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United States v. Howard: Refocusing Probable Cause for Probationers and Parolees

Sean A. Kersten

NOTE

UNITED STATES v. HOWARD:

REFOCUSING PROBABLE CAUSE FOR PROBATIONERS AND PAROLEES

INTRODUCTION

Imagine a probationer is released from a correctional facility.[1] Pursuant to his release he must adhere to specific conditions to ensure that he does not engage in further criminal activity, including the warrantless search of his residence at any time.[2] These conditions have been imposed because the probationer's criminal history indicates that he poses an egregious threat to society. This probationer appears to be in compliance with the conditions of his release; however, in secret, he is engaged in the exact type of criminal activity the conditions of his supervised release are designed to prevent.

Suppose the probation officer assigned to this probationer receives reports from an informant indicating the probationer is regressing into criminal activity at an unreported address. An investigation of these reports ultimately results in the discovery of evidence suggesting the probationer has established a "safe house"[3] where he can engage in

[1] This hypothetical was created by the author to illustrate the issues addressed in this Note. The terms probationer, parolee, and supervised releasee will be used interchangeably throughout this Note since the Ninth Circuit has recognized that there is not a "constitutional difference between probation and parole for the purposes of the fourth amendment." United States v. Harper, 928 F.2d 894, 896 n.1 (1991).

[2] *See generally* United States v. Knights, 534 U.S. 112, 119 (2001).

[3] A "safe house" is a place where a probationer could deposit the fruit of his or her illegal activities, and where it would not be discovered pursuant to conditions of a supervised release. *See* United States v. Howard, 447 F.3d 1257, 1269 (9th Cir. 2006) (Noonan, J., concurring).

criminal activity without detection. Further proactive investigation has been thwarted, however, due to the lack of sufficient evidence to satisfy the ambiguous, yet stringent, probable cause standard to establish the safe house as the probationer's residence, and thus subject it to a warrantless search. A search of the safe house would, therefore, be unconstitutional.[4] As a result, the probation officer is helpless to fulfill his duty to ensure that the probationer is refraining from criminal activity and, further, protect society's interest in preventing crime.

In *United States v. Howard*, the Court of Appeals for the Ninth Circuit reversed the district court's holding that officers had probable cause to believe Curtis Ray Howard, a probationer, resided at an unreported address.[5] The Ninth Circuit concluded that the search of the address violated Howard's Fourth Amendment rights.[6] In overturning the district court's decision, the majority developed a stringent probable cause standard, thus crippling a probation officer's ability to search a suspected safe house.[7] The court stated that officers do not have probable cause to believe a probationer lives at an unreported residence when (1) visits to the probationer's reported address suggest that the probationer continued to reside there; (2) the police watched the address in question for a month and did not see the probationer there; (3) no credible witnesses had seen the probationer at the address in question for some time before the search; (4) the probationer did not have a key to the residence in question; and (5) neither the probationer nor his or her purported co-resident admitted to his or her residence there.[8]

This Note argues that the Ninth Circuit rigidly followed circuit precedent to create and apply an incorrect standard to determine whether probable cause existed to believe that Howard resided at an unreported address. The court should have determined the reasonableness of the search by balancing Howard's reduced expectation of privacy as a probationer with legitimate governmental interests.[9] Furthermore, the court's analysis served to protect the *property* at the unreported address

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[4] *See id.* (Noonan, J., concurring).

[5] United States v. Howard, 447 F.3d 1257, 1268 (9th Cir. 2006).

[6] *Id.* (reversing the district court's ruling that police had probable cause to believe Howard resided at an unreported address); *see also* U.S. CONST. amend. IV (stating "[t]he 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.")

[7] *Howard*, 447 F.3d at 1268.

[8] *Id.*

[9] *See, e.g.*, United States v. Knights, 534 U.S. 112, 118-19 (2001); Samson v. California, 126 S. Ct. 2193, 2197 (2006).

rather than Howard's Fourth Amendment privacy rights.[10] This decision is contrary to the principle articulated in *Katz v. United States*, which states the Fourth Amendment is intended to protect *people*, not places.[11]

Part I of this Note provides a background of the facts and procedural history of *Howard*, followed by a discussion of the development of the probable cause standard in the Ninth Circuit.[12] Part II examines the court's analysis and application of the probable cause standard to the facts in *Howard*, followed by a discussion of Circuit Judge John T. Noonan's concurring opinion, which cast doubt on the constitutionality of the majority's decision.[13] Part III argues that the court should have balanced Howard's reduced expectation of privacy against legitimate governmental interests to determine whether the search of the unreported address was reasonable for purposes of the Fourth Amendment.[14] Part IV analyzes whether Howard had standing to assert his Fourth Amendment rights.[15] Finally, Part V concludes that the court failed to use the correct standard to determine whether the search of the residence in question was reasonable.[16]

I. BACKGROUND

In *Howard*, the Ninth Circuit engaged in an extensive factual recitation prior to determining whether officers had probable cause to believe Howard resided at an unreported address.[17] The court focused on Howard's conduct, his interaction with his probation officer, and information the officers had received indicating that Howard was violating the conditions of his supervised release.[18] The court then turned its analysis to the nature of the probable cause test.[19]

A. FACTS AND PROCEDURAL HISTORY

On August 28, 1996, Chief Judge Phillip M. Pro of the United States District Court for the District of Nevada sentenced Curtis Ray

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[10] Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

[11] *Id.*

[12] *See infra* notes 17-74 and accompanying text.

[13] *See infra* notes 75-129 and accompanying text.

[14] *See infra* notes 130-182 and accompanying text.

[15] *See infra* notes 183-198 and accompanying text.

[16] *See infra* notes 199-205 and accompanying text.

[17] *See* United States v. Howard, 447 F.3d 1257, 1258-62 (9th Cir. 2006).

[18] *See id.* at 1266-67.

[19] *See id.* at 1262.

Howard ("Howard") to ninety-six months of incarceration and three years of supervised release following his guilty plea to one count of bank robbery.[20] On April 14, 2003, Howard was placed on supervised release under the supervision of Probation Officer Robert Aquino ("Aquino").[21] Howard's release was subject to several conditions, including a "warrantless search of his residence, person, property, and automobile at any time."[22] Furthermore, Howard was precluded from associating with convicted felons.[23] Howard reported his residence as 4879 East Owens, Las Vegas, Nevada ("East Owens").[24]

Shortly after his release, Howard met Tami Barner ("Barner").[25] On May 14, 2003, Barner met with Aquino to request permission to continue her relationship with Howard.[26] Barner was denied permission to associate with Howard because the relationship violated a condition of his release, since Barner was a seven-time convicted felon and a recovering cocaine addict.[27] Howard agreed to discontinue the relationship to abide by the conditions of his supervised release.[28]

On February 3, 2004, a confidential informant who claimed to know Howard contacted Aquino.[29] The informant told Aquino that Howard was living at 2221 West Bonanza ("West Bonanza"), had a firearm at the apartment, and spent time at a local tavern known for gang activity.[30] However, the informant could not specify which apartment Howard was living in within the West Bonanza complex.[31] Barner had previously told Aquino that she resided in apartment forty-nine at 2221 West Bonanza.[32]

To investigate, Aquino drove to the West Bonanza apartment and

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[20] *Id.* at 1258. *See* Brief for Appellant at 2, United States v. Howard, No. 05-10469 (9th Cir. Oct. 13, 2005); Appellee's Answering Brief at 2, United States v. Howard, No. 05-10469 (9th Cir. Nov. 23, 2005).

[21] *Howard*, 447 F.3d at 1258.

[22] *See id.* (internal quotation marks omitted) (noting that the purpose of this condition was to ensure Howard was abiding by further conditions of his supervised release); *see also infra* notes 143-151 and accompanying text (discussing this distinction).

[23] United States v. Howard, 447 F.3d 1257, 1259 (9th Cir. 2006).

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* (noting Aquino informed both Barner and Howard that their relationship must be terminated).

[28] *Id.*

[29] United States v. Howard, 447 F.3d 1257, 1259 (9th Cir. 2006).

[30] *Id.*

[31] *Id.* The confidential informant also stated that he or she had not seen Howard for two weeks and denied having a motive to fabricate information. *Id.*

[32] *Id.*

then to the East Owens address.[33] Aquino did not observe Howard at either address, nor did he see him the following day at the tavern suggested by the informant.[34] Aquino later returned to the West Bonanza complex and contacted the apartment manager who, after seeing a picture of Howard, stated that he had seen Howard at the complex and that Howard's car had been parked in the parking lot.[35] This information was corroborated by the president of the condominium owners association, who stated that he had seen Howard visiting Barner at the complex.[36]

Aquino's visit to the West Bonanza complex heightened his concern that Howard was violating the conditions of his release by residing at the West Bonanza apartment and engaging in criminal activity.[37] Further, Aquino grew increasingly concerned because he attempted to visit Howard at the East Owens address ten times, yet found him there only twice.[38] Moreover, Aquino had made morning visits to the East Owens address because, based on his knowledge of Howard's work schedule, this was the time Howard was most likely to be home.[39] However, Howard was present on Aquino's most recent visit to the East Owens address.[40] This address appeared to be Howard's residence because there were pictures, clothes, and furniture in the house.[41]

Aquino contacted the local police department to determine whether Howard was the subject of any investigations.[42] A member of the Las Vegas Metropolitan Gang Unit told Aquino there were no ongoing investigations concerning Howard.[43] However, a gang-unit officer later informed Aquino that a reliable informant stated that Howard was a gun dealer and possibly a leader of the West Coast Bloods.[44]

On February 7, Aquino received a second call from the original

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[33] *Id.*

[34] *Id.*

[35] United States v. Howard, 447 F.3d 1257, 1259 (9th Cir. 2006).

[36] *Id.*

[37] *Id.*

[38] *Id.* at 1259-60.

[39] *Id.* at 1260. Aquino knew, however, that Howard's work schedule was subject to change and that Howard was not required to report such changes. *Id.* Prior to the tip from the informant, Aquino had not been concerned that Howard was not residing at the East Owens address. *Id.*

[40] *Id.*

[41] United States v. Howard, 447 F.3d 1257, 1260 (9th Cir. 2006). Furthermore, on another occasion when Howard was not at the East Owens address, Aquino had spoken with one of Howard's neighbors, who suggested that Howard still resided there. *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

informant, who stated that Howard's vehicle was currently at the West Bonanza apartment.[45] Aquino immediately drove to the West Bonanza apartment complex, where he observed Howard's vehicle parked directly below Barner's apartment.[46] Aquino enlisted the help of other officers to conduct surveillance on both the East Owens residence and the West Bonanza apartment beginning February 10.[47] As of March 8, when the surveillance ended, officers had not affirmatively seen Howard at the West Bonanza apartment.[48] On March 17, Aquino returned to the leasing office and a leasing agent told him that Howard had been seen at the West Bonanza apartment roughly a week and a half before.[49]

Aquino secured an order from the probation department to search both the West Bonanza apartment and the East Owens residence.[50] On March 30, at 6:00 a.m., Aquino arrived at the East Owens apartment to search Howard's residence, but he did not see Howard's car parked in the parking lot.[51] At approximately 6:30 a.m., Aquino drove to the West Bonanza apartment, where he observed Howard's car parked below Barner's apartment.[52] While waiting for the search team to arrive, Aquino observed Howard emerge from the apartment without a shirt on and stand in the doorway for ten to fifteen minutes.[53]

Barner and Howard subsequently left the West Bonanza apartment and began walking in different directions.[54] After they separated, Aquino and another member of the search team confronted Barner.[55] Barner was notified that officers were going to conduct a search of her apartment based upon Howard's presence there.[56] Barner stated that Howard did not reside at the apartment, that he did not have a key, and that she refused consent to the search.[57]

Meanwhile, Howard had been handcuffed for officer safety and read his *Miranda* rights.[58] Howard admitted that he stayed at the West

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[45] *Id.*

[46] *Id.*

[47] United States v. Howard, 447 F.3d 1257, 1260 (9th Cir. 2006).

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.* at 1261.

[53] United States v. Howard, 447 F.3d 1257, 1261 (9th Cir. 2006).

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.* Barner acknowledged, however, that Howard had personal belongings in her apartment. *Id.*

[58] United States v. Howard, 447 F.3d 1257, 1261 (9th Cir. 2006); *see generally* Miranda v.

Bonanza apartment, but denied living there and stated that he did not have a key to the apartment.[59] Barner was given permission to leave the scene, and she again refused to consent to a search of her apartment.[60] The officers attempted to gain entry to the West Bonanza apartment by using Howard's keys in the lock, but they were unsuccessful.[61]

The apartment owner approached the officers and let them into Barner's apartment.[62] Aquino was approached by another resident of the complex who stated that she had seen Howard at the West Bonanza apartment at least eighty to ninety percent of the time.[63] The officers' search revealed a gun wrapped in a hat, concealed in a closet.[64] Howard admitted that the gun was his.[65] However, Howard's only other possessions at the apartment were an alarm clock and a prescription with Howard's name on it.[66]

At his indictment, Howard challenged the constitutionality of the search and sought to suppress his statements as fruit of the poisonous tree.[67] Following an evidentiary hearing, the magistrate entered a finding that the search was constitutional and that the incriminating statements were voluntary.[68] The district court adopted these findings, and Howard entered a conditional plea of guilty to charges that he knowingly received a firearm.[69]

Arizona, 384 U.S. 436, 467 (1966) (holding that "[i]n order to combat these pressures [of custodial interrogation] and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored."); *see also id.* at 478-79 (requiring that when an individual is taken into custody, he or she must be apprised of the right to remain silent, that anything said will be used in court, that he or she has a right to an attorney, and that if the individual cannot afford an attorney one will be provided).

[59] United States v. Howard, 447 F.3d 1257, 1261 (9th Cir. 2006).

[60] *Id.*

[61] *Id.*

[62] *Id. But see id.* n.3 (stating that the government conceded that the apartment owner did not have the power to consent to a search of the apartment).

[63] *Id.* at 1261.

[64] *Id.*

[65] United States v. Howard, 447 F.3d 1257, 1261 (9th Cir. 2006).

[66] *Id.*

[67] *Id. See generally* Wong Sun v. United States, 371 U.S. 471, 484 (1963) (holding that evidence obtained by officers during an unlawful search must be excluded as fruits of such illegality; furthermore, "[t]he exclusionary prohibition extends as well to the indirect as the direct products of such invasions.").

[68] *Howard*, 447 F.3d at 1261.

[69] *Id.* at 1261-62. Howard reserved the right to appeal the validity of the probation search and was sentenced to 120 months, followed by 3 years of supervised release. *Id.*

B. AN INTRA-CIRCUIT SPLIT RESOLVED

In the Ninth Circuit, prior to *Motley v. Parks*, decided in 2005, there was an intra-circuit split regarding the correct standard to use in determining whether a parolee resides at an unreported address.[70] The court in *United States v. Dally* held that a parolee may be searched pursuant to a consent provision in his parole terms, if his parole officer reasonably believed that a search was appropriate.[71] Furthermore, the *Dally* court required police to have a "reasonable belief" that a parolee resides at a particular place before conducting a parole search.[72] In contrast, the court in *United States v. Harper* held that officers must have probable cause to believe that a parolee is a resident of an address before conducting a warrantless search.[73] *Motley v. Parks* resolved this intra-circuit split by holding that "before conducting a warrantless search pursuant to a parolee's parole condition, law enforcement officers must have probable cause to believe that the parolee is a resident of the house to be searched."[74]

II. THE MAJORITY OPINION: THE COURT'S ANALYSIS

In *Howard*, Circuit Judge Jay S. Bybee, writing for the court, implicitly recognized that the court in *Harper* stated that there was no constitutional difference between probation and parole for the purposes of determining the validity of a warrantless search.[75] The *Howard* court then examined a series of prior decisions, in which the Ninth Circuit had found probable cause, to articulate what factors must be considered in determining whether the stringent probable cause standard for finding a

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[70] *See* Motley v. Parks, 432 F.3d 1072, 1074 (9th Cir. 2005).

[71] United States v. Dally, 606 F.2d 861, 863 (9th Cir. 1979).

[72] *Id; see also* Terry v. Ohio, 392 U.S. 1, 21 (1968) (stating that to justify a search based on reasonable suspicion, an officer must be able to "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."). The terms "belief" and "suspicion" are used interchangeably throughout the cases discussed in this Note.

[73] United States v. Harper, 928 F.2d 894, 896 (9th Cir. 1991); *see also* Illinois v. Gates, 462 U.S. 213, 245 n.13 (1983) (stating that "[i]n making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of non-criminal acts."). Probable cause is a more stringent standard than reasonable suspicion because probable cause focuses on the degree of suspicion associated with a particular act as opposed to the particularized facts taken with inferences involved in reasonable suspicion. *Compare* Terry v. Ohio, 392 U.S. 1, 21 (1968), *with* Illinois v. Gates, 462 U.S. 213, 245 n.13 (1983).

[74] Motley v. Parks, 432 F.3d 1072, 1080 (9th Cir. 2005).

[75] *See* United States v. Howard, 447 F.3d 1257, 1262 n.5 (9th Cir. 2006) (referring to the applicable standard to determine whether a parolee or a probationer resides at a particular residence); *see also* United States v. Harper, 928 F.2d 894, 896 n.1 (9th Cir. 1991).

parolee resides at a particular place is satisfied.[76] The court concluded the relevant factors to be the following: (1) whether the parolee appeared to be residing at any address other than the one searched;[77] (2) whether officers had directly observed something that gave them good reason to suspect that the parolee was using the unreported residence as a home base;[78] (3) whether the parolee had a key to the residence in question;[79] and (4) whether the parolee's co-resident, or the parolee himself, identified the residence in question as that of the parolee.[80] In analyzing these factors, the court stated that when presented with weak facts, it would not hesitate to rule that officers could not justify a search for lack of probable cause.[81] Confusingly, the court's analysis gave some of the factors more weight than others, yet no factor alone was intended to be

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[76] *Howard*, 447 F.3d at 1262-66.

[77] *See Howard*, 447 F.3d at 1265-66; *see also* United States v. Conway, 122 F.3d 841, 842-43 (9th Cir. 1997) (stating an officer had been to a probationer's reported address twenty-one times and found him there only once). In *Conway*, the probationer's only possession at his reported address was a pair of socks. *Conway*, 122 F.3d at 842-43. *See also* United States v. Watts, 67 F.3d 790, 792 (9th Cir. 1995) (recognizing an informant stated that the probationer was living at an unreported address, driving a Ford Taurus, and selling cocaine; further, the probationer was followed to the unreported address); United States v. Harper, 928 F.2d 894, 895 (9th Cir. 1991) (noting police believed a parolee was violating the conditions of his parole by manufacturing drugs; however, the agents did not have his current address); United States v. Dally, 606 F.2d 861, 862 (9th Cir. 1979) (noting a parole agent was unsuccessful in locating a parolee at his unreported address).

[78] *See Howard*, 447 F.3d at 1265-66; *see also Conway*, 122 F.3d at 842-43 (recognizing a probation officer confirmed an informant's tip that a probationer walked his dog around the unreported address, was known by his "street moniker" in the neighborhood, and was seen leaving the unreported address early in the morning). In *Conway*, the probationer told the probation officer that he had a dog at the unreported address; furthermore, while at the unreported address, the probation officer noticed mail and notes addressed to the probationer. *Conway*, 122 F.3d at 842-43. *See also Watts*, 67 F.3d at 792-93 (stating officers confirmed the probationer was driving a Taurus that had been seen parked in the driveway of the unreported address and noting the probationer was observed walking to the front door of his reported address, knocking, waiting for an answer, and then leaving when no one responded); *Harper*, 928 F.2d at 895 (noting that acting on a tip, police began surveillance on the parolee's brothers' house where he was seen entering and exiting the residence); *Dally*, 606 F.2d at 862 (recognizing agents notified the parole agent the parolee was residing at a different address and was seen driving a car parked at the address overnight).

[79] *See Howard*, 447 F.3d at 1265-66; *see also Conway*, 122 F.3d at 843 (noting that the probationer opened the door of the unreported address with his own key to allow the officer access to the residence); *Watts*, 67 F.3d at 793 (confirming a search of the probationer's vehicle resulted in the discovery of keys and a garage door opener that were later confirmed to be for the unreported address); *Harper*, 928 F.2d at 895 (noting the parolee was seen entering the unreported address with his own key); *Dally*, 606 F.2d at 863 (stating the parolee was observed entering and exiting the residence by the use of his own key while carrying dry cleaning).

[80] *See Howard*, 447 F.3d at 1265-66; *see also Conway*, 122 F.3d at 843 (recognizing that the probationer identified the bedroom at the unreported address as his); *Watts*, 67 F.3d at 793 (noting the probationer's girlfriend informed the police that they lived together at the house in question).

[81] *See* United States v. Howard, 447 F.3d 1257, 1265 (9th Cir. 2006). *But see id.* at 1266 n.13 (stating that the final factor, a denial by the parolee or his co-resident that the parolee lives at the unreported address, is not necessarily credible because it can be tinged with self-interest).

dispositive.[82]

A. APPLICATION OF THE ESTABLISHED PROBABLE CAUSE STANDARD

The *Howard* court first articulated the factors that would establish probable cause to believe a probationer resides at an unreported address, then applied the factors to the facts of the case.[83] The court compared the facts in *United States v. Dally*, *United States v. Harper*, *United States v. Conway*, and *United States v. Watts* to the facts in *Howard* and concluded that none of the factors were met.[84] Therefore, officers lacked probable cause to believe that Howard resided at the West Bonanza apartment.[85] The court held that the search of the West Bonanza apartment violated Howard's Fourth Amendment rights.[86] Consequently, the court excluded the gun discovered at the apartment and Howard's confession as fruit of the poisonous tree.[87]

First, the court analyzed whether Howard appeared to be residing at the East Owens address.[88] Aquino testified that he had visited Howard at the East Owens address ten times yet found him there only twice.[89] However, Aquino opined that this was not a low success rate in light of Howard's work schedule.[90] Aquino testified that he had spoken to Howard's neighbors while attempting to visit him at the East Owens address.[91] One neighbor told Aquino that he had just missed Howard,

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[82] *See, e.g., Howard*, 447 F.3d at 1267 (focusing on the fact that Aquino did not suspect that Howard was not living at the East Owens address until the tip from the confidential informant, and that Howard did not have a key to the West Bonanza apartment). The court focused on the information officers did not have, as opposed to the information they had obtained, such as the information given by the confidential informant, statements by neighbors, and observations on the morning of the search. *See id.*

[83] *See Howard*, 447 F.3d at 1266-68.

[84] *Id.* at 1265-67.

[85] *Id.* at 1268.

[86] *Id.*

[87] United States v. Howard, 447 F.3d 1257, 1268 (9th Cir. 2006).

[88] *See id.* at 1266-68.

[89] *Id.* at 1266. The court noted that in *Conway*, officers attempted to visit Conway at his reported address twenty times and found him there only once, thus Aquino's success rate of 20% is much higher than the 5% success rate in *Conway*. *Id.* at 1265, 1266. *But see* Illinois v. Gates, 462 U.S. 213, 232 (1983) (stating that "probable cause is a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules.") Instead, the court's analysis in *Howard* created an arbitrary legal rule rather than a fluid probability by implying that a certain percentage of successful officer visits, somewhere between 5% and 20%, are required to establish probable cause to believe that a parolee is residing at the address. *See Howard*, 447 F.3d at 1265-66.

[90] *Howard*, 447 F.3d at 1266.

[91] *Id.* at 1267.

and another stated that Howard was still living at the East Owens address.[92] There was also no indication that Howard did not respond to messages left at the East Owens address.[93] Moreover, the court found that more evidence existed to show that Howard resided at the East Owens address rather than at the West Bonanza apartment.[94] The court concluded that simply observing Howard at the West Bonanza apartment, while he visited Barner, was insufficient to create probable cause to believe he lived there.[95]

On March 30, the day of the search, the apartment manager, who had seen Howard in the complex in early February, told the officers that he had not seen Howard for about a week.[96] The best evidence police had indicating that Howard lived at the West Bonanza apartment was a statement by one of Barner's neighbors, who stated that she had seen Howard there at least eighty to ninety percent of the time.[97] This statement, however, was inconsistent with what officers observed during surveillance and contradicted prior statements made by the apartment complex staff members.[98] The court reasoned that the first factor to establish probable cause was not satisfied because Howard appeared to be residing at the East Owens address and not the West Bonanza apartment.[99]

Turning to the second factor, the court examined whether officers directly observed something that gave them good reason to suspect that Howard was using the unreported West Bonanza apartment as a home base.[100] The court focused on the fact that police had watched the West Bonanza residence for nearly an entire month and there were no reports of Howard entering the apartment complex during that period.[101] Prior to March 30, the day of the search, officers had not seen Howard or his car at the West Bonanza complex since February 7.[102] The court concluded that the officers had not directly observed anything that gave them good

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[92] *Id.*

[93] United States v. Howard, 447 F.3d 1257, 1267 (9th Cir. 2006).

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] United States v. Howard, 447 F.3d 1257, 1267 (9th Cir. 2006).

[100] *Id.* at 1266-67.

[101] *Id.* at 1267.

[102] *Id.* The court also noted that February 7 was the last day the officers had been in contact with the confidential informant who had originally stated Howard lived with Barner at the West Bonanza apartment. *Id.*

reason to suspect that Howard lived at the West Bonanza apartment.[103]

Third, the court focused on whether Howard had a key to the West Bonanza apartment.[104] The police knew Howard did not have a key to the West Bonanza apartment because they checked each of his keys against the door on the morning of the search.[105] Jacobs, the West Bonanza complex manager, unlocked the apartment door so the officers could conduct their search.[106] The court stated this factor was in stark contrast to *Dally*, *Harper*, *Watts*, and *Conway* because the parolee had a key to the unreported address in each of those cases.[107]

Fourth, the court examined whether Barner or Howard identified the West Bonanza address as Howard's residence.[108] In contrast to *Conway*, neither Howard nor Barner told the officers that Howard lived at the West Bonanza apartment.[109] Howard and Barner both admitted that Howard had a few personal belongings in the apartment, yet they also stated he was not a resident.[110] The court acknowledged that such statements are tinged with self-interest and that Barner clearly had a motive to lie because she knew that Howard was violating his parole by associating with her.[111]

The court concluded that the officers did not have probable cause to believe Howard resided at the West Bonanza apartment,[112] overruling the district court on that point.[113] Therefore, both the gun found at the

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[103] *Id.* at 1268.

[104] *Id.* at 1266.

[105] United States v. Howard, 447 F.3d 1257, 1267 (9th Cir. 2006).

[106] *Id.*

[107] *Id.*; *see* United States v. Conway, 122 F.3d 841, 843 (9th Cir. 1997) (noting that the probationer opened the door of the unreported address with his own key to allow the officer access to the residence); United States v. Watts, 67 F.3d 790, 793 (9th Cir. 1995) (focusing on a search of the probationer's vehicle resulted in the discovery of keys and a garage door opener that were later confirmed to be for the unreported address); United States v. Harper, 928 F.2d 894, 895 (9th Cir. 1991) (noting the parolee was see entering the unreported address with his own key); United States v. Dally, 606 F.2d 861, 863 (9th Cir. 1979) (stating the parolee was observed entering and exiting the residence by the use of his own key while carrying dry cleaning).

[108] *Howard*, 447 F.3d at 1266.

[109] *Id.* at 1267. *Compare* United States v. Conway, 122 F.3d 841, 843 (9th Cir. 1997) (noting that Conway said his dog was at the unreported residence and identified a room at the residence as his).

[110] *Howard*, 447 F.3d at 1267.

[111] United States v. Howard, 447 F.3d 1257, 1266 n.13 (9th Cir. 2006). The court stated further that Barner's relationship with Howard presumably violated her parole, so she had reason to downplay the extent of her contact with Howard to keep herself out of custody. *Id.*

[112] *Id.* at 1268. Although the *Howard* court stated that there were five factors to determine whether probable cause existed to believe a parolee is residing at an unreported address, the court did not expressly analyze the credibility of the witnesses involved in the case. *Id.* at 1266-68.

[113] *Id.* at 1268.

apartment and Howard's confession were excluded as fruit of the poisonous tree.[114]

B. THE CONCURRING OPINION, DUBITANTE: A CLOSER LOOK IS REQUIRED

Circuit Judge John T. Noonan, Jr., filed a concurring opinion, dubitante,[115] stating that in adherence to the *Motley* decision, officers must have probable cause to believe that a parolee is a resident of the house to be searched before conducting a warrantless search pursuant to a parolee's parole condition.[116] However, Judge Noonan stated that although he "[could not] deny the controlling standard set by *Motley* and the pattern of what constitutes probable cause [was] not unreasonably presented" by the majority, he doubted whether circuit precedent conformed to the Constitution as interpreted by the United States Supreme Court in *United States v. Knights*.[117]

Judge Noonan explained that in *Knights,* the Supreme Court held that the distinction between probationary searches and investigative searches was without foundation.[118] In *Knights*, the Court analyzed the reasonableness of the search of the probationer's residences by balancing the degree a search intruded on a probationer's privacy with the degree a search was necessary to promote a legitimate governmental interest.[119] Judge Noonan drew attention to the fact that the *Knights* Court noted a "probationer was a person undergoing punishment. . . . [and does] not enjoy 'some freedoms enjoyed by law-abiding citizens.'"[120] With regard to the government's interests, the Court found "it is 'the very assumption of the institution of probation' that a probationer is more likely than an ordinary citizen to violate the law."[121] Further, Judge Noonan noted one prevalent governmental interest was the realization of the strong

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[114] *Id.*

[115] The word "dubitante" is used "next to a judge's name, indicating that the judge doubted a legal point but was unwilling to state that it was wrong." BLACK'S LAW DICTIONARY 537 (8th ed. 2004).

[116] United States v. Howard, 447 F.3d 1257, 1268 (9th Cir. 2006) (Noonan, J., concurring).

[117] *Id.* (Noonan, J., concurring); *see also* United States v. Knights, 534 U.S. 112, 121-22 (2001).

[118] *Howard*, 447 F.3d at 1268 (Noonan, J., concurring) (citing United States v. Knights, 534 U.S. 112, 121-22 (2001)).

[119] *Howard*, 447 F.3d at 1268 (Noonan, J., concurring) (citing United States v. Knights, 534 U.S. 112, 118-19 (2001)).

[120] *Howard*, 447 F.3d at 1268 (Noonan, J., concurring) (quoting United States v. Knights, 534 U.S. 112, 119 (2001)) (internal quotation marks omitted).

[121] *Howard*, 447 F.3d at 1268-69 (Noonan, J., concurring) (quoting United States v. Knights, 534 U.S. 112, 120 (2001)).

"incentive that a probationer has to go to greater lengths to conceal his new criminal activity, which, if detected, will send him back to prison in a summary proceeding."[122]

In applying the balancing test from *Knights*, Judge Noonan stated that the majority's analysis did not account for Howard's diminished expectation of privacy, or for the government's interest in preventing his possession of a firearm.[123] Furthermore, Judge Noonan opined that, in effect, the majority created a safe house where Howard could stash a gun and engage in further criminal activity.[124] Such a consequence was a result of the majority's rigid application of precedent without taking the *Knights* perspective of reasonableness into account when analyzing probable cause.[125] Finally, Judge Noonan recognized that the Supreme Court in *Katz* held that the Fourth Amendment protects *people* not places, a decision that enlarged the scope of protection.[126] However, application of the same concept here contracted the protection of the Fourth Amendment.[127] The majority's decision protected the *property* of the West Bonanza apartment.[128] According to Judge Noonan, the Fourth Amendment was not designed to offer this type of sanctuary to felons serving part of their sentence on parole.[129]

III. REASONABLENESS: THE TRUE FOURTH AMENDMENT ANALYSIS

The Fourth Amendment to the United States Constitution prescribes that, "[t]he 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 . . . ."[130] The *Knights* Court held reasonableness to be the "touchstone" of a Fourth Amendment analysis.[131] A balancing test is required to assess

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[122] United States v. Howard, 447 F.3d 1257, 1269 (9th Cir. 2006) (Noonan, J., concurring).

[123] *Id.* (Noonan, J., concurring).

[124] *Id.* (Noonan, J., concurring).

[125] *Id.* (Noonan, J., concurring).

[126] *Id.* (Noonan, J., concurring); *see* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *see also* U.S. CONST. amend. IV ("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.").

[127] United States v. Howard, 447 F.3d 1257, 1269 (9th Cir. 2006) (Noonan, J., concurring).

[128] *Id.* (Noonan, J., concurring).

[129] *Id.* (Noonan, J., concurring).

[130] U.S. CONST. amend IV. Probable cause must be "supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Id.*

[131] United States v. Knights, 534 U.S. 112, 118 (2001).

such reasonableness, in which the degree of intrusion into an individual's privacy is weighed against legitimate governmental interests.[132] Reasonableness is established if, at the time of the search, officers are aware of facts "sufficient to support a belief, in 'a man of reasonable caution,'" that criminal activity is afoot.[133]

In *Howard*, the Ninth Circuit used the incorrect standard to determine whether probable cause existed to believe that Howard was violating a condition of his supervised release.[134] The court should have determined the reasonableness of the search by balancing Howard's reduced expectation of privacy with legitimate governmental interests.[135] Furthermore, the court's opinion is flawed because it recognized a distinction between probationary searches pursuant to a condition of a supervised release and investigative searches directed at uncovering evidence of criminal activity, yet this distinction is without foundation.[136]

The *Howard* court applied a stringent standard, considering four factors, to determine whether probable cause existed to believe that Howard was violating a condition of his supervised release by residing at the West Bonanza apartment.[137] However, the court failed to determine whether the search of the West Bonanza apartment was reasonable because the court did not apply the test, articulated in *Knights* and affirmed in *Samson v. California*, which balances a parolee's reduced expectation of privacy with legitimate governmental interests.[138] The majority relied on the *Motley* decision, which held that before conducting a warrantless search pursuant to a parolee's parole condition, officers must have probable cause to believe that a parolee is a resident of the

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[132] *See id.* at 118-19 (citing Wyoming v. Houghton, 526 U.S. 295, 300 (1999)); *see also* Samson v. California, 126 S. Ct. 2193, 2197 (2006).

[133] United States v. Howard, 447 F.3d 1257, 1262 (9th Cir. 2006) (quoting Texas v. Brown, 460 U.S. 730, 742 (1983)).

[134] *See Howard*, 447 F.3d at 1268-69 (Noonan, J., concurring).

[135] *See id.* at 1268 (Noonan, J., concurring). *Knights* and *Samson* require application of the balancing test to determine the existence of probable cause. *Knights*, 534 U.S. at 118-19; *Samson*, 126 S. Ct. at 2197; *see also Howard*, 447 F.3d at 1268.

[136] *See Howard*, 447 F.3d at 1268 (Noonan, J., concurring); *see also infra* notes 143-151 and accompanying text.

[137] *See Howard*, 447 F.3d at 1265-67. *But see* Illinois v. Gates, 462 U.S. 213, 232 (1983) (stating "probable cause is a fluid concept - turning on the assessment of probabilities in particular factual contexts - not readily, or even usefully, reduced to a neat set of legal rules.") The test created by the majority, focusing on a series of factors to determine whether officers have probable cause to believe a probationer is residing at a particular place, creates a "neat set of legal rules" that, in effect, would not be applicable to all situations and could not be applied in a uniform fashion. *See Howard*, 447 F.3d at 1268.

[138] *See Howard*, 447 F.3d at 1268 (Noonan, J., concurring); *see also* United States v. Knights, 534 U.S. 112, 118-19 (2001); Samson v. California, 126 S. Ct. 2193, 2197 (2006).

house to be searched.[139] The *Motley* court recognized that requiring officers to have probable cause to believe that a parolee resides at a particular address prior to conducting a search protects the interests of third parties.[140] However, if a third party or the parolee does not have a reasonable expectation of privacy in a place, he or she does not have standing to assert a Fourth Amendment violation.[141] This creates a contradiction because Howard, if not a resident at the West Bonanza apartment, could not claim that Aquino's search violated his Fourth Amendment rights.[142]

A. THE DISTINCTION BETWEEN PROBATION AND INVESTIGATIVE SEARCHES IS WITHOUT FOUNDATION

There is no constitutional requirement that a search condition in a probation order must be seen as limited to probation searches, thereby excluding investigative searches.[143] In *Knights*, the Supreme Court held that the distinction between probationary searches, pursuant to conditions of release, and investigative searches, directed at uncovering evidence of criminal activity by a felon on probation, lacks foundation.[144] Furthermore, the Court in *Knights* stated that searches have been upheld pursuant to probation conditions, "whether the purpose of the search is to monitor the probationer or to serve some other law enforcement purpose."[145] Thus the distinction recognized by the *Howard* court, focusing on whether Howard was in compliance with the conditions of

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[139] *See* United States v. Howard, 447 F.3d 1257, 1262 (9th Cir. 2006); *see also* Motley v. Parks, 432 F.3d 1072, 1080 (9th Cir. 2005) (determining, in a § 1983 suit brought by a tenant, that officers were required to have probable cause to believe that a parolee resided at a particular place before conducting a search). Motley, the plaintiff, was the parolee's girlfriend, not the parolee himself. *Motley*, 432 F.3d at 1075.

[140] *See Motley*, 432 F.3d at 1080.

[141] *See, e.g.*, Minnesota v. Carter, 525 U.S. 83, 88 (1998); Rakas v. Illinois, 439 U.S. 128, 143-44 (1978).

[142] *See Howard*, 447 F.3d at 1268; *see also infra* notes 183-198 and accompanying text.

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

[144] *See Howard*, 447 F.3d at 1268 (Noonan, J., concurring) (citing *Knights*, 534 U.S. at 117); *see, e.g., Knights*, 534 U.S. at 121 (holding that warrantless searches are reasonable within the Fourth Amendment when a legitimate governmental interest outweighs an individual's expectation of privacy); Samson v. California, 126 S. Ct. 2193, 2202 (2006) (expanding the holding in *Knights*, which is directed at special needs searches, by concluding that suspicionless searches are reasonable within the Fourth Amendment).

[145] *Knights*, 534 U.S. at 116 (quoting People v. Woods, 981 P.2d 1019, 1027, 21 Cal. 4th 668, 681 (Cal. 1999)). In *Knights*, the Supreme Court concluded that the Supreme Court of California's rejection of the distinction between "investigative" and "probationary" searches was constitutional. *See Knights*, 534 U.S. at 121.

his supervised release, is superfluous.[146]

The *Howard* court analyzed Aquino's search as one focused on whether Howard was complying with conditions of his supervised release, rather than a broader search to determine if Howard was engaging in criminal activity.[147] However, there were reports that Howard was a leader of the West Coast Bloods and was engaged in the sale of firearms.[148] A limitation on the scope of probation searches hinders the ability of law enforcement to further governmental interests of thwarting crime and protecting society from criminal activity.[149]

Furthermore, the *Howard* court erred in basing its determination on the propriety of a probation search to find that the officers lacked probable cause to believe Howard was violating the conditions of his release by residing at the West Bonanza apartment.[150] Rather, the court should have determined the need for an investigative search. Additionally, the court should have determined the reasonableness of the search by balancing Howard's reduced expectation of privacy as a probationer with the legitimate governmental interest of ensuring that Howard was not engaged in criminal activity.[151] Therefore, the court used the incorrect standard to determine the constitutionality of Aquino's search of the West Bonanza apartment.

B. RECOGNIZING THAT PAROLEES HAVE A REDUCED EXPECTATION OF PRIVACY

The court should have recognized that Howard, due to his status as a probationer, had a reduced expectation of privacy.[152] According to the

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[146] *See* United States v. Howard, 447 F.3d 1257, 1268 (9th Cir. 2006) (Noonan, J., concurring).

[147] *See id.* at 1262.

[148] *Id.* at 1260.

[149] *See* Samson v. California, 126 S. Ct. 2193, 2200-01 (2006) (citing Cal. Penal Code §§ 2931, 2933, 3000(b)(1) (West 2000)). In *Samson*, the Supreme Court upheld the California Court of Appeal's holding that a suspicionless search of a parolee was valid under California law and "'reasonable within the meaning of the Fourth Amendment as long as it is not arbitrary, capricious or harassing.'" *See Samson*, 126 S. Ct. at 2196 (citations omitted). The California Court of Appeal relied on *People v. Reyes*, which held that a search pursuant to parole conditions, in the absence of particularized suspicion, "does not intrude on any expectation of privacy society is prepared to recognize as legitimate." *See id.*; *see also* People v. Reyes, 968 P.2d 445, 451, 19 Cal. 4th 743, 754 (Cal. 1998) (internal quotation marks omitted).

[150] *See Samson*, 126 S. Ct. at 2202 (holding that "the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee."). The propriety of a probationary search (special needs search) is not a relevant inquiry now that officers can engage in suspicionless searches of parolees and probationers. *See id.*

[151] *See* United States v. Knights, 534 U.S. 112, 118-19 (2001).

[152] *See* United States v. Howard, 447 F.3d 1257, 1268-69 (9th Cir. 2006) (Noonan, J.,

Supreme Court in *Knights*, "[p]robation, like incarceration, is 'a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty.'"[153] There is no constitutional difference between probation and parole for purposes of the Fourth Amendment when determining whether a search is reasonable.[154] A consequence of probation is the understanding that "probationers 'do not enjoy "'the absolute liberty to which every citizen is entitled.'"'"[155] Furthermore, the Supreme Court has recognized that "as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens."[156]

In *Howard*, the court analyzed whether officers had sufficient probable cause to believe that Howard resided at the West Bonanza address by comparing the facts in the case with the facts of *Dally*, *Harper*, *Watts*, and *Conway*.[157] Significantly, however, those cases also failed to balance the parolees' reduced expectations of privacy with legitimate governmental interests.[158] Although it was reasonable for the majority to conclude that probable cause was lacking, the constitutionality of the precedent relied upon was questionable because Howard's reduced expectation of privacy was not taken into account in accordance with the requirements previously mandated by the Supreme Court.[159]

Howard was on probation for a bank robbery conviction;[160] thus, he had a reduced expectation of privacy due to his prior criminal history.[161] This was reflected in the conditions of Howard's release that permitted

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concurring).

[153] *See Knights*, 534 U.S. at 119 (quoting Griffin v. Wisconsin, 438 U.S. 868, 874 (1987) (quoting G. KILLINGER, H. KERPER, & P. CROMWELL, PROBATION AND PAROLE IN THE CRIMINAL JUSTICE SYSTEM 14 (1976))).

[154] *See* United States v. Harper, 928 F.2d 894, 896 n.1 (9th Cir. 1991).

[155] *Knights*, 534 U.S. at 119 (quoting Griffin v. Wisconsin, 483 U.S. 868, 874 (1987) (quoting Morrissey v. Brewer, 408 U.S. 471, 480 (1972))).

[156] *Knights*, 534 U.S. at 120. The *Knights* Court found it unnecessary to "address the constitutionality of a suspicionless search because the search in this case was supported by reasonable suspicion." *Id.* at 120 n.6. However, the *Samson* Court held that suspicionless searches do not violate the Fourth Amendment. *See* Samson v. California, 126 S. Ct. 2193, 2202 (2006).

[157] *See Howard*, 447 F.3d at 1265.

[158] *See* United States v. Conway, 122 F.3d 841, 843 (9th Cir. 1997); United States v. Watts, 67 F.3d 790, 795 (9th Cir. 1995); United States v. Harper, 928 F.2d 894, 896-97 (9th Cir. 1991); United States v. Dally, 606 F.2d 861, 863 (9th Cir. 1979).

[159] *See* United States v. Howard, 447 F.3d 1257, 1268 (9th Cir. 2006) (Noonan, J., concurring).

[160] *Id.* at 1258.

[161] *See* United States v. Knights, 534 U.S. 112, 119 (2001).

warrantless searches of his residence, person, property, and automobile at any time.[162] Howard was also prohibited from associating with any persons engaged in criminal activity.[163] Aquino began an investigation of Howard's compliance with the conditions of his supervised release upon receiving anonymous tips that Howard was living with Barner and engaging in further criminal activity.[164] Howard argued that the search of the West Bonanza apartment, which resulted in the discovery of a loaded revolver and a confession, violated his Fourth Amendment rights because he had an expectation of privacy at the apartment.[165] However, the court did not account for Howard's reduced expectation of privacy as a probationer when analyzing whether the search was reasonable, which resulted in the erroneous reversal of the district court's finding of probable cause.[166] The court recognized Howard's expectation of privacy as an ordinary citizen, rather than considering his reduced expectation of privacy as a probationer.[167]

C. A LEGITIMATE GOVERNMENT INTEREST TO KEEP A GUN OUT OF HOWARD'S HANDS

The court did not recognize the legitimate governmental interest in preventing Howard, a convicted felon, from engaging in criminal activity when it reversed the district court's holding that probable cause existed to believe Howard was residing at the West Bonanza apartment.[168] In assessing legitimate governmental interests "it must be remembered that 'the very assumption of the institution of probation' is that the probationer 'is more likely than the ordinary citizen to violate the law.'"[169] Furthermore, "[t]he recidivism rate of probationers is

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[162] *See Howard*, 447 F.3d at 1258.

[163] *Id.*

[164] *Id.* at 1259-60.

[165] United States v. Howard, 447 F.3d 1257, 1262 (9th Cir. 2006).

[166] *Cf.* Marc R. Lewis, Comment, *Lost In Probation: Contrasting the Treatment of Probationary Search Agreements in California and Federal Courts*, 51 UCLA L. REV. 1703, 1706 (2004) (stating "[b]ecause a probationer's consent to search eliminates the probationer's expectation of privacy, subsequent searches do not need to be justified by either probable cause or reasonable suspicion."). *See also Howard*, 447 F.3d at 1262.

[167] *See* Edward J. Loya, Jr., Comment, *Probationers, Parolees, and the Fourth Amendment: Addressing Unanswered Questions*, 35 CUMB. L. REV. 101, 106-07 (2005) (stating "analysis of the Supreme Court's preliminary, albeit somewhat ambiguous, guidelines for evaluating reasonable suspicion strongly supports the conclusion that probationer and parolee status should be taken into account."). *See also Howard*, 447 F.3d at 1262.

[168] *See Howard*, 447 F.3d at 1268.

[169] United States v. Knights, 534 U.S. 112, 120 (2001) (quoting Griffin v. Wisconsin, 483 U.S. 868, 880 (1987)).

significantly higher than the general crime rate" of ordinary citizens.[170] The State has a dual concern with a probationer because, although the goal of probation is to integrate the probationer back into the community, a major concern of integration is that a probationer will be more likely to engage in criminal conduct than an average citizen.[171] The State also has a legitimate interest in apprehending violators of the criminal law to fulfill its duty to society by protecting potential victims of criminal conduct.[172] Therefore, the State may justifiably focus law-enforcement efforts on probationers in a way that it may not on ordinary citizens.[173] "Although the Fourth Amendment ordinarily requires the degree of probability embodied in the term 'probable cause,' a lesser degree satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable."[174]

The information received by Aquino indicated that Howard might have been engaging in criminal activity, and there was a legitimate governmental interest in preventing such activity.[175] Howard was a supervised releasee on probation from a bank robbery.[176] Further, Howard was associating with Barner, a seven-time convicted felon and a recovering cocaine addict.[177] Finally, confidential informants told

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[170] *Knights*, 534 U.S. at 120 (citing U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, Recidivism of Felons on Probation, 1986-89, 1, 6 (Feb. 1992) (reporting that forty-three percent of 79,000 felons placed on probation in seventeen states were rearrested for a felony within three years while still on probation); U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, Probation and Parole Violators in State Prison, 1991, 3 (Aug. 1995) (stating that in 1991, twenty-three percent of state prisoners were probation violators)).

[171] *See Knights*, 534 U.S. at 121.

[172] *See id.* at 120-21 (noting that "probationers have even more of an incentive to conceal their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal because probationers are aware that they may be subject to supervision and face revocation of probation, and possible incarceration . . . ."). The majority has, in effect, created a safe house where Howard could hide his gun so it would not be discovered pursuant to a warrantless probation search. *See* United States v. Howard, 447 F.3d 1257, 1269 (9th Cir. 2006) (Noonan, J., concurring). This safe house was the result of the court's failure to balance Howard's reduced expectation of privacy with legitimate governmental interests. *See id.* at 1268 (Noonan, J., concurring). Further, the test created in *Howard* frustrates the ability of law enforcement to proactively protect the community from probationers continuing in their criminal activity because officers, due to their lack of legal training, are not in a position to study circuit precedent and compare the facts of a current situation to those analyzed in prior cases. *Cf. id.* (Noonan, J., concurring).

[173] *See, e.g., Knights*, 534 U.S. at 121; Samson v. California, 126 S. Ct. 2193, 2195 (2006) (stating that "a State's interests in reducing recidivism, thereby promoting reintegration and positive citizenship among probationers and parolees, warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment.").

[174] *Knights*, 534 U.S. at 121.

[175] *See* United States v. Howard, 447 F.3d 1257, 1258-62 (9th Cir. 2006).

[176] *Id.* at 1258.

[177] *Id.* at 1259.

Aquino that Howard was among the leaders of the West Coast Bloods, that he currently had a firearm at the West Bonanza apartment, and that he was an arms dealer.[178] Therefore, the State had a legitimate interest in determining whether Howard was engaging in criminal activity, especially if such criminal activity was to the extent suggested by the confidential informants.

The court failed to account for the legitimate government interest in curbing Howard's suspected criminal activity when it reversed the magistrate's and the district court's finding of probable cause.[179] The court focused on Howard's interactions with Aquino and the observations of officers, rather than Howard's criminal conduct.[180] The decision in *Howard* requires the State to shut its eyes to the concern that a probationer will be more likely to engage in criminal conduct than an ordinary member of the community; however, the Fourth Amendment requires States to take such a concern into account.[181] Accordingly, the court's decision is inconsistent with contemporary Fourth Amendment jurisprudence because the court did not account for a legitimate governmental interest to prevent further criminal activity.[182]

IV. THE PURPOSE OF THE FOURTH AMENDMENT: PROTECTING PEOPLE, NOT PLACES

The *Howard* court held that the search of the West Bonanza apartment violated Howard's Fourth Amendment right to reasonable search and seizure,[183] yet this holding is flawed in two distinct ways. The court determined that officers did not have probable cause to believe

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[178] *Id.* at 1259-60.

[179] *See id.* at 1268 (Noonan, J., concurring).

[180] *See id.* at 1266-68.

[181] *See* United States v. Knights, 534 U.S. 112, 121 (2001).

[182] *See generally* United States v. Knights, 534 U.S. 112 (2001); Samson v. California, 126 S. Ct. 2193 (2006). The test created in *Howard* is likely to substantially increase the amount of litigation to determine whether probable cause exists to believe a parolee resides at an unreported address. *Cf.* United States v. Howard, 447 F.3d 1257, 1268 (9th Cir. 2006) (Noonan, J., concurring) (discussing the proper application of the Supreme Court's tests regarding probationary searches, investigative searches, and the "significant" diminished expectation of privacy of a probationer). Courts will have to resolve questions such as: How much direct observation by the police is necessary to find probable cause? Was there sufficient evidence to indicate the probationer was residing somewhere besides the reported address? Was corroboration of a confidential informant's tips sufficient to indicate the probationer was residing at an unreported address? How much weight will be accorded to a probationer's possession of keys for the unreported address? Was a probation officer's rate of success in locating the probationer at his reported address sufficient to indicate that he was still living there? *See id.*

[183] United States v. Howard, 447 F.3d 1257, 1268 (9th Cir. 2006).

Howard resided at the West Bonanza apartment, and that the subsequent search therefore violated the Fourth Amendment.[184] Furthermore, the court concluded that Howard had a reasonable expectation of privacy at the West Bonanza apartment and the search was unreasonable.[185] However, the court failed to incorporate the *Knights* balancing approach into its analysis of whether the search was reasonable.[186] Therefore, the officers could have conducted a reasonable search of the West Bonanza apartment pursuant to the conditions of Howard's supervised release.

Alternatively, the court's opinion is flawed because concluding that the officers lacked probable cause to believe that Howard was a resident of the West Bonanza apartment implies that Howard did not have a reasonable expectation of privacy.[187] If Howard did not have a reasonable expectation of privacy in the West Bonanza apartment, it follows that he did not have standing to assert a violation of his Fourth Amendment rights.[188] Therefore, the district court properly admitted the gun and Howard's confession into evidence at trial.

The Fourth Amendment to the United States Constitution is intended to protect people, not places, yet this protection refers to places in which a person has a reasonable expectation of privacy.[189] Therefore, the court's assertion that officers did not have probable cause to believe that Howard resided at the West Bonanza apartment mistakenly protects

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[184] *See id.*

[185] *Id.*

[186] *See id.* (Noonan, J., concurring); *see also* United States v. Knights, 534 U.S. 112, 118-19 (2001).

[187] *See* Minnesota v. Olson, 495 U.S. 91, 97 (1990) (holding that status as an overnight guest can create an expectation of privacy that society is prepared to recognize as reasonable). Howard could still have an expectation of privacy at the apartment as an overnight guest, yet the court analyzed whether officers had probable cause to believe Howard was a resident without accounting for his reduced expectation of privacy as a probationer. *See Olson*, 495 U.S. at 97; *see also Howard*, 447 F.3d at 1266-68.

[188] *See* Minnesota v. Carter, 525 U.S. 83, 88 (1998) (quoting United States v. Rakas, 439 U.S. 128, 143-144 (1978)) (holding that "in order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; i.e., one that has 'a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.'"). The *Carter* Court noted that the "statement that 'anyone legitimately on the premises where a search occurs may challenge its legality,' was expressly repudiated in *Rakas v. Illinois*. Thus, an overnight guest in a home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not." *Carter*, 525 U.S. at 90 (citations omitted). In Howard's case, he is in a situation where if he claims an expectation of privacy at Barner's apartment, he would be subject to reasonable suspicionless searches. *See* Samson v. California, 126 S. Ct. 2193, 2202 (2006). On the other hand, if Howard claims that he does not have an expectation of privacy at the apartment as an overnight guest, he will not have standing to assert a Fourth Amendment violation. *See Rakas*, 439 U.S. at 143.

[189] *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

the rights of a *place*, rather than those of a *person*.[190] The court held that Howard's Fourth Amendment privacy rights were violated when officers conducted the search of the West Bonanza apartment without sufficient probable cause to believe Howard was a resident at the apartment.[191] However, this holding implicitly asserts that it was the apartment's Fourth Amendment rights that were violated by the search, not Howard's privacy rights.[192]

If Howard was not a resident of the West Bonanza apartment, he did not have a legitimate expectation of privacy in the apartment.[193] Therefore, Howard lacked standing to assert that his Fourth Amendment right to privacy had been violated.[194] Howard's contention that the search was unconstitutional essentially protected the Fourth Amendment rights of a third person, Barner, which violates the Supreme Court's holding in *United States v. Rakas*, that standing to assert such rights is personal to the individual and cannot be vicariously asserted.[195] The *Howard* court's holding protected the Fourth Amendment rights of the apartment to be free from unreasonable searches and seizures, not the rights of Howard.[196] Therefore, the *Howard* court's holding was in error on two alternative grounds. It either (1) improperly protected the Fourth Amendment rights of a place in violation of the *Katz* decision,[197] or (2) it protected Howard's Fourth Amendment rights to a reasonable expectation of privacy at the apartment, failing to consider that such an

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[190] *See* United States v. Howard, 447 F.3d 1257, 1268 (9th Cir. 2006).

[191] *Id.*

[192] *Id.* at 1268-69 (Noonan, J., concurring).

[193] *But see* Minnesota v. Olson, 495 U.S. 91, 96-97 (1990) (holding that overnight guests have an expectation of privacy that "society is prepared to recognize"). However, due to Howard's status as a probationer, he had a reduced expectation of privacy. *See* United States v. Knights, 534 U.S. 112, 119 (2001). Therefore, society does not have an interest in protecting the reduced expectation of privacy of a probationer who is an overnight guest when the purpose of his or her stay is not shelter in a friend's house, but to secretly engage in continuing criminal activity. *See Olson*, 495 U.S. at 96-97.

[194] *See* Minnesota v. Carter, 525 U.S. 83, 88 (1998); *see also* United States v. Rakas, 439 U.S. 128, 143 (1978) (holding that "capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.").

[195] *See Rakas*, 439 U.S. at 134-35 (holding that Fourth Amendment rights are personal to the individual and cannot be vicariously asserted).

[196] *See generally* Motley v. Parks, 432 F.3d 1072 (9th Cir. 2005); United States v. Dally, 606 F.2d 861 (9th Cir. 1979). This conclusion would be different if Barner asserted that the search violated her Fourth Amendment or her civil rights. If Barner asserted the violation, this case would be similar to *Motley* or *Dally*. *See Motley*, 432 F.3d at 1075; *Dally*, 606 F.2d at 863.

[197] *See* United States v. Howard, 447 F.3d 1257, 1269 (9th Cir. 2006); *see also* Katz v. United States, 389 U.S. 347, 351 (1967).

expectation was reduced as a result of his status as a probationer.[198]

V. CONCLUSION

In *United States v. Howard*, the Ninth Circuit did not use the proper standard to determine whether the search of the West Bonanza apartment was reasonable.[199] The court failed to balance Howard's reduced expectation of privacy with the legitimate governmental interest to prevent Howard from engaging in continuing criminal activity.[200] If the search was reasonable under this standard, it was constitutional. The court's analysis rigidly followed circuit precedent that was not in compliance with the Supreme Court's decisions in *United States v. Knights* and *Samson v. California*.[201]

The court further erred in making a distinction between probationary searches and investigative searches.[202] Legitimate governmental interests cannot be furthered if a search is limited to ascertaining whether probationers are complying with conditions of their release. Additionally, the court's analysis protected the property rights of Barner's apartment, not Fourth Amendment privacy rights, in violation of the holding in *Katz v. United States*.[203] Alternatively, the decision over-emphasized Howard's expectation of privacy in the apartment, which was exactly what the conditions imposed on his release were intended to prevent.[204] The court should have remanded the case to the district court and ordered it to apply the *Knights* balancing test to determine whether the search of the West Bonanza apartment was reasonable.[205]

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[198] *See Howard*, 447 F.3d at 1268-69; *see also* United States v. Knights, 534 U.S. 112, 118-20 (2001).

[199] *See Howard*, 447 F.3d at 1268-69 (Noonan, J., concurring); *see also supra* notes 75-129 and accompanying text.

[200] *See supra* notes 152-182 and accompanying text.

[201] *See Howard*, 447 F.3d at 1268-69 (Noonan. J., concurring); *Knights*, 534 U.S. at 118-20; Samson v. California, 126 S. Ct. 2193, 2197 (2006).

[202] *See supra* notes 143-151 and accompanying text.

[203] *See* Katz v. United States, 389 U.S. 347, 351 (1967); *see also supra* notes 183-198 and accompanying text.

[204] *See supra* notes 152-167 and accompanying text.

[205] *See* United States v. Knights, 534 U.S. 112, 118-20 (2001).

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SEAN A. KERSTEN*

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