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COMMENT

A Fourth Amendment Problem with Probation in North Carolina

I. INTRODUCTION*

In 1995, the North Carolina Legislature amended Article XI, section 1 of the North Carolina Constitution to provide explicitly for probation as an appropriate sanction in criminal cases.¹ Attached to Session Laws 1995, c. 429,² the bill which authorized this constitutional amendment, was a provision³ repealing North Carolina General Statute § 15A-1341(c).⁴ Previously, N.C. Gen. Stat. § 15A-1341(c) provided that if the defendant chose, he could refuse to consent to the terms of the probation and elect to actively serve the sentence imposed

* The author wishes to express his gratitude to Scott Casey, Esq., for his helpful insight in regard to the issues discussed herein.

1. 1995 N.C. Sess. Laws 429; N.C. Const. art. XI, § 1. The North Carolina Constitution, as amended, reads:

The following punishments only shall be known to the laws of this State: death, imprisonment, fines, *suspension of a jail or prison term with or without conditions, restitution, community service, restraints on liberty, work programs, removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under this State.*

N.C. Const. art. XI, § 1 (1995 additions in italics).

2. 1995 N.C. Sess. Laws 429 is entitled:

An act to repeal the law providing that a defendant may choose imprisonment rather than probation or an alternative punishment and to amend the constitution to provide that probation, restitution, community service, work programs, and other restraints on liberty are punishments that may be imposed on a person convicted of a criminal offense.

3. 1995 N.C. Sess. Laws 429. (Section 1 of c. 429 simply reads: "G.S. 15A-1341(c) is repealed.")

4. Prior to repeal, N.C. Gen. Stat. § 15A-1341(c) read:

Election to Serve Sentence or Be Tried on Charges.—Any person placed on probation may at any time during the probationary period elect to serve his suspended sentence of imprisonment in lieu of the remainder of his probation. Any person placed on probation upon deferral of prosecution may at any time during the probationary period elect to be tried upon the charges deferred in lieu of remaining on probation.

by the judge.⁵ This change has had the practical effect of authorizing searches of probationary defendants without obtaining the defendant's consent to the search. This article will argue that this practice is in violation of a defendant's protection under the Fourth Amendment, applicable to the State of North Carolina through the Fourteenth Amendment.⁶

Under N.C. Gen. Stat. § 15A-1343, when a judge orders a defendant to be placed on probation, he may order appropriate terms for the probation, including special circumstances.⁷ One of the provisions of § 15A-1343⁸ allows a judge to order the defendant to submit to searches by a parole officer, without probable cause, if "reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so."⁹ Previously, the defendant would then have been given the option of serving the active sentence imposed, or agreeing to these terms, which would include the defendant signing a waiver of his Fourth Amendment freedom from unreasonable search and seizure to the extent ordered.¹⁰

The current practice of North Carolina courts, following the repeal of § 15A-1341(c), is to order probation without obtaining the consent of the defendant to these searches.¹¹ This leaves the defendant with no choice as to the disposition of the case, and no option to consent or refuse the conditions.¹² The defendant must comply with the order rather than actively serving the original sentence, face a possible probation violation, and be subject to searches and seizures which

5. *Id.*

6. See *Mapp v. Ohio*, 367 U.S. 643 (1961).

7. N.C. Gen. Stat. § 15A-1343 (1999).

8. N.C. Gen. Stat. § 15A-1343(b1)(7). This statute, in relevant part, provides: In addition to the regular conditions of probation . . . the court may, as a condition of probation, require that the defendant comply with . . . the following special condition[]: . . . (7) Submit at reasonable times to *warrantless searches* by a probation officer of his person and of his vehicle and premises

Id. (emphasis added).

9. N.C. Gen. Stat. § 15A-1343(a).

10. N.C. Gen. Stat. § 15A-1341(c).

11. Following the repeal of § 15A-1341(c), consent is no longer part of the probationary formula. However, searches of a probationer pursuant to § 15A-1343(b1)(7) must comply with the requirements of the Fourth Amendment.

12. N.C. Gen. Stat. § 15A-1341(c) previously read: "Election to Serve Sentence or Be Tried on Charges—Any person placed on probation may at any time during the probationary period elect to serve his suspended sentence of imprisonment in lieu of the remainder of his probation."

may lack any reasonable suspicion of criminal activity.¹³ In effect, the State has taken away the Fourth Amendment rights of the defendant for the period of his probation, without obtaining a waiver or the defendant's consent.

This practice has not been addressed by North Carolina courts in any reported decisions, nor has this situation been expressly addressed by the United States Supreme Court in this specific context. Therefore, in evaluating the validity of this practice, it is necessary to examine the rationale of this probation system, and analyze how North Carolina has handled this issue under the previous statute, as well as the rationale adopted by other states in dealing with searches incident to probation.

When a search is conducted of a probationary defendant, it may be conducted without probable cause, or even a reasonable, articulable suspicion of specific criminal wrongdoing.¹⁴ These searches may only be conducted by probation officers at reasonable times.¹⁵ However, there is currently no requirement that probable cause or reasonable suspicion exist as to specific wrongdoing. This, it appears, violates the protections of the Fourth Amendment of the United States Constitution,¹⁶ which guarantees "the right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause."¹⁷

II. BACKGROUND

Under former § 15A-1341(c), the reasonableness requirement for probationary searches was met by the limited waiver of Fourth Amendment rights to which the defendant consented as part of the probation agreement.¹⁸ It was clear under the previous North Carolina provisions that "a suspended sentence or probationary judgment can only be entered with the consent of the defendant."¹⁹ Consent was used to

13. N.C. Gen. Stat. § 15A-1345 (1999).

14. N.C. Gen. Stat. § 15A-1343(b1)(7). Under this section, a criminal defendant may be subject to "warrantless searches" as a condition of his probation.

15. *Id.*

16. U.S. Const. amend. IV. (The full text of the Fourth Amendment reads: "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.").

17. *Id.*

18. N.C. Gen. Stat. § 15A-1341(c).

19. *Shore v. Edminsten*, 290 N.C. 628, 631, 227 S.E.2d 553, 557 (1976). See *State v. White*, 264 N.C. 600, 142 S.E.2d 153 (1965); *State v. King*, 42 N.C. App. 210, 256

satisfy the requirements of the North Carolina Constitution, as well as the Fourth Amendment probable cause requirements.²⁰ This waiver of Fourth Amendment protections was limited in scope to comply with the requirement of the United States Supreme Court that such a waiver must be consensual and narrowly tailored to the purpose which the search is meant to accomplish.²¹ In general, the Fourth Amendment requires a warrant for a nonconsensual search of a defendant or his home unless the search falls within one of the clearly delineated exceptions established by the Supreme Court.²²

For probationers, the United States Supreme Court has recognized a standard lower than probable cause.²³ In *Griffin v. Wisconsin*, a probation officer had reasonable suspicion that Griffin possessed a firearm in violation of his parole.²⁴ Justice Scalia found that "the special needs of Wisconsin's probation system make the warrant requirement impracticable and justify replacement of the standard of probable cause by reasonable grounds."²⁵ The Court found the search acceptable "because it was carried out pursuant to a regulation that itself satisfies the Fourth Amendment's reasonableness requirement under well-established principles."²⁶ Therefore, searches pursuant to a valid regulation will be upheld so long as the facts and circumstances establish the reasonableness of the search.²⁷

However, it is important to note that *Griffin* "only addressed the standard required to search"; it did not address the reasons why a probationer receives a lower standard of protection.²⁸ A search under a reasonableness standard must be based upon an objectively reasonable and articulable suspicion of criminal wrongdoing.²⁹ The reasonableness standard does not allow unfettered discretion of the officer to

S.E.2d 247 (1979); *State v. Simpson*, 25 N.C. App. 176, 212 S.E.2d 566, cert. denied, 287 N.C. 263, 214 S.E.2d 436 (1975).

20. Searches of a probationer, while not requiring probable cause, must be narrowly tailored, reasonable, and limited to those terms "reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so." N.C. Gen. Stat. § 15A-1343(a). See also *Griffin v. Wisconsin*, 483 U.S. 868 (1987).

21. *Bumper v. North Carolina*, 391 U.S. 543 (1968). See also *Camara v. Municipal Court*, 387 U.S. 523 (1967).

22. See *Camara*, 387 U.S. 523.

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

24. *Id.* at 871.

25. *Id.* at 876.

26. *Id.* at 873.

27. *Id.*

28. See *United States v. Gianetta*, 909 F.2d 571, 578 (1st Cir. 1990).

29. *Terry v. Ohio*, 392 U.S. 1 (1968).

conduct a search.³⁰ Thus far, consent is the only basis which has been recognized to allow searches *without any* suspicion of particularized wrongdoing.³¹

III. PROBATION AS A DE FACTO SUSPENDED SENTENCE

There is no dispute that rights may be waived.³² However, the state has never had the right to trample a probationer's constitutional rights through the use of a probation decree.³³ A probation order cannot be a Bill of Attainder.³⁴ In support of such view the Michigan Court of Appeals has taken the position that when constitutional rights are statutorily restricted by a probation decree, the probationer has the option to consent to the decree or reject it.³⁵ "Probation is a matter of grace and rejectable . . . at the option of the probationer. But it is not a Bill of Attainder for the period of probation."³⁶ Indeed, a probationer does not lose all of his rights. In fact, "the liberty of a [probationer], although indeterminate, includes many of the core values of unqualified liberty."³⁷ Although on probation, a defendant retains the rights guaranteed under the Fourth Amendment.³⁸

In N.C. Gen. Stat. § 15A-1343, the legislature outlined the conditions which may be part of a defendant's probation.³⁹ When assigned correctly, these conditions will be no more restrictive than required to help rehabilitate the defendant.⁴⁰ Most of these terms do not relate to rights protected by the Constitution, and a waiver would be unnecessary for a valid probation order in these instances.⁴¹ Regular conditions are incorporated via § 15A-1343(b) and specific terms via § 15A-1343(b1).⁴² Most of these conditions may be ordered because they generally do not implicate any constitutional rights. The problem

30. See, e.g., *Florida v. J.L.*, 529 U.S. 266 (2000).

31. *United States v. Wryn*, 952 F.2d 1122 (9th Cir. 1991).

32. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (holding advance waiver of Fourth Amendment rights must be voluntary). See, e.g., *State v. Mitchell*, 22 N.C. App. 663, 207 S.E.2d 263 (1974).

33. See *Morrissey v. Brewer*, 408 U.S. 471 (1972).

34. U.S. Const., art. I, § 10. ("No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; . . . pass any bill of attainder . . .").

35. *People v. Peterson*, 233 N.W.2d 250 (Mich. 1975).

36. *Id.* at 255.

37. *Morrissey*, 408 U.S. at 482.

38. *Id.*

39. See N.C. Gen. Stat. § 15A-1343 (1999).

40. N.C. Gen. Stat. § 15A-1343(a).

41. N.C. Gen. Stat. § 15A-1343(b)-(d).

42. N.C. Gen. Stat. § 15A-1343(b); N.C. Gen. Stat. § 15A-1341(b1).

arises from a coupling of the repeal of § 15A-1341(c), which allowed a probationer to elect to serve an active jail sentence rather than probation, with § 15A-1343(b1)(7), which requires the probationer to "[s]ubmit at reasonable times to warrantless searches by a probation officer of his person and of his vehicle and premises while he is present."⁴³

Under prior law, probationary searches were allowed by obtaining the consent of the probationer.⁴⁴ Now, however, a judge, pursuant to N.C. Const. art. XI, sec. 1, may order probation, including this condition, without consent as the basis for the search.⁴⁵ *Griffin* requires that this search be based on reasonable suspicion,⁴⁶ but the statute allows any search, limited only to a reasonable time.⁴⁷

As in many areas of the law, courts must look at the substance of a statute rather than its mere form.⁴⁸ The North Carolina Constitution, as amended, states:

The following punishments only shall be known to the laws of this State: death, imprisonment, fines, *suspension of a jail or prison term with or without conditions, restitution, community service, restraints on liberty, work programs*, removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under this State.⁴⁹

While this amendment appears to provide probation as a criminal sanction,⁵⁰ the actual workings of this provision will involve a judge pronouncing an active sentence, but suspending the sentence in favor of probation. The probation itself is not the punishment; it is given in lieu of the active sentence. The United States Supreme Court has "rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or a 'privilege'."⁵¹ The same rationale applies to this form-substance argument. The practical effect of this change is not that the sentencing methods have

43. N.C. Gen. Stat. § 15A-1343(b1)(7).

44. N.C. Gen. Stat. § 15A-1341(c) (*repealed* 1995). See *supra* text accompanying note 4. See also *State v. Cole*, 241 N.C. 576, 582, 86 S.E.2d 203, 207 (1955).

45. N.C. Const. art. XI, § 1. See *supra* text accompanying note 1.

46. *Griffin v. Wisconsin*, 483 U.S. 868, 875-880 (1987).

47. N.C. Gen. Stat. § 15A-1343(b1)(7). This section requires, as a possible condition of probation, that a defendant on probation submit to warrantless searches "at reasonable times."

48. See, e.g., *Jefferson County, Alabama v. Acker*, 527 U.S. 423, 439 (1999).

49. N.C. Const. art. XI, § 1 (1995 additions in italics). See also 1995 N.C. Sess. Laws 429 (see *supra* text accompanying note 2.).

50. N.C. Const. art. XI, § 1. See also 1995 N.C. Sess. Laws 429.

51. *Graham v. Richardson*, 403 U.S. 365, 374 (1971) (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)).

changed; only the provision relating to consent has changed.⁵² When a defendant refuses to consent to the terms of the probation, the court invariably orders an active sentence. Although the form provides for probation as a punishment, it is still a suspended sentence in substance.

IV. CONSENT AS AN EXCEPTION TO THE FOURTH AMENDMENT

Failure to obtain consent before imposing these conditions violates the due process clause of the Fourteenth Amendment, unless the State has a narrowly tailored exception, other than consent, to the probable cause requirement. An order, such as the one contemplated here, is effectively forced consent, and fails to provide the probationer an opportunity to be heard and refuse consent to the search requirement of the probation sentence. In *Schneckloth v. Bustamonte*, the United States Supreme Court stated:

The Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion were applied, the resulting "consent" would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.⁵³

This issue was also addressed in *United States ex. rel Coleman v. Smith*.⁵⁴ In *Coleman*, the court held that a condition of parole that was involuntary, but provided for a parole officer's search of parolee's residence—without suspicion of parole violation—was unreasonable.⁵⁵ The court also held that to have a proper search in these circumstances, the state must prove that consent was in fact freely and voluntarily given.⁵⁶ By refusing to allow a probationer to reject warrantless searches that are not supported by reasonable suspicion, the state limits the defendant's due process rights by forcing overbroad conditions on the defendant.⁵⁷ "A condition which is a violation of the defendant's constitutional right and, therefore, beyond the power of the court to impose is [p]er se unreasonable."⁵⁸ Therefore, the State can-

52. The provision that related to consent was N.C. Gen. Stat. § 15A-1341(c) (repealed 1995).

53. *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973). See *Kuentler v. State*, 486 S.W.2d 367 (Tex. Crim. App. 1970) (holding that when a motion fails to fully inform the probationer, he is denied the rudiments of due process).

54. 395 F. Supp. 1155 (W.D.N.Y. 1975).

55. *Id.*

56. *Id.* See also *Bumper v. North Carolina*, 391 U.S. 543 (1968).

57. *State v. Caudle*, 276 N.C. 550, 173 S.E.2d 778 (1970).

58. *Id.* at 554, 173 S.E.2d at 781.

not unilaterally claim that it is granting consent on behalf of the defendant.⁵⁹

V. PROBLEMS WITH APPLYING OTHER EXCEPTIONS TO THE FOURTH AMENDMENT

Two other possible bases for searches lacking both probable cause and reasonable suspicion that the Supreme Court has recognized are searches incident to arrest and searches under the inventory rationale.⁶⁰ Both of these fail to logically encompass the search of a probationer. First, a search incident to arrest is only applicable to the time of incarceration of the defendant.⁶¹ It could not reasonably be argued that a police officer maintains the “immediate control” over the individual that justifies such a search.⁶² Applying the inventory rationale is equally unreasonable. Probation searches are used neither to “safeguard the owner’s property” nor “guarantee the safety of the custodians.”⁶³ The random search of the defendant’s person, vehicle, and dwelling is too broad to fit into this limited exception. The state does not gain possessory rights over a defendant’s dwelling merely because he is on probation.⁶⁴ Put simply, the inventory rationale lacks the immediacy contemplated by these exceptions.⁶⁵

The following argument could also be advanced by the state: if the state may completely deny a probationer his liberty by placing him in jail, then it may impose limitations which are a lesser burden on his liberty. Hence, anything short of jail is an acceptable alternative for the probationer, and all his rights are satisfied. This is an argument which the United States Supreme Court has addressed in the context of the First Amendment—and expressly rejected.⁶⁶ In *44 Liquormart, Inc. v. Rhode Island*,⁶⁷ the Supreme Court effectively reversed *Posadas De Puerto Rico Assocs. v. Tourism Co. of Puerto Rico* on this point.⁶⁸ In

59. *Bumper*, 391 U.S. 543.

60. See *Cady v. Dombrowski*, 413 U.S. 433 (1973); *Chimel v. California*, 395 U.S. 752 (1969).

61. *Chimel*, 395 U.S. at 760.

62. *Id.* at 760.

63. *Cady*, 413 U.S. at 446.

64. *Cf. Morrissey v. Brewer*, 408 U.S. 471 (1972).

65. *Warden v. Hayden*, 387 U.S. 294, 298 (1967) (allowing exception to the warrant requirement when “the exigencies of the situation made that course imperative.”) (quoting *McDonald v. United States*, 335 U.S. 451, 456 (1948)).

66. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

67. *Id.*

68. *Posadas De Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), called into doubt by *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

Posadas, the Court had narrowly held that if Puerto Rico could prohibit all advertising for gambling, it could prohibit advertising for gambling not based in Puerto Rico. Noting its disapproval, the Court in 44 *Liquormart* stated: “[We] cannot accept the State’s . . . ‘greater-includes-the-lesser’ reasoning [because it is] inconsistent with both logic and well-settled doctrine.”⁶⁹ Applying the reasoning in 44 *Liquormart* to Fourth Amendment concerns, a possible complete deprivation of liberty does not authorize an incremental one. Analogously, the Supreme Court, in two cases which operate together to further highlight the constitutional infirmity of the “greater-includes-the-lesser” argument, has held that the mere fact that police may establish a road block and stop all vehicles traveling down a certain road does not give them the right to stop any vehicle at random on that same road.⁷⁰

VI. CONSENT AND ITS LIMITATIONS

Consent is left as the only basis to justify the imposition of a search that lacks reasonable suspicion of particular wrongdoing. Implicit in *Griffin v. Wisconsin* is that without consent, any search must be narrowly tailored to satisfy the reasonableness requirement.⁷¹ Wisconsin’s statute, like the previous North Carolina provision, provided for consent hearings for probationers.⁷² Even in cases where consent is obtained, it does not waive all of the probationer’s freedom from unreasonable searches.⁷³ Indeed, some courts do not believe that a probationer can consent to unreasonable searches and seizures.⁷⁴ Drawing on the language in *Bumper v. North Carolina* that consent

69. 44 *Liquormart*, 517 U.S. at 510.

70. Compare *Delaware v. Prouse*, 440 U.S. 648 (1979) (holding police may not make random vehicle stops), with *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) (holding sobriety checkpoints constitutional).

71. 483 U.S. 868 (1987).

72. Wis. Stat. §§ 161.47, 973.20 (1985-1986).

73. N.C. Gen. Stat. §15A-1343(b1)(7) (1999). This statute, in relevant part, provides:

In addition to the regular conditions of probation . . . the court may, as a condition of probation, require that the defendant comply with . . . the following special condition[]: . . . (7) Submit at reasonable times to warrantless searches by a probation officer of his person and of his vehicle and premises . . . but the probationer may not be required to submit to any other search that would otherwise be unlawful.

Id.

74. See, e.g., *United States v. Consuelo-Gonzalez*, 521 F.2d 259 (9th Cir. 1975); *State v. Fields*, 686 P.2d 1379 (Haw. 1984); *Johnson v. State*, 386 So.2d 291 (Fla. 1980); *State v. Rupp*, 586 P.2d 1302 (Ariz. 1978).

must be "in fact, freely and voluntarily given,"⁷⁵ these courts have held that a defendant faced with choosing probation or prison is not freely and voluntarily giving his consent.⁷⁶

The theory behind these arguments is that a defendant is in a poor bargaining position to complain about the conditions of the probation.⁷⁷ In North Carolina, consent to probationary searches is limited by several factors.⁷⁸ For example, searches may only be conducted by probation officers,⁷⁹ (who are, of course, vested with arrest powers in North Carolina).⁸⁰ Also, searches can only take place at reasonable times.⁸¹ Even given similar limitations such as these, other states have upheld a defendant's consent only when freely given and the terms of the search are narrowly tailored.⁸² Missouri has held that "a probationer is free to reject the terms of a probation agreement . . . and accept instead the punishment for his crime."⁸³

However, many courts have held that consent given by a defendant faced with this Hobson's choice is constitutionally valid.⁸⁴ The Ohio Supreme Court succinctly stated: "While it is true that the defendant was presented with choosing whether to consent to warrantless

75. 391 U.S. 543, 548 (1968).

76. See *United States v. Gianetta*, 909 F.2d 571, 576 n.4 (1st Cir. 1990) (the court stated: "a question of coercion would arise as to any contention that 'agreement' to a probation search condition constitutes a general consent to search"); *United States v. Pierce*, 561 F.2d 735, 739 (9th Cir. 1977), *cert denied*, 435 U.S. 923 (1978) (the court stated: "As a practical matter, a defendant's consent to a probation condition is likely to be nominal where consent is given only to avoid imprisonment"); *Oregon v. Thomas*, 575 P.2d 171 (Or. 1978) (holding that requiring submission to police officer for warrantless search invalid); *Oregon v. Davis*, 891 P.2d 1373, 1379 (Or. Ct. App. 1995), *review denied*, 899 P.2d 1197 (Or. 1995) (the court stated: "The environment surrounding the probation search may be sufficiently coercive so as to preclude the probationer from raising an objection.").

77. See, e.g., *Pierce*, 561 F.2d 735.

78. N.C. Gen. Stat. § 15A-1341 to 1342.

79. N.C. Gen. Stat. § 15A-1343(b1)(7).

80. N.C. Gen. Stat. § 15-205 (1999).

81. N.C. Gen. Stat. § 15A-1341(b1)(7).

82. See, e.g., *Fox v. State*, 527 S.E.2d 847 (Ga. 2000) (holding waiver of Fourth Amendment rights invalid if not obtained as part of the plea bargaining process). See also *State v. Marquart*, 945 P.2d 1027 (N.M. 1997), *cert. denied*, 944 P.2d 274 (N.M. 1997); *Dearth v. State*, 390 So.2d 108 (Fla. Dist. Ct. App. 1980); *State v. Oregon*, 575 P.2d 171 (Or. Ct. App. 1978); *Tamez v. State*, 534 S.W.2d 686 (Tex. Crim. App. 1976); *People v. Peterson*, 233 N.W.2d 250 (Mich. Ct. App. 1975).

83. *State v. Fetterhoff*, 739 S.W.2d 573, 576 (Mo. Ct. App. 1987).

84. See, e.g., *United States v. Schoenrock*, 868 F.2d 289 (8th Cir. 1989); *State v. Josephson*, 867 P.2d 993 (Idaho 1994); *Wilson v. State*, 752 S.W.2d 46 (Ark. Ct. App. 1988).

searches at any time or to remain incarcerated, the fact that the defendant must decide between two unattractive choices does not invalidate the waiver."⁸⁵ Prior to the recent amendment eliminating the defendant's choice between serving an active sentence and probation, consent searches, part of the standard investigatory techniques of law enforcement,⁸⁶ apparently found favor with North Carolina courts.⁸⁷ While consent may place the defendant in an unenviable situation of choosing random searches or jail, when limited in scope North Carolina has accepted consent as a valid solution to imposing searches by probation officers as a means of rehabilitative and deterrent punishment.⁸⁸

VII. RATIONALE FOR ALLOWING THE CONSENT OPTION

All this raises the following question: when would anyone ever prefer jail to the imposition of warrantless searches? Remarkably, there are several situations in which a defendant may wish to avoid probationary searches which may not be accompanied by a reasonable, articulable suspicion of wrongdoing. "One need not carry contraband to prefer that the police not examine one's private possessions."⁸⁹ Perhaps he finds them embarrassing and intrusive. Perhaps he finds these searches too onerous, or the period of time over which he may be searched too long. Perhaps he just prefers to place these events behind him as quickly as possible. These possibilities stem from the basic concept that, upon weighing the factors, the defendant prefers the inconvenience of a shorter prison term to the long term waiver of his constitutional right to be free from unreasonable searches.

85. *State v. Benton*, 695 N.E.2d 757, 762 (Ohio 1998). See *Fox*, 527 S.E.2d at 849 (observing that "such waivers are valid on the theory that the defendant has voluntarily consented to such a condition as 'an acceptable alternative to prison'"); see also *State v. Ullring*, 741 A.2d 1065 (Me. 1999), *cert. denied*, 120 S. Ct. 2664 (2000) (applying consent waiver to bail conditions).

86. See *Schneekloth v. Bustamonte*, 412 U.S. 218, 231 (1973).

87. See, e.g., *State v. Mitchell*, 22 N.C. App. 663, 207 S.E.2d 263 (1974).

We find valid the conditions of the prior suspended sentences by which defendants gave consent to search of their premises at reasonable hours without a search warrant. . . . We see no sound reason why such waiver and consent may not effectively be given by agreeing thereto as one of the conditions of a suspended sentence.

Id.

88. *Id.*

89. *South Dakota v. Opperman*, 428 U.S. 364, 393 (1976) (Marshall, J. dissenting).

An example of this balance in favor of prison can be found in *Higdon v. United States*.⁹⁰ Higdon was convicted of defrauding the government.⁹¹ His probation entailed the forfeiture of all his assets, full-time charity work (6200 hours in three years) without pay, and the loss of all his pension rights.⁹² Such conditions resulted in his failure to be able to pay child support or support his family.⁹³ While this case did not involve a condition of warrantless searches, the Ninth Circuit Court of Appeals found the conditions to be “needlessly harsh”, remanding the case to the trial court.⁹⁴ Although this case was not a matter of constitutional significance, it suggests that not all defendants will wish to waive their constitutional rights to avoid an active prison term.

Under North Carolina’s present system, the trial court makes this choice for the defendant, depriving him of the ability to either consent to a limited waiver of his protections or to serve his sentence for his crime. Also, the judge is no longer obligated to send a probationer to jail if he violates the terms of his probation.⁹⁵ Article XI, section 1 of the North Carolina Constitution now authorizes “suspension of a jail or prison term” as a punishment,⁹⁶ and the judge has the authority to extend the period of probation⁹⁷ and impose more limitations on the liberties of the probationer rather than impose an active sentence.⁹⁸ It is now theoretically possible in North Carolina for a judge to order a period of unreasonable searches for up to five years as the sentence for probation violations rather than activate a jail term.⁹⁹ The state should not be allowed to waive Constitutional rights for the defendant merely because it is more expedient and convenient for the state to dispense with obtaining consent for searches incident to a valid probation decree.

90. *Higdon v. United States*, 627 F.2d 893 (9th Cir. 1980).

91. *Id.* at 896.

92. *Id.*

93. *Id.*

94. *Id.* at 898.

95. N.C. Const. art. XI, § 1; N.C. Gen. Stat. § 15A-1342.

96. N.C. Const. art. XI, § 1.

97. N.C. Gen. Stat. § 15A-1342. “The court with the consent of the defendant may extend the period of probation beyond the original period” *Id.*

98. N.C. Const. art. XI, § 1.

99. Sec. 15A-1342 limits the period that probation may be imposed to five years. It is unclear if the constitutional amendment allowing probation as a sentence may be applied to probation violations themselves.

VIII. SCOPE

A court may examine the scope of the search in determining the validity of a warrantless probationary search if the validity of a probationary search is in issue.¹⁰⁰ Probationary searches under § 15A-1343(b1)(7) are very broad, and include the probationer, his vehicle, and his home.¹⁰¹ A probation officer has the authority to charge the probationer with specific offenses if contraband is discovered, in addition to charging the probationer with a probation violation.¹⁰² While it is true that any evidence seized as a result of an illegal search is treated as the fruit of the poisonous tree¹⁰³ and is subject to the exclusionary rule in criminal trials,¹⁰⁴ this is not the case for probation revocation hearings. The exclusionary rule, which requires that “any unconstitutionally seized evidence that could lead to an indictment . . . be suppressed in a criminal trial”,¹⁰⁵ does not apply to probation revocation hearings. However, while not applicable to probationary hearings, the exclusionary rule does apply to any future criminal prosecutions based on contraband found during a search by a probation officer.¹⁰⁶ Under the North Carolina Constitution as amended,¹⁰⁷ probation is defined as a punishment in itself (along with, for example, imprisonment) rather than an option given to the defendant in lieu of state sanctioned punishment, and given that a probationary period may be imposed which is far in excess of the active sentence which would be imposed under North Carolina Structured Sentencing Guidelines,¹⁰⁸ it is at least arguable that the exclusionary rule should, in fact, apply to probation-related hearings. As to the admissibility in a future criminal trial relating to the contraband discovered, it appears clear that suppression would be the appropriate remedy.¹⁰⁹

100. *Griffin v. Wisconsin*, 483 U.S. 868 (1987); *Chimel v. California*, 395 U.S. 752 (1969).

101. N.C. Gen. Stat. § 15A-1343(b1)(7).

102. N.C. Gen. Stat. § 15-205.

103. *Wong Sun v. United States*, 371 U.S. 471 (1963).

104. *Mapp v. Ohio*, 367 U.S. 643 (1961).

105. *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357 (1998). The exclusionary rule may apply, however, as a matter of statutory law. Under § 15A-1342(g), “the failure of a defendant to object to a condition of probation imposed pursuant to N.C. Gen. Stat. § 1343(b1) at the time such a condition is imposed does not constitute a waiver of the right to object at a later time to the condition.”

106. *Scott*, 524 U.S. at 369.

107. N.C. Const. art. XI, § 1.

108. N.C. Gen. Stat. § 15A-1340.1 *et seq.*

109. *Scott*, 524 U.S. at 369. *See also Mapp*, 367 U.S. 643.

IX. CONCLUSION

In sum, the 1995 amendment to the North Carolina Constitution authorizing "suspension of a jail or prison term" as an appropriate sentence is not *per se* unconstitutional when applied as provided in § 15A-1343 *et seq.* The problem arises only in the situation where the probationer is required to undergo unreasonable searches as part of that probation. When the North Carolina General Assembly repealed § 15A-1341(c), a defendant's ability to refuse to consent to these searches was revoked.¹¹⁰ The North Carolina Legislature, in effect, has revoked the defendant's search and seizure protections which are guaranteed under the Fourth Amendment. Such revocation of Fourth Amendment rights is beyond the power of the legislature and is *per se* unconstitutional.

Under the prior sentencing structure, the defendant's consent to this term was acceptable because it satisfied the requirements of the Fourth Amendment.¹¹¹ In removing the consent provision from § 15A-1341(c), however, the court must find an alternative basis for ordering unreasonable searches. After surveying the law, it is clear that North Carolina is unable to justify this system. In trying to amend the requirements of the North Carolina Constitution, the legislature has brought the law of North Carolina into conflict with the Fourth Amendment of the United States Constitution. None of the other clearly delineated exceptions to the Fourth Amendment requirements are applicable to this statutory scheme.

While some courts have expressed concern over the consent requirement, consent is a viable option for searches incident to probation and has been accepted in North Carolina. It would work little harm upon the probation system for North Carolina courts to obtain consent from the defendant to the probation decree before ordering a search of the defendant, his vehicle, or his residence as an incidence of probation. The Constitution requires no less.

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110. 1995 N.C. Sess. Laws 429.

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