

Corrections Goes Public (and Private) in California	<i>Dale K. Sechrest David Shichor</i>
Mandatory Minimums and the Betrayal of Sentencing Reform: A Legislative Dr. Jekyll and Mr. Hyde	<i>Henry Scott Wallace</i>
Juvenile Detention Programming	<i>David W. Roush</i>
Legal and Policy Issues From the Supreme Court's Decision on Smoking in Prisons	<i>Michael S. Vaughn Rolando V. del Carmen</i>
Community Corrections and the Fourth Amendment	<i>Stephen J. Rackmill</i>
A Study of Attitudinal Change Among Boot Participants	<i>Velmer S. Burton, Jr. James W. Marquart Steven J. Cuvelier Leanne Fiftal Alarid Robert J. Hunter</i>
Failure of Group Home Treatment Programs for Juveniles	<i>Bahram Haghghi Alma Lopez</i>
Prisons in New Zealand	<i>Chris W. Eskridge Greg Newbold</i>
Status to the Progressives: A Study of Probation's Formative Years	<i>Edward W. Sieh</i>
Prisoners and the Law—Discovery of Probation Files	<i>David N. Adair, Jr.</i>

SEPTEMBER 1993

145274
145282

145274-
145282

**U.S. Department of Justice
National Institute of Justice**

This document has been reproduced exactly as received from the person or organization originating it. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the National Institute of Justice.

Permission to reproduce this copyrighted material has been granted by
Federal Probation

to the National Criminal Justice Reference Service (NCJRS).

Further reproduction outside of the NCJRS system requires permission of the copyright owner.

Federal Probation

A JOURNAL OF CORRECTIONAL PHILOSOPHY AND PRACTICE

Published by the Administrative Office of the United States Courts

NCJRS

VOLUME LVII

SEPTEMBER 1993

OCT 12 1993 NUMBER 3

This Issue in Brief ^{ACQUISITIONS}

Corrections Goes Public (and Private) in California.—Authors Dale K. Sechrest and David Shichor report on a preliminary study of two types of community correctional facilities in California: facilities operated by private for-profit corporations and facilities operated by municipal governments for profit. The authors compare the cost effectiveness and quality of service of these two types of organizations.

Mandatory Minimums and the Betrayal of Sentencing Reform: A Legislative Dr. Jekyll and Mr. Hyde.—According to author Henry Scott Wallace, mandatory minimums are "worse than useless." In an article reprinted from the *Federal Bar News & Journal*, he puts mandatory minimums in historical perspective, explains how they fall short of alleviating sentencing disparity, and offers some suggestions for correcting what he describes as a Jekyll-and-Hyde approach to sentencing reform.

Juvenile Detention Programming.—Author David W. Roush focuses on programming as a critical part of successful juvenile detention. He defines juvenile detention and programming; explains why programs are necessary; and discusses objectives of programs, what makes good programs, and necessary program components. Obstacles to successful programming are also addressed.

Legal and Policy Issues From the Supreme Court's Decision on Smoking in Prisons.—In *Helling v. McKinney*, the Supreme Court held that inmates may have a constitutional right to be free from unreasonable risks to future health problems from exposure to environmental tobacco smoke. Authors Michael S. Vaughn and Rolando V. del Carmen discuss the legal and policy issues raised in *McKinney*, focusing on correctional facilities in which smoking or no-smoking policies have been a concern. They also discuss litigation in the lower courts before *McKinney* and how this case might shape future lower court decisions.

Community Corrections and the Fourth Amendment.—The increased use of community corrections programs has affected the special conditions of probation and parole imposed on offenders. Author Stephen J. Rackmill focuses on one such condition—that proba-

tioners submit to searches at the direction of their probation officers. Explaining the importance of the Supreme Court's decision in *Griffin v. Wisconsin*, the author assesses the case law before and after *Griffin* regarding searches and points out that policy regarding searches is still inconsistent.

A Study of Attitudinal Change Among Boot Camp Participants.—Authors Velmer S. Burton, Jr., James W. Marquart, Steven J. Cuvelier, Leanne Fiftal Alarid, and Robert J. Hunter report on whether participation in the CRIPP (Courts Regimented Intensive Probation Program) boot camp program in Harris County, Texas, influenced young felony offenders' attitudes. The authors measured attitudinal change in

CONTENTS

Corrections Goes Public (and Private) in California	145-274	Dale K. Sechrest David Shichor	3
Mandatory Minimums and the Betrayal of Sentencing Reform: A Legislative Dr. Jekyll and Mr. Hyde	145-275	Henry Scott Wallace	9
Juvenile Detention Programming	145-276	David W. Roush	20
Legal and Policy Issues From the Supreme Court's Decision on Smoking in Prisons ..	145-277	Michael S. Vaughn Rolando V. del Carmen	34
Community Corrections and the Fourth Amendment	145-278	Stephen J. Rackmill	40
A Study of Attitudinal Change Among Boot Camp Participants ..	145-279	Velmer S. Burton, Jr. James W. Marquart Steven J. Cuvelier Leanne Fiftal Alarid Robert J. Hunter	46
Success/Failure of Group Home Treatment Programs for Juveniles	145-280	Bahram Haghighi Alma Lopez	53
Corrections in New Zealand	145-281	Chris W. Eskridge Greg Newbold	59
From Augustus to the Progressives: A Study of Probation's Formative Years ..	145-282	Edward W. Sieh	67
Departments			
News of the Future			73
Looking at the Law			76
Reviews of Professional Periodicals			81
Your Bookshelf on Review			85
It Has Come to Our Attention			94

145278

Community Corrections and the Fourth Amendment

By STEPHEN J. RACKMILL

Chief United States Probation Officer, Eastern District of New York

THE NUMBER of prisoners under correctional authority in the United States at the end of 1991 reached a record high of 823,414. This represented a growth of approximately 150 percent since 1980.¹ Faced with this astonishing increase, authorities have needed to find alternatives to traditional incarceration and have sought relief by diverting many offenders into intensive probation supervision programs. These programs have the goal of providing meaningful accountability through intensive contacts that emphasize risk control and public protection.² Risk control is emphasized because many of these offenders present potential safety concerns, as they represent a more difficult clientele than that traditionally assigned to probation. Consequently, probation systems have been obliged to develop nontraditional supervision styles that emphasize offender control and introduce surveillance functions into the supervision process.³ A recent study assessing the rearrest rate of felons placed on probation as a sentencing alternative in 1986 determined that within 3 years, nearly two in three had been either arrested for a new felony or charged with a probation violation.⁴

Intensive community correctional programs in response to prison overcrowding and escalating costs allow for a high risk offender to be released to the community under the most restrictive of circumstances.⁵ Many of these programs do their utmost to control clients' activities with unannounced home visits, employment visits, checks for drug use, and a close working relationship with law enforcement.⁶ Probation officers are typically granted a wide range of law enforcement powers to ensure the close supervision of offenders. Numerous jurisdictions have provided officers with the right to carry firearms in conjunction with their duties. This oftentimes also includes warrant enforcement services which require officers to execute the warrants.⁷ With the proliferation of community corrections programs, special conditions of probation and parole have increasingly been imposed. As a special condition, many jurisdictions require that offenders submit to search at the direction of their supervising officers.

Sentencing judges possess broad power to impose regulations designed to promote compliance with law-abiding behavior and minimize offender recidivism. Throughout the years, there has been substantial

litigation concerning the suitability of many of these conditions. Often the litigation centers around the question of whether the law enforcement requirements of probation impede the ability of offenders to exercise constitutionally protected rights.

In June 1987, the Supreme Court, in a landmark case, *Griffin v. Wisconsin*, 483 U.S. 868 (1987), concluded that warrantless searches of probationers are reasonable within the meaning of the fourth amendment, but only if they are conducted pursuant to a reasonable regulation allowing such a search and identifying it as falling within the province of special needs of the state. These needs normally justify departures from the usual warrant and probable cause requirements. In *Griffin*, the Court concluded that the probation office would be permitted to infringe upon privacy rights of probationers that would not be constitutional if applied to the public at large, since restrictive probation conditions are intended to ensure that objectives of rehabilitation and community protection are simultaneously accomplished.⁸

Prior to *Griffin*, court decisions were based on different rationales concerning the application of the fourth amendment to community offenders. This article will assess the case law prior to the *Griffin* decision and then analyze litigation in its wake. It will point out that there is still substantial inconsistency from both the bench and practitioners in developing policy concerning such issues as minimum standards to justify a search, the scope of such searches, as well as the mechanisms for appropriate implementation of the search.

Historical Analysis of Search and Seizure Issues

From an historical perspective, in 1935, *Escoe v. Zerbst* laid a foundation upon which the expansion of restrictive conditions of probation was often based. In this case, the Supreme Court, addressing a claim that a revocation of probation was unconstitutional, stated:

We do not accept the petitioner's contention that the privilege (probation) has a basis in the constitution, apart from any statute. Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in the respect of its duration as Congress may impose.⁹

Moving from this premise, when the search issue for offenders on community supervision was subsequently addressed, a California court held that the residence of a parolee may be searched by the parolee's

supervisor without a search warrant and without the parolee's consent.¹⁰

During the late 1960's and early 1970's, warrantless searches were generally upheld. Special concerns developed, however, when evidence of a new crime was obtained as a result of the search. In a case in New York, a parole officer obtained a warrant charging a parolee with a violation of parole. Thereafter, he went to the parolee's apartment and conducted a 2½-hour search which yielded controlled substances. The parolee was subsequently convicted on the new charge of possession of heroin. The conviction was upheld in spite of claims of constitutional deprivation.¹¹ The court stated:

However, a search which would be "unreasonable" if an ordinary citizen were involved, might be reasonable if directed against a parolee. It would be unrealistic to ignore the fact that parolees, as a class, pose a greater threat of criminal activity than do ordinary citizens.¹²

In 1970, a case was decided in which an offender named Sperling was illegally searched and arrested by New York City police for possession of a firearm. At the time, the officers did not know that Sperling was under parole supervision, and he was later indicted. However, the evidence was suppressed as the fruit of an illegal search. Thereafter, Sperling's parole was revoked for possession of the revolver discovered by the search. Sperling, at his parole hearing, claimed that the parole board should not consider the illegally seized evidence. The board, however, disagreed, and parole was revoked. In its review of the case, the appellate court concluded that there was no need to apply the exclusionary rule to parole revocation proceedings, and the revocation was upheld.¹³

In *United States ex rel. Santos v. New York State Board of Parole*, 441 F.2d 1216 (2nd Cir. 1971), the court refused to suppress evidence obtained in a warrantless search by a parole officer in a subsequent criminal prosecution. The court submitted that the parolee's fourth amendment rights were necessarily less than those of an ordinary citizen. Searches against parolees were found necessary to effectuate appropriate supervision activities. Furthermore, the court rejected the parolee's argument that his parole officer was acting as an agent of the law enforcement community in order to enable the police to circumvent fourth amendment protections otherwise applicable had they investigated him without the parole department's assistance. The 2nd Circuit noted that:

To hold that evidence obtained by a parole officer in the course of carrying out (his) duty cannot be utilized in a subsequent prosecution because evidence obtained directly by the police in such a matter would be excluded, would unduly immunize parolees from conviction.¹⁴

In 1972, the Supreme Court of the United States addressed the issue of the rights of parolees in the

landmark case, *Morrissey v. Brewer*, 408 U.S. 471 (1972). In this case, which related to a revocation of parole proceeding in the State of Ohio, the Court declared that before parole could be revoked, an offender was entitled to minimum due process safeguards. The following year, the Supreme Court extended to probationers the right to preliminary and final revocation hearings under similar conditions as those set forth in the *Morrissey* case.¹⁵

In *Morrissey*, the Court determined that an offender is entitled to a written notice of the claimed violation of parole; disclosure of the evidence against him; an opportunity to be heard in person and to present witnesses and documentary evidence; the right to confront and cross-examine adverse witnesses; a neutral and detached hearing body such as a traditional parole board (members of which need not be judicial officers or lawyers); and a written statement of the fact-finders as to the evidence relied upon and reasons for revoking parole. In *Gagnon v. Scarpelli*, the Court mandated that there should be an assessment of the need for legal representation on a case-by-case basis for all revocations.

These two decisions addressed and challenged the viewpoint that considered parolees and probationers to be in legal custody as quasi-prisoners with diminished constitutional rights. Additionally, the grace doctrine as set forth in *Escoe v. Zerbst* was totally repudiated:

It is clear at least after *Morrissey v. Brewer* that a probationer may no longer be denied process, in reliance on the dictum in *Escoe v. Zerbst* . . . that probation is an act of grace.¹⁶

These two decisions substantially altered the views of many courts in regard to offenders' rights under community correctional supervision. The debate regarding fourth amendment rights of probationers and parolees thereafter centered around the search warrant requirement with the Courts of Appeals for the 9th and 4th Circuits as the major protagonists. The 9th Circuit took the conservative position that warrants should not be required for searches by probation and parole officers, as set forth in *Latta v. Fitzharris*, 521 F.2d 246 (1975); and *United States v. Consuelo-Gonzalez*, 521 F.2d 259 (1975).

In *Latta*, the court held that if a parole officer reasonably believed that a search was necessary for the performance of his duties, he was justified in conducting a warrantless search of a parolee's home. The court reduced the standard of reasonableness to a level of information that was less than sufficient for a finding of probable cause. Even a "hurry" by the officer was deemed adequate. The reason that this restriction of fourth amendment rights was not deemed unreasonable was because the supervising officer was held to possess a unique interest in invading the privacy of

parolees, in order to assure appropriate supervision, guidance, and direction. In *Latta*, the court reasoned that harassment or intimidation would not provide acceptable reasons to conduct warrantless searches. It stated:

This is not to say that we will uphold every search by a parole officer. In a given case, what is done may be so unreasonable as to require that the search be held to violate the 4th Amendment. For example, harassment or intimidation is not part of a parole officer's job. In short, we do not accept the notion that parole officers may conduct full blown searches of parolee's homes, whenever and so often as they feel like it. To do so would practically gut the principle that parolees are entitled to some privacy. Moreover, it would not advance the goals of the parole system. Indeed, it has been suggested that providing parole authorities with an unlimited power to conduct indiscriminate searches actually undermines the rehabilitation process.¹⁷

A lengthy and vigorous dissent to this opinion argued that a warrant should be required for parole officers since the rehabilitative goals of parole would be advanced and not impeded by officers securing warrants.

In a companion case, *United States v. Consuelo-Gonzalez*, 521 F.2d 259 (9th Cir. 1975), the court actually invoked the exclusionary rule to suppress evidence seized as the result of a consent search. The search was based on a special condition of probation which was found to be overly broad and violative of the probationer's fourth amendment rights. The offender had been placed on probation with the special condition that she submit her person and property to search at any time upon the request of a law enforcement officer. Local and Federal authorities took advantage of this condition in a warrantless search which yielded the evidence which was eventually suppressed. Although it ruled that the special condition of probation was overly broad and that the search was illegal, the court did not substantially compromise its conservative position on the fourth amendment rights of offenders. The judges ruled that the search would have been legal if conducted by a probation officer for a purpose consistent with the Federal Probation Act. They suggested for the future that an acceptably worded special condition of probation could be:

That she submit to search of her person and property conducted in a reasonable manner and at a reasonable time by a probation officer.¹⁸

The lead cases on this issue in the 4th Circuit are *United States v. Bradley*, 571 F.2d 787 (1978), and *United States v. Workman*, 585 F.2d 1205 (1978). In *Bradley*, a parole officer, acting on sufficient probable cause, conducted a warrantless search of a parolee's home. Evidence was found which resulted in a parole revocation and a new criminal conviction. The appellate court reversed the revocation and conviction on the grounds that unless an established exception to the warrant requirement is applicable, a parole officer

must obtain a search warrant, even where the parolee has consented to periodic and unannounced visits by his parole officer. The court stressed, however, that the standards of probable cause which must normally be met to obtain such a warrant must be reasonably and necessarily reduced due to the special relationship between the offender and parole authorities. In rejecting the search and excluding the evidence, the court determined that there were no exceptions to the warrant, and the *Bradley* court directed an entry of a judgment of acquittal.

In *United States v. Workman*, the 4th Circuit reaffirmed its position in *Bradley* concerning the warrant requirement. It also extended the exclusionary rule to probation revocation proceedings. Workman was a Federal probationer whose probation officer testified at the revocation hearing that he had searched Workman's storage shed after receiving a report that Workman possessed an illegal distillery. Possession of such a distillery was in violation of a specific condition of Workman's probation. The officer had not obtained a warrant because he believed he did not need one. The court held to the contrary that a warrant was necessary and excluded the tainted evidence. Thus, in *Workman*, the court extended the exclusionary rule to probation revocation proceedings.

United States v. Scott, 678 F.2d 32 (5th Cir. 1982), relates to postal inspectors who obtained a search warrant based upon documents secured during a parole officer's visit to an offender's residence. The evidence obtained by the officer later yielded probable cause for the issuance of a search warrant. The seizures resulted in a conviction. Assessing the events, the *Scott* court stated:

The parolee occupies a position intermediate between that of an ordinary citizen entitled to be free of intrusion not based on probable cause...and that of an incarcerated convictee liable to searches at any time for well-nigh any reason.¹⁹

During the same year, the 2nd Circuit reversed itself in *United States v. Rea*, 678 F.2d 382 (2nd Cir. 1982), by applying the exclusionary rule to a probation revocation hearing. The court also recognized that a probationer's fourth amendment protections included the right to be free from warrantless searches and thereby extended the warrant requirement to probation officers.

In *Rea*, during May 1981, a probation officer received a telephone call from an anonymous informant indicating that the probationer was traveling outside the district and possessed cocaine and a fraudulent baptismal certificate. The caller also made allegations of other failures to comply with the conditions of supervision. After verifying the reliability of several of these allegations, the probation officer and coworkers visited the probationer's apartment. During the course of a search they uncovered a 25-caliber pistol, ammunition, hol-

sters, knives, tear gas pellets, marijuana, and a triple beam scale.

Based upon evidence found in the search, Rea's probation was revoked. On appeal, however, the circuit court concluded that the probation department had violated Rea's rights by not obtaining a warrant. The search was declared invalid. In reaching this decision, the court used the balancing test enunciated in *United States v. Calandria*, 414 U.S. 338 (1974). *Calandria* treats the potential injury to the fact-finding process as a result of excluding relevant evidence and balances it against the possible benefit of deterring future unlawful searches by probation personnel. The *Rea* court concluded that the exclusionary rule should have been applied and that the warrant requirement would not interfere with the effectiveness of the probation system. The court, however, failed to recognize that probation officers were not and still are not authorized to obtain search warrants. The remedial device offered by the court for the officers was unworkable because probation officers have no statutory authority to obtain search warrants.²⁰

Some authors, recognizing that probation officers are not authorized to secure warrants, have suggested that the courts impose special search conditions in conjunction with supervision requirements and that this would obviate the need for a warrant by the probation officer.²¹

In 1983, the 11th Circuit, addressing an allegedly unconstitutional search condition, made the following assessments in *Owens v. Kelley*:

A probation condition is not necessarily invalid simply because it affects a probationer's ability to exercise constitutionally protected rights. *United States v. Conry*, 605 F.2d 144, 150 (5th Cir. 1979). In *Conry*, the Court adopted the following test to determine whether a probation condition imposed by a Federal Court pursuant to the Federal Probation Act, 18 U.S.C. Sec. 3651, is duly intrusive in constitutionally protected freedoms:

The condition must be "reasonably related" to the purposes of the act. Consideration of three factors is required to determine whether a reasonable relationship exists:

- 1) The purpose sought to be served by probation.
- 2) The extent to which constitutional rights enjoyed by law abiding citizens should be accorded to probation.
- 3) The legitimate needs of law enforcement.²²

The court concluded that reasonable suspicion is not a necessary requirement for the search, since probation personnel have a special relationship with offenders, during which time offenders' lives and behavior may be regulated by the state to an extent that would not be permissible under other conditions.

Although the *Owens* court rejected the notion that probation officers are not to conduct searches as a subterfuge for criminal investigations, it nevertheless believed that law enforcement officers can lend legiti-

mate assistance to probation personnel in regard to conducting said searches.²³

In *Griffin v. Wisconsin*, the Supreme Court upheld the legality of probation home searches as reflecting a special need of the state that may justify departures from the usual warrant and probable cause requirements. The Court concluded that because of the special needs of Wisconsin's probation system, the warrant requirement was impractical and justified the replacement of the probable cause standard with the Wisconsin administrative regulations reasonable grounds standard. Thus, the *Griffin* case determined that it was reasonable to use information provided by a police officer (whether or not on the basis of firsthand knowledge) to support a search by probation personnel. Further, *Griffin* stated that the probable cause requirement would unduly disrupt the probation system by reducing the range of information available to the officer and the deterrent effect of the supervisory arrangement.²⁴

In *Griffin*, the Court upheld the Wisconsin Administrative Code that granted state probation officers the power to conduct warrantless home searches. Such searches, however, required supervisory approval and the existence of reasonable grounds to believe that contraband would be present.²⁵ Thus, the Supreme Court agreed with the lower court's ruling that the nature of probation diminishes one's legitimate expectations of privacy and justifies an exception to the warrant requirement.²⁶

During 1989, the 8th Circuit addressed the issue of whether a condition requiring random searches is reasonably related to the goals of probation (*United States v. Schoenrock*, 868 F.2d 289 (8th Cir. 1989), and *United States v. Coone*, 868 F.2d 289 (8th Cir. 1989)). In both cases, the defendants were given probation with the special condition that they permit the probation officer to conduct warrantless searches of their home and car.

Coone and Schoenrock lived together, and a subsequent search of their premises yielded alcohol and cocaine. On appeal, the court found that the probation conditions were reasonably related to the objectives of the sentencing court. Thus, these cases followed the lead in *Griffin* and further established the validity of warrantless searches by officers when a condition was provided but narrowly fitted to the needs of a particular offender. This view was further supported in *United States v. Wryn*, 952 F.2d 1122 (9th Cir. 1991); *United States v. Giannetta*, 909 F.2d 571 (1st Cir. 1990); and *United States v. Robinson*, 857 F.2d 1006 (5th Cir. 1988).

In *United States v. Giannetta*, the scope of the search became an issue when the officer, upon discovering evidence that the defendant was engaged in fraud, expanded the scope of the search to the entire house.

Although the search was held reasonable, its scope was at issue since there was no warrant describing the articles that the probation officer was attempting to locate.²⁷

Collateral Problems Implementing Search Conditions

In that a number of courts have adopted the position that a reasonable suspicion standard is all that is necessary for a search pursuant to a valid condition, other issues have emerged regarding the authority of the probation officers. Officer safety is of paramount concern.

Probation officers do not necessarily possess the full powers and responsibilities of police officers. Yet, probation officers' limited authority over offenders potentially has a substantial impact upon their safety in conducting a search, since courts have viewed their authority to search as similar to that empowering administrative searches. However, rather than addressing building violations or safety codes, as is typical in administrative searches, probation officers conduct quite a different kind of search that promotes goals to rehabilitate offenders and protect the public from them. In dealing with an offender population, officers must be equipped to perform protective sweeps for safety purposes. Specific conditions may give probation officers the authority to search entire buildings without the protection afforded to other law enforcement agents.

At issue are the probation officers' options to ensure their safety. Authority for police officer protection is enunciated in *Terry v. Ohio*, 392 U.S. 1 (1968) and *Michigan v. Summers*, 442 U.S. 692 (1981). The latter case held that the police could detain individuals on the premises while a search was being conducted. Probation officers do not have the same authority to detain individuals in order to secure the location and prevent the destruction or disappearance of evidence.

One solution would be to have law enforcement personnel accompany probation officers. However, such assistance could raise the accusation that probation officers act as "stalking horses" for the police who can use probation officers in order to circumvent the need for a warrant. Although the police would be present primarily for the probation officers' protection, possibly they could actually participate in and direct the searches based upon their more extensive experience and expertise.²⁸

Officers are not always comfortable with their duty to conduct searches. A survey of Wisconsin probation agents determined that they disliked searching offenders and only conducted approximately two full-blown searches yearly. There was a high degree of discomfort, anxiety, and fear on the part of many of

these probation agents. They were generally concerned with community protection rather than rehabilitation when they initiated a search.²⁹

Probation officers' authority to carry firearms is an issue affecting searches. A survey of Federal probation and parole offices conducted by the United States Parole Commission in order to assess the feasibility of implementing a search condition revealed that of 93 districts, only 54 fully authorized officers to carry firearms. This issue was further complicated when it was determined that in certain states probation officers had no statutory authority either to serve as peace officers or to carry weapons. Additionally, there is no Federal statute in place for granting such authority. This matter was addressed by the Judicial Conference in March 1975, when a firearms policy for probation officers was adopted.³⁰ The Parole Commission further determined that there was no consistent training in the districts regarding search and seizure. It found that there was constant concern for officer safety and an inability to arrest or forcibly detain offenders if contraband were found without police assistance.³¹

If a probation department opts to utilize search and seizure in conjunction with its supervision activities, the department has to develop and adopt a comprehensive policy which would ensure safety and minimize the possibility of any collateral liability. As more drug offenders are being diverted to probation and supervised release sentences, many courts and parole boards are amending their policies to permit and regulate searches.

In this era of intensive supervision, there appears to be a body of reliable authority defining the parameters of constitutionally sanctioned warrantless searches by community corrections personnel. Despite the existence of such a tool, probation and parole officers still remain at risk because of significant ambiguity and a lack of information concerning the permissible scope of such searches, the officer's capacity to control the search scene, and third party restraint.

In the event that probation and parole departments incorporate searches as an integral component of their supervision strategies, they must initiate extensive training and secure the funding necessary to support the increased law enforcement functions. Probation officers currently lack protective equipment. They have only minimal self-defense training, may not be armed, and are ill-equipped to conduct searches, as they possess little understanding of chain of custody procedures.

The present confusion and ambiguity of the probation/parole officer's role as perceived by the bench and legislatures, coupled with a growing emphasis upon social control, require that correctional administrators

carefully examine the complexities of search and seizure before risking the safety of their officers in the field.

NOTES

¹T. Snell, *Prisoners in 1991*, Bureau of Justice Statistics (May 1992).

²James M. Byrne, "The Control Controversy: A Preliminary Examination of Intensive Supervision Programs in the United States," *Federal Probation*, June 1986 at 4-16.

³Charles Lindner, "The Refocused Probation Home Visit: A Subtle but Revolutionary Change," *Federal Probation*, March 1992 at 16-21.

⁴Patrick A. Langan, *Recidivism of Felons on Probation, 1986-89*, Bureau of Justice Statistics (Feb. 1992).

⁵Byrne Note 2, *supra* at 5.

⁶Howard Abadinsky, *Probation and Parole Theory and Practice*, 4th edition (1991).

⁷*Id.* at 313.

⁸In *Griffin*, the Supreme Court upheld the constitutionality of a warrantless search performed by a Wisconsin probation officer pursuant to a state regulation that authorized such searches on the basis of "reasonable suspicion." The Court's analysis of the Wisconsin search procedures analogized the search to administrative searches that had previously been determined to satisfy the fourth amendment requirement of reasonableness. See *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985); *O'Connor v. Ortega*, 480 U.S. 709 (1987); *Cammara v. Municipal Court*, 387 U.S. 523, 538 (1967); *U.S. v. Biswell*, 406, U.S. 311, 316 (1972).

⁹*Escoe v. Zerbst*, 295 U.S. 490, 492 (1935).

¹⁰*People v. Debnam*, 261, Cal. App. 2d 206, 67 Cal. Rptr. 692 (1968).

¹¹*United States ex rel. Joseph Randazzo v. Follette*, 418 F.2d 1319 (2nd Cir. 1969).

¹²*Id.* at 1322. It is noted that the drugs were found in the parolee's bedroom, and it was considered among other premises under his immediate control, as the search took place in the summer of 1962, and *Chimel v. California*, 395 U.S. 752 (1969) was not considered applicable.

¹³*United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161 (2nd Cir. 1970).

¹⁴*U.S. ex rel. Santos v. N.Y.S. Board of Parole*, 441 F.2d 1216, 1218-1219 (2nd Cir. 1971). In *Santos*, the parole officer was contacted by the police concerning allegations that the parolee was dealing stolen property. The officer and a detective went to Santos' apartment, and although Santos was not at home, they were admit-

ted by a landlady whereupon the search by the parole officer yielded stolen property that was admitted in the state criminal proceeding.

¹⁵*Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

¹⁶*Id.* at 782.

¹⁷*Latta v. Fitzharris*, 521 F.2d 246 at 252 (9th Cir. 1975). The marijuana obtained by the parole officer was found to be appropriately admitted into evidence by the police officer who accompanied the parole agent to Latta's home.

¹⁸*United States v. Consuelo-Gonzalez*, 521 F.2d 259 at 263 (9th Cir. 1975). The decision did explicitly point out that under no circumstances should probation personnel cooperate with law enforcement officers in utilizing searches as a mechanism to circumvent the warrant requirement or as a subterfuge for criminal investigations.

¹⁹*United States v. Scott*, 768 F.2d 32 at 34 (5th Cir. 1982). Postal inspectors notified Scott's parole officer of his involvement in a scheme to alter money orders sent by mail and requested that she obtain exemplars written by his hand and by typewriter. During the course of a visit, she borrowed the machine on a pretext of typing a business document and later asked Scott for information which he wrote out manually about a roommate. This was turned over to inspectors and resulted in the warrant and subsequent conviction. The *Scott* court rejected the argument that the parole officer had acted as a pawn of the postal inspector and concluded that the parole officer had reasonable grounds to conduct the search which was deemed admissible in the criminal proceeding.

²⁰See Rule 41(a) and (h), Federal Rules of Criminal Procedure.

²¹Jud Kutcher, "The Probation Officer's Role in Search and Seizure of Probationers," *Federal Probation*, September 1982 at 55.

²²*Owens v. Kelley*, 681 F.2d 1362 at 1366 (11th Cir. 1982).

²³*Id.* at 1370.

²⁴*Griffin* Note 8, *supra* at 869-870.

²⁵Wisconsin Administrative Code Sec. 328.21 (Feb. 1987).

²⁶*Griffin* Note 8, *supra* at 878-880.

²⁷*United States v. Giannetta*, 909 F.2d 577 at 577 (1st Cir. 1990).

²⁸Howard P. Schneiderman, "Conflicting Perspectives from the Bench and Field on Probationer Home Searches—*Griffin v. Wisconsin* Reconsidered," 1989, Wis. L. Rev. 607.

²⁹*Id.* at 665 and 66.

³⁰Administrative Office of the U.S. Courts, *Guide to Judiciary Policies and Procedures*, Probation Manual Chapter I P.11-12 (March 1990).

³¹U.S. Parole Commission unpublished survey of U.S. Probation System concerning search and seizure (June 1992).