, 335 U.S. 451, 455 (1948).

80. The Court seems to suggest that because of certain language in the probation regulation, the probation officer is a person who helps the probationer. It says that the regulations calls the probationer a "client" and notes that the regulation requires the probation officer to "[p]rovid[e] individualized counseling designed to foster growth and development of the client as necessary" *Griffin*, 107 S. Ct. at 3169 (citations omitted). Just because the regulation uses language suggesting a "beneficial" relationship between the probationer and probation officer does not change the fact that the probation officer sees his probation officer as the police. See *infra* n.81. The Court also claims that the relationship is non-adversarial. *Griffin*, 107 S. Ct. at 3170. It is difficult to see how the Court can maintain this idea given the facts of this case. Looking at the situation from *Griffin's* standpoint, the Court's contention is absurd. Two probation officers, with three policemen, searched *Griffin's* apartment. This search resulted in the revocation of his probation and an additional prison term. It is difficult to imagine a more adversarial situation. The Court says that a probation officer is not a policeman, but in this context, there is little difference.

81. *Striking the Balance*, *supra* note 7, at 816.

82. This fact was demonstrated in this case where after finding contraband in *Griffin's* apartment, Lew ordered the police to place *Griffin* under arrest. Brief for the State of Wisconsin at 8, *Griffin v. Wisconsin*, 107 S. Ct. 3164 (1987) (No. 86-5324).

relationship was a friendly and helping one, it is difficult to imagine why a warrant requirement would interfere with the relationship to the extent that it frustrates the goals of the probation system.⁸³

Finally, doing away with the warrant requirement is an invitation to abuse by both probation officers and police.⁸⁴ There is nothing to keep a probation officer from searching without any grounds whatsoever. If the search uncovers evidence of a violation, it will be less difficult for a probation officer to justify his search.⁸⁵ As the Court has stated previously, after the fact justifications are ineffective.⁸⁶ Further, if no violation is found, the search will never be reviewed.⁸⁷ Although the probationer may sue his probation officer for a violation of his constitutional rights,⁸⁸ this remedy is not always practicable.⁸⁹

Allowing warrantless searches also invites abuse by the police.

83. Allowing a probation officer to search without a warrant may in fact be destructive to the rehabilitative process. *State v. Fields*, 686 P.2d 1379, 1388 (Haw., 1984).

84. P. Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See*, 61 CALIF. L. REV. 1011, 1023 (1973) (warrantless searches create the possibility of substantial governmental abuse).

85. *Striking the Balance*, *supra* note 7, at 815 (searching officer may use the evidence he discovered in the search to try and justify the search itself). *See also* *Beck v. Ohio*, 379 U.S. 89, 96 (1964) (after the fact justification of a search is often tainted by the shortcomings of hindsight judgment); *Latta v. Fitzharris*, 521 F.2d 246, 257 (9th Cir. 1975) (Hufstедler, J., dissenting) (in most cases, "the searching officers will be able retrospectively to point to specific facts that justify the search," therefore, a warrant is required to safeguard parolees from after the fact justifications).

86. *United States v. United States Dist. Court*, 407 U.S. 297, 317-18 (1972).

87. *Id.* If the searching officer does not discover any contraband, he will not have any basis to bring charges against the probationer.

88. A probationer could sue his probation officer under 42 U.S.C. § 1983 which states that any "person who, under color of any . . . regulation . . . of any State . . . subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . ."

89. A suit brought pursuant to § 1983 is a poor remedy for two reasons. First, a probationer may not be able to afford to sue his probation officer nor is he likely to win. It would be very difficult for a probationer to recover damages from a probation officer because the officer searched his home and did not find anything. The probationer has not been harmed in any way, save for the embarrassment and inconvenience of the search, which in most cases is very slight. *But cf. Monroe v. Pape*, 365 U.S. 167 (1961) (police officers held liable under 42 U.S.C. 1983 after illegally searching plaintiffs in the middle of the night, making them stand naked in the middle of the room, ransacking every room and ripping apart mattresses). Secondly, aside from the difficulty involved in a § 1983 suit, the probationer still must depend on the good graces of his probation officer to remain on probation. As Judge Hufstедler said in her dissent in *Latta*, "it will be a very brave or very foolhardy parolee who attempts to vindicate his Fourth Amendment rights by suing his parole officer pursuant to 42 U.S.C. § 1983 . . . even if he has the financial wherewithal to do so." 521 F.2d 246, 258 *cert. denied*, 423 U.S. 897 (1975) (Hufstедler, J., dissenting). *Cf. A. Amsterdam, Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 429 (1974) (suits against government officials are not enough to protect the public's fourth amendment rights).

While a police officer must have a warrant and probable cause to search a probationer's residence,⁹⁰ police may easily circumvent these restrictions. If a police officer wishes to search a probationer without going through the usual procedures, all he has to do is tell the probation officer that the probationer may be committing a crime. The probation officer may then search the residence with the police officer there for "protection."⁹¹ Thus, the only restriction on the police is that they must receive the cooperation of the probation officer. This very well could have been the situation in Griffin's case. The Beloit police department supplied the information, and the probation department readily cooperated.⁹²

The Court's arguments that the warrant requirement is not needed are unpersuasive. However, its position that the probable cause standard should be replaced⁹³ has merit.⁹⁴ A probation officer must be able to adequately supervise his probationer.⁹⁵ The greater the amount of supervision, the lower a probationer's recidivism rate is.⁹⁶ Further, because a probationer is more likely to commit crimes

90. *United States v. Consuelo-Gonzalez*, 521 F.2d 259 (9th Cir. 1975); cf. *Griffin v. Wisconsin*, 107 S. Ct. 3164, 3169 (1987) (Supreme Court differentiated between searches conducted by probation officers and searches by police officers, suggesting that a warrantless search by a police officer would be unconstitutional).

91. White, *The Fourth Amendment Rights of Parolees and Probationers*, 31 U. PITT. L. REV. 167, 174-75 (1969) (if a police officer wants to search a parolee's home, all he normally must do is ask the parole officer to search for him; therefore, a police officer may usually "invade a parolee's privacy with the same freedom as the parolees supervising parole officer).

92. For a discussion of the facts in *Griffin*, see *supra* notes 10-22 and accompanying text.

93. *Griffin*, 107 S. Ct. at 3167-71.

94. The Court suggests that a warrant based upon less than probable cause is impermissible under the constitution. *Id.* at 3169. This contention seems to be irrefutable. The history of the fourth amendment, however, as it applies to administrative searches, shows that the Court is incorrect. In *Camara v. Municipal Court*, for example, the Court held that although government officials must obtain a warrant to search a house for health code violation, they do not have to meet a strict probable cause standard. 387 U.S. 523 (1967). The *Camara* Court stated that "[i]f a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." *Id.* at 539. See also *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320 (1978) (warrant does not have to be based upon probable cause); *See v. Seattle*, 387 U.S. 541, 545 (1967) (standard of proof to issue a search warrant is measured "against a flexible standard of reasonableness . . .").

The *Griffin* Court, however, stated that the administrative search cases were inapplicable in a probationer search situation. 107 S. Ct. at 3169, 3170. It stated that although the Court has previously allowed administrative search warrants to be based on a standard less than probable cause, those warrants were not "judicial" warrants; therefore the administrative search cases are distinguishable. *Id.* at 369-70. In his dissent, Justice Blackmun states that administrative warrants can be and are issued by the judiciary, and in any event, there is no reason to deny probationers the protection of a warrant simply because it was not based upon probable cause. *Id.* (Blackmun, J. dissenting).

95. For a discussion of the probation officer's need to supervise, see *supra* notes 45-48 and accompanying text.

96. White, *supra* note 91 at 184.

than the average citizen, he must be more closely supervised.⁹⁷ There may be times when the probation officer has a strong suspicion that the probationer is committing a crime or a probation violation, but the suspicion does not rise to the level of probable cause. This is where a reasonable suspicion test⁹⁸ would be appropriate. A reasonable suspicion standard would allow a probation officer to search when the officer is able to point to certain facts, together with the inferences from those facts, which reasonably suggest that a violation has been or is occurring.⁹⁹ This lower standard would allow a probation officer to respond to possible violations quicker because he would not have to wait until he had sufficient facts to meet a probable cause standard. A reasonable suspicion standard would also help deter probationers from violating their restrictions.¹⁰⁰

The *Griffin* Court's conclusion that a warrant requirement interferes with the state's probation system sets a dangerous and wholly unneeded precedent. As this case demonstrated, without a warrant requirement, even a detailed reasonable suspicion standard will be difficult, if not impossible, to enforce. Probation officers will be able to search their probationer's homes, in effect, without any grounds at all. By allowing probation officers to determine the grounds for the search, the Court has opened the door to possible abuses by both probation officers and the police, effectively crushing the fourth amendment rights of probationers.

William Blake Weiler

97. *Griffin*, 107 S. Ct. 3171.

98. For a discussion of the standard of proof necessary for a probationer search, see *Cohen*, *supra* note 7, at 384.

99. *United States v. Scott*, 678 F.2d 32, 35 *reh'g denied* 683 F.2d 1373 (5th Cir. 1982). The Wisconsin regulation listing the criteria for searching a probationer, quoted *supra* note 33, would also be a good "reasonable grounds" standard. It would allow the judge to take the probation officer's experience into account as well as the specific information.

100. *Griffin*, 107 S. Ct. at 3170.

