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## What To Do When the Probationer's Probation Conditions Authorize a Warrantless Search of His Person or Property

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This Roll Call Training Bulletin will cover the rulings in two (count - 'em, 2!) United States Supreme Court Decisions on virtually the same issue: searching the probationer or parolee

Those cases are *Samson v. California*, decided June 19, 2006, and *U.S. v. Knights*, decided in December 2001.

We shall look at Mr. Sampson's case first.

### **Samson v. California:**

This one is e-a-s-y. A California law requires every prisoner eligible for release on parole to agree in writing to be subject to a search or seizure by a parole officer or *law enforcement officer* without a search warrant and with or without cause. North Carolina law does not allow a law enforcement officer to make such a search (also, see our discussion on *Knights*, supra., concerning probationer's rights.)

The Supreme Court ruled that the Fourth Amendment did not prohibit a law enforcement officer from conducting a suspicionless search of a parolee as permitted under this California law.

Thus, if you recently saw this case in the media, you know that this case only applies to California officers and does not permit North Carolina officers to do these types of searches on parolees. Actually, we only have probationers now that we have the Structured Sentencing law, but some releases from the Department of Correction may be inmates sentenced under the old Fair Sentencing law, and they would be parolees. In any event, conduct no random, non-probable cause searches of somebody just because they were once in prison or jail.

Now, let's look at probationers, of whom we have a gracious plenty, and a discussion of THAT issue may save you just a whole BUNCH of grief and heartache.

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## **U.S. v. Knights:**

In this case the United States Supreme Court upheld a warrantless search of a probationer's apartment by a *law enforcement officer*. The officer was aware that while on probation the probationer had to submit to warrantless searches at any time by a probation or law enforcement officer in California. **But, such is not the law in North Carolina for law enforcement officers.**

**In North Carolina only a probation officer may make a warrantless search of a probationer under these conditions. A law enforcement officer may not.**

In North Carolina G.S. 15A-1343(b1)(7) provides for warrantless searches of a probationer as a condition of probation. That section reads as follows:

*(7) Submit at reasonable times to warrantless search by a probation officer of his or her person and of his or her vehicle and premises while the probationer is present, for purposes specified by the court and reasonably related to his or her probation supervision, but the probationer may not be required to submit to any other search that would otherwise be unlawful. Whenever the warrantless search consists of testing for the presence of illegal drugs, the probationer may also be required to reimburse the Department of Correction for the actual cost of drug screening and drug testing, if the results are positive.*

Thus, if a court orders a probationer to comply with 15A-1343(b1)(7) only a probation officer can conduct the search. Please note that the probation officer does not need reasonable suspicion or probable cause to make this search. It may be, and often is, a completely random search not based on any suspicion. **A law enforcement officer may not conduct this search, but may stand by as a witness and for security/safety reasons.**

This discussion raises two immediate issues. The first is whether a probation officer can use force if the probationer forcibly refuses to allow the search or physically denies access to himself or his property. What then? Well, we think the best course of action would be for the probation officer to arrest the probationer for a violation of this condition. If while restrained the probationer calms down, the probation officer should finish the search. We would never advise probation officers to use force to exercise authority under this condition of probation. There are too many remedies available rather than the use of substantial force in this situation.

The second issue is whether the court can authorize a law enforcement officer to execute these kinds of searches by so stating as a condition of probation. In our opinion, the best reasoned position is that a judge may **not** authorize a law enforcement officer to conduct such a search. It would be in clear contravention of the statute that only authorizes probation officers to conduct searches under this special condition. Should you be in a position where you believe a probationer is in violation of his probation, and the conditions of probation authorize you to search, we strongly advise you to contact the probation officer with the information. If you are asked to standby during the arrest or search, you should act as you have in the past - consider department or office policy, the facts (as you know them) and the guidance of your supervisor.

We are aware that most of you are already sufficiently knowledgeable in this area. However, we did not want some well-intentioned but mistaken third party from outside your agency attempting to have you conduct a search of this type and citing *Knights* as authority.

One last matter. How can our state law be different from that stated by the US Supreme Court when it interprets the US Constitution, the “supreme law of the land?” First, the court was dealing with a case from *California* and a case where the law enforcement officer had reasonable suspicion to search the probationer's apartment (it was not just a random search). But mainly because the US Constitution, through its interpretation by the Supreme Court, holds that the states must give its citizens, aliens and defendants certain **minimal** rights. We can never, as a state, give them less than the standards set by constitutional law, U.S. or North Carolina.

**BUT NORTH CAROLINA CAN GIVE OUR CITIZENS, ALIENS (LEGAL OR NOT) AND DEFENDANTS MORE STATUTORY RIGHTS THAN REQUIRED BY CONSTITUTIONAL LAW.** This we have done by the enactment of 15A-1343(b1)(7). Our federal judges have stated that it is Constitutional if either a probation officer or law enforcement officer conducts a search under these conditions. Our legislature, to the contrary, stated that **only a probation officer** might search under these conditions. This is a restriction on law enforcement behavior, but grants greater individual rights to our citizens, aliens and defendants. Thus it is Constitutional.

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