

**REQUIRING NOTICE: GEORGIA PROBATIONERS’  
FOURTH AMENDMENT RIGHTS AFTER *JONES V. STATE***

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## I. INTRODUCTION

Since the U.S. Supreme Court first addressed the issue in 1987, courts have struggled with determining the extent of Fourth Amendment protections afforded to individuals under criminal probationary sentences. The Court has approved warrantless searches by probation officers based upon “reasonable grounds” to believe that a probationer possessed contraband—conducted pursuant to a Wisconsin regulation—under the “special needs doctrine.”<sup>1</sup> Later, seemingly shifting its analysis away from the special needs doctrine in this context, the Court approved a warrantless search—based on reasonable suspicion and conducted pursuant to a consent to search agreement<sup>2</sup> included as a condition of probation—under the traditional reasonableness balancing test customarily applied in Fourth Amendment cases.<sup>3</sup> The Court has also applied this reasonableness test to approve suspicionless searches of parolees based on a similar consent to search agreement imposed as a condition of parole.<sup>4</sup> The Court has never disapproved of a search of a probationer or parolee based on the absence of a warrant or probable cause.

Because the Court has altered the test used to analyze searches of probationers, as well as the fact-specific nature of the opinions themselves, lower courts have struggled with defining the extent of protections afforded by the Fourth Amendment to individuals on probation.<sup>5</sup> One area of disagreement among courts is whether the warrant and probable

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1. *Griffin v. Wisconsin*, 483 U.S. 868 (1987).

2. A “consent to search agreement” is a condition of probation agreed to by the defendant at sentencing by which he agrees to waive some or all of his Fourth Amendment rights while on probation. Consent to search agreements are also known as “Fourth Amendment Waivers,” and other names, but for the purposes of this Article will be referred to as consent to search agreements.

3. *U.S. v. Knights*, 534 U.S. 112 (2001).

4. *Samson v. California*, 547 U.S. 843 (2006).

5. *See, e.g.*, 1-3 CRIMINAL CONSTITUTIONAL LAW (MB) § 3.14 (discussing questions left open after *Knights* and *Griffin* and comparing the treatment of those issues by various courts).

cause requirements of the Fourth Amendment remain applicable to probationer home searches where a state has no law or regulation authorizing warrantless searches, and the probationer has not signed a consent to search agreement as a part of his sentence.

In *Jones v. State*, the Supreme Court of Georgia recently held that absent “a state law, legally authorized regulation, or sentencing order,” the search of a probationer’s home was per se unreasonable absent a search warrant, probable cause, or a generally applicable exception to the warrant requirement because the probationer was not put on notice that his Fourth Amendment rights would be diminished under such circumstances.<sup>6</sup> By contrast, other courts, including the Eleventh Circuit, treat the absence of such laws, regulations, and sentencing orders as just one factor in a balancing test designed to determine the reasonableness of a particular search under the totality of the circumstances in existence at the time of the search.<sup>7</sup>

This Article argues that the Supreme Court of Georgia adopted the wrong approach to determine the reasonableness of probationer home searches where there is no law, regulation, or sentencing order allowing such searches without a warrant or probable cause. Specifically, *Jones* rests on a misconstruction of the decisions of the U.S. Supreme Court in *Griffin v. Wisconsin*<sup>8</sup> and *United States v. Knights*.<sup>9</sup> A better reading of those cases, adopted by other courts, treats notice to the probationer as a significant, but not indispensable factor in determining the reasonableness of a probationer home search.

Part II discusses the decisions of the U.S. Supreme Court in *Griffin v. Wisconsin* and *United States v. Knights*, which frame the discussion regarding probation searches. Part III presents an overview of cases discussing the Fourth Amendment rights of probationers in Georgia, prior to the U.S. Supreme Court’s decision in *Knights*, and then discusses the decision by the Supreme Court of Georgia in *Jones v. State*. Part IV analyzes the *Jones* decision in light of the U.S. Supreme Court decisions

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6. *Jones v. State*, 653 S.E.2d 456 (Ga. 2007).

7. *U.S. v. Yuknavich*, 419 F.3d 1302 (11th Cir. 2005).

8. *Griffin*, 483 U.S. 868.

9. *Knights*, 534 U.S. 112.

in *Griffin* and *Knights*. Part V argues that the test adopted by other courts—including the Eleventh Circuit Court of Appeals—to determine the reasonableness of warrantless searches of probationers based on less than probable cause is the better approach than the rule adopted in *Jones*. This Article concludes in Part VI by discussing the pragmatic implications of the *Jones* decision for the State of Georgia and offers possibilities on how to remedy the effects of the decision.

## II. UNITED STATES SUPREME COURT CASES DEALING WITH PROBATIONER SEARCHES

The U.S. Supreme Court first dealt with the extent to which individuals on probation are protected by the Fourth Amendment in *Griffin v. Wisconsin*.<sup>10</sup> There, the Court upheld a warrantless search conducted on the basis of reasonable suspicion by a probation officer, pursuant to a valid regulation.<sup>11</sup> In *United States v. Knights*,<sup>12</sup> the Court upheld a warrantless search based upon reasonable suspicion conducted pursuant to a consent to search agreement that the defendant agreed to as a condition of probation.<sup>13</sup> While heavily relying on its prior decision in *Griffin*, the Court upheld the search in *Knights* based on a traditional balancing test designed to assess the reasonableness of the search based on the totality of the circumstances.<sup>14</sup> Thus, although it appears the Court has largely shifted its analysis from a special needs test to a reasonableness balance,<sup>15</sup> it is still critical to understand the *Griffin* decision due to the extent to which the factors discussed in that case informed the reasonableness balance conducted by the Court in *Knights*.

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10. *Griffin*, 483 U.S. 868.

11. *Id.*

12. *Knights*, 534 U.S. 112.

13. *Id.*

14. *Id.* at 118-19.

15. See Antoine McNamara, Note, *The Special Needs of Prison, Probation, and Parole*, 82 N.Y.U. L. REV. 209 (advocating a return to the special needs doctrine because the reasonableness test undervalues probationers' rights).

A. *Griffin v. Wisconsin and the Special Needs Doctrine*1. *Background*

On September 4, 1980, Joseph Griffin was convicted of the offenses of obstructing an officer, resisting arrest, and disorderly conduct in Wisconsin State Court and was placed on probation.<sup>16</sup> Under Wisconsin law, probationers were considered to be in the custody of the State Department of Health and Human Services, and therefore subject to the rules and regulations established by that department.<sup>17</sup> One such regulation promulgated after Griffin was sentenced allowed a probation officer to conduct a warrantless search of a probationer's home so long as the officer had "reasonable grounds to believe contraband was present, and [] approval of a supervisor."<sup>18</sup> The regulation instructed probation officers to consider a variety of factors in order to assess whether "reasonable grounds" existed, including: the reliability and specificity of the information, informant reliability, the officer's prior experience with the individual on probation, and the need to "verify compliance" with both the rules of probation and with state and federal law.<sup>19</sup>

Probation officers supervising Griffin were informed by a police detective in April of 1983 that Griffin might have guns in his apartment.<sup>20</sup> A probation officer went to the apartment with three police officers and conducted a warrantless search, pursuant to the regulation, and located a firearm.<sup>21</sup> Griffin was charged with possession of a firearm by a convicted felon.<sup>22</sup> At his trial, Griffin moved to suppress the firearm claiming that the search of his apartment conducted by the probation officer violated the Fourth Amendment.<sup>23</sup> The trial court denied the

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16. *Griffin*, 483 U.S. at 870.

17. *Id.* (citing WISC. STAT. § 973.10 (1) (1985-1986)).

18. *Id.* at 870-871 (citing WIS. ADMIN. CODE HHS §§ 328.21 (4), 328.16(1) (1981)).

19. *Id.* at 871 (citing WIS. ADMIN. CODE HHS § 328.21 (7)).

20. *Id.* at 871.

21. *Id.*

22. *Id.* at 872.

23. *Id.*

motion, and Griffin was convicted.<sup>24</sup> The Wisconsin Supreme Court affirmed the conviction, holding that the fact that Griffin was on probation alone so diminished his expectation of privacy that a warrantless search based on reasonable grounds was permissible.<sup>25</sup>

## 2. *United States Supreme Court Opinion*

The U.S. Supreme Court affirmed the decision of the Wisconsin Supreme Court using a different rationale. The Court found no need to reach the issue of whether a probationer's expectation of privacy was so diminished that a warrantless search based on reasonable grounds would always be permitted.<sup>26</sup> Rather than accept or reject this "new principle of law," the Court affirmed the search on the basis of the special needs doctrine.<sup>27</sup>

Justice Scalia, writing for a seven justice majority, noted that the Fourth Amendment requires searches of probationers' homes to be "reasonable."<sup>28</sup> While reasonableness generally requires a warrant and probable cause, the opinion notes that the Court has allowed exceptions to these requirements "when special needs beyond the needs of normal law enforcement, make the warrant and probable-cause requirement impracticable."<sup>29</sup> The Court held that a State's operation of a probation system was one such special need.<sup>30</sup>

First, the Court noted, "probation, like incarceration, is a form of criminal sanction imposed by a court upon an offender after verdict, finding, or guilty plea."<sup>31</sup> Second, the Court pointed out that "it is always true of probationers. . . that they do not enjoy the absolute liberty to which every citizen is entitled, but only conditional liberty properly dependent on observance of special restrictions."<sup>32</sup> The restrictions are designed to serve

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24. *Id.*

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

26. *Griffin*, 483 U.S. at 872.

27. *Id.* at 872-74.

28. *Id.* at 873.

29. *Id.*

30. *Id.* at 873-74.

31. *Id.* at 874 (citing G. Killinger, H. Kerper, & P. Cromwell, *Probation and Parole in the Criminal Justice System* (1976)).

32. *Id.* at 874.

the two primary purposes of probation—rehabilitation of the offender and protection of the public—and supervision was needed to serve those purposes.<sup>33</sup> The Court thus concluded that supervision of probationers was a special need of the state that allowed infringements on privacy that would violate the Fourth Amendment if applied to the public at large.<sup>34</sup> Because the opinion then pointed out that the allowable infringements were not unlimited, the Court went on to analyze the Wisconsin system under the special needs doctrine.<sup>35</sup>

The Court approved the warrantless search conducted pursuant to the Wisconsin regulation, determining that the warrant and probable cause requirements would unduly frustrate the operations of the Wisconsin probation system.<sup>36</sup> First, the Court stated that a warrant requirement would replace the probation officer with a magistrate in determining the proper level of supervision of a probationer.<sup>37</sup> Second, “the delay inherent in obtaining a warrant would make it more difficult for probation officials to quickly respond to evidence of misconduct, and would reduce the deterrent effect that the possibility of expeditious searches would otherwise create.”<sup>38</sup> The Court also determined that a probable cause requirement would “unduly disrupt”<sup>39</sup> the probation system, because it “would reduce the deterrent effect of the supervisory arrangement,”<sup>40</sup> and would not allow probation officers to act on the basis of the complete knowledge of the offender’s history and circumstances possessed by probation officers.<sup>41</sup>

*B. United States v. Knights and the Reasonableness Test*

In 1998, Mark Knights was placed on probation for a drug offense and agreed as a condition of probation to submit his “person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant

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33. *Id.* at 875.

34. *Id.*

35. *Id.*

36. *Id.* at 876-80.

37. *Id.* at 876.

38. *Id.*

39. *Id.* at 878.

40. *Id.*

41. *Id.* at 879.

of arrest, or reasonable cause by any probation officer or law enforcement officer.”<sup>42</sup> Three days after being placed on probation, a Deputy Sheriff obtained reasonable suspicion that Knights was involved in several acts of vandalism resulting in over one million dollars worth of damage to a local gas and electric company.<sup>43</sup> Aware of the search condition imposed as a part of Knights’s sentence, the Deputy conducted a search of Knights’s home, finding several items implicating him in the vandalism.<sup>44</sup>

Knights was charged for the new offense in Federal District court and moved to suppress the evidence obtained during the search of his home.<sup>45</sup> Relying on Ninth Circuit case law decided after *Griffin*,<sup>46</sup> the District court granted the motion to suppress, holding that the search was investigative in nature rather than being conducted for probationary purposes.<sup>47</sup> The Ninth Circuit Court of Appeals affirmed,<sup>48</sup> and the United States appealed to the Supreme Court.

The U.S. Supreme Court unanimously reversed the granting of the motion to suppress. The Court rejected the distinction drawn by the Ninth Circuit between investigative searches and searches by probation officers pursuant to special needs.<sup>49</sup> The opinion referred to the logic of the Ninth Circuit’s interpretation of *Griffin* as “dubious,” rejecting the idea that “an opinion upholding the constitutionality of a particular search implicitly holds unconstitutional any search not like it.”<sup>50</sup> The Court also refused to decide the case based on the government’s argument that Knights’s acceptance of the special condition of probation constituted consent to search within the meaning of the Fourth Amendment.<sup>51</sup> It was unnecessary to reach that issue, said the Court, because the case could be decided under the “general Fourth Amendment approach” of examining the totality of the

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42. *Knights*, 534 U.S. at 114.

43. *Id.* at 114-15.

44. *Id.* at 115.

45. *Id.* at 116.

46. *Id.*

47. *Id.*

48. *U.S. v. Knights*, 219 F.3d 1138 (9th Cir. 2000).

49. *Knights*, 534 U.S. at 116-18.

50. *Id.* at 117.

51. *Id.* at 118.

circumstances surrounding the search.<sup>52</sup>

Under the totality of the circumstances approach, the Court determines the reasonableness of a search by balancing the degree to which the search intrudes on an individual's privacy against the extent to which the search is needed to further legitimate governmental interests.<sup>53</sup> The opinion noted two factors that "significantly diminished Knights'[s] reasonable expectation of privacy."<sup>54</sup> First, relying on prior decisions—including *Griffin*—the Court noted that the fact that an offender is on probation itself reduces his expectation of privacy.<sup>55</sup> Second, Knights was unambiguously informed of the search condition when he was sentenced, thus further lowering his privacy expectations.<sup>56</sup>

On the governmental interest side of the balance, the Court relied on the State's interest in serving the two primary purposes of probation identified in *Griffin*—rehabilitation and prevention of recidivism.<sup>57</sup> The opinion, citing high recidivism rates for probationers, noted that efforts to protect society from recidivist probationers made it reasonable for a State to "focus on probationers in a way it does not on the ordinary citizen."<sup>58</sup> Moreover, probationers have a greater incentive to conceal criminal activities than the ordinary criminal does, because probation revocations lack many of the procedural safeguards of a criminal trial.<sup>59</sup> Balancing the interests, the Court determined that the warrantless search of Knights, based on reasonable suspicion, was not unreasonable<sup>60</sup> with the signed search condition constituting a "salient circumstance" in the reduction of Knights's expectation of privacy.<sup>61</sup>

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52. *Id.*

53. *Id.* at 118-19 (citing *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

54. *Knights*, 534 U.S. at 119-20.

55. *Id.*

56. *Id.* at 119.

57. *Id.* at 119-20.

58. *Id.* at 120.

59. *Id.*

60. *Id.* at 121.

61. *Id.* at 118.

## III. PROBATIONER SEARCHES IN THE GEORGIA COURTS

A. *Georgia Decisions Prior to United States v. Knights*

Prior to the U.S. Supreme Court's decision in *Knights*, Georgia—like several other jurisdictions—adopted a “waiver theory” to probation searches.<sup>62</sup> Waiver theory holds that where a defendant agrees to a waiver of his Fourth Amendment rights as a special condition of a probationary sentence, that waiver constitutes consent, and searches conducted pursuant to the condition are valid.<sup>63</sup> Georgia courts interpreted the question of when a defendant consented to a Fourth Amendment waiver narrowly, however. For example, in *Fox v. State*,<sup>64</sup> the defendant signed a sentence sheet stating that he agreed to follow “all general and special conditions” of probation included in page two of his written sentence.<sup>65</sup> A Fourth Amendment waiver was one of the conditions listed on page two.<sup>66</sup> Despite this fact, the Court determined that the defendant had not waived his Fourth Amendment rights because he was not specifically advised of the condition until right after his sentence by a probation officer, outside the presence of his attorney.<sup>67</sup> Thus, the Court concluded that the defendant did not consent to the waiver as a condition of his sentence.<sup>68</sup>

This did not end the analysis in *Fox*, however. After finding that the defendant did not consent to the Fourth Amendment waiver, the Court then addressed the issue of whether the search was nonetheless reasonable under the special needs test set forth in *Griffin v. Wisconsin*.<sup>69</sup> Despite the fact that the *Griffin* Court

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62. See *Allen v. State*, 369 S.E.2d 909 (Ga. 1988) (adopting waiver theory); see also 3 WAYNE LAFAYE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT § 10.10 (b) (3d ed. 1996) (discussing waiver theory and the States which have adopted it).

63. LAFAYE, *supra* note 62, § 10.10 (b).

64. *Fox v. State*, 527 S.E.2d 847 (Ga. 2000).

65. *Id.* at 851 (Hunstein, J., Concurring).

66. *Id.*

67. *Fox*, 527 S.E.2d at 848.

68. *Id.* at 848-49.

69. *Id.* at 849 (“The question remains, however, [after finding that the defendant had not waived his Fourth Amendment Rights] whether the search of Fox’s residence was reasonable under the Fourth Amendment.”).

specifically stated that it was not ruling on whether a search based on less than reasonable grounds could pass constitutional muster,<sup>70</sup> the *Fox* majority interpreted *Griffin* to mean that any special needs search must be based, at a minimum, on “reasonable grounds to believe that the probationer has contraband in the home or is engaged in some criminal activity there.”<sup>71</sup> The Court concluded that reasonable grounds did not exist in *Fox* and held the search unconstitutional.<sup>72</sup> What is noteworthy is not the result of the special needs analysis, but the fact that the Court conducted the analysis at all. Given the absence of any waiver of rights as a condition of the defendant’s probation—and the absence of a Georgia statute or regulation authorizing probationer home searches without a warrant and probable cause—this balance of interests would be unnecessary to reach a determination that the search was unreasonable today, after the opinion of the Supreme Court of Georgia in *Jones v. State*.

*B. Jones v. State: A Notice Requirement for Probationer Searches*

*1. Background*

Jerry Jones<sup>73</sup> was under two separate probationary sentences for possession of a firearm by a convicted felon, obstruction of an officer, and a motor vehicle law violation.<sup>74</sup> Jones’s sentencing order out of Gordon County contained a pre-printed warrantless search condition, but the box next to that condition was not checked.<sup>75</sup> As a condition of that sentence, Jones was to serve four to six months on intensive probation that included a Fourth Amendment waiver, but at the time of the search at issue on this case the intensive probation period had ended.<sup>76</sup>

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70. *Griffin*, 483 U.S. at 872-73.

71. *Fox*, 527 S.E.2d at 850.

72. *Id.* at 850-51.

73. Jerry Jones’s sentencing trial is still pending. The author has had no involvement in this case, and this article contains no information about the case not already available to the public through the opinion of the Supreme Court of Georgia.

74. *Jones*, 653 S.E.2d at 458-59.

75. *Id.* at 458.

76. *Id.*

There was no evidence that Jones's sentence out of Floyd County contained a Fourth Amendment waiver at all.<sup>77</sup>

The search of Jones's apartment occurred when a probation officer, who had obtained an arrest warrant but no search warrant, went to Jones's apartment along with several law enforcement officers to effectuate an arrest for a probation violation.<sup>78</sup> It is unclear from the opinion what type of probation violation was alleged against Jones in the arrest warrant. What is clear, however, is that at the time Jones was suspected in a quadruple homicide that occurred in Gordon County.<sup>79</sup> While present to serve the arrest warrant, the probation officer, accompanied by several law enforcement personnel, conducted a warrantless search of the apartment.<sup>80</sup>

Jones ultimately pleaded guilty to four counts of murder and eighteen other crimes, and the State announced that it would seek the death penalty.<sup>81</sup> Jones filed a motion to suppress the evidence found at his apartment, seeking to have it excluded at his sentencing trial.<sup>82</sup> The trial court entered an order denying Jones's motion to suppress, and the Supreme Court of Georgia granted his application for interim review.<sup>83</sup>

## 2. *The Opinion of the Supreme Court of Georgia*

In *Jones v. State*, the Supreme Court of Georgia held that any evidence beyond that which was in plain view of the officers present should be suppressed because the search conducted violated the Fourth Amendment.<sup>84</sup> The Court determined that Jones did not consent to a waiver of his Fourth Amendment rights as a condition of his prior sentence beyond the four to six month period of intensive probation that he already completed.<sup>85</sup> Furthermore, no Georgia law or regulation created

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77. *Id.* at 459.

78. *Id.* at 457.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 458-59.

a blanket search provision applicable to probationers.<sup>86</sup> Thus, Jones did not have notice that his Fourth Amendment rights were diminished based solely on the fact that he was under a probationary sentence.<sup>87</sup>

The Court first noted that probationers are protected by the Fourth Amendment and that any search of their residence must be reasonable.<sup>88</sup> The Court looked to *Griffin* for guidance, but noted that in *Griffin* the special needs analysis was conducted in a case where the state of Wisconsin had a legal regulation authorizing the search of a probationer based on “reasonable grounds.”<sup>89</sup> The opinion also cited *Knights*, but pointed out that there was an explicit search condition agreed to by Knights as a condition of probation that limited his Fourth Amendment rights.<sup>90</sup> Reading *Knights* and *Griffin* together, the Court concluded that the U.S. Supreme Court had “strongly suggested that the Fourth Amendment right not to have one’s home searched without a warrant may only be denied to probationers through a valid law, legally authorized regulation, or sentencing order giving notice of that deprivation of rights.”<sup>91</sup> Because Jones did not have such notice—which the court concluded was a “critical consideration” in determining his expectation of privacy—the search was unconstitutional.<sup>92</sup> The opinion did not conduct a balancing test based on reasonableness under totality of the circumstances, implicitly determining that such a test was unnecessary based on the lack of notice provided to Jones.

#### IV. AN ANALYSIS OF THE *JONES* DECISION IN LIGHT OF *GRIFFIN* AND *KNIGHTS*

The problem with *Jones v. State* and the Supreme Court of Georgia’s approach to probationer searches does not necessarily lie in the result reached by the Court in that particular case. The search conducted there may or may not have been

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86. *Id.*

87. *Id.*

88. *Id.* at 457.

89. *Id.* at 457-58.

90. *Id.* at 458.

91. *Id.* at 459.

92. *Id.*

constitutional, depending on a host of circumstances that the opinion does not even consider. Rather, the problem lies in the fact that the Court held that, absent notice to the probationer through a valid law, regulation, or sentencing order, there is no diminution of the probationer's Fourth Amendment rights based on the fact that he is on probation.<sup>93</sup>

To read *Knights* and *Griffin* as the *Jones* Court did, to establish the proposition that notice is an absolute requirement for conducting a warrantless search of a probationer's home, is, at best, a selective reading of what those opinions hold. Relying on their own decisions and the U.S. Supreme Court's decision in *Griffin*, the *Jones* Court focused on the assertion that "the Fourth Amendment applies to probationers as well as other citizens," and that a probationer's home is protected by the requirement that searches be reasonable.<sup>94</sup> While true, these observations shed no light on the extent to which the Fourth Amendment applies, or how the fact that an individual is on probation might affect a court's determination of whether a search of their home is in fact reasonable.<sup>95</sup> To be sure, there was a regulation authorizing searches based on reasonable grounds in *Griffin* and a Fourth Amendment waiver in *Knights*, but neither opinion states that such notice to the probationer is a constitutional prerequisite to a warrantless search. In fact, the circumstances of *Griffin* suggest the opposite.

In *Griffin*, the defendant was subject to a Wisconsin regulation allowing searches of probationers based on reasonable grounds, but that regulation was not promulgated until over a year after the defendant was already under sentence.<sup>96</sup> Even assuming that the defendant regularly read the regulations of the Wisconsin Department of Health and Social

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93. *Id.*

94. *Id.* at 457 (citing *Griffin*, 483 U.S. at 873; *Allen*, 369 S.E.2d 909; *Fox*, 527 S.E.2d at 847).

95. *See Samson*, 547 U.S. at 850 (noting "... to say that Fourth Amendment applies to parolees says nothing about the extent to which it applies.").

96. *Knights*, 534 U.S. at 117 (citing *Griffin*, 483 U.S. at 870-71); *see also* *U.S. v. Keith*, 375 F.3d 346, 350 (5th Cir. 2004) (relying on the application of a regulation passed after sentencing in *Griffin* as a major factor in upholding a warrantless probation search even in the absence of a law, regulation, or sentencing order).

Services—and thus had actual notice of the search regulation—it cannot be seriously argued that the notice was in any sense meaningful. Since the regulation was not on the books at the time of his sentencing, he could not have objected to it at that time. When it was later made retroactively applicable to him, it would constitute a violation of his probation if he refused to allow a search pursuant to the provision.<sup>97</sup> Thus, even if the defendant had notice of the provision, there was essentially nothing he could do to prevent its application to him. It can be reasonably asked what good notice does under such circumstances, and it is difficult to read this opinion in conjunction with *Knights* and come to the conclusion that the Supreme Court of Georgia did—that notice is somehow the constitutional touchstone of reasonableness under the circumstances.

The Court also pointed out that the defendant in *Knights* expressly consented to a waiver of his Fourth Amendment rights as a condition of his probationary sentence.<sup>98</sup> Of course, the *Knights* opinion pointed to the fact that the defendant had notice and consented to the condition as a “salient circumstance” in determining that he had a lesser expectation of privacy than a normal citizen did.<sup>99</sup> But to say that something is a salient factor in an overall balancing test to determine reasonableness is not the same as saying that it is a factor that, without which, a balancing test would become unnecessary. Nothing in *Knights*—or *Griffin* for that matter—necessarily leads to the conclusion that notice through a statute, regulation, or law is an absolute constitutional prerequisite to a diminution of a probationer’s privacy rights. In fact, the Court in those cases pointed out that probationers’ rights are diminished to some extent even without notice of a specific search condition, based solely on the fact that they are under a criminal sentence and are on probation.<sup>100</sup> Moreover, in *Samson v. California*, the U.S. Supreme Court has interpreted *Knights* to mean that the fact that the defendant was under a probationary sentence was the real “salient factor” in their reasonableness analysis, while

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97. *Griffin*, 483 U.S. at 871 (citing WIS. ADMIN. CODE HHS § 328.04(3)(k) (1981)).

98. *Jones*, 653 S.E.2d at 458.

99. *Knights*, 534 U.S. at 118.

100. *Id.* at 119-22; see also *Griffin*, 483 U.S. at 874-80.

the fact that the defendant was clearly informed of the probation condition was just another factor that the Court considered in upholding the search.<sup>101</sup> In sum, it appears that the Supreme Court of Georgia is employing the same “dubious logic” criticized by Justice Rehnquist in *Knights*—“an opinion upholding the constitutionality of a particular search implicitly holds unconstitutional any search that is not like it.”<sup>102</sup>

In addition to their discussion of *Griffin* and *Knights*, the *Jones* decision also lists several cases from state and federal appeals courts in a string citation to support its conclusion.<sup>103</sup> The majority of these cases, however, simply stand for the proposition that warrantless “reasonable cause” searches based on state regulations,<sup>104</sup> or sentencing orders,<sup>105</sup> do not violate the Fourth Amendment. This is no different than the conclusions reached in *Griffin* and *Knights*. Again, the *Jones* Court is making a logical jump by citing opinions upholding the constitutionality of a search where there is a probation condition or a regulation present to state that searches not based on such a condition or regulation are necessarily unconstitutional. The Court did cite three cases where other courts have explicitly held that the warrant and probable cause requirements apply to probationers absent a law, regulation, or sentencing order.<sup>106</sup> But the *Jones* decision also cited three cases where other courts have upheld warrantless searches despite the absence of a law, regulation, or sentencing order authorizing the search.<sup>107</sup> The

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101. *Samson*, 547 U.S. at 848.

102. *Knights*, 534 U.S. at 117.

103. *Jones*, 653 S.E.2d at 459.

104. *U.S. v. Godsey*, 224 Fed. Appx. 896 (11th Cir. 2007) (unpublished opinion); *U.S. v. Grimes*, 225 F.3d 254, 258-59 (2nd Cir. 2000).

105. *U.S. v. Midgette*, 478 F.3d 616 (4th Cir. 2007); *U.S. v. Giannetta*, 909 F.2d 571 (1st Cir. 1990); *U.S. v. Schoenrock*, 868 F.2d 289 (8th Cir. 1989); *People v. Hale*, 714 N.E.2d 861 (NY. 1999); *State v. Lockwood*, 632 A.2d 655 (Vt. 1993).

106. *U.S. v. Freeman*, 479 F.3d 743 (10th Cir. 2007); *Commonwealth v. Pickron*, 634 A.2d 1093 (Pa. 1993); *People v. Flagg*, 577 N.E.2d 815 (Ill. App. 1991).

107. *Yuknavich*, 419 F.3d 1302; *U.S. v. Hill*, 967 F.2d 902 (3d Cir. 1992); *Keith*, 375 F.3d 346; see also *U.S. v. Scott*, 678 F.2d 32, 34-35 (5th Cir. 1982) (case decided prior to *Griffin* and *Knights* upholding warrantless search of a probationer based on reasonable suspicion despite the absence of a regulation or consent order); *Latta v. Fitzharris*, 521 F.2d 246, 250 (9th Cir.

Court made no effort to discuss or analyze these contrary cases in order to determine which courts better interpreted *Knights* and *Griffin*. The opinion just asserted without analysis that the Court was persuaded that notice was “critical.”<sup>108</sup>

The *Jones* Court also ignored parts of one of its own prior decisions in reaching this result. As previously discussed, in *Fox v. State*, the Court concluded that there was no valid sentencing order that the defendant consented to waiving his Fourth Amendment rights.<sup>109</sup> Even without this sentencing order, however, and in the absence of any state law or regulation putting the probationer on notice of his reduced expectation of privacy, the Court still analyzed the search conducted in that case under the special needs doctrine to determine if “reasonable grounds” existed for the search.<sup>110</sup> Though the Court did not find reasonable grounds in that case,<sup>111</sup> the noteworthy fact is that the Court applied a reasonable grounds analysis rather than requiring a warrant and probable cause in absence of notice, as *Jones* would require. *Fox* was decided between the Supreme Court decisions in *Griffin* and *Knights*. But the Court in *Jones* made no effort to explain what it found in reading *Knights*, a decision upholding the constitutionality of a probation search that would alter the approach taken in *Fox*. Rather, the Court apparently implicitly overruled this portion of the *Fox* opinion without any real analysis.

#### V. AN ALTERNATIVE APPROACH: NOTICE AS A FACTOR IN DETERMINING REASONABLENESS

Rather than treating the lack of such notice as making any search of a probationer’s home unconstitutional absent a warrant and probable cause, a better application of the opinions in *Knights* and *Griffin* is to treat lack of notice through a statute, regulation, or sentencing order as one factor—albeit a “salient” factor—in the reasonableness under the totality of the circumstances balancing test set forth in *Knights*. At least three

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1975).

108. *Jones*, 653 S.E.2d at 459.

109. *Fox*, 527 S.E. 2d at 849.

110. *Id.* at 850.

111. *Id.* at 850-51.

circuits,<sup>112</sup> including the Eleventh Circuit Court of Appeals,<sup>113</sup> have adopted this approach. As the Fifth Circuit Court of Appeals has explained, “The core reasoning of the Court in [*Griffin and Knights*] is directed at explaining why the needs of the probation system outweigh the privacy rights of the probationers generally,” and was not directed at highlighting the importance of a “written condition of probation or an explicit regulation permitting the search.”<sup>114</sup>

This reasoning is sounder than the *Jones* approach because it takes into account both sides of the balancing test to determine Fourth Amendment reasonableness, just as the Supreme Court did in *Knights*.<sup>115</sup> As previously discussed, this test balances the Government’s need to conduct the search to promote legitimate governmental interests against the degree to which the search intrudes on the individual’s privacy.<sup>116</sup> To understand why treating lack of notice to the probationer as only one factor in a reasonableness balance, rather than treating it as outcome determinative, is the better approach, it is necessary to look at both the governmental and the individual sides of the reasonableness balance to see how they are affected by notice to the probationer, or lack thereof.

#### A. *Georgia’s Interests in Conducting Warrantless Probationer Searches*

The State of Georgia is second only to Texas in the number of individuals under a sentence of probation.<sup>117</sup> Georgia has a higher percentage of its population under probationary supervision than any other state in the nation.<sup>118</sup> The number of individuals under a sentence of probation in Georgia nearly tripled between 1995 and 2006.<sup>119</sup> While state to state comparisons of recidivism rates are scarce, it appears that the

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112. *Freeman*, 479 F.3d 743; *Pickron*, 634 A.2d 1093; *Flagg*, 577 N.E.2d 815.

113. *Yuknavich*, 419 F.3d 1302.

114. *Keith*, 375 F.3d at 350.

115. *Knights*, 534 U.S. at 119.

116. *Id.*

117. LAUREN E. GLAZE & THOMAS P. BONCZAR, *PROBATION AND PAROLE IN THE UNITED STATES*, 2006 3 (U.S. Dep’t of Justice, 2007).

118. *Id.*

119. *Id.* at 11.

rate of unsuccessful probation completion in Georgia is comparable with the rest of the nation.<sup>120</sup>

The U.S. Supreme Court has recognized that the purposes of probation are to rehabilitate criminal offenders and to protect society from them.<sup>121</sup> The Court has also noted, “the very assumption of the institution of probation is that the probationer is more likely than the average citizen to violate the law.”<sup>122</sup> Moreover, because he is subject to probation revocations, which are not protected by all of the rights normally associated with a criminal trial, the probationer has more of an incentive to destroy evidence and conceal his criminal activities.<sup>123</sup> Thus, in this context, there is a special need for supervision to rehabilitate offenders and protect society, justifying departures from the probable cause and warrant requirements.<sup>124</sup>

The Court has noted that it is both “unrealistic and destructive of the whole object of the continuing probation relationship” to require the same degree of reliability for the state to act against a probationer than against an ordinary citizen.<sup>125</sup> It has also held that probation systems would be interfered with by a warrant requirement.<sup>126</sup> This is unaffected by whether or not the defendant received notice through a sentencing order or regulation that his Fourth Amendment rights are diminished.

That is, probationer recidivism, the need to protect society, and the need to rehabilitate the offender are just as real in Georgia as in Wisconsin or any other State. Also, given the number of individuals under a probationary sentence in Georgia and the fact that recidivism rates appear to be roughly equal to those of other states,<sup>127</sup> it is difficult to imagine that it is any more realistic to demand a finding of probable cause for probationer searches, or that a warrant requirement is any less

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120. GEORGIA DEP'T OF CORRECTIONS, PROBATION DIVISION, PROBATION IN THE NEW CENTURY 1 (2001) (Successful completion of probation nationally is 60%; in Georgia, it is 66%).

121. *Knights*, 534 U.S. at 120-21.

122. *Id.* at 120 (quoting *Griffin*, 483 U.S. at 880).

123. *Knights*, 534 U.S. at 120.

124. *Id.* at 121.

125. *Griffin*, 483 U.S. at 879.

126. *Id.* at 876.

127. *See supra* note 117, at 11.

disruptive to Georgia's probation system than it was in Wisconsin at the time of *Griffin*. These reasons for departure from the probable cause and warrant requirements exist whether or not the probationer is put on notice regarding his diminution of Fourth Amendment rights. Thus, the governmental needs side of the reasonableness balance is not at all affected by the lack of notice to the probationer through a law, regulation, or sentencing order containing a consent to search.

*B. Reasonable Expectation of Privacy*

A probationer's expectation of privacy is undoubtedly affected by whether or not he is given notice that his Fourth Amendment rights are diminished because he is on probation.<sup>128</sup> But under the balancing test, an expectation of privacy consists of both a subjective and an objective component.<sup>129</sup> That is, the defendant must not only have a subjective expectation of privacy, but that expectation must be one that society accepts as reasonable.<sup>130</sup> While it might well be the case that absent notice a given probationer may subjectively expect that he will be treated the same as a law abiding citizen with respect to searches—despite the fact that he is under a sentence for violating a criminal law—the presence or absence of notice seems only tangentially related to whether society recognizes that expectation as objectively reasonable.

As the U.S. Supreme Court has noted, probation “is a form of criminal sanction imposed on an offender,”<sup>131</sup> and “it is always true of probationers that they do not enjoy the absolute liberty to which every citizen is entitled.”<sup>132</sup> Thus, the status of a probationer alone justifies “reasonable conditions that deprive the offender of some freedoms enjoyed by law abiding citizens.”<sup>133</sup> The *Jones* opinion never discussed whether the defendant's expectation was objectively reasonable in light of these holdings or to what extent the fact that Jones was on probation alone may have reduced the reasonableness of his

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128. *Knights*, 534 U.S. at 119.

129. See *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

130. *Id.*

131. *Knights*, 534 U.S. at 119.

132. *Id.* (quoting *Griffin*, 483 U.S. at 874, in turn, quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)).

133. *Knights*, 534 U.S. at 119.

privacy expectation.

In order to determine what extent probationers in Georgia have an objectively reasonable expectation of privacy, it is necessary to look at Georgia's probation system more closely, in combination with the above descriptions by the U.S. Supreme Court regarding the nature of probation generally. This is because, even if a defendant is not put on specific notice that his rights against warrantless searches based on less than probable cause are diminished by being on probation, the nature of probation in Georgia could affect whether it is objectively reasonable for a probationer to expect to be treated the same as a law abiding citizen where his Fourth Amendment rights are concerned.<sup>134</sup>

Probationers in Georgia are placed under supervision of the Georgia Department of Corrections by statute.<sup>135</sup> Probation officers are required by statute to "keep informed of the conduct, habits, associates, employment, recreation, and whereabouts" of probationers by visits and requiring reports.<sup>136</sup> Probationers are required by statute to keep their officers informed of their current residence.<sup>137</sup> Moreover, probation officers may arrest a probationer without a warrant anytime she "believes" the probationer has materially violated the terms or conditions of probation.<sup>138</sup>

Sentencing courts are given wide discretion in determining what conditions of probation to impose in a given case,<sup>139</sup> and no conditions are mandated by statute. However, certain "general conditions" of probation are suggested by statute,<sup>140</sup> and sentencing courts generally impose these as part of a probationary sentence as a matter of course,<sup>141</sup> in addition to any "special conditions" of probation imposed by the court.<sup>142</sup>

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134. See *Yuknavich*, 419 F.3d at 1310 (considering how conditions of probation can affect the reasonable expectation of privacy, even in the absence of a search condition, law or regulation).

135. O.C.G.A. § 42-8-27 (2007); O.C.G.A. § 42-8-22 (2007).

136. O.C.G.A. § 42-8-29 (2007).

137. O.C.G.A. § 42-8-36 (2007).

138. O.C.G.A. § 42-8-38 (2007).

139. *Grant v. State*, 336 S.E.2d 354 (Ga. App. 1985).

140. O.C.G.A. § 42-8-35 (2007).

141. *Hill v. State*, 606 S.E.2d 831, 834 (Ga. App. 2004).

142. *Grant*, 336 S.E.2d at 354.

The statutory general conditions that could affect the reasonableness of the probationers' expectation of privacy include, avoiding injurious and vicious habits<sup>143</sup> as well as places and persons of disreputable character,<sup>144</sup> reporting to the probation officer as directed,<sup>145</sup> permitting the supervisor to visit him at home or elsewhere,<sup>146</sup> remaining within a specified location,<sup>147</sup> and maintaining employment.<sup>148</sup> Moreover, sentencing courts have nearly limitless discretion in determining special conditions of a probationary sentence in addition to these general conditions.<sup>149</sup>

Thus, simply being sentenced to probation under the general conditions of probation in Georgia limits the rights of probationers to do a host of things that law abiding citizens are able to do. Probationers are told who they may not associate with, what activities they may participate in, and what location they must remain. They must report to probation officers as directed, keep the officer abreast of their current residence, and allow the officer to visit them at that residence and elsewhere. Moreover, they are subject to arrest in their homes without a warrant or probable cause.<sup>150</sup> All of this is in addition to any special conditions of probation a sentencing court may impose that could further bear on the rights of the probationer.<sup>151</sup> Under these circumstances, it is fair to question whether it is objectively reasonable for a probationer to expect officers to obtain a warrant and probable cause in order to conduct a search of his home. This is a question that the Court in *Jones* did not even consider, because despite the fact that the probationer had notice that his rights were diminished in all of these ways, he was not given specific notice that his search rights might be diminished.

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143. O.C.G.A. § 42-8-35 (1).

144. O.C.G.A. § 42-8-35 (2).

145. O.C.G.A. § 42-8-35 (3).

146. O.C.G.A. § 42-8-35 (4).

147. O.C.G.A. § 42-8-35 (6).

148. O.C.G.A. § 42-8-35 (5).

149. *Grant*, 336 S.E.2d at 354-55 (“We see no logical reason why any reasonable condition imposed for probation or suspension of a sentence by a trial court should not be approved.”).

150. O.C.G.A. § 42-8-38.

151. *Hill*, 606 S.E.2d 831.

*C. Factors Affecting Both Sides of the Reasonableness Balance*

Courts that treat the absence of a sentencing order, law, or regulation as one factor in the overall analysis of the reasonableness of a search consider a number of factors foreclosed by the Supreme Court of Georgia's analysis in *Jones*. These courts have reasoned that the offense for which the offender is on probation<sup>152</sup> as well as the contraband he is suspected of possessing at the time of the search<sup>153</sup> are relevant factors in determining reasonableness. For example, if a probationer is suspected of possessing controlled substances or firearms—items that are easily disposable—the government's interest in conducting a warrantless search is greater than would be the case in other circumstances.<sup>154</sup> If the probationer's prior offenses were committed out of his home, this might reduce his expectation of privacy in that area while on probation.<sup>155</sup> Courts have also looked to how the defendant has performed on probation up until the time of the search as a factor that can diminish the probationer's expectation of privacy and increase the governmental interest in conducting the search.<sup>156</sup> Under the *Jones* approach, however, these factors are not taken into account because of the absence of a sentencing order, law or regulation allowing probationer home searches absent a warrant and probable cause.

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152. *Yuknavich*, 419 F.3d at 1310.

153. *Id.*

154. *Id.*; see also *Griffin*, 483 U.S. at 879 (“In some cases, especially those involving drugs or illegal weapons, the probation officer must be able to act 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.”).

155. See *Yuknavich*, 419 F.3d at 1310 (being on probation for crime involving computer child pornography reduced expectation of privacy in any computer probationer owned).

156. *Id.* at 1310-11; see also *Griffin* 483 U.S. at 879 (a probation agency “must be able to proceed on the basis of its entire experience with the probationer to assess probabilities in light of its knowledge of his life, character, and circumstances.”).

## VI. CONCLUSION

The U.S. Supreme Court has twice upheld warrantless searches of probationers' homes based on less than probable cause. While *Jones v. State* is distinguishable because Jones was not subject to a consent to search agreement and there was no law or regulation providing him notice of the possibility of a warrantless search, nothing in *Knights* or *Griffin* establishes this factor as a constitutional prerequisite to a reasonableness balancing test. The better approach is to treat a lack of notice as a salient factor in determining the reasonableness of the search at issue.

From the facts provided in the opinion by the Supreme Court of Georgia, it is not possible to make a determination whether the search conducted in *Jones* violated the Fourth Amendment. To correctly reach a determination, the Court would have to balance the expectation of privacy of the defendant—shaded by the fact that he is a probationer—against the government's need to conduct the search at the time the search occurred. To determine reasonableness under the circumstances, the fact the defendant was not given notice through a law, regulation, or sentencing order is a salient circumstance that should have been taken into account, but should not be treated as outcome determinative. The Court's determination should have also looked at the totality of the circumstances at the time of the search, including, the government's interest in conducting the search, the seriousness of the offenses for which Jones was on probation, the nature of the offense for which Jones was suspected leading to the search, other conditions of Jones's probation which may have informed his expectation of privacy, and any other factor bearing on the issue of reasonableness. Instead, the Court misinterpreted *Knights* and *Griffin* to hold that in absence of a sentencing order, regulation, or law, searches of probationers' homes based on less than probable cause can never be reasonable, absent a generally applicable exception to the warrant requirement.

At first glance, it would seem that the decision in *Jones* would not pose any real pragmatic problems for the probation system. Because Georgia has no law or regulation relating to probationer home searches, sentencing judges would simply have to include a consent to search provision as a condition of probation. But a problem emerges when one considers the

interpretation of the Court in *Fox* regarding whether the search condition was validly imposed. There, even though the defendant signed a form acknowledging the search condition, it was held inapplicable because he was not informed of it by the judge at the time he entered his plea.<sup>157</sup> This would necessitate an officer obtaining a transcript of the plea colloquy in order to determine whether the search provision is applicable—because the condition is only valid if the judge mentions it in the colloquy. This is, of course, impractical, and good officers will likely be deterred from conducting probation searches even when they are permissible, because they cannot rely on a defendant's signed acknowledgement to establish the applicability of the condition. Instead, the officer would have to read a transcript of the probationer's sentencing, which can often take some time to obtain.

Because *Jones v. State* was decided recently and unanimously, it is unlikely that the Supreme Court of Georgia will alter its approach to probationer searches any time in the near future. But this is a rare instance where a misapplication of the constitution can be corrected by the legislature. Should the Georgia General Assembly pass a statute similar to the regulation at issue in *Griffin* allowing probationer searches based on reasonable grounds, or similar to a Georgia statute already in existence, allowing warrantless arrests, this would resolve the notice issue that so concerned the Supreme Court of Georgia. Moreover, this statute could be applied retroactively to individuals already on probation without constitutional difficulty, as established in *Griffin*. Absent such a statute—or U.S. Supreme Court decision clarifying the issue—probationers are likely to be treated the same as law abiding citizens with respect to their Fourth Amendment rights in Georgia.

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157. *Fox*, 527 S.E.2d at 849.