INSPECTION AND SEARCH AUTHORITY FOR PAROLE AND PROBATION OFFICERS

Probation and parole officers are "peace officers."[1] They are authorized to protect and uphold the law in the same capacity as full time "regular" police officers, though they are charged with the specific task of supervising convicted felons.[2] Police officers have authority to search a person's property pursuant to a valid search warrant.[3] Parole and probation officers have authority to search the property of the parolees/probationers they supervise, pursuant to valid search warrants.

When a parolee/probationer is subjected to a search that is not accompanied by a valid search warrant, is the evidence obtained from that search admissible against the parolee/probationer in either federal or state court?

Our research supports the conclusion that, under federal law, evidence obtained through a warrantless search by a parole/probation officer is admissible in parole/probation revocation hearings. However, under current Oregon law, evidence obtained through a warrantless search is not admissible for any purpose unless the search is consented to at the time the search is made or the searching officer has reasonable grounds to perform such a search.

This research project examined the restrictions and limitations imposed upon parole and probation officers with regard to their authority to conduct inspections, searches, and seizures as to parolees and probationers under their supervision. The project also considered the limitations imposed by the federal government pursuant to the Fourth Amendment of the United States Constitution, as well as the limitations imposed by the state of Oregon pursuant to Article I section 9 of the Oregon Constitution. It will illuminate the guidelines for acceptable search and seizure practices for Oregon parole/probation officers with regard to the parolees and probationers under their supervision.

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[1] O.R.S. § 137.620 and O.R.S. § 181.653.
[2] Id.
[3] O.R.S. § 133.575.

The Federal Position

The Fourth Amendment [4] was enacted primarily as a reaction to the evils associated with the use of the general warrant in England and the writs of assistance in the Colonies.[5] It was intended to protect the "sanctity of a man's home and the privacies of life."[6] The United States Supreme Court adopted the exclusionary rule to effectuate the rights guaranteed under the Fourth Amendment.[7] In Weeks v. United States, [8] the United States Supreme Court held that in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure.[9] This became known as the exclusionary rule. The Supreme Court expanded the scope of the exclusionary rule in Mapp v. Ohio [10] and held that the rule should also apply in state prosecutions.[11]

According to the United States Supreme Court and the majority of the federal circuit courts, the purpose of the federal exclusionary rule is not to redress the injury of the privacy of the search victim.[12] Rather, the exclusionary rule is aimed at deterring

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[4] Fourth Amendment to the United States Constitution which states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized

[5] Stone v. Powell, 428 U.S. 465, 482, (1976).
[6] Id. (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).
[7] Stone, 428 U.S. at 482. See also United States v. Calandra, 414 U.S. 338, 347 (1974).
[8] 232 U.S. 383 (1914).
[9] *See id.* at 397-98. An illegal search and seizure is one that occurs without probable cause or the proper issuance of a warrant. *See supra* note 1. As originally adopted in *Weeks*, the exclusionary rule applied only in federal prosecutions and the states could either accept or reject the rule. *See* Wolf v. Colorado, 338 U.S. 25 (1949). (holding that in a prosecution in a state court for a state crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure).
[10] 367 U.S. 643 (1961)
[11] *See id* at 654-55. The United States Supreme Court decided *Mapp* twelve years after *Wolf*, overruling the proposition that the exclusionary rule applies only in federal prosecutions. *See id. Mapp* made the exclusionary rule binding on the states in criminal prosecutions. *See id.* For a discussion of the exclusionary rule in general, *see* Potter Stewart, *The Road to Mapp v. Ohio: the Origins Development and Future of the Exclusionary Rule in Search and Seizure Cases*, 83 Colum L. Rev. 1365 (1983).
[12] Pennsylvania Board of Probation v. Scott, 524 U.S. 357 (1998), Scott v. Pennsylvania Board of Probation and Parole, 698 A.2d 32, 32 (Pa. 1997). [hereinafter Scott III] *See also* United States v. Armstrong, 187 F.3d 392, 394 (4th Cir. 1999), United States v. Montez, 952 F.2d 854, 859 (5th Cir. 1992). United States v Bazzano, 712 F.2d 826, 829 (3d Cir. 1982). United States v. Fredrickson, 581 F.2d 711, 713 (8th Cir. 1978), United States v. Farmer, 512 F.2d 160, 162-63 (6th Cir. 1975), United States v. Vandermark, 522 F.2d 1019, 1020 (9th Cir. 1975), United States v. Winsett, 518 F2d 51, 53-55, (9th Cir.

future unlawful police conduct. [13] Under the deterrence rationale, the exclusionary rule operates as a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than as a personal constitutional right of the aggrieved party.[14] As a result, the Fourth Amendment has never been interpreted to prohibit the introduction and use of illegally seized evidence in all proceedings or against all persons.[15] Instead, as with other remedial devices, the federal exclusionary rule has been restricted to those areas where its "remedial objectives are thought to be most efficaciously served."[16]

The majority of federal circuit courts and state courts addressed the issue of whether the exclusionary rule should apply in probation and or parole revocation proceedings prior to the decision in Pennsylvania Board of Probation v. Scott. [hereinafter Scott III][17] These courts determined that the purpose of the exclusionary rule is to serve as a deterrent device and that application of the exclusionary rule in probation or parole revocation proceedings would have only a minimal deterrent effect. [18] Consequently, they concluded the exclusionary rule should not apply in probation or parole revocation proceedings.[19]

1975), United States v. Brown, 488 F.2d 94,95 (5th Cir. 1973), United States v. Hill, 447 F.2d 817, 818-19 (7th Cir. 1971), United States ex rel Sperling v. Fitzpatrick, 426 F.2d 1161, 1163-64 (2d Cir. 1970), (all holding that the exclusionary rule should not apply in probation revocation hearings). *But see* United States v. Rea, 678 F.2d 382, 389-90 (2d Cir. 1982) United States v. Workman, 585 F.2d 1205, 1211(4th Cir. 1978) (holding that the exclusionary rule should apply in probation revocation hearings).

[13] *See Calandra*, 414 U.S. at 347-48; United States v. Leon, 468 U.S. 897, 916 (1984) (holding that the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates). *But see Mapp*, 367 U.S. at 659 (holding that the exclusion doctrine is an essential part of the right to privacy and needed to keep government from becoming lawbreakers); Elkins v United States, 364 U.S. 206, 222 (1960) (holding that the exclusionary rule works to secure judicial integrity).

[14] *See* United States v. Leon et al, 468 U.S. 897, 906 (1984) (quoting *Calandra*, 414 U.S. at 348; *Bazzano*, 712 F.2d at 832) (holding that the wrong condemned by the Fourth Amendment is fully accomplished by the unlawful search and seizure itself and the exclusionary rule was not designed to operate as a constitutional right of the aggrieved party).

[15] *See Leon*, 468 U.S. at 906. *See also Calandra*, 414 U.S. at 348.

[16] *Calandra*, 414 U.S. at 348. *See also* Arizona v. Evans, 514 U.S. 1, 11 (1995).

[17] *See supra* note 5 and accompanying text. *See also, e.g.*, State v. Sears, 553 P.2d 907, 913 (Alaska 1976); State v. Alfaro, 623 P.2d 8, 9 (Ariz. 1980); Payne v. Robinson, 541 A.2d 504, 507 (Conn. 1988), *cert. denied* 488 U.S. 898 (1988); Commonwealth v. Olsen, 541 N.E.2d 1003, 1006 (Mass. 1989) (all holding that, as a general rule, the exclusionary rule does not apply in a probation revocation hearing).

[18] *See supra* notes 11-13 and accompanying text.

[19] *See* State v. Turner, 891 P.2d 317, 320 (Kan. 1995) (discussing the holdings of the courts that have held the exclusionary rule should not apply in probation or parole revocation proceedings).

The Supreme Court did not conclude that evidence obtained through a parole/probation officers unlawful search was admissible in a separate criminal trial. Rather, the Court's determination that the exclusionary rule does not apply is limited to parole revocation hearings.[20] Stated another way, parolee/probationers are given the full protection of the Fourth Amendment with regard to criminal matters that are unrelated to their parole/probation. Practically speaking, there are no unrelated criminal matters because any criminal activity is considered a parole/probation violation.

In Scott III, the court considered the social costs of extending exclusionary rule to parolees' and probationers' revocation hearings and concluded these costs would be extremely high in light of the parolees/probationers' status as convicted felons. It recognized that, as convicted felons, they were more likely to commit crimes than an average citizen.[21] Additionally, the court determined that application of the exclusionary rule at parole revocation hearings would be inconsistent with the traditionally flexible, non-adversarial, administrative procedures of parole revocation.[22]

The court compared the relative high costs of applying the exclusionary rule to the benefits derived from the deterrent effect of the exclusionary rule and determined the deterrent quality would not outweigh the high social costs.[23] In reaching this conclusion the court recognized that, when searching a parolee/probationer's person or property, the officer is deterred by the exclusionary effect provided in criminal proceedings.[24] The officer would likely be searching for evidence of criminal conduct with an eye toward the introduction of the evidence at a criminal trial. The likelihood that illegally obtained evidence will be excluded from trial provides sufficient deterrence against Fourth Amendment violations.[25]

Stated succinctly, "the federal exclusionary rule does not bar the introduction at parole revocation hearings, of evidence seized in violation of parolee/probationers' Fourth

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[20] Scott III 524 U.S. at footnote 5.
[21] Scott III 524 U.S. at 357.
[22] Id. at 365
[23] Id at 367.
[24] Id.
[25] Id *See also* United States v. Janis, 428 U.S. at 448.

Amendment rights."[26] The exclusionary rule is a judicially created means of deterring illegal searches and seizures.[27] It is not a remedy for the individual whose Fourth Amendment rights are violated. [28] It does not proscribe the introduction of illegally seized evidence in all proceedings or against all persons, but applies only in contexts where its remedial objectives are thought most efficaciously served.[29] Moreover, because the rule is prudential rather than constitutionally mandated, it applies only where its deterrence benefits outweigh the substantial social costs inherent in precluding consideration of reliable, probative evidence.[30]

The Oregon Position

Whereas the federal government does not extend Fourth Amendment protection to those people who are currently on probation or parole, the state of Oregon, along with a few other states, does extend this protection through provisions found in their state constitutions.[31] The Oregon judiciary has repeatedly interpreted this section to apply to all persons, whether on parole or not.[32] In so doing Oregon, along with Washington and New Mexico, provide protection to parolees and probationers who are in violation of their probation and parole agreements.

In State ex rel. Juvenile Department of Multnomah County v. Rogers, [33] the Oregon Supreme Court held that when the government violates an individual's Article 1, Section 9 rights by conducting an unreasonable search and seizure in obtaining evidence, that person's state constitutional right to be secure against such an unlawful search or

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[26] Scott III 524 U.S. at 357.
[27] Id.
[28] Calandra, 414 U.S. at 348.
[29] Stone v. Powell, 428 U.S. 465, 486, (1976), *see also* Calandra at 348.
[30] Leon, 468 at 907
[31] Or. Const. Art. I, § 9.

No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized

[32] State v. Altman, 97 Ore. App. 462; 777 P.2d 969 (1989), State v. Culbertson, 29 Ore. App. 363; 563 P.2d 1224; (1977), State v. Gulley, 324 Ore. 57; 921 P.2d 396; (1996), State v. Guzman, 164 Ore. App. 90; 990 P.2d 370,(1999), State v. Meir, 145 Ore. App. 179; 929 P.2d 1052 (1999).
[33] Rogers, 314 Ore. 114; 836 P.2d 127, 129 (1992).

seizure must be protected through suppression of the evidence. [34] Thus, Oregon applies the exclusionary rule with regard to unwarranted searches conducted by parole/probation officers. Only Oregon, Washington, and New Mexico have provided this protection within their state constitutions.[35] All other states, along with most federal districts, limit the protection given to parolee/probationers to the Fourth Amendment.[36]

Oregon provides this additional protection by applying the same standard to convicted felons as it does to average citizens, with regard to protection from unwarranted search and seizures.[37] In Oregon, evidence obtained through an unwarranted search is admissible only if the search is performed with the consent of the party being searched, or the searching officer has reasonable grounds to believe that a search is warranted.[38]

An officer may be deemed to have reasonable grounds to search a person if the officer does so to protect himself or others, or if during the course of a lawful encounter the officer develops a reasonable suspicion, based upon specific and articulable facts, that a citizen might "pose an immediate threat of serious physical injury to the officer or to others then present."[39]

In State of Oregon v. Gilkey, the evidence obtained through a warrantless search of defendant's lip balm tube was deemed inadmissible because the officer had possession of the tube at the time of the search. The court reasoned, as long as the officer was in control of the tube, the tube could not reasonably pose a threat to the officer. Therefore, opening the opaque container was deemed inadmissible since there was no consent or reasonable suspicion to warrant searching the tube.[40]

Under the current interpretation of Oregon law the test for parolee/probationer officer searches is precisely the same. Parole/probation officers have no greater authority

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[34] Id. at 130

[35] Prokott, Daniel G., "Deterrence and the Preservation of Judicial Integrity: The Problems with the Decision in Pennsylvania Board of Probation and Parole v. Scott, and Why the Exclusionary Rule Should Apply in Probation and Parole Revocation Proceedings in Minnesota" 23 Hamline L. Rev. 249, 264.

[36] State v. Sears, 553 P.2d 907, 913 (Alaska 1976), State v. Alfaro, 623 P.2d 8, 9 (Ariz. 1980); Payne v. Robinson, 541 A.2d 504, 507 (Conn. 1988), *cert. denied* 488 U.S. 898 (1988); Commonwealth v. Olsen, 541 N.E.2d 1003, 1006 (Mass. 1989) (all holding that, as a general rule, the exclusionary rule does not apply in a probation revocation hearing).

[37] State v. Nelson, 103 Or. App. 299, 302, 796 P.2d 1250, 1252 (1990).

[38] State v. Gilkey, 172 Or. App. 95, ---P.2d---, 2001 WL 575595 Or. App. (2001)

[39] Id. (quoting - States v. Bates, 304 Or. 519, 524 747 P.2d. 991 (1987).)

[40] Gilkey, 172 Or. App. 95 (2001).

to monitor convicts in their charge than police officers have to monitor the conduct of the average citizen. "The general pattern of Oregon law is that a probationer is a free person possessed of all civil rights except those which are taken away from him for probationary purposes."[41]

In State of Oregon v. Brown, a parole officer observed a drug scale, baggies, bullets, and knives on a table during a routine visit to parolees home.[42] As a result of these observations, the parole officer had reasonable grounds to search the parolee's home.[43] During this search, the parolee asked if he could remove his pants. In the process of removing his pants he emptied his pockets, which contained several sets of car keys. Upon realizing that the car keys were in his pocket, parolee tried to hide one set of keys.[44] The parole officer took the keys forcibly and conducted a search of parolee's vehicle and found stolen items, drugs, and weapons.

On appeal the court determined that although the officer had reasonable grounds to search parolees house, the officer did not have reasonable grounds to search parolee's vehicle.[45] The court viewed the parolee's attempt to hide the keys as a simple assertion of his right to deny consent to the search.[46] Furthermore, the court ruled, a denial of consent does not provide reasonable grounds for an unwarranted search.[47] The evidence obtained through the unwarranted search of parolee's car was deemed inadmissible.[48]

The only justification beyond reasonable grounds for admitting evidence obtained in an unwarranted search is consent of the party being searched. As a condition of parole or probation in Oregon, a parolee/probationer must agree to "Permit the probation officer to visit the probationer or the probationer's residence or work site,"[49] In addition, the

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[41] State v. Guzman, 164 Ore. App. 90; 95, 990 P.2d 370, 373 (1999). "ORS 137.275 provides that a convict does not lose any of his civil liberties solely by virtue of conviction. Upon conviction, however, ORS 137.540 gives to the court responsibility and authority to restrict or take away a probationer's liberties by imposing conditions of probation.
[42] State of Oregon v. Brown, 110 Or. App. 604, 825 P.2d 282, (1992).
[43] Id. at 283.
[44] Id
[45] Id. at 284
[46] Id. at 285
[47] Id.
[48] Id.
[49] ORS § 137.540(1)(h) (1999). (1) The court may sentence the defendant to probation, which shall be subject to the following general conditions unless specifically deleted by the court. The probationer shall: (h) Permit the probation officer to visit the probationer or the probationer's residence or work site, and report as required and abide by the direction of the supervising officer.

statute also requires probationer/parolees to submit to unwarranted searches by officers if the officers have reasonable grounds to believe a parole or probation violation has occurred.[50] Consequently, every parolee/probationer consents to unwarranted searches as a condition to parole or probation.

Nevertheless, Oregon courts take the position that merely signing a parole/ probation agreement does not constitute consent to an unwarranted search.[51] Rather, consent must be given at the time of the search in question because their agreement is merely an agreement to consent when the question arises about whether or not they should allow a search.[52] Presumably, a parolee/probationer would be in violation (and thereby have their parole/probation revoked) if they elect not to consent to an unwarranted search, simply by not giving the consent they already agreed to give!

Additionally, the Oregon Court of Appeals distinguished the authority to conduct a "home visit" from the authority to conduct a "search."[53] It looked to statutory language and determined that the authority to conduct a home visit and the authority to conduct a search were found in different sections of the statute.[54] Therefore, one that was authorized to conduct a home visit could not be automatically deemed authorized to conduct a home search. Thus, the court concluded that a probation officer is not authorized to conduct a search of the probationer's home and property.

In State v. Guzman, the question presented to the Oregon Court of Appeals dealt with whether or not the probation officer was authorized to search the defendant's home by the terms of the probation agreement. In this case the probation officer was having a difficult time meeting with the probationer, at his home. Finally, they met at the probation officer's office. At this meeting the probation officer informed the probationer that it would be necessary for them to go to his home immediately for a visit. The reasons given for the visit were to (1) make sure defendant was living where he said he

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[50] ORS § 137.540(1)(i) (1999). *See footnote 49*(i) Consent to the search of person, vehicle or premises upon the request of a representative of the supervising officer if the supervising officer has reasonable grounds to believe that evidence of a violation will be found, and submit to fingerprinting or photographing, or both, when requested by the Department of Corrections or a county community corrections agency for supervision purposes.
[51] State v. Altman, 97 Ore. App. 462, 466, 777 P.2d 969, 971 (1989).
[52] Guzman, 990 P.2d at 96.
[53] Id. at 97.
[54] Id.

was, and (2) look around and make sure that defendant was not in violation in any way.[55] In response to these stated reasons for inspecting his residence defendant commented, "Gee, I was wondering when you guys were going to come and visit me at my house." During the inspection that ensued the officer found weapons that led to the revocation of defendant's probation.[56]

On appeal the court found that no consent to search was given in either the probation agreement or the probationer's response to the probation officer's comments about the home visit.[57] Further, it concluded that there was no evidence indicative of a probation violation at the time of the search.[58] Therefore, there was not reasonable grounds with which to justify a search. Consequently, the evidence obtained in the unlawful search was deemed inadmissible.[59]

Stated succinctly, Oregon law provides protection for parolees and probationers that goes well beyond the protection provided by the Fourth Amendment's exclusionary rule. Whereas the exclusionary rule only provides a deterrent for violations of the Fourth Amendment, Oregon law protects the privacy of convicted felons by making evidence obtained through intrusions into their privacy inadmissible even though they are in violation of the very parole or probation granting them the right to any privacy. By so doing, Oregon law makes it more difficult for parole/probation officers to effectively monitor the parolees/probationers in their charge.

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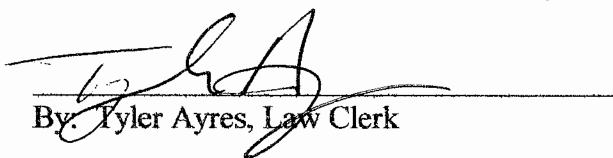

By: Tyler Ayres, Law Clerk

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[55] Id. at 93.
[56] Id.
[57] Id. at 103.
[58] Id. at 99.
[59] Id at 103.