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of the
JUDICIAL CONFERENCE OF THE UNITED STATES
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June 18, 2008

Honorable Lee H. Rosenthal
United States District Court
11535 Bob Casey United States Courthouse
515 Rusk Street
Houston, TX 77002-2600

Dear Judge Rosenthal:

I am writing to you in my capacity as Chair of the Judicial Conference Committee on Criminal Law (CLC) to ask that the Rules Committee consider an amendment to Rule 41 of the Federal Rules of Criminal Procedure to authorize probation and pretrial services officers to apply for search warrants. This request comes after careful consideration by the CLC of the recommendations of the Probation and Pretrial Services Chiefs Advisory Group (CAG) and the Search and Seizure Working Group. At present, Rule 41 does not permit probation officers to apply for a search warrant. As a result, in a post-conviction situation, probation officers are empowered to carry out searches of convicted offenders only when search conditions have been imposed as a condition of supervised release or probation or when the offender consents. As to pretrial supervision, it is unclear that pretrial services officers may properly conduct searches of pretrial defendants without first obtaining a search warrant, even when a search condition is made part of the defendant's pretrial release order. Accordingly, the inability to obtain a search warrant prevents pretrial officers from executing searches of those that they supervise, even in exigent circumstances.

Indeed, federal judges often set out search conditions in their criminal judgments. Where the judgment does not authorize a search as a condition of release or probation, however, the officer has no power to effect a search, absent the issuance of a search warrant or the consent of the offender. In exigent circumstances, where the suspected misconduct is serious, an officer's inability to effect a search could undermine public safety.

An amendment of Rule 41 to permit an officer to seek issuance of a search warrant would also permit searches by a pretrial services officer of a defendant who has not yet been convicted. Although courts have sometimes issued a search condition as a requirement of pretrial release, the enforceability of such conditions has been called into question as a result of the Ninth Circuit's decision in *United States v. Scott,* 450 F.3d 863 (9th Cir. 2006).

In *Scott,* the defendant had originally been arrested on state charges and his pretrial release was conditioned on his consent to random drug testing and to a warrantless search of his home for drugs, whenever requested by officers. State officers utilized this condition of release and entered the defendant's home for the purposes of administering a drug test. When the test revealed that the defendant had used drugs, officers arrested him, searched his home, and discovered a shotgun. Federal prosecutors then prosecuted the defendant for unlawfully possessing an unregistered shotgun. The Ninth Circuit upheld the district court's suppression of the shotgun, holding that a warrantless search, even when executed pursuant to a condition of pretrial release, requires a showing of probable cause, unless the Government can demonstrate the existence of "special needs" that make impracticable the enforcement of the otherwise applicable standard of suspicion. The court found no special need in the case before it.

Scott did not address federal pretrial search conditions. Indeed, the court explicitly noted that it expressed no view as to whether the result in the case would have been different had the court been examining the federal Bail Reform Act. *Id.* at n.8. Nonetheless, this Ninth Circuit decision, coupled with preexisting concerns about the enforceability of a warrantless search condition on a defendant who has not yet been convicted, has led to uncertainty about the propriety of any pretrial search undertaken without a warrant. Thus, while in FY 2005, district courts ordered 2,284 pretrial services search conditions, this

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discretionary condition of probation or supervised release imposed on certain sex offenders, a search based on reasonable suspicion. *See* 18 U.S.C. § 3563(b)(23) and § 3583(d).

number fell to 1,056 in FY 2006, the year after issuance of the original *Scott* opinion.[4]

Some districts have reportedly attempted to utilize the Rule 41 mechanism to obtain a search warrant when officers deem it necessary to search an offender. As noted, Rule 41(b) authorizes a magistrate judge or a state court of record in the district to issue warrants to "a federal law enforcement officer or an attorney for the government." Rule 41(a)(2)(C) defines the phrase "federal law enforcement officer" as "a government agent (other than an attorney for the government) who is engaged in enforcing the criminal laws *and is within any category of officers authorized by the Attorney General to request a search warrant.*" (Emphasis added.) The Attorney General, however, has not designated federal pretrial services or probation officers as "federal law enforcement officers" for the purpose of Rule 41. *See* 28 C.F.R. §§ 60.2 & 60.3. Accordingly, the issuance of a search warrant to a probation officer under the present iteration of Rule 41 is problematic.

Some districts have developed a procedure whereby officers petition the district court for a "search order" based on probable cause. The authority relied upon for this procedure is not Rule 41, but the All Writs Act, 28 U.S.C. § 1651 ("the Act"). The All Writs Act provides that courts "may issue all writs necessary or appropriate in aid of their . . . jurisdiction[] and agreeable to the usages and principles of law." Neither the plain language of the Act nor case law clearly authorizes its use to obtain a search warrant or order, however. While the Supreme Court has invoked the Act in the context of searches, it has not authorized its use as an alternative basis for the issuance of a search warrant or a means to bypass Rule 41's procedural requirements. In *United States v New York Tel. Co.,* 434 U.S. 159 (1977), the Supreme Court held that when a search is supported by probable cause and a search warrant has issued under Rule 41, a district court can order a third party to cooperate with law enforcement agents conducting the search to insure that the warrant is executed. The Court stated that the Act therefore authorized the district court to order a non-party telephone company to provide access to its facilities and to assist the agents in install–

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[4] *Scott* was originally decided on September 9, 2005. *United States v. Scott,* 424 F.3d 888 (9th Cir. 2005). In response to the Government's petition for rehearing *en banc*, the *Scott* majority superseded its original opinion on June 9, 2006, with an opinion amended to include *dicta* indicating that the court was not addressing the question whether the outcome would have been different if the drug testing condition that was the premise for the search had been imposed under the federal Bail Reform Act. *United States v. Scott,* 450 F.3d 863 (9th Cir. 2006).

ing pen registers as part of a criminal investigation. The Court noted that it had "repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *Id.* at 172. A search warrant would not typically effectuate other previously-issued orders, however. In short, the All Writs Act appears to be an uncertain vehicle for use by probation officers who perceive the need to execute a search on an individual being supervised.

Judicial Conference's Current *Model Search and Seizure Guidelines*

Between 1981-83, the Advisory Committee on Criminal Rules considered a proposal, favored by the predecessor to the CLC (the Probation Committee), to amend Rule 41 to allow probation officers to apply for search warrants. The Advisory Committee did not approve this amendment, although it appears that no formal vote was ever taken. *See* Minutes of the Advisory Committee's June 1982 meeting, page 5, at http://www.uscourts.gov/rules/CR06-1982-min.pdf; July 1982 Advisory Committee Report at http://www.uscourts.gov/rules/Reports/CR07-1982.pdf.

As a result of the Supreme Court's decision in 1987 upholding the warrantless search of a probationer's home, based on a regulation that permitted such searches when "reasonable grounds" existed,[5] there was little impetus to revisit the need for probation officers to have authority to apply for a search warrant. Instead, the Judicial Conference determined that guidelines should be promulgated to govern probation officers' exercise of the search authority conferred by the Supreme Court's decision. In 1993, the Judicial Conference approved distribution of *Model Search and Seizure Guidelines* (Attachment 3) to be followed by officers in conducting searches and seizures of persons on probation or supervised release. JCUS-MAR 93, p.13. The Guidelines emphasized that searches are "disfavored" and "discouraged" and should be conducted only when alternatives to protect the public and assist the offender in complying with the conditions of supervision have been exhausted. The guidelines recognized three circumstances under which searches by officers could be conducted: (1) plain view searches, (2) searches conducted pursuant to a special condition of supervision, and (3) searches conducted with the consent of the offender.

Over the past two years, the Working Group and CAG have re-evaluated the guidelines in light of developments since the Conference initially approved them in 1993.

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[5] *Griffin v. Wisconsin,* 483 U.S. 868 (1987).

The groups have submitted a series of recommendations to the CLC, which we have begun to consider. A significant first step was taken when, during its March 2008 session, the Judicial Conference approved the CLC's recommendation to seek legislation that would provide to probation officers conducting searches the same powers available to traditional law enforcement officers to control and direct third parties when safety considerations require, and to permit probation officers to arrest, based on probable cause, persons who assault, resist, or impede the officer in the performance of official duties. The CLC will work with AO staff to ensure that this legislative proposal is transmitted to Congress and that appropriate policies, procedures, and training are developed.

The CLC understands that the development of revised guidelines to govern the search authority of probation officers is just as important as the legislative and criminal rule amendments that it has recommended. A working group of probation officers and staff of the Office of Probation and Pretrial Services (OPPS) are now conducting a thorough study of current search practices followed by the various districts. Ultimately, the CLC will attempt to draft a set of guidelines that will provide search authority for officers in appropriate situations and constrain use of that authority in inappropriate circumstances.

Thank you for considering our proposal and please contact me if you have any questions.

Sincerely,

Julie E. Carnes
Chair, Criminal Law Committee

jec

Enclosures

cc: Hon. Richard C. Tallman, Chair
Advisory Committee on Criminal Rules

John K. Rabiej, Chief
Rules Committee Support Office

John M. Hughes, Assistant Director
Office of Probation and Pretrial Services

Rule 41. Search and Seizure

[proposed revisions appear on page 1 (subsection (a)(2)(C)), page 2 (subsection (c)(5)), and page 6 (subsection (h))]

(a) Scope and Definitions.

(1) Scope. This rule does not modify any statute regulating search or seizure, or the issuance and execution of a search warrant in special circumstances.

(2) Definitions The following definitions apply under this rule:

(A) "Property" includes documents, books, papers, any other tangible objects, and information

(B) "Daytime" means the hours between 6.00 a.m. and 10:00 p.m. according to local time.

(C) "Federal law enforcement officer" means a government agent (other than an attorney for the government) who is engaged in enforcing the criminal laws and is within any category of officers authorized by the Attorney General to request a search warrant, *and a U.S. pretrial services or probation officer.*

(D) "Domestic terrorism" and "international terrorism" have the meanings set out in 18 U.S.C. § 2331.

(E) "Tracking device" has the meaning set out in 18 U.S.C. § 3117(b).

(b) Authority to Issue a Warrant. At the request of a federal law enforcement officer or an attorney for the government:

(1) a magistrate judge with authority in the district -- or if none is reasonably available, a judge of a state court of record in the district -- has authority to issue a warrant to search for and seize a person or property located within the district;

(2) a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the

district when the warrant is issued but might move or be moved outside the district before the warrant is executed,

(3) a magistrate judge--in an investigation of domestic terrorism or international terrorism--with authority in any district in which activities related to the terrorism may have occurred has authority to issue a warrant for a person or property within or outside that district; and

(4) a magistrate judge with authority in the district has authority to issue a warrant to install within the district a tracking device; the warrant may authorize use of the device to track the movement of a person or property located within the district, outside the district, or both.

(c) Persons or Property Subject to Search or Seizure. A warrant may be issued for any of the following:

(1) evidence of a crime;

(2) contraband, fruits of crime, or other items illegally possessed;

(3) property designed for use, intended for use, or used in committing a crime; ~~or~~

(4) a person to be arrested or a person who is unlawfully restrained*; or*

(5) evidence of a violation of a condition of pretrial release, probation, or supervised release if the warrant is applied for by federal law enforcement officers responsible for supervising defendants or offenders to ensure compliance with such conditions

(d) Obtaining a Warrant.

(1) In General. After receiving an affidavit or other information, a magistrate judge--or if authorized by Rule 41(b), a judge of a state court of record--must issue the warrant if there is probable cause to search for and seize a person or property or to install and use a tracking device.

(2) Requesting a Warrant in the Presence of a Judge.

(A) Warrant on an Affidavit. When a federal law enforcement officer or an attorney for the government presents an affidavit in support of a warrant, the judge may require the affiant to appear personally and may examine under oath the affiant and any witness the affiant produces.

(B) Warrant on Sworn Testimony. The judge may wholly or partially dispense

with a written affidavit and base a warrant on sworn testimony if doing so is reasonable under the circumstances

(C) Recording Testimony. Testimony taken in support of a warrant must be recorded by a court reporter or by a suitable recording device, and the judge must file the transcript or recording with the clerk, along with any affidavit.

(3) Requesting a Warrant by Telephonic or Other Means.

(A) In General A magistrate judge may issue a warrant based on information communicated by telephone or other reliable electronic means.

(B) Recording Testimony. Upon learning that an applicant is requesting a warrant under Rule 41(d)(3)(A), a magistrate judge must:

(i) place under oath the applicant and any person on whose testimony the application is based; and

(ii) make a verbatim record of the conversation with a suitable recording device, if available, or by a court reporter, or in writing.

(C) Certifying Testimony. The magistrate judge must have any recording or court reporter's notes transcribed, certify the transcription's accuracy, and file a copy of the record and the transcription with the clerk. Any written verbatim record must be signed by the magistrate judge and filed with the clerk

(D) Suppression Limited Absent a finding of bad faith, evidence obtained from a warrant issued under Rule 41(d)(3)(A) is not subject to suppression on the ground that issuing the warrant in that manner was unreasonable under the circumstances.

(e) Issuing the Warrant.

(1) In General. The magistrate judge or a judge of a state court of record must issue the warrant to an officer authorized to execute it

(2) Contents of the Warrant.

(A) Warrant to Search for and Seize a Person or Property. Except for a tracking-device warrant, the warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned The warrant must command the officer to:

(i) execute the warrant within a specified time no longer than 10 days;

(ii) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time; and

(iii) return the warrant to the magistrate judge designated in the warrant

(B) Warrant for a Tracking Device. A tracking-device warrant must identify the person or property to be tracked, designate the magistrate judge to whom it must be returned, and specify a reasonable length of time that the device may be used. The time must not exceed 45 days from the date the warrant was issued. The court may, for good cause, grant one or more extensions for a reasonable period not to exceed 45 days each. The warrant must command the officer to:

(i) complete any installation authorized by the warrant within a specified time no longer than 10 calendar days;

(ii) perform any installation authorized by the warrant during the daytime, unless the judge for good cause expressly authorizes installation at another time; and

(iii) return the warrant to the judge designated in the warrant.

(3) Warrant by Telephonic or Other Means. If a magistrate judge decides to proceed under Rule 41(d)(3)(A), the following additional procedures apply:

(A) Preparing a Proposed Duplicate Original Warrant. The applicant must prepare a "proposed duplicate original warrant" and must read or otherwise transmit the contents of that document verbatim to the magistrate judge.

(B) Preparing an Original Warrant. If the applicant reads the contents of the proposed duplicate original warrant, the magistrate judge must enter those contents into an original warrant. If the applicant transmits the contents by reliable electronic means, that transmission may serve as the original warrant

(C) Modification. The magistrate judge may modify the original warrant. The judge must transmit any modified warrant to the applicant by reliable electronic means under Rule 41(e)(3)(D) or direct the applicant to modify the proposed duplicate original warrant accordingly.

(D) Signing the Warrant. Upon determining to issue the warrant, the magistrate judge must immediately sign the original warrant, enter on its face the exact date

and time it is issued, and transmit it by reliable electronic means to the applicant or direct the applicant to sign the judge's name on the duplicate original warrant

(f) Executing and Returning the Warrant.

(1) Warrant to Search for and Seize a Person or Property.

(A) Noting the Time. The officer executing the warrant must enter on it the exact date and time it was executed.

(B) Inventory. An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person.

(C) Receipt. The officer executing the warrant must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken or leave a copy of the warrant and receipt at the place where the officer took the property.

(D) Return. The officer executing the warrant must promptly return it--together with a copy of the inventory--to the magistrate judge designated on the warrant. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.

(2) Warrant for a Tracking Device.

(A) Noting the Time. The officer executing a tracking-device warrant must enter on it the exact date and time the device was installed and the period during which it was used.

(B) Return. Within 10 calendar days after the use of the tracking device has ended, the officer executing the warrant must return it to the judge designated in the warrant.

(C) Service Within 10 calendar days after the use of the tracking device has ended, the officer executing a tracking-device warrant must serve a copy of the warrant on the person who was tracked or whose property was tracked. Service may be accomplished by delivering a copy to the person who, or whose property, was tracked; or by leaving a copy at the person's residence or usual place of abode

with an individual of suitable age and discretion who resides at that location and by mailing a copy to the person's last known address. Upon request of the government, the judge may delay notice as provided in Rule 41(f)(3)

(3) Delayed Notice. Upon the government's request, a magistrate judge--or if authorized by Rule 41(b), a judge of a state court of record--may delay any notice required by this rule if the delay is authorized by statute.

(g) Motion to Return Property A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings

(h) Motion to Suppress A defendant may move to suppress evidence in the court where the trial will occur, as Rule 12 provides. *A person on pretrial release, supervised release, or probation may not move to suppress evidence in a revocation proceeding except as otherwise authorized by law*

(i) Forwarding Papers to the Clerk The magistrate judge to whom the warrant is returned must attach to the warrant a copy of the return, of the inventory, and of all other related papers and must deliver them to the clerk in the district where the property was seized.

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Memorandum

DATE: November 27, 2007

FROM: Joe Gergits, Assistant General Counsel

SUBJECT: Revocation Hearing Exception to Federal Rule of Criminal Procedure 41(h)

TO: District Judge Julie E. Carnes, Chair, Committee on Criminal Law

You requested that I explain the legal basis for one aspect of a proposed amendment to Rule 41 of the Federal Rules of Criminal Procedure that would authorize probation and pretrial services officers to apply for search warrants. Your concern was that the suggested amendment would diminish the right of probationers and supervised releasees to suppress illegally-obtained evidence at revocation hearings. The overall proposal (Attachment 6 to Agenda T) was appended to the agenda item as "[a]n example of revisions to Rule 41 that would extend the authority to apply for a search warrant to pretrial services and probation officers." The specific language in subsection (h) prompting your inquiry is indicated in italics on page 6 of attachment 6:

> (h) Motion to Suppress. A defendant may move to suppress evidence in the court where the trial will occur, as Rule 12 provides. *A person on pretrial release, supervised release, or probation may not move to suppress evidence in a revocation proceeding except as otherwise authorized by law*

Agenda Item T, Attachment 6, p. 6.

The suggested amendment to subsection (h) reflects decades-old circuit court holdings refusing to extend the exclusionary rule to illegally-obtained evidence offered in a revocation proceeding,[1] as well as the Supreme Court's holding in *Pennsylvania Board*

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[1] *See, e g , United States v. Bazzano,* 712 F.2d 826, 832-34 (3d Cir. 1983) (per curiam) (Fourth Amendment exclusionary rule inapplicable to evidence illegally seized by police that was used at probation revocation proceeding; suppression would not deter

of Probation v Scott, 524 U.S. 357 (1998), that the exclusionary rule does not apply in state parole revocation proceedings. Prior to *Scott,* the Second and Fourth Circuits adopted a minority view that extended the exclusionary rule to revocation proceedings.[2] The Fourth circuit, however, retrenched and endorsed the majority view in light of the Supreme Court's decision in *Scott.*[3]

In *Scott,* the Supreme Court applied the traditional balancing test for extending the exclusionary rule to proceedings other than criminal trials. The test required the Court to weigh the costs to the fact-finding process of applying the exclusionary rule against the likelihood that it would deter future Fourth Amendment violations. *Id* at 363 (*citing INS v. Lopez Mendoza,* 468 U.S. 1032 (1984) (exclusionary rule does not apply in civil deportation proceedings); *United States v. Janis,* 428 U.S. 433, 448, 454 (1976) (exclusionary rule does not apply in civil tax proceedings); & *United States v Calandra,* 414 U.S. 338, 349-52 (1974) (exclusionary rule does not apply in grand jury proceedings)). The Court stated that the high costs of applying the exclusionary rule had compelled it to "repeatedly decline[] to extend the exclusionary rule to proceedings other than criminal trials." *Scott,* 524 U.S. at 363-64 & n.4.

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police misconduct, but it would exact great injury to determination of probationer's compliance with conditions of supervision), citing *United States v Calandra,* 414 U.S. 338, 349 (1974) (exclusionary rule inapplicable to grand jury proceedings);*United States v. Farmer,* 512 F.2d 160, 162 (6th Cir. 1975) (Fourth Amendment exclusionary rule does not apply in probation revocation proceedings); *United States v. Brown,* 488 F.2d 94, 95 (5th Cir 1973) (per curiam) (agreeing with offender's admission that the exclusionary rule is inapplicable to probation revocation proceedings); *United States v. Hill,* 447 F.2d 817, 818-19 (7th Cir. 1971) (same); *United States ex rel. Sperling v. Fitzpatrick,* 426 F.2d 1161, 1163-64 (2d Cir. 1970) (exclusionary rule does not apply to parole revocation proceedings).

[2]*See United States v Rea,* 678 F.2d 382, 390 (2d Cir. 1982) (exclusionary rule precludes admission of unconstitutionally seized evidence in probation revocation hearing; impact on administrative fact-finding process negligible because probation officers can easily apply for a warrant pursuant to Fed. R. Crim. P. 41 and officers should be deterred from constitutional violations); *United States v Workman,* 585 F.2d 1205, 1211 (4th Cir. 1978) (exclusionary rule applies in probation revocation proceedings), *overruled by United States v Armstrong,* 187 F.3d 392, 395 (4th Cir. 1999) (*citing Scott,* 524 U.S. 357).

[3]*Armstrong,* 187 F.3d at 395.

> although in some instances parole officers may act like police officers and seek to uncover evidence of illegal activity, they (like police officers) are undoubtedly aware that any unconstitutionally seized evidence that could lead to an indictment could be suppressed in a criminal trial. In this case, assuming that the search violated respondent's Fourth Amendment rights, the evidence could have been inadmissible at trial if respondent had been criminally prosecuted.

Id. at 368-69 (citations omitted).

The Supreme Court's holding in *Scott* prompted the Fourth Circuit to disavow its prior position extending the exclusionary rule to revocation proceedings. The Second Circuit, however, has not repudiated the minority view it had adopted in *Rea*. The Second Circuit therefore remains the only circuit court that extends the exclusionary rule to revocation proceedings. The suggested amendment to Rule 41(h) would appropriately alert the Rules Committee to the well-settled case law establishing that the exclusionary rule generally does not apply to revocation hearings. Circuit courts prior to *Scott,* and the Supreme Court in *Scott,* have held that the costs of extending the exclusionary rule to the revocation context substantially outweigh the marginal (or non-existent) deterrence benefits of extending the rule.

cc: John Hughes
James Oleson
John Fitzgerald

APPENDIX H: MODEL SEARCH AND SEIZURE GUIDELINES

(Approved for distribution by the Judicial Conference, March 1993)

Scope — Applies to probation officers in applying for and conducting searches and seizures of persons on probation or supervised release ("supervisees").

I. Search Policy

Searches by probation officers are disfavored. Other techniques should be relied upon to monitor compliance with conditions of supervision and, when information exists that indicates possession of contraband or evidence of a crime, consideration should be given to referring the matter to an appropriate law enforcement agency for investigation. When there are no other alternatives, searches should be conducted only (1) pursuant to conditions of release that specifically permit such searches or (2) pursuant to the consent of the client freely and voluntarily given.

Searches conducted pursuant to valid search conditions have been held to be permissible as administrative searches pursuant to the Supreme Court's decision in *Griffin v Wisconsin*, 483 U.S. 868 (1987). Search conditions are restrictions on the liberty of the supervisees and do not grant the probation officer the broader search powers of other law enforcement officers. The authority to conduct searches pursuant to conditions or to the consent of the supervisee does not extend the law enforcement authority of probation officers beyond those set out in 18 U.S C. § 3606 Accordingly, officers are not authorized to restrain third parties during a search. Officers should avoid searches where it is reasonably foreseeable that a third party or the releasee himself may present a danger Likewise, an attempted search should be abandoned if a third party or the releasee refuses to cooperate.

The fruits of any search conducted pursuant to these guidelines may, if relevant, be used in the regular course of management of non-compliant behavior by the supervisee. Seized items that are not contraband should be returned to the supervisee as soon as practicable.

Probation officers who may participate in searches are encouraged to receive, if available, appropriate training from Federal, state, or local law agencies prior to participating in such searches

II. Special Search Condition

A. Imposition of Search Condition

1 A probation officer should not routinely recommend that the court impose a special condition authorizing searches of persons under supervision. A probation officer should recommend such a special condition only in those cases in which the officer determines, based upon the offense of conviction and background of the offender, that resort to such a condition is necessary to enforce the conditions of release or to protect the public.

B. Composition of Search Condition

1. A special condition shall permit searches only of the supervisee's person, residence, office or vehicle.
2. A special condition shall permit searches only if the probation officer has a reasonable belief that contraband or evidence of a violation of the conditions of release may be found.
3. A special condition shall provide that any searches be conducted in a reasonable manner and at a reasonable time.
4. A special condition shall require the supervisee to notify any other residents of his home that areas of the home may be subject to search.
5 A special condition shall provide that failure to permit a search may be grounds for revocation.

C. Model Search Condition.

The court may utilize the following model special search condition:

The defendant shall submit his person, residence, office or vehicle to a search, conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

III. Consent Searches

A. A probation officer may conduct a search in the absence of a special condition if the supervisee gives written consent for the search. To ensure that consent is freely and voluntarily given, the probation officer shall advise the supervisee before the consent is given that the consent may be refused without adverse consequences, such as revocation of release. A search based upon consent may not exceed the scope of the consent.

B. A probation officer may use the following model consent:

I,_____, hereby consent to permit _____ a United States Probation Officer for the _____ District of _____ to search my_____. My consent is freely and voluntarily given. I understand that I am not required to consent to the search and that my refusal to consent may not be the basis of a revocation of my release or other adverse consequences, though the court may consider such refusal in connection with a modification of conditions of release

IV General Rules for Searches

A. A search of the person, residence, office or vehicle of a supervisee may be conducted by a probation officer only upon consent or pursuant to a special condition of release, as provided by these guidelines

B. No random, routine, or periodic searches, other than for the purpose of urinalyses as part of a drug treatment program, shall be conducted unless specifically authorized by a special condition of release.

C. A search shall not be conducted if the contemplated scope of the search will result in other than minor damage to the property to be searched.

D. A search shall not be conducted if there is reasonably reliable information that suggests that the conduct of the search would subject an officer or any other person to a danger of harm.

V. Approval of Searches

A. A search shall be conducted only upon the written approval of an application for such search. The application shall be in writing, shall be reviewed by the probation officer's supervisor, and shall be approved in writing by the chief probation officer of the district or his or her designee, which may not be the officer's supervisor. The application shall be approved prior to the officer's seeking consent or, in the case of a search pursuant to a search condition, prior to the search.

B. If exigent circumstances make it impracticable to present the application or to give approval in writing, the application or approval may be presented orally and reduced to writing at the earliest opportunity. Exigent circumstances exist if it is reasonably foreseeable that delay will result in danger to any individual or the public

C The application for the search shall contain the following information:

1 The name, address, type and term of supervision, offense of conviction, and relevant background of the person to be searched;

2. whether the search would be pursuant to a search condition or consent;

3 a description (address, license number, etc.) of the place to be searched;

4. a specific description of the grounds to believe that the search will yield contraband or evidence of a violation of the conditions of release;

5 a description of the general nature of the contraband or evidence sought;

6. a description of any potential dangers the search may present to the probation officer or others;

7 the assistance to be provided by other law enforcement agencies or the reasons why such assistance is unavailable, unnecessary, or impracticable;

8. a description of any contemplated minor damage to the property that may be caused by the search;

9 an explanation of why the matter should not be referred to an appropriate law enforcement agency for investigation; and

10. an explanation of why alternatives to conducting a search are inappropriate or impracticable

D. Approval of a search should, as specifically as is practicable, describe the place to be searched, the object of the search, the scope of the search approved, and the contemplated assistance from other law enforcement agencies.

E. The application, approval or rejection, and any consent form shall be filed in the probation office.

VI. Conduct of Searches

A. An officer conducting an approved search should take necessary safety precautions, including but not limited to, the following;

1. conducting the search with one or more fellow probation officers;

2 utilizing the assistance of other law enforcement officers for protection while conducting the search and taking possession of any dangerous contraband seized during the search;

3 carrying firearms, if authorized, during the search; and

4. conducting an initial security sweep of the premises to ascertain the presence of third parties or other hazards.

B. A probation officer is not authorized to detain or to restrain third parties If third parties are present who may present a risk to any person conducting the search or to the supervisee, or if the officer becomes aware of any other reasonably foreseeable danger of harm to any person, the officer should abandon the search.

C The search should be conducted in accordance with the approval and in a reasonable manner. The search should be no more intensive than is reasonably necessary to locate the objective of the search.

D. If a search is abandoned because of danger to the officer or another person, and there are reasonable grounds to believe that there exists a danger to the public, the officer shall notify the appropriate law enforcement authority as soon as possible.

VII. Plain View "Searches"

Contraband that falls within the plain view of a probation officer who is justified being in the place where the contraband is seen may properly be seized by the probation officer. It must be immediately apparent that the item is contraband with respect to the supervisee.

VIII. Seizures

A. An item that is located during an approved search or observed in plain view may be seized if the probation officer has reasonable grounds to believe that the item is contraband or constitutes evidence of a violation of a condition of release. If the item is not contraband, the supervisee should be given a receipt for the item and the item should be returned after it is no longer needed by the court.

B. A careful record must be kept regarding the chain of custody of any item seized.

C. Contraband should be delivered to an appropriate law enforcement agency as soon as practicable. Pending such delivery, the probation officer should take necessary measures to safeguard the contraband.

IX Reports of Search and Seizures

The probation officer shall prepare a narrative report of the circumstances and results of a search, including a search that is abandoned, file such report in the probation office, and provide copies to the chief probation officer and the Probation and Pretrial Services Division of the Administrative Office of the United States Courts.