RULE 27 – PROBATION – Probationers have reduced expectations of privacy, in general…….Revised 3/2010

While a defendant is on probation or parole, "his expectations of privacy are less than those of other citizens not so categorized." *State v. Montgomery,* 115 Ariz. 583, 584, 566 P.2d 1329, 1330 (1977). Therefore, probationers are often subject to conditions of probation that require them to submit to warrantless searches. *Id*. In *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987), the Supreme Court recognized that a "State's operation of a probation system, like its operation of a school, government office or prison … presents 'special needs' beyond normal enforcement that may justify departures from the usual warrant and probable-cause requirements." Because probation and parole are forms of criminal sanctions, probationers and parolees are restricted and supervised, both to ensure that they are rehabilitated and to ensure that they do not victimize the community.

> To a greater or lesser degree, it is always true of probationers (as we have said it to be true of parolees) that they do not enjoy "the absolute liberty to which every citizen is entitled, but only … conditional liberty properly dependent on observance of special [probation] restrictions."

Id. at 874, *quoting Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). *Griffin* upheld a Wisconsin regulation providing that any probation officer could search a probationer's home without a warrant based on "reasonable grounds" to believe the probationer had contraband.

Because probationers have a lesser expectation of privacy than other citizens do, the Fourth Amendment allows courts to impose probation terms that require the probationer to submit to warrantless searches based on "reasonable suspicion," rather than the higher standard of probable cause. In *United States v. Knights*, 534 U.S. 112, 122 S.Ct. 587 (2001), Knights was on probation in California for a drug offense. As a

condition of his probation, he signed an agreement that he would submit to a search of his person, property, residence, and vehicle at any time, with or without a warrant and with or without probable cause, by any probation officer or law enforcement officer. Knights was also suspected of various acts of arson against a power company. While Knights was on probation, a detective who had reasonable suspicion (but did not have either probable cause or a warrant) searched Knights' apartment. The detective seized bomb-making supplies and a padlock belonging to the power company. Knights was indicted on various charges in federal court and moved to suppress the seized items. Citing *Griffin v. Wisconsin*, 483 U.S. 868 (1987), Knights argued that, while a state's operation of its probation system presented a "special need" for warrantless searches to monitor a probationer's compliance with probationary conditions, that "special need" rationale did not extend to allow "investigatory" searches. The district court granted the motion to suppress, and the Ninth Circuit affirmed. The government appealed.

The United States Supreme Court unanimously reversed the Ninth Circuit, finding that the warrantless probationary search, based on reasonable suspicion and authorized by a probationary condition, satisfied the Fourth Amendment. Nothing in Knights' probation terms limited searches to those with a "probationary" purpose, *Knights*, 534 U.S. at 116, 122 S.Ct. at 590, and *Griffin* could not be read so narrowly.[1] Instead, under the "totality of the circumstances" test set forth in *Ohio v. Robinette*, 519 U.S. 33, 39 (1996), the probation search condition was reasonable.

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[1] Further, *Whren v. United States*, 517 U.S. 806, 813 (1996) abolished the "pretext search" theory, holding that the actual motivations of individual officers were irrelevant.

The Court stated in *Knights* that in determining the reasonableness of a search under the Fourth Amendment, a court must balance the degree of intrusion on a person's privacy against the government's need for the search. Knights' status as a probationer was relevant both to sides of that balance. First, as to the privacy side of the equation, the Court stated that probation, like incarceration, is a form of criminal sanction imposed on an offender after a finding of guilt. All criminal sanctions curtail some of an offender's freedoms, and "a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." *Knights*, 534 U.S. at 118, 122 S.Ct. at 591. The judge who put Knights on probation determined that the search provision was necessary, and "It was reasonable to conclude that the search condition would further the two primary goals of probation – rehabilitation and protecting society from future criminal violations." *Id*. Thus, the probation condition significantly lowered Knights' reasonable expectation of privacy. On the governmental interest side of the equation, the Court recognized that probation is based on a reasonable assumption that the probationer is more likely than the ordinary citizen to violate the law. The State has a dual concern – on one hand, a hope that the probationer will be rehabilitated, and on the other, a concern that he will re-engage in criminal behavior. The governmental interest in apprehending violators of criminal law and protecting victims justifies treating probationers differently from ordinary citizens. *Id.* at 120, 122 S.Ct. at 592. The Court concluded:

> We hold that the balance of these considerations requires no more than reasonable suspicion to conduct a search of this probationer's house. The degree of individualized suspicion required of a search is a determination of when there is a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable. 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. Those interests warrant a lesser than probable-cause standard here. 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.

Id. at 121, 122 S.Ct. at 592-93 [citations omitted]. In addition, the same circumstances make the warrant requirement unnecessary. Since the trial court found, and Knights conceded, that there was reasonable suspicion for the search, the warrantless probationary search was reasonable within the meaning of the Fourth Amendment.

Similarly, in *United States v. Stokes*, 292 F.3d 964 (9th Cir. 2002), the Ninth Circuit held that a probation officer could search a probationer's vehicle with no more than reasonable suspicion. In that case, Stokes was on probation for a felony. His probation terms prohibited him from drinking alcohol or possessing firearms, and further required him to submit to warrantless searches by his probation officer on "reasonable cause" at any time. A co-worker showed some guns to Stokes, then saw Stokes by the trunk of Stokes' car, and later found the guns missing from the trunk of his own car. The co-worker believed that Stokes had stolen the guns and informed police of the theft, describing Stokes. A police officer recognized Stokes from the description and contacted Stokes' probation officer, who asked the police to locate Stokes and inform him when they had found him.

The next night, a police officer responded to a call of someone sleeping in a car in a parking lot. When the officer approached the car, no one was in it, but he checked and found that it was Stokes' car. Stokes returned, smelling of alcohol, and admitted he had been drinking. The officer called Stokes' probation officer, who came to the scene

and searched the car, finding one of the stolen guns. Stokes was arrested for possession of the gun and moved to suppress the evidence from the search, “arguing that the search was not for probationary purposes but was part of a criminal investigation, requiring probable cause to support the search.” *Stokes*, 292 F.3d at 966. The court denied the motion to suppress and Stokes was found guilty. On appeal, he argued that the search was unconstitutional because the search was “to investigate criminal activity, not to verify Stokes’ compliance with his probation conditions.” *Id*. at 967. Citing *Knights*, *supra*, the Ninth Circuit found that the search of Stokes’ vehicle was reasonable. The explicit search provision diminished Stokes’ expectation of privacy, and as a probationer, he was more likely than an ordinary citizen to violate the law. Because the standard of reasonable suspicion was met, the search was justified.