
HOOKING THE CROOK: THE SEVENTH CIRCUIT JUSTIFIES THE SUSPICIONLESS SEARCH OF A PROBATIONER

MEIRA GREENBERG*

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INTRODUCTION

Criminal convictions for less serious crimes such as damaging property or fleeing from the police may result in a prison sentence or probation.¹ Commonly, individuals in such cases will agree to forgo a criminal trial and enter into a plea bargain,² in which they may admit guilt in an effort to secure a more favorable sentence of probation rather than prison time. Although plea bargains are presumed constitutional, not every condition of probation is permissible.³ In assessing the validity of the conditions of probation, courts have taken two different approaches: (1) constitutional analysis approach;⁴ and (2)

* J.D. candidate, May 2007, Chicago-Kent College of Law, Illinois Institute of Technology. Meira Greenberg would like to thank her mom and sister for their unconditional love and support. She dedicates this Comment to them, as well as in loving memory of her dad Yaakov Avramson.

¹ See generally Federal Sentencing Guidelines, November 1, 2006; *Alabama v. Shelton*, 535 U.S. 654, 658 (2002).

² The Lectric Law Library, available at <http://www.lectlaw.com/def2/p053.htm> (last visited on November 29, 2006).

³ See, e.g., *Minnesota v. Murphy*, 465 U.S. 420, 435-37 (1984).

⁴ *United States v. Knights*, 534 U.S. 112, 118 (2001).

the consent/contract approach.⁵ Courts that have used the first approach engage in a determination of whether the condition agreed to is constitutional⁶ whereas courts that have used the second approach engage in a determination of whether the condition was accepted voluntarily.⁷ This Comment contends that the constitutional approach is better and argues that the consent/contract approach improperly hooks the crook when it upholds constitutionally questionable probationary conditions upon the basis that a convict voluntarily consents to the condition to avoid a prison sentence.

Recently, the United States Court of Appeals for the Seventh Circuit, in *United States v. Barnett*, upheld an agreed order that required the accused to consent to suspicionless searches during the probation period.⁸ Judge Posner,⁹ writing for the unanimous three judge panel, reasoned that probationers may be subject to suspicionless searches because they voluntarily consent to waive their Fourth Amendment rights in favor of the less appealing choice of facing a prison sentence, which is similar to many waivers made by recipients of plea bargain agreements.¹⁰

The *Barnett* decision is important because it lends credence to the consent approach, a little used argument asserted to support the suspicionless search of a probationer.¹¹ Under the consent theory, an individual waives their right to Fourth Amendment protection and procedure, and thus the requirement that searches be reasonable is deemed moot.¹² Thus, *Barnett* supports a loophole by which the state

⁵ *United States v. Barnett*, 415 F.3d 690, 692 (7th Cir. 2005).

⁶ *Knights*, 534 U.S. at 118.

⁷ *Barnett*, 415 F.3d at 692.

⁸ *Id.*

⁹ Judge Richard Posner is an expert in the economics of law. He has published many works on this topic. <http://www.law.uchicago.edu/faculty/posner-r/>

¹⁰ *Barnett*, 415 F.3d at 692.

¹¹ Prior to *Barnett*, practitioners had attempted to use the consent theory, but the Supreme Court specifically declined to review this line of reasoning because the search was permissible under the standard Constitutional analysis approach. *United States v. Knights*, 534 U.S. 112, 120 n.6 (2001).

¹² *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

may conduct searches that are not permissible under the Fourth Amendment so long as the probationer consents to such searches as a prerequisite of probation in lieu of a prison sentence.¹³

This Comment will contend that the Seventh Circuit's decision in *Barnett* did not sufficiently examine the propriety of upholding a suspicionless search within the terms of a plea bargain agreement upon the consent approach because such requirements are unreasonable under constitutional analysis. Thus, a suspicionless search as a probationary term constitutes an unconstitutional condition absent more direction from the Supreme Court that either a suspicionless search is permissible under the Fourth Amendment or that the consent approach justifies complete removal of a probationer's Fourth Amendment rights.

Part I of this Comment lays out the landscape of a probationer's Fourth Amendment protection by briefly discussing the case law leading up to the Seventh Circuit's decision in *Barnett*. Part II recounts the *Barnett* litigation by setting forth the procedural and factual record and then detailing the opinion issued by the court. Part III analyzes the consent theory by comparing the typical consent case in which the individual is not in custody to the consent given by an individual as a prerequisite of probation. Part IV examines the contours of a plea bargain agreement, reviews the sentencing guidelines for probation and then compares a plea bargain agreement to an agreed order that a probationer signs as a prerequisite of release. Part V explores the doctrine of unconstitutional conditions and contends that a probationary suspicionless search condition constitutes an impermissible condition on constitutional rights. Part VI reviews the recent Supreme Court decision of *Samson v. California* and contends that this decision cautions against permitting suspicionless searches of probationers. Part VII questions the Seventh Circuit's assertion that even if a suspicionless search was an impermissible condition of probation, the remedy would be rescission and require Barnett to go to prison.

¹³ *Barnett*, 415 F.3d at 692.

I. THE FOURTH AMENDMENT PROTECTS A PROBATIONER

Probationers are subject to less Fourth Amendment Protection than a free citizen.¹⁴ The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” by police officers and other government officials.¹⁵ Normally, this constitutional right is protected by the probable cause and warrant requirement.¹⁶ However, the Supreme Court decisions of *Griffin v. Wisconsin* and *United States v. Knights* lowered the requisite probable cause standard to the standard of reasonable suspicion for probationers.¹⁷ The Court justified this lowered standard on one of two bases: either that the search constitutes a special need of the state¹⁸ or that in light of the government’s need and the probationer’s lowered expectation of privacy, the search is reasonable under the Fourth Amendment.¹⁹

A. *Griffin v. Wisconsin*

In 1984, nearly 2,000,000 adults were on probation or parole in the United States.²⁰ The primary purpose of probation and parole is to place the offender back into the community; however, the offender’s release into the community is not without restriction.²¹ In virtually

¹⁴ *Knights*, 534 U.S. at 119.

¹⁵ U.S. CONST. amend. IV.

¹⁶ *Johnson v. United States*, 333 U.S. 10, 13 (1948). The warrant and probable cause requirements protect individuals from unreasonable searches and seizures and significantly limit police action.

¹⁷ *Knights*, 534 U.S. at 119; *Griffin v. Wisconsin*, 483 U.S. 868, 872 (1987).

¹⁸ *Griffin*, 483 U.S. at 872.

¹⁹ *Knights*, 534 U.S. at 122.

²⁰ BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1987 at 173.

²¹ 18 U.S.C. § 3561. Probation may be used as an alternative to incarceration, provided that the terms and conditions of probation can be fashioned so as to fully meet the statutory purposes of sentencing, including promoting respect for law,

every case, conditions accompany the release of the probationer.²² One frequently imposed condition of probation requires the probationer to submit to searches.²³ In *Griffin*, the United States Supreme Court articulated the scope of a probationer's Fourth Amendment rights, and held that those rights did not prohibit a probationer from being required to consent to searches as a prerequisite of probation.²⁴

The petitioner in *Griffin* challenged the condition of his probationary terms which permitted the state to conduct a warrantless search of his home.²⁵ In that case, the officers conducted a warrantless search after receiving notice from a known informant that the probationer may be in possession of weapons.²⁶ The officers did not obtain a warrant before conducting the search, but rather relied upon the probationer's consent to submit to such searches.²⁷

The *Griffin* Court held that a search of a probationer predicated upon reasonable suspicion was justified under the special needs doctrine.²⁸ Reasonable suspicion is a standard determined by weighing all of the facts including the reliability of the informant and the probationer's history to assess whether there is sufficient evidence to believe that the probationer violated the terms of his probation.²⁹ Although a probationer's home is subject to Fourth Amendment protection, the special needs doctrine permits, under limited circumstances, reductions of a probationer's Fourth Amendment

providing just punishment for the offense, achieving general deterrence, and protecting the public from further crimes by the offender.

²² *Higdon v. United States*, 627 F.2d 893, 897 (9th Cir. 1980). Common conditions of probation include obeying all laws, refraining from alcohol use, avoiding association with other convicts, reporting to a probation agent on a regular schedule, and advising probation agent of any change in address or employment.

²³ *See, e.g., Owens v. Kelley*, 681 F.2d 1362, 1366 (11th Cir. 1982).

²⁴ 483 U.S. at 873.

²⁵ *Id.* at 870.

²⁶ *Id.* at 872.

²⁷ *Id.* at 870.

²⁸ *Id.* at 875. The reasonable suspicion standard is a lower standard than the probable cause standard.

²⁹ *Id.* at 871.

protection because a “special needs beyond that of law enforcement make the warrant and probable cause requirement impracticable” and make the search reasonable under the Fourth Amendment.³⁰

The Court reasoned that the state’s operation of a probation system operates as a special need beyond law enforcement interests, in part because evidence discovered in such a search is rarely used in criminal trial, but rather is only admissible at probation revocation hearings.³¹ It found that the purposes of probation, to promote rehabilitation and to prevent recidivism, justify a probation officer supervising the probationer to ensure that these goals are met, but cautioned that the degree of supervision is not unlimited.³² Thus, where an officer has reasonable suspicion that the probationer is engaged in criminal activity the officer may conduct a search of the probationer as part of a legitimate probationary condition.³³

B. United States v. Knights

After *Griffin*, the lower courts split on whether the probationary search condition would permit officers to use incriminating evidence discovered in the search not only at the probation revocation hearing, but also in subsequent criminal trials.³⁴ In *Knights*, the petitioner challenged a probationary condition that permitted officers to conduct warrantless searches with or without reasonable cause after evidence of Knights’ participation in arson was discovered during a search pursuant to this condition.³⁵ The *Knights* Supreme Court held that the

³⁰ *Id.* at 873.

³¹ *Id.* at 873-874; *see also* Penn. Bd. of Prob. & Parole v. Scott, 524 U.S. 357 (1998). This case talks about how the normal Fourth Amendment protection provided by the exclusionary rule, which bars the admission of evidence in violation of the Fourth Amendment, does not apply in a parole revocation hearing because the parole revocation process is not inherently adversarial and thus does not demand safeguards of this nature.

³² 483 U.S. at 874-75.

³³ *Id.* at 879.

³⁴ *See* United States v. Knights, 534 U.S. 112, 117 (2001).

³⁵ *Id.* at 114.

Fourth Amendment permitted the search of a probationer based upon reasonable suspicion, and thus evidence garnered pursuant to the search was admissible in future criminal trials.³⁶

The Court reasoned that the search of a probationer is justified under the reasonableness requirement of the Fourth Amendment.³⁷ A search is reasonable if the balance between the probationer's reasonable expectation of privacy³⁸ and the government's interest in conducting the search justifies the infringement on a probationer's Fourth Amendment rights.³⁹ A probationer, by virtue of his status, has a reduced expectation of privacy.⁴⁰ Moreover, the Court acknowledged that "just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens."⁴¹ Consequently, probationers who are made unequivocally aware of the search condition and who sign the consent form may reasonably be deemed to have notice of their lessened privacy rights.⁴² On the other side of the scale is the government's interest in preventing recidivism and promoting rehabilitation, which counters the probationer's reduced expectation of privacy.⁴³ Thus, under the Court's holding in *Knights*, the Fourth Amendment permits courts to condition probation upon submission to searches conducted with reasonable suspicion because such searches are reasonable.⁴⁴

³⁶ *Id.* at 121.

³⁷ *Id.*

³⁸ It is not just the individual's subjective expectation of privacy, but also the expectation of privacy that society deems acceptable such that it is willing to protect that individual's subjective expectation. *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999).

³⁹ *Knights*, 534 U.S. at 119.

⁴⁰ *Id.*

⁴¹ *Id.*; see also *Minnesota v. Murphy*, 465 U.S. 420, 438 (1984).

⁴² *Knights*, 534 U.S. at 119.

⁴³ *Id.*

⁴⁴ *Id.* at 121.

Although the government attempted to justify the search based upon the probationer's consent to the probationary term, the Court specifically declined to rule on this argument.⁴⁵ The government argued that the probationer had voluntarily accepted the probationary condition and had the option to decline the terms and go to prison instead.⁴⁶ Further, the government argued that such conditions are analogous to the "voluntary decision defendants often make to waive their right to trial and accept a plea bargain."⁴⁷ However, the Court declined to determine both whether consent itself justified the search and whether searches conducted with less than reasonable suspicion would violate the Fourth Amendment because the search in this case was conducted with reasonable suspicion and thus permissible.⁴⁸

The *Griffin* and *Knights* cases demonstrate that probationers are entitled to less Fourth Amendment protection than free-citizens, but intimate that probationers are not without some degree of protection.⁴⁹ In assessing the degree of protection the Fourth Amendment requires, both cases employed a balancing test to determine the government's interest in conducting the search and the privacy infringement suffered by the probationer.⁵⁰ However, neither case answered the question of whether a probationer's consent to a probationary condition would alone permit the search or whether the Fourth Amendment would permit a suspicionless search based upon the probationer's status. These questions were answered in the affirmative by the Seventh Circuit.⁵¹

⁴⁵ *Id.* at 120 n. 6.

⁴⁶ *Id.* at 118.

⁴⁷ *Id.*

⁴⁸ *Id.* at 120 n. 6.

⁴⁹ *Id.*; *Griffin*, 483 U.S. at 875.

⁵⁰ *Knights*, 534 U.S. at 119; *Griffin*, 483 U.S. at 873.

⁵¹ *United States v. Barnett*, 415 F.3d 690, 693 (7th Cir. 2005).

II. *UNITED STATES V. BARNETT*:
JUSTIFYING THE SUSPICIONLESS SEARCH OF A PROBATIONER

On July 18, 2005, the Seventh Circuit Court of Appeals ruled on the validity of a search conducted by police officers pursuant to a probationer's consent to the search as part of the terms of his probation.⁵² Judge Posner authored the opinion for a three-judge panel, which also consisted of Judge Coffey and Judge Kanne.⁵³ The court upheld the suspicionless search, reasoning that the probationary waiver should be viewed in light of both consent and plea bargain analysis since a probationer may contract away their Fourth Amendment rights, thereby justifying a suspicionless search.⁵⁴

A. *Facts of the Case*

Curtis Barnett ("Barnett") was found guilty of fleeing from police and destroying state property, both of which are felonies under Illinois law.⁵⁵ The trial judge sentenced Barnett to one year of intensive probation in lieu of a prison sentence.⁵⁶ As a condition of probation, as set forth in the agreed order, Barnett was required to "submit to searches of [his] person, residence, papers, automobile, and/or effects at any time such requests are made by the Probation Officer, and consent to the use of anything seized as evidence in Court proceedings."⁵⁷ Barnett's lawyer acknowledged that Barnett bargained

⁵² *Id.* at 691. This case was before the Seventh Circuit on appeal from a decision by the S.D. of Illinois District Court to deny the motion to quash evidence because the lower court held that Barnett's consent to suspicionless searches as part of his probationary condition provided justification for the search. *United States v. Barnett*, No. 03-CR-30170, 2004 WL 391830, at *1 (S.D. Ill. Feb. 27, 2004).

⁵³ *Barnett*, 415 F.3d at 691.

⁵⁴ *Id.* at 692.

⁵⁵ *Id.* at 691.

⁵⁶ *Id.* The difference between intensive probation as opposed to regular probation is the number of conditions that an individual is required to subject himself as a prerequisite of being granted the probationary sentence.

⁵⁷ *Id.*

for these terms so that he could avoid a prison sentence.⁵⁸ Soon thereafter, police conducted a suspicionless search of Barnett's apartment and discovered a firearm in violation of the terms of his probation.⁵⁹

B. Seventh Circuit's Opinion

The Seventh Circuit held that a suspicionless searches of a probationer is permissible when the probationer agrees to these searches as a term of his probation based upon the intersection of both consent and plea bargain law.⁶⁰ First, the court looked to normal consent analysis and acknowledged that an individual may waive their constitutional rights if the waiver is both knowing and intelligent.⁶¹ Second, the court compared the probationary condition of a plea bargain to a contractual agreement.⁶² In either case, the court noted that Barnett was given the choice of prison or probation and voluntarily accepted the consequences of that decision.⁶³

Consent is an exception to the warrant requirement.⁶⁴ The Seventh Circuit reasoned that there was nothing unusual about a person consenting to a search and relinquishing Fourth Amendment rights when they believe they will be better off waiving the right than by standing on it.⁶⁵ Of course, probation, which subjects individuals to only occasional suspicionless searches, is less invasive than prison, which does not provide even a modicum of Fourth Amendment protection.⁶⁶ Expanding on this line of reasoning, Judge Posner opined that a bargained for probation sentence is the equivalent of a plea

⁵⁸ *Id.* at 691-92.

⁵⁹ *Id.* at 691.

⁶⁰ *Id.* at 692.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 691-92.

⁶⁴ *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

⁶⁵ *Barnett*, 415 F.3d at 692.

⁶⁶ *Id.*

bargain.⁶⁷ He noted that a plea bargain is a form of contract and is thus enforceable and presumed to benefit both parties, though one party may give up constitutional rights.⁶⁸ Accordingly, Barnett gave up very little considering the alternative of prison that loomed ahead.⁶⁹

Barnett raised two arguments against validating the suspicionless search waiver upon the consent approach.⁷⁰ Barnett argued that the blanket waiver of Fourth Amendment rights invites officers to abuse this privilege and conduct arbitrary, capricious or harassing searches.⁷¹ In addition, Barnett argued that the contract was indefinite⁷² because the waiver he signed subjected him to suspicionless searches, but the police manual required officers to have reasonable suspicion before conducting a search of a probationer's home.⁷³ This, Barnett argued, created a discrepancy in the terms of the agreed order, which invalidated the contract.⁷⁴ The Seventh Circuit rejected both arguments.⁷⁵

First, the Seventh Circuit reasoned that interpreting the contract as an invitation for harassment and improper behavior was inappropriate because if two interpretations of a contract are possible, and one interpretation would make the contract unenforceable while the other term would be enforceable, then the contract is interpreted with the

⁶⁷ *Id.* Note that there is a discrepancy as to whether this was an actual plea bargain agreement. The district court described the probationary condition waiver a bargain between the people and the State because the judge could have sentenced him to prison and Barnett was not involuntarily placed on probation since he could have refused the condition and went to jail. *United States v. Barnett*, 03-CR-30170, 2004 WL 391830, at *2 (S.D. Ill. Feb. 27, 2004).

⁶⁸ *Barnett*, 415 F.3d at 692.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² The bargaining process requires that the parties assent to the terms and that the agreement is definite. Definiteness protects the promisee's expectation interest. E. Allen Farnsworth, *Contracts*, 110 (3d ed. Aspen Publishers, Inc.) (1999)

⁷³ *Barnett*, 415 F.3d at 692.

⁷⁴ *Id.*

⁷⁵ *Id.* at 693.

term that is enforceable.⁷⁶ Second, it reasoned that the indefinite argument must fail because the remedy for an indefinite contract is rescission, which places both parties in the position they would have been in prior to the contract.⁷⁷ Under the rescission theory, Barnett's position prior to the probation contract was a prison sentence and Barnett did not want to serve a prison sentence and so withdrew this argument.⁷⁸ After dismissing Barnett's arguments, the Seventh Circuit queried no further about whether the imposition of a suspicionless search condition should be upheld by the constitutional approach to a probationer's Fourth Amendment rights, unlike the Court's analysis in *Griffin* and *Knights*.⁷⁹

III. JUSTIFYING THE SUSPICIONLESS SEARCH UPON CONSENT

The Seventh Circuit erroneously equates the consent given by a probationer to the consent given by a free individual. It fails to account for a significant difference, namely, that the free individual retains a meaningful choice to decline to consent to the search, while the probationer is subject to the search regardless of his supposed consent. In part, the *Barnett* court upheld the suspicionless search because it reasoned that consent is an exception to the Fourth Amendment requirement of reasonableness.⁸⁰ The two cases cited most often in support of the Seventh Circuit's view of consent, *Schneekloth v. Bustamonte*⁸¹ and *Zap v. United States*,⁸² evince an important distinction between consent given by a free individual and consent that is given in the context of a prerequisite of probation. Failure to account for this difference undermines the Seventh Circuit's decision

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *See id.*

⁸⁰ *Id.* at 692.

⁸¹ 412 U.S. 218 (1973).

⁸² 328 U.S. 624 (1946).

to uphold the suspicionless search of a probationer based upon a consent approach.

In *Schneckloth*, the Court delineated the parameters of a Fourth Amendment consent case and determined that an individual need not be specifically advised of the right to decline an officer's request to search for the individual's consent to validate the search.⁸³ Although it was widely accepted that consent created an exception to the warrant requirement, the prosecutor had the burden of proving that the consent was freely and voluntarily given.⁸⁴ The narrow question before the Court was whether an individual could freely and voluntarily give consent if they were unaware of the ability to decline the officer's request to conduct the search.⁸⁵ "Voluntariness is a question of fact to be determined from all the circumstances;"⁸⁶ knowledge of a right to refuse is only one factor to be taken into account in that determination.⁸⁷

The Court created a narrow holding when it proclaimed that the consent must be both voluntary and given without coercion and only applies when the subject of the search is not in-custody.⁸⁸ For example, if police officers were to come to someone's door and claim to have a warrant, then the officer in effect announces "that the occupant has no right to consent or to resist the search . . . the situation is instinct with coercion . . . where there is coercion there cannot be consent."⁸⁹ Finally, the Court reasoned that although consent is considered a waiver of Fourth Amendment rights, waiver is really a "standard enunciated. . . in the context of the safeguards of a fair

⁸³ 412 U.S. at 249.

⁸⁴ *Id.* at 219.

⁸⁵ *Id.* at 222.

⁸⁶ *Id.* at 226.

⁸⁷ *Id.* at 229. Other factors may include age, education, length of detention, prolonged nature of the questioning, and the physical punishment inflicted such as the deprivation of food or sleep.

⁸⁸ *Id.* at 249. The Court declined to determine the standard of consent for one who was already in custody, but recognized that other courts are particularly sensitive to the heightened possibility of coercion in this context. *Id.* at 240 n. 29.

⁸⁹ *Id.* at 234.

criminal trial.”⁹⁰ Thus, there is a difference between waiver and consent and the degree of voluntariness needed for each to be constitutionally permissible.⁹¹

Proponents of the consent theory also use *Zap v. United States* to support their contention that a suspicionless search may be bargained for and thus upheld upon the doctrine of consent.⁹² In *Zap*, the petitioner had entered into a contract with the Navy Department in which he was to conduct experimental work on airplane wings.⁹³ The contract provided that all accounts and records of the petitioner would be made available to the government at all times.⁹⁴ The government conducted a search pursuant to this term of the contract and discovered that the petitioner had committed fraud and overcharged for various fees assessed to the Navy.⁹⁵ The Court upheld the suspicionless search conducted pursuant to the terms of the contract reasoning that “to obtain the government’s business [the petitioner] specifically agreed to permit inspection of his accounts and records,” and thus he voluntarily waived his right to privacy protected by the Fourth Amendment.⁹⁶

In both *Schneckloth* and *Zap* the petitioner was free to walk away and refuse to consent to the search.⁹⁷ It is axiomatic that a voluntary choice assumes the ability to decline.⁹⁸ However, in the case of a probationer like Barnett, the probationer is not free to walk away from a plea bargain as the petitioners were free to walk away from consenting to a search in *Schneckloth* and *Zap*.⁹⁹ The Seventh Circuit

⁹⁰ *Id.* at 236.

⁹¹ *Id.* at 238.

⁹² 328 U.S. 624 (1946).

⁹³ *Id.* at 626.

⁹⁴ *Id.* at 627.

⁹⁵ *Id.*

⁹⁶ *Id.* at 628.

⁹⁷ *See Schneckloth*, 412 U.S. at 220; *Zap*, 328 U.S. at 327.

⁹⁸ *See United States v. Matlock*, 415 U.S. 164, 169 (1974).

⁹⁹ *See Barnett*, 415 F.3d at 692. Had Barnett walked away from the plea bargain terms he would have been subject to the same searches while in prison. *See generally Hudson v. Palmer*, 468 U.S. 517 (1984).

failed to recognize this important point. Thus, “to speak of consent in [the context of a probationary waiver] is to resort to a manifest fiction, for the probationer who purportedly waives his rights by accepting a condition [he] has little genuine opportunity to refuse.”¹⁰⁰ Barnett could not voluntarily consent to suspicionless searches because if he refused to sign the probationary waiver, he would be placed in prison where he would still be subject to suspicionless searches.¹⁰¹ Accordingly, the consent doctrine should not justify the suspicionless search of a probationer.

Moreover, public policy cautions against using the consent approach to justify the infringement of a probationer’s constitutional rights because it could result in a slippery slope of unfettered prosecutorial discretion. It is easily imagined that the consent theory could justify a probationary condition that restricted travel, but could this not, taken to its logical, though extreme, conclusion, justify the restriction of a probationer’s movement to a 4x4 square, permit the restriction of speech during certain hours, or allow the conduction of cavity searches without cause without any indication that these conditions are in fact necessary for the probationer’s rehabilitation or for public safety?

Perhaps these conditions sound outlandish and that no one would consent to such probationary terms. But, are there not thoroughly invasive searches conducted in prison, a threat of gang rape, murder, and possible solitary confinement such that an individual faced with these conditions in prison might voluntarily consent to the probationary conditions to be carried out in the privacy of his own home?¹⁰² And if probation benefits the probationer, and is given in return for this consent to these conditions, then under the Seventh Circuit’s reasoning the probationary terms would be permissible.

¹⁰⁰ Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* 440-41 (4th ed. 2004).

¹⁰¹ See *Hudson v. Palmer*, 468 U. S. 517 (1984) (holding that prisoners have no Fourth Amendment protection and thus may be subject to suspicionless searches).

¹⁰² See generally http://www.legalaffairs.org/issues/March-April-2004/feature_brook_marapr04.msp; <http://www.geocities.com/prisonmurder/>; <http://www.cbsnews.com/stories/2003/01/29/60II/main538407.shtml>

Requiring the court to conduct a formal Fourth Amendment analysis and determine the reasonableness of the search condition before conditioning probation upon the search requirement, prevents prosecutorial abuse that might otherwise be upheld under the consent approach. Thus, the court should not be allowed to require the prospective probationer to consent to unreasonable probationary terms.¹⁰³ This scenario demonstrates an improper “hooking of the crook” by providing no real choice between the constitutional infringements outside of the location where the infringement might occur, yet justifying the infringement upon meaningful consent. The Seventh Circuit’s failure to adequately account for this distinguishing fact, inherent in any probationary consent, undermines the analogy between a normal consent case and probationary consent. However, the Seventh Circuit did not solely rely on the probationary condition as a straightforward consent case, but also argued that consent of a probationary condition as part of a plea bargain, justified the condition.¹⁰⁴

IV. THE PROBATIONARY CONDITION AS A PLEA BARGAIN

The Seventh Circuit improperly implied that a probationer’s consent to the terms of his probation is the equivalent of a plea bargain. But even if the probation in *Barnett* was part of a plea bargain agreement, the court should still have been required to demonstrate that the condition of suspicionless searches was reasonably related and served the purposes of probation. “A plea bargain is a negotiated agreement between the defense and the prosecution in a criminal case. Typically the defendant agrees to plead guilty to a specified charge in exchange for an oral promise of a lower

¹⁰³ The reasonableness of the search must be determined by conducting a formal Fourth Amendment analysis and balancing the interest of the state in conducting the search against the interest of the probationer’s reasonable expectation of privacy. *See* Part I.

¹⁰⁴ *United States v. Barnett*, 415 F.3d 690, 691 (2005).

sentence.”¹⁰⁵ Plea bargains are deemed to be valid contractual agreements that benefit both sides.¹⁰⁶ As such, an individual who is party to an improper plea agreement is entitled to all of the remedies associated with a contract in addition to other protections that ensure fairness in criminal proceedings.¹⁰⁷

Individuals often waive their constitutional rights within a plea bargain agreement, but the waivers of these rights are generally related to the current criminal trial.¹⁰⁸ Recall that a plea bargain is an agreement between the prosecution and the defendant.¹⁰⁹ Thus, the prosecution often requests waivers that assist them at trial and makes trying the case more cost and time efficient.¹¹⁰ For example, a guilty plea sometimes involves relinquishing certain constitutional rights, such as the right against self-incrimination, right to a trial by a jury, and right to confront accusers.¹¹¹ But, ordinarily, such plea bargain waivers may not require waiver of other rights such as protection of double jeopardy, right to challenge the sentence imposed, and right to challenge the Defendant’s competency to stand trial.¹¹² Finally, for a waiver to be upheld, unlike consent, the prosecution is required to inform the individual of his constitutional right and the right to refuse

¹⁰⁵ The Lectric Law Library, available at <http://www.lectlaw.com/def2/p053.htm> (last visited on November 29, 2006).

¹⁰⁶ *Barnett*, 415 F.3d at 692; *United States v. Rubbo*, 396 F.3d 1330, 1334 (11th Cir. 2005);

¹⁰⁷ *United States v. Cook*, 406 F.3d 485, 487-88 (2005).

¹⁰⁸ *See id.*

¹⁰⁹ *See id.* at 486.

¹¹⁰ *See generally* *Liberetti v. United States*, 516 U.S. 29, 33 (1995) (where the defendant plead guilty, which he acknowledged waived other constitutional rights against self-incrimination and the right to a jury); *Rubbo*, 396 F.3d at 1332 (where the Defendant may agree to cooperate, plead guilty, and waive rights to appeal); *United States v. McKinney*, 406 F.3d 744, 745 (5th Cir. 2005) (where the Defendant agreed to cooperate and help the prosecution secure the convictions of other individuals involved in the drug distribution scheme).

¹¹¹ Bennett L. Gershman, *Prosecutorial Misconduct*, Chapter 7, misconduct in plea bargaining process.

¹¹² *Id.*

the plea bargain.¹¹³ Thus many waivers declare the individual's constitutional rights and then explicitly inform the individual that by signing the waiver he forfeits his rights.¹¹⁴

Barnett's probationary condition that waived all of his Fourth Amendment protection raises three questions. First, was Barnett's probationary waiver in fact a plea bargain or was it a normal probationary condition that was dubbed a plea bargain? Second, did the plea bargain terms conform to the purposes and spirit of probation and should that matter? And third, given that a plea bargain normally assists the prosecution at the current trial, should a plea bargain that waives constitutional rights, require infringement of those rights in subsequent trials?

The language used by the *Barnett* court in the United States District Court opinion creates an inference that Barnett's probation was not in fact part of the terms of a plea bargain, but rather normal conditions consented to by a prospective probationer. This inference is supported by the fact that the district court found that the consent doctrine should apply and not the doctrine of plea bargaining.¹¹⁵ Although it is true that Barnett's lawyer conceded that Barnett had signed and consented to the conditions of intensive probation supervision and that this consent constituted a *bargain* between Barnett and the People of the State of Illinois,¹¹⁶ the government defended the search on the basis of consent and not on the basis of enforcing the terms of the plea bargain.¹¹⁷ Further, the court described this *bargain* not as an agreement in which Barnett consented to waive his rights at trial for a reduced sentence, but as a normal consent to probation where the "condition was one among many accepted in the place of going to prison."¹¹⁸ The term bargain was used because the court stated, "what is not present in this case is a defendant who was

¹¹³ *Schneekloth v. Bustamonte*, 412 U.S. 218, 235 (1973).

¹¹⁴ *See id.* at 236.

¹¹⁵ *United States v. Barnett*, 03-CR-30170, 2004 WL 391830, at *1, (S.D. Ill. Feb 27, 2004).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at *2.

¹¹⁸ *Id.* at *3.

involuntarily placed on probation . . . and who has no right to refuse the conditions.”¹¹⁹ This language creates an inference that the bargain was merely to stay out of prison and not a term of in a comprehensive plea bargain agreement.

Normally, a prosecutor enters into a plea bargain agreement before the suspect is convicted and the suspect pleads guilty as part of the plea bargain in return for the prosecutor’s recommendation of a reduced sentence.¹²⁰ Though one may easily recognize that the prosecutor may well wield more bargaining power, at least there is the notion that the prosecutor will not be overly greedy in their offered terms of the plea bargain because to do so would jeopardize their ability to make a deal that is both cost and time efficient.¹²¹ This is not the case if the defendant is already found guilty and the risks of trial have passed.¹²² Post conviction, the prosecutor has all of the cards and can condition a reduced sentence on any condition he so desires.¹²³ In this instance the plea bargain analysis should not apply.

But, even if Barnett’s condition was in fact part of a broader plea bargaining scheme, should not the probationary condition comport with the policy and purpose behind probation? Probation is an alternative to incarceration and may serve as in independent sentence if it is fashioned to fully meet the statutory purposes of sentencing, “including respect for the law, providing just punishment for the offense, achieving general deterrence, and protecting the public from further crimes by the defendant.”¹²⁴ Further, the court may impose conditions of probation only to the extent that those conditions are both reasonably related to the offense or history of the defendant and

¹¹⁹ *Id.*

¹²⁰ Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YLJ 1909 (1992).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 1918; *see also* Part III *supra*.

¹²⁴ Sentencing Guidelines, § 5B1.1, November 1, 2006.

the conditions involve only those deprivations of liberty or property as are reasonably necessary for the purpose of sentencing.¹²⁵

The language used by the sentencing guidelines regarding probation is remarkably close to the analysis conducted in a typical constitutional approach, namely, a determination of whether the search is reasonable based upon the government's interests in ensuring the rehabilitation of the probationer and preventing recidivism is balanced against the privacy expectations of the probationer.¹²⁶ Although it is clear that a probationary condition that requires submission to searches predicated upon reasonable suspicion are appropriate both because it serves the policy and purpose of the probationary statute and is reasonable under the Fourth Amendment, there is no indication that a suspicionless search standard is equally appropriate because the Seventh Circuit's opinion failed to conduct a Fourth Amendment analysis and neglected to point to any proof in the record that such a condition was reasonably necessary and conformed to the policies of the probationary sentence.¹²⁷

In this case, Barnett was charged with destroying state property and running from police.¹²⁸ Assuming we are concerned that this individual has a higher penchant than the normal citizen to commit this type of crime based on past performance, is a subsequent suspicionless search of Barnett's house or his person likely to stop a recurrence of this type of crime? Arguably it does not. Nor is it likely that the police will catch Barnett for recommitting property damage by subjecting him to suspicionless searches. Thus, the government should not justify search conditions unrelated to the probationary policy simply because it attaches such a condition to a plea bargain scheme.

Finally, the waiver required Barnett to both submit to suspicionless searches and to permit the use of any evidence discovered during the search in both a probation revocation hearing

¹²⁵ *Id.* at § 5B1.3; 18 U.S.C. § 3553

¹²⁶ *See* United States v. Knights, 534 U.S. 112, 118 (2001).

¹²⁷ *See* United States v. Barnett, 415 F.3d 690, 691 (2005).

¹²⁸ *Id.*

and a subsequent criminal trial.¹²⁹ This issue was not raised by Barnett's counsel or by the court; however, this condition should be deemed impermissible because the United States Supreme Court has justified removing normal Fourth Amendment protection simply because of the unique situation of a probationer and the atmosphere of a probation revocation hearing.¹³⁰ Normal exclusionary rules and careful assessment of Fourth Amendment propriety do not apply in a probation revocation hearing because it is not deemed an adversarial process.¹³¹ Although the Court in *United States v. Knights* permitted evidence discovered in a search into a subsequent trial, this was only after determining the search did *not* violate the Fourth Amendment thus the exclusionary rule would not apply.¹³² Here, not only during an adversarial process did the Seventh Circuit justify the removal of all Fourth Amendment protection, but also condoned the expansion of the primary place in which these protections are most sacrosanct by allowing evidence to be submitted at a subsequent criminal trial.¹³³

Justifying the complete removal of Fourth Amendment protection as part of a plea bargaining process, a process where constitutional rights are dependent upon a kind of contract in which one side has all of the bargaining power,¹³⁴ should be narrowly construed and required to comport with the constitutional guidelines of those rights that the bargain purports to limit. Although constitutional rights may be waived within the plea bargain process, these concessions are not beyond judicial review and may be overturned if the agreement constitutes an unconstitutional condition.¹³⁵ The Supreme Court has consistently refused to justify a search of a probationer or parolee

¹²⁹ *Barnett*, 415 F.3d at 691.

¹³⁰ *Penn. Bd. of Prob. & Parole v. Scott*, 534 U.S. 357, 364 (1998).

¹³¹ *Id.* at 365.

¹³² 534 U.S. 112, 122 (2001).

¹³³ See more about this in *Scott*, 524 U.S. 357.

¹³⁴ *People v. Hernandez*, 229 Cal. App. 2d 143 (1964).

¹³⁵ See *Minnesota v. Murphy*, 465 U.S. 420, 438 (1984).

upon the consent/contract approach¹³⁶ and it is arguably because such a condition would in fact create an unconstitutional condition.

V. DOES THE FOURTH AMENDMENT WAIVER CONSTITUTE AN UNCONSTITUTIONAL CONDITION?

The doctrine of unconstitutional conditions may invalidate a plea bargain that conditions probation upon a suspicionless search. The doctrine of unconstitutional conditions precludes the government from conditioning discretionary privileges upon an individual's waiver of a constitutional right in certain circumstances.¹³⁷ Thus, even if the probationer consents to a complete waiver of his Fourth Amendment rights as a condition of bargained-for-probation, the search condition may be nonetheless unlawful under this doctrine.¹³⁸

The Supreme Court's decision in *Minnesota v. Murphy* supports the contention that the government may not condition probation upon an individual's waiver of constitutional rights in all circumstances.¹³⁹ In *Murphy*, the defendant was twice questioned about the murder and rape of a teenage girl, but he was never charged with the crime.¹⁴⁰ On an unrelated incident, Murphy pled guilty to a reduced charge of false imprisonment for which he was sentenced to a suspended prison term of sixteen months and three years of probation.¹⁴¹ The probationary terms required Murphy to "participate in a treatment program for sexual offenders . . . report to his probation officer as directed, and be truthful with the probation officer 'in all matters.'"¹⁴² During the course of treatment, Murphy admitted to his counselor that he had

¹³⁶ *Samson v. California*, 126 S.Ct. 2193, 2199 n.3 (2006); *United States v. Knights*, 534 U.S. 112, 118 (2001).

¹³⁷ *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994).

¹³⁸ *See Minnesota v. Murphy*, 465 U.S. 420, 438 (1984).

¹³⁹ *Id.* at 437.

¹⁴⁰ *Id.* at 422.

¹⁴¹ *Id.*

¹⁴² *Id.*

committed a rape and murder.¹⁴³ The counselor relayed this information to Murphy's probation officer, who then set up a meeting during which the probation officer intended to ask Murphy questions regarding the rape and murder.¹⁴⁴ Murphy was compelled to truthfully answer the probation officer's questions as a condition of his probation.¹⁴⁵ He asserted that the probationary condition that required him to answer questions truthfully was in violation of his Fifth Amendment rights.¹⁴⁶

The Court did not agree with Murphy's assessment of the probationary condition.¹⁴⁷ The Court reasoned that a penalty case is a situation where the state not only compels an individual to testify, but also induces their waiver of Fifth Amendment rights by "threatening to impose economic or other sanctions 'capable of forcing the self-incrimination which the Amendment forbids.'"¹⁴⁸ Thus, a state may not "expressly or by implication, assert[] that invocation of the privilege would lead to revocation of probation."¹⁴⁹ The Court reasoned that Murphy's probationary conditions prohibited only false statements, but did not restrict his freedom to answer particular questions and it did not require that he waive his future Fifth Amendment rights.¹⁵⁰

Similarly, in *National Treasury Employees Union v. Von Raab*,¹⁵¹ the Court limited the government's ability to condition the receipt of a benefit upon the waiver of Fourth Amendment rights. In *Von Raab*, the government restricted certain jobs with the U.S. customs service department to those individuals who consented to submit to

¹⁴³ *Id.* at 423.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 424.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 427.

¹⁴⁸ *Id.* at 434.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 436.

¹⁵¹ 489 U.S. 656 (1989).

suspicionless drug-testing.¹⁵² Specifically, individuals who handled guns, drugs, or “classified material” were required to submit to such searches as a condition of employment.¹⁵³ The Court did not examine whether employees legally consented to such searches by signing valid waivers nor did it reason that submission to such searches was bargained for because the employee had access to better job positions.¹⁵⁴ The Court granted certiorari to determine whether the government could condition the benefit of employment upon a prospective employee’s waiver of their Fourth Amendment rights.¹⁵⁵ The Court dealt with this question by employing the constitutional approach.¹⁵⁶

Under the constitutional approach, the Court determines the reasonableness of the search condition by balancing the individual’s expectation of privacy against the government’s interest in conducting the search without individualized suspicion.¹⁵⁷ The Court acknowledged that the government had a substantial interest to ensure that employees who handled guns and drugs were not under the influence and were trustworthy and dependable.¹⁵⁸ Although individuals have a high expectation of privacy as relates to body fluid taken for drug testing, the Court held that the government interest outweighed the individual’s privacy expectation.¹⁵⁹ Thus, the government may condition employment on an employee’s submission to drug testing where such employee may handle drugs or guns.¹⁶⁰ However, the Court declined to uphold the government’s drug testing

¹⁵² *Id.* at 661. Urine testing is a search, and thus must be examined under the Fourth Amendment test for to determine its reasonableness.

¹⁵³ *Id.* at 664.

¹⁵⁴ *Id.* at 660. Employees do not sign waivers, but were sent a later stating that if they wished to pursue the job they must submit to these searches and that a drug screening center would contact them to make arrangements.

¹⁵⁵ *Id.* at 665.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 665-66.

¹⁵⁸ *Id.* at 670.

¹⁵⁹ *Id.* at 672.

¹⁶⁰ *Id.* at 679.

of employees who handle classified material because the government failed to demonstrate a serious need to justify the invasion of Fourth Amendment protection.¹⁶¹

In both *Murphy* and *Von Raab*, the Court determined the validity of certain conditions that the government placed upon a benefit. Although in each instance it was possible to assess the validity of the required condition by employing the consent approach and examining the contractual agreement between the parties, instead, the Court examined the condition using a constitutional approach.¹⁶² Thus the unconstitutional conditions doctrine applies in situations where the government “seeks to achieve its desired result by obtaining bargained-for consent.”¹⁶³ And the government may only condition a grant or deny a benefit where the condition is constitutionally permissible, which requires the court to analyze the conditionality of the condition.¹⁶⁴

A search condition may be constitutionally permissible if it is reasonable under the Fourth Amendment.¹⁶⁵ “Where a condition of probation requires a waiver of precious constitutional rights, the condition must be narrowly drawn; to the extent that it is overbroad it is *not* reasonably related to the compelling state interest in reformation and rehabilitation and is an unconstitutional restriction on the exercise of the probationer’s privacy.”¹⁶⁶

The Seventh Circuit failed to discuss the unconstitutional conditions doctrine in *Barnett*, likely because it had already dismissed this notion and the language of *Minnesota v. Murphy* in an earlier

¹⁶¹ *Id.* at 678.

¹⁶² *See, e.g., id.* at 665-66. Similarly, this is the same approach the Court employed in *United States v. Knights* where the Court was required to determine the validity of the waiver of Fourth Amendment rights as a prerequisite of probation. 534 U.S. 112, 118 (2001).

¹⁶³ *Minnesota v. Murphy*, 465 U.S. 420, 434 (1984).

¹⁶⁴ *Id.*

¹⁶⁵ *United States v. Knights*, 534 U.S. 112, 118 (2001).

¹⁶⁶ Wayne R. LaFave, *Search and Seizure: A treatise on the Fourth Amendment*, 5 SearchSrz § 10.10 (2007).

Judge Posner opinion, *United States v. Cranley*.¹⁶⁷ In *Cranley*, the court allowed Wisconsin to condition probation upon a probationer's waiver of Fifth Amendment rights as a prerequisite to probation because it reasoned that "Wisconsin need not provide probation as a possible sentencing option."¹⁶⁸ The court then dismissed the unconstitutional conditions doctrine because while it agreed that Wisconsin could not condition probation upon being a non-Jew or being white, it could condition probation upon the requirement that the convict provide a "full accounting of any criminal behavior in which [the convict] engaged."¹⁶⁹ The court acknowledged that this condition would conflict with the language of the *Murphy* Court, but reasoned that in light of cases like *Griffin v. Wisconsin* and *United States v. Knights*, the trend had been to enforce terms associated with a conditional release.¹⁷⁰ Unfortunately, the Seventh Circuit failed to acknowledge that the probationary terms in those cases were only enforced because the Court deemed them reasonable in light of Fourth Amendment analysis.¹⁷¹ Therefore, the Seventh Circuit should have conducted a Fourth Amendment analysis to decide whether the suspicionless search of a probationer is reasonable before permitting the government to condition probation upon the search. The Seventh Circuit's shortcut of upholding this search condition upon the consent/contract approach is thus fatally flawed unless such conditions are permissible under the Fourth Amendment.

VI. FOURTH AMENDMENT ANALYSIS: SAMSON V. CALIFORNIA

When the Seventh Circuit decided *Barnett*, probationers were protected under the Fourth Amendment by the reasonable suspicion standard, as articulated by the Supreme Court in *United States v.*

¹⁶⁷ 350 F.3d 617, 620 (7th Cir. 2003).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 621.

¹⁷¹ See *United States v. Knights*, 534 U.S. 112, 121 (2001); *Griffin v. Wisconsin*, 483 U.S. 868, 880 (1984).

Knights.¹⁷² Subsequently, in the summer of 2006, the Supreme Court permitted a suspicionless search of a parolee after determining that the search was reasonable under the Fourth Amendment in *Samson v. California*.¹⁷³ Thus, it is necessary to determine whether the Seventh Circuit's decision to uphold the suspicionless search of a probationer under the consent/contract approach was a harmless error in light of the more recent Supreme Court case. The Seventh Circuit's decision to uphold the probationary condition upon consent may be permissible if that condition is reasonable under the Fourth Amendment, and thus an appropriate condition of a probationary plea bargain agreement.¹⁷⁴

The petitioner in *Samson* was a parolee who while walking down the street was approached by a police officer, who knew of Samson's parole status and believed that there was a warrant out for Samson's arrest.¹⁷⁵ Although the police officer soon learned that there was not an outstanding warrant against Samson, the officer conducted a search of Samson's person based solely on Samson's status as a parolee.¹⁷⁶ The Supreme Court granted certiorari on whether a suspicionless search of a parolee violated the Fourth Amendment.¹⁷⁷

The *Samson* Court conducted a Fourth Amendment analysis of the search and determined that a suspicionless search of a parolee is reasonable.¹⁷⁸ An individual's status determines their reasonable expectation of privacy.¹⁷⁹ The Court used the term "continuum" to explain the relationship between an individual's status and their reasonable expectation of privacy.¹⁸⁰ At the highest end of the continuum is a free citizen who is afforded the full protection of the

¹⁷² 534 U.S. 112, 122 (2001).

¹⁷³ 126 S.Ct. 2193, 2196 (2006).

¹⁷⁴ See generally *Minnesota v. Murphy*, 465 U.S. 420, 438 (1984).

¹⁷⁵ 126 S.Ct. at 2196.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 2196-97.

¹⁷⁹ *Id.* at 2197.

¹⁸⁰ *Id.* at 2198.

Fourth Amendment.¹⁸¹ At the lowest end of the continuum is a prisoner who has no expectation of privacy, and thus does not have any protection under the Fourth Amendment.¹⁸² The Court determined that a parolee has a lower expectation of privacy than a probationer because parole is in addition to a prison sentence and not in lieu of prison.¹⁸³ Thus, parolees are the second lowest on the continuum just above a prisoner.¹⁸⁴

Next, the Court examined the government's interest in supervising parolees: preventing recidivism and promoting parolee rehabilitation.¹⁸⁵ The government's interest in supervising parolees is "overwhelming" because "parolees are more likely to commit future criminal offenses."¹⁸⁶ The Court examined the empirical evidence put forth by the Criminal Justice center in California, which demonstrated that the recidivism rate of parolees was astronomical.¹⁸⁷ The Court then determined that California's ability to conduct a suspicionless search of a parolee serves its interest in reducing recidivism in a manner that aids rehabilitation and reintegration into society.¹⁸⁸ Moreover, the government's interest in conducting suspicionless searches is significantly high because parolees are released into society regardless of whether the parolee is able to reintegrate.¹⁸⁹ Thus, requiring officers to have reasonable suspicion before they conduct a search of a parolee would hinder law enforcement interest in both promoting rehabilitation and preventing recidivism when these

¹⁸¹ *Id.*

¹⁸² *Id.* at 2198 n.2 (citing *Hudson v. Palmer*, 468 U. S. 517 (1984)).

¹⁸³ *Samson*, 126 S.Ct. at 2198 (this is important because a prisoner has no expectation of privacy and thus a parolee would have been accustomed to police searches); see *Hudson*, 468 U.S. 517.

¹⁸⁴ *Samson*, 126 S.Ct. at 2198.

¹⁸⁵ *Id.* at 2200.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* (noting that 70% of the paroled felons re-offend within 18 months).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* Prisoners are released after they complete the days of their sentence which is then reduced by good time credits earned and without regard to whether that individual is indeed ready for parole.

individuals have not demonstrated a capacity to avoid criminal conduct.¹⁹⁰ Accordingly, the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee because the balance between the privacy interest of the parolee and the government's interests make this search reasonable.¹⁹¹

Although parolees are subject to suspicionless searches, a similar search standard for a probationer may violate the Fourth Amendment for two reasons. First, probationers have a greater expectation of privacy than prisoners and parolees, and therefore should not be similarly subject to suspicionless searches.¹⁹² Second, a suspicionless search standard would hinder law enforcement efforts.¹⁹³ Thus both sides of the balancing test are impacted and demonstrate that the suspicionless search of a probationer is not justified under the Fourth Amendment.

The probationer should maintain a degree of Fourth Amendment protection.¹⁹⁴ Parolees have a lesser expectation of privacy than probationers because parole is more akin to imprisonment than probation is to imprisonment.¹⁹⁵ The probationer is above the parolee on the continuum and below free citizens on the continuum.¹⁹⁶ Accordingly, probationers should be afforded a higher degree of Fourth Amendment protection than parolees, but less protection than free citizens.¹⁹⁷ The reasonable suspicion standard provides the appropriate degree of protection.¹⁹⁸

Not only does the probationer's expectation of privacy weigh against a suspicionless search, but the government's interest in conducting the search is less imperative in the case of a probationer

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 2202.

¹⁹² *See id.* at 2198.

¹⁹³ *Id.* at 2199.

¹⁹⁴ *See generally id.* at 2198.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *See generally id.*

¹⁹⁸ *United States v. Knights*, 534 U.S. 112, 122 (2001).

than in the case of a parolee. The parole system at issue in *Samson* granted prisoners parole irrespective of whether the inmate was deemed capable of reintegrating into society.¹⁹⁹ It follows that the government would be significantly concerned about preventing anticipated future crime of those individuals who have not fully reformed.²⁰⁰ In contrast, probation is only granted when the sentencing judge believes that the sentence will be conducive to the convict's rehabilitation and the convict does not pose a serious risk of recidivism that would caution against probation.²⁰¹ Thus, the Seventh Circuit should have held that police officers must have a reasonable suspicion before searching a probationer's apartment.

VII. RESCISSION OR REFORMATION

The proper remedy of an improperly imposed criminal sentence should be either reformation or a new trial.²⁰² Yet, the Seventh Circuit opined that if the plea bargain's suspicionless search condition was improper then the proper remedy was rescission, which would indicate that Barnett would be sentenced to jail.²⁰³ The court indicted this was the proper remedy because it operated under the mistaken assumption that the only feasible defense against enforcing the terms of Barnett's plea bargain was the claim that its terms were indefinite.²⁰⁴ However, in light of the foregoing analysis, if the probationary terms were invalid, not only because they were indefinite but also unconstitutional, then the proper remedy should be reformation of the sentence or a new trial.

Barnett defended the terms of his probationary conditions, which independently purported to justify a warrantless and unreasonable search of his person and property, on the basis that the

¹⁹⁹ *Samson*, 126 S.Ct. at 2200.

²⁰⁰ *Id.*

²⁰¹ Sentencing Guidelines, § 5B1.1 at 383 (November 1, 2006).

²⁰² *See generally* *Collins v. Youngblood*, 497 U.S. 37 (1990).

²⁰³ *United States v. Barnett*, 415 F.3d 690, 693 (2005).

²⁰⁴ *See id.* at 692.

plea agreement and the probation office policy guidelines could render the agreement void for indefiniteness because, he alleged, that the terms of the plea agreement and the probation office policy guidelines, which required officers to have reasonable suspicion before conducting the search, were in contradiction.²⁰⁵ Judge Posner, however, upheld the search condition reasoning that the condition was part of a plea bargain in which Barnett received a benefit of not going to jail and the state received the benefit of being able to keep a close watch over his activities and use any discovered evidence against Barnett in a subsequent trial.²⁰⁶ But, if the contract was unenforceable because it was indefinite then the parties would be returned to the positions they would have occupied had there been no contract.²⁰⁷

The doctrine of indefiniteness applies when the terms of a contract are not reasonably certain to create a basis for determining the existence of a breach or selecting an appropriate remedy.²⁰⁸ In such cases, the proper remedy is rescission.²⁰⁹ However, in addition to the indefiniteness argument, this condition may be challenged on the basis that the parties entered into the agreement on the mistaken belief that such a condition was constitutionally permissible. The proper review of a criminal sentence is to determine whether it is unreasonable.²¹⁰ Where a sentence is deemed improper and unreasonable then the proper remedy is to reform the verdict or the defendant may be entitled to a new trial.²¹¹ Moreover, neither party has a constitutional right to explicitly enforce the terms of a plea bargain agreement.²¹² Thus the recommended and negotiated sentence does not bind the court.²¹³

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 693.

²⁰⁸ See RESTATEMENT (SECOND) OF CONTRACTS § 33(2) (1981).

²⁰⁹ *United States v. Cook*, 406 F.3d 485, 488 (7th Cir. 2005).

²¹⁰ *United States v. Booker*, 543 U.S. 220, 261 (2005).

²¹¹ See generally *Collins v. Youngblood*, 497 U.S. 37 (1990).

²¹² *Marby v. Johnson*, 567 U.S. 504, 508 (1984).

²¹³ *Id.*

The sentencing court determined that Barnett demonstrated the ability to be placed on probation, and although the court permitted the probation with the condition of intensified monitoring, it is entirely possible and appropriate that Barnett should be re-sentenced and subject to monitoring by police under terms and conditions that are constitutionally permissible. Thus, reforming Barnett's probationary sentence to subject him to searches conducted with reasonable suspicion would be an appropriate remedy.²¹⁴

CONCLUSION

The Seventh Circuit's consent/contract approach to justifying the suspicionless search of a probationer improperly hooked the crook in *United States v. Barnett* when the court upheld the constitutionally questionable probationary condition of a suspicionless search upon the basis that a convict voluntarily consents to the condition to avoid a prison sentence. The court's three page decision created a loophole around constitutional analysis and is problematic both because it paves the way for prosecutorial misconduct and creates an unconstitutional condition, summarily dismissing the implication this decision will have on a probationer's constitutional rights.

As a consequence of the *Barnett* decision, the law regarding proper analysis of probationary conditions became unclear in the Seventh Circuit. Thus, without further direction from the Supreme Court, that the suspicionless search of a probationer is permissible within the bounds of Fourth Amendment protection, courts throughout the country will inevitably muddle the analysis of questionable probationary conditions instead of applying a straight forward constitutional approach and assessing the impact of the probationary condition on a probationer's constitutional rights.

²¹⁴ See generally *Youngblood*, 497 U.S. 37.