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United States v. Scott: Should a Pre-Trial Releasee Be Subject to Fourth Amendment Searches and Seizures Based on Probable Cause or Reasonable Suspicion?

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United States v. Scott:[1] Should a Pre-Trial Releasee Be Subject To Fourth Amendment Searches and Seizures Based on Probable Cause or Reasonable Suspicion?

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Introduction

The Ninth Circuit affirmed the United States District Court for the District of Nevada's suppression of a shotgun and statements made by defendant, Raymond Lee Scott (Scott), as a violation of Scott's Fourth Amendment rights.[2] The court held that the government may not conduct a search of an individual released while awaiting trial, based on less than probable cause even when his Fourth Amendment rights were waived as a condition of pre-trial release.[3] The main issue evaluated by the court was whether the government can induce a defendant released on his own recognizance and awaiting trial, to waive his Fourth Amendment rights and subject him to anything less than probable cause concerning searches and seizures.[4] The court decided this question in the negative.[5]

This issue was one of first impression in the federal circuit courts and in the majority of the state courts. The majority decision was two to one.[6] The Fourth Amendment grants individuals the right to be free from unreasonable searches and seizures by the government.[7] Federal and state cases generally

1. United States v. Scott, 450 F.3d 863 (9th Cir. 2005).

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2. *Id.* at 875.
3. *Id.*
4. *Id.* at 865 n.4.
5. *Id.* at 875.
6. *Id.* at 875.
7. U.S. CONST. amend. IV.

address the waiver of Fourth Amendment rights as they relate to probationers and post trial sentencing releasees. The majority views pre-trial releasees as "presumed innocent" with rights similar to ordinary citizens and very different from those individuals convicted of crimes, who are consequently subject to a probable cause standard.[8] The Dissent believes, however, the pre-trial releasee does not enjoy the same rights as an ordinary citizen, but instead enjoys rights similar to probationers and pre-sentencing releasees.[9] The Dissent asserts pre-trial releasees are charged with a crime, and are therefore, not ordinary citizens. The conditions placed on their release are in lieu of being detained and held in jail. Therefore, according to the Dissent they should be subject to the reasonable suspicion standard, rather than the probable cause standard.[10]

This case note will examine (1) whether pre-trial releasees should be afforded more rights than the probationer, pre-sentencing releasee and parolee; (2) whether pre-trial releasees should be subject to searches and seizures based on probable cause or reasonable suspicion; (3) whether the government should be able to induce the waiver of the pre-trial releasee's Fourth Amendment rights as a condition of his release; and (4) the potential effects *Scott* will have on state pre-trial release procedures. Part I will document the background information concerning the current state of the law as it pertains to pre-trial releasees, probationers and pre-sentencing releasees. Part II will discuss *Scott*, including the facts, holding, majority opinion, and dissenting opinion. Part III will discuss the impact *Scott* has on the current state of the law, the potential of *Scott* for appeal and how the Supreme Court may analyze and conclude on the issues presented. Part IV will conclude on the importance of *Scott* on today's law.

I. Background Information

The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,

8. *Scott*, 450 F.3d at 871-72.
9. *Id.* at 876-81 (Bybee, J., dissenting).
10. *Id.* at 875-89.

> 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.[11]

The fundamental rights of the Fourth Amendment are expressly granted in the Constitution and therefore require probable cause to search individuals and their homes. Alleged violations of fundamental rights are scrutinized greatly by the courts. Individuals may waive their Fourth Amendment rights.[12] However, the federal cases, generally dealing with the waiver of Fourth Amendment rights, pertain to probationers and post trial sentencing releasees. Federal courts have held that probationers are subject to a standard of reasonable suspicion regarding searches and seizures, rather than a standard of probable cause.[13]

The United States employs a rule "granting broad discretion where pre-trial releasees are concerned."[14] The applicable federal statute pertains to the pre-trial release process, providing for pre-trial release subject to "any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community."[15] Nevada's legislature has left release conditions to be determined in individual cases.[16]

Current case law generally deals with persons convicted of crimes. One federal case, *United States v. Kills Enemy*, contrasted an individual on pre-trial release with a convicted person awaiting sentencing; the court stated, "[The latter] is no

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11. U.S. CONST. amend. IV.

12. *Scott*, 450 F.3d at 865 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973)). In *Schneckloth*, the police had reason to stop the defendant for traffic violations but no probable cause to search the vehicle or the occupants; however the defendant voluntarily consented to the search. *Schneckloth*, 412 U.S. 218. The Court stated, "[w]e hold only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." *Id.* at 248.).

13. *See* Terry v. Ohio, 392 U.S. 1 (1968); United States v. Brignoni-Ponce, 422 U.S. 873, 881-82 (1975); Griffin v. Wisconsin, 483 U.S. 868, 873 (1987).

14. *Scott*, 450 F.3d at 888 (Bybee, J., dissenting) (citing 18 U.S.C § 3142(c)(1)(B)(xiv) (2000)).

15. 18 U.S.C. § 3142(c)(1)(B)(xiv) (2000).

16. NEV. REV. STAT. §§ 178.484-.4853 (2005).

longer entitled to a presumption of innocence or presumptively entitled to his freedom."[17] In *Cruz v. Kauai*, the court stated, "[o]ne . . . released on pre-trial bail does not lose his or her Fourth Amendment right to be free of unreasonable seizures."[18]

The leading federal case concerning probationers and pre-sentencing releasees is *United States v. Knights*.[19] In *Knights*, a reasonable suspicion search of a probationer was upheld on the theory of totality of the circumstances.[20] The Supreme Court stressed the status of the individual as a probationer, with sharply reduced liberty and privacy interests.[21] "Probation, like incarceration, is 'a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty.'"[22] "Knights' signature on a form purporting to authorize searches without a warrant or 'reasonable cause' as a condition of probation, reduced his reasonable expectation of privacy."[23] "Probationer 'is more likely than the ordinary citizen to violate the law.'"[24] There is a difference between those convicted of crimes and those accused of crimes, but still presumed innocent. Probationers are different from pre-trial releasees, in that they have a reduced liberty interest from ordinary citizens and warrantless searches have been upheld.[25] The current state of the law concerning probationers is reasonable suspicion.[26] In *Knights*, the Court held that the state's "interest in apprehending violators of the criminal law, thereby protecting potential victims of criminal enterprise, may therefore justifiably focus on probationers in a way that it does not on the ordinary citizen."[27] Case law supports distinguishing probationers from

17. United States v. Kills Enemy, 3 F.3d 1201, 1203 (8th Cir. 1993).

18. Cruz v. Kauai County, 279 F.3d 1064, 1068 (9th Cir. 2002).

19. United States v. Knights, 534 U.S. 112 (2001).

20. *Id.* at 121-22.

21. *Id.* at 119.

22. *Id.* (quoting Griffin v. Wisconsin, 483 U.S. 868, 874 (1987)).

23. United States v. Scott, 450 F.3d 863, 873 (9th Cir. 2005) (citing United States v. Knights, 534 U.S. at 114, 119-20 (2001)).

24. *Id.* (citing *Knights*, 534 U.S. at 120).

25. *See* Unites States v. Consuelo-Gonzalez, 521 F.2d 259 (9th Cir. 1988) (en banc); United States v. Richardson, 849 F.2d 439 (9th Cir. 1988); United States v. Tucker, 305 F.3d 1193 (10th Cir. 2002) (upholding warrantless searches).

26. *Knights*, 534 U.S. at 122.

27. *Id.* at 121.

ordinary citizens; however, the status of the federal law concerning pre-trial releasees prior to *Scott* is non-existent.

II. Statement of the Case

A. *The Facts*

The police arrested Scott for state drug possession crimes.[28] Scott was released on his own recognizance.[29] As a condition of his pre-trial release, Scott consented to random drug testing and having his home searched without a warrant at any time by any peace officer.[30] After Scott's release, the police received information from an informant.[31] The police went to Scott's home and administered a urine test.[32] The government conceded that the information received from the informant was not enough for probable cause.[33] The police then searched Scott's house and found an unregistered shotgun.[34] The police then administered two additional urine tests. Scott insisted that he did not take illegal drugs and that he only consumed allergy medicine.[35] The first two urine tests administered using the enzyme multiplied immunoassay techniques were positive.[36] The final test administered using the more accurate gas chromatography mass spectrometry method was negative.[37]

B. *Procedural History*

"A federal grand jury indicted Scott for unlawfully possessing an unregistered shotgun."[38] Scott moved to suppress the shotgun and any statements he made to the officers concerning it.[39] The United States District Court for the District of Nevada granted Scott's motion on the grounds that the officers needed

28. *Scott*, 450 F.3d at 865.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 890.
38. *Id.*
39. *Id.* at 865.

probable cause to search Scott's home without a warrant.[40] The federal government took an interlocutory appeal.[41]

C. *The Holding*

The Ninth Circuit Federal Court in Nevada affirmed the ruling of the district court granting Scott's motion to suppress the shotgun and the statements.[42] The court held the totality of the circumstances required probable cause in order to search Scott or his home.[43] "Since the government concedes that there was no probable cause to test Scott for drugs, Scott's drug test violated the Fourth Amendment."[44] "'Probable cause to search Scott's house did not exist until the drug test came back positive."[45] The search was therefore invalid and the shotgun and statements were suppressed.[46]

D. *The Majority Opinion*

The majority opinion focuses on two issues (1) whether the drug test and the search of Scott's home were valid because he consented to them as a condition of his release, thus waiving his Fourth Amendment rights, and (2) whether the search of Scott and his home was reasonable. The majority is concerned with the government's ability to induce the waiver of Scott's Fourth Amendment rights by forcing him to choose between freedom and prison while awaiting trial. Scott's consent to any search was only valid if the search was reasonable.[47]

1. Whether the drug test and the search of Scott's home were valid because Scott consented and waived his Fourth Amendment rights?

Although Fourth Amendment rights can be waived, the question is whether the government can induce Scott to waive his Fourth Amendment rights as a condition to pre-trial re-

40. *Id.*
41. *Id.* at 890.
42. *Id.* at 875.
43. *Id.* at 874.
44. *Id.*
45. *Id.*
46. *Id.* at 875.
47. *Id.* at 863.

lease.[48] "The government may detain an arrestee 'to ensure his presence at trial.'"[49] The government "may impose . . . conditions[,] such as reasonable bail[,] before releasing" an arrestee.[50] Many pre-trial detainees willingly consent to conditions, in order to be released, preferring to go home while awaiting trial. Scott's options expanded when he agreed to waive his Fourth Amendment rights.[51]

Although citizens can waive certain rights in exchange for a valuable benefit such as to go home rather than stay in jail, constitutional law may not permit it in all circumstances.[52] "The 'unconstitutional conditions' doctrine . . . limits the government's ability to exact waivers of rights as a condition of benefits, even when those benefits are fully discretionary."[53] "Giving the government free rein to grant conditional benefits creates the risk that the government will abuse its power by attaching strings strategically, striking lopsided deals and gradually eroding constitutional protections."[54] "Where a constitutional right 'functions to preserve spheres of autonomy . . . unconstitutional conditions doctrine protects that [sphere] by preventing governmental end-runs around the barriers to direct commands.'"[55]

Releasing Scott was a discretionary decision. "[T]he Government's proposed conditions of release or detention [must] not be 'excessive' in light of the perceived evil" under the Excessive Bail Clause.[56] In some cases risk of flight may be so low that any amount of bail may be excessive and releasing one on their own recognizance may be deemed a low flight risk, therefore limiting the pre-trial release conditions.[57] The state must make decisions on whom to detain and who to release, since it would be impossible and impractical to jail every person charged with

48. *Id.* at 865.

49. *Id.* (quoting Bell v. Wolfish, 441 U.S. 520, 536 (1979)).

50. *Id.* (quoting United States v. Salerno, 481 U.S. 739, 754 (1987)).

51. *Id.* at 865-66.

52. *Id.*

53. *Id.* at 866 (quoting Dolan v. City of Tigard, 512 U.S. 374, 385 (1994)).

54. *Id.*

55. *Id.* (quoting Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1492 (1989)).

56. United States v. Salerno, 481 U.S. 739, 754 (1987).

57. *Scott*, 450 F.3d at 867.

a crime. The state may only impose conditions that are constitutional once deciding to release someone.[58]

The Fourth Amendment modern interpretation "depends on whether a reasonable expectation of privacy has been violated."[59] The Supreme Court decision in *Katz* expanded Fourth Amendment protection from government invasions of privacy in public places to include protection in private places such as homes.[60] "[A] *Fourth Amendment* search does not occur – even when the explicitly protected location of a *house* is concerned—unless 'the individual manifested a subjective expectation of privacy in the object of the challenged search,' and 'society [is] willing to recognize that expectation as reasonable.'"[61] Imposing warrantless searches as a condition of pre-trial release can diminish the expectation of privacy. However, government employees do not waive their Fourth Amendment rights when accepting employment and any searches of government employees must still be reasonable.[62] The government, when acting as employer or sovereign, is subject to the same constraints. Deciding whether someone will be jailed or released prior to a determination of guilt is a sovereign prerogative.[63] "'One who has been released on pre-trial bail does not lose his or her Fourth Amendment right to be free of unreasonable seizures . . . .'"[64] Probationers who are subject to more restrictions than pre-trial releasees do not waive their *Fourth Amendment* rights as conditions of their probation.[65] "[A]ny search made pursuant to the condition included in the terms of probation must necessarily meet the Fourth Amendment's standard of reasonableness."[66]

58. *Id.*
59. *Id.* (citing Katz v. United States, 389 U.S. 347, 361 (1967)).
60. *Id.*
61. *Id.* at 867 (quoting Kyllo v. United States, 533 U.S. 27, 32-33 (2001)).
62. *Id.* at 868.
63. *Id.*
64. *Id.* (quoting Cruz v. Kauai County, 279 F.3d 1064, 1068 (9th Cir. 2002)).
65. United States v. Consuelo-Gonzalez, 521 F.2d 259, 261 (9th Cir. 1975) (en banc).
66. *Id.* at 262.

2. Whether the search of Scott and his home was reasonable?

Scott's consent to any search is only valid if the search was reasonable. The majority analyzed the reasonableness of the government's search of Scott and his home.[67] Under the Fourth Amendment, "reasonableness means that a search or seizure must be supported by probable cause."[68] However in U.S. Supreme Court cases *Terry v. Ohio*[69] and *United States v. Brignoni-Ponce*,[70] pat-downs and minor intrusions can be supported by reasonable suspicion.

The requirements of probable cause can be relaxed "when 'special needs, beyond the normal need for law enforcement,'" make an insistence on the otherwise applicable level of suspicion "impractical."[71] Special needs can justify less than probable cause.[72] In *Scott*, "[t]he United States argues . . . searching pre-trial releasees by testing . . . for drugs served two special needs: (1) protecting the community from criminal defendants released pending trial and (2) ensuring that the defendants show up at trial."[73] The court in *Scott* reasoned that the first special need argued by the Government did not require anything more than normal law enforcement. The second argument may require more than normal law enforcement,[74] however two Supreme Court cases limited the special needs doctrine, *City of Indianapolis v. Edmond* [75] and *Ferguson v. City of Charleston*.[76] In *Edmond*, the court invalidated a roadside checkpoint program aimed at enforcing drug laws through drug sniffing dogs and visual inspection of cars.[77] "[S]uspicionless checkpoint stops are constitutional only if their primary purpose is separate from the general interest in crime control."[78]

67. *Scott*, 450 F.3d at 868.
68. *Id.*
69. Terry v. Ohio, 392 U.S. 1 (1968).
70. United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975).
71. Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (Blackmun, J., concurring) (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985)).
72. *Id.*
73. *Scott*, 450 F.3d at 869.
74. *Id.*
75. City of Indianapolis v. Edmond, 531 U.S. 32, 39 (2000).
76. Ferguson v. City of Charleston, 532 U.S. 67 (2001).
77. *Scott*, 450 F.3d at 869 (citing *Edmond*, 531 U.S. at 35).
78. *Id.* (citing *Edmond*, 531 U.S. at 41).

The U.S. Supreme Court upheld programs designed to secure the border[79] and programs that promote highway safety.[80] Programs designed to deter or punish violations of ordinary criminal laws are not constitutional according to the U.S. Supreme Court.[81]

In *Ferguson*, "the Court invalidated a state hospital's practice of testing pregnant women for cocaine and providing the results to the police. The Court had upheld suspicionless drug testing before, but in those cases, 'the special need' . . . was one divorced from the State's general interest in law enforcement."[82] The government used law enforcement to coerce the patients into substance abuse treatment. The Government's argument was the beneficial goal of protecting mother and child; however the Court said it was not distinguishable from general interest in crime control.[83]

Edmond and *Ferguson* establish primary and ultimate purposes for upholding special needs. The court examined the government's purposes for the search in *Scott* to see if any were primary. The first special need argued by the government was protecting the community from criminal activities of defendants awaiting trial. The government's interest in preventing crime by anyone is legitimate. Crime prevention is a general law enforcement purpose and the opposite of a special need.[84] The second government special need was ensuring that defendants show up at trial. The government's special interest is the efficiency and integrity of the judicial system.[85] The question is whether the interest in judicial efficiency is important enough to override the individual's privacy interest under the normal requirement of the Fourth Amendment's individualized suspicion.[86] The court must weigh the importance against the intrusion on the individual's interest in privacy.[87] The object of the test is drug use and the harm to be avoided is non-appearance

79. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 556-57 (1976).
80. *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990).
81. *Scott*, 450 F.3d at 869.
82. *Id.* (quoting Ferguson v. City of Charleston, 532 U.S. 67, 79 (2001)).
83. *Id.* (quoting *Ferguson*, 532 U.S. at 80-81).
84. *Id.* at 870.
85. *Id.* (quoting State v. Ullring, 1999 ME 183, ¶ 13, 741 A.2d 1065, 1068).
86. Chandler v. Miller, 520 U.S. 305, 318 (1997).
87. *Ferguson*, 532 U.S. at 78.

in court. The court concluded that there was not enough evidence to show that pre-trial releasees show up to court in a drug induced stupor or do not show up at all to support an intrusion on the privacy rights of every defendant released and awaiting trial.[88]

The court concluded that this was a hypothetical result and was highly unlikely.[89] "The Supreme Court has criticized assertions of special needs based on 'hypothetical' hazards that are unsupported by 'any indication of a concrete danger demanding departure from the *Fourth Amendment's* main rule.'"[90] The Nevada legislature has not taken the position that drug use among pre-trial releasees impairs their tendency to show up in court. The legislature has left release conditions to be determined in individual cases.[91] There is no obvious connection between drug use and showing up in court. Therefore, the search condition imposed in *Scott* was unnecessary to ensure Scott's appearance at trial.[92]

"Private residences are places which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable."[93] "The *Fourth Amendment* protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home . . . ."[94] Pre-trial releasees are ordinary citizens, accused of a crime but are presumed innocent in the eyes of the law until proven otherwise. Scott's assent to his release conditions does not make an unreasonable search reasonable. His consent may have reduced his expectation of privacy, but not enough to eliminate his expectation of privacy in his home.[95] Although the Supreme Court in *Griffin* upheld the search of a probationer's home without probable cause, *Scott* can be distin-

88. *Scott*, 450 F.3d at 870.
89. *Id.*
90. *Id.* (quoting *Chandler*, 520 U.S. at 319) (emphasis added).
91. NEV. REV. STAT. §§ 178.484-.4853 (2005).
92. *Scott*, 450 F.3d at 871.
93. *Id.* (quoting United States v. Karo, 468 U.S. 705, 714 (1984)).
94. *Id.* (quoting Payton v. New York, 445 U.S. 573, 589 (1980)).
95. *Id.*

guished, since Scott is not a probationer.[96] Probationers have been tried and convicted or have plead guilty. Pre-trial releasees have not been tried by the court and there is no verdict or admission of guilt.[97] "Griffin is properly read as limited by the fact that probationers have a lesser expectation of privacy than the public at large."[98] Pre-trial releasees have not suffered any judicial abridgment of their constitutional rights. There is no special needs showing and therefore, the police needed probable cause to search Scott and his home.[99]

The search was not reasonable under a general "totality of the circumstances" approach either.[100] In *United States v. Knights*, a reasonable suspicion search of a probationer was upheld on the theory of totality of the circumstances.[101] The Supreme Court stressed the status as a probationer with sharply reduced liberty and privacy interests.[102] Scott's privacy expectations were far greater than that of a probationer. Scott was not convicted of a crime; he was presumed innocent. Scott was released on his own recognizance and his crime was not serious enough to detain him, therefore, probable cause was needed to search his person and home. The government conceded there was no probable cause. Therefore, the search of Scott and his home was unreasonable and violated the Fourth Amendment.[103]

E. *The Dissenting Opinion*

The Dissent is disappointed that the Majority adopted a rule that carries monumental implications for pre-trial procedures, employed by every state in the circuit, as well as the United States, with a case of first impression in federal court when no state is a party.[104] The Dissent examines the status of probationers, parolees, pre-sentence and pre-trial releasees under state and federal common law. The Dissent argues that probable cause was not needed to search Scott's person for

96. Griffin v. Wisconsin, 483 U.S. 868, 870 (1987).
97. *Scott*, 450 F.3d at 872 (citing *Griffin*, 483 U.S. at 874).
98. *Id.* (quoting Ferguson v. City of Charleston, 532 U.S 67, 80 n.15 (2001)).
99. *Id.*
100. *Id.*
101. United States v. Knights, 534 U.S. 112 (2001).
102. *Id.* at 119.
103. *Scott*, 450 F.3d at 874-75.
104. *Id.* at 875 (Bybee, J., dissenting).

drugs, once the test was positive there was probable cause to search Scott's home.[105] According to the Dissent in *Scott*, the standard for a warrantless search of a pre-trial releasee is the same as the standard for probationers and parolees. All have reduced liberty interests from ordinary citizens.[106] The Dissent cites cases where warrantless searches were upheld. In these cases, the defendants were convicted of crimes, free on bond or pending sentencing. They had a diminished expectation of privacy from ordinary citizens and therefore probable cause was not necessary.[107]

The Dissent discusses the reasonable grounds standard, discussed in *State v. Fisher*.[108]

> A convicted felon who awaits sentencing is still subject to the court's jurisdiction, but yet does not possess the same constitutional rights as one merely accused . . . . Accordingly, [the defendant's] rights must be analyzed not from the status of an accused person, but from her status as a convicted felon released on personal recognizance and awaiting sentencing.[109]

However, those awaiting trial and detained in prison have the same privacy rights as those in prison already convicted of crimes.[110]

The leading state case imposing warrantless searches on pre-trial releasees is *In re York*.[111] The defendants were unable to post bail for their crimes. The California court offered pre-trial release conditions, including random drug testing and warrantless searches in exchange for being released on their own recognizance. The California Supreme Court upheld the pre-trial release conditions on the grounds that the conditions were reasonable within the guidelines of the California statute.[112] Pre-trial releasees do not enjoy the same reasonable expectation

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105. *Id.*

106. *Id.* at 877 (Bybee, J., dissenting).

107. *Id.* (citing United States v. Tucker, 305 F.3d 1193 (10th Cir. 2002); United States v. Richardson, 849 F.2d 439 (9th Cir. 1988); Unites States v. Consuelo-Gonzalez, 521 F.2d 259 (9th Cir. 1988)).

108. *Id.* (citing State v. Fisher, 35 P.3d 366 (Wash. 2001)).

109. *Id.* (quoting *Fisher*, 35 P.3d at 375-76).

110. *Id.* at 878 (Bybee, J., dissenting) ("treating pretrial detainees the same as prisoners convicted of an offense") (citing Bell v. Wolfish, 441 U.S. 520 (1979)).

111. *In re* York, 892 P.2d 804 (Cal. 1995).

112. *Scott*, 450 F.3d at 878 (Bybee, J., dissenting) (citing, *In re* York, 892 P.2d at 806).

of privacy as ordinary citizens who have not been charged with a crime and defendants able to post reasonable bail. The accused is not required to agree to the conditions of pre-trial release and is only burdened by the conditions after consent.[113] One who cannot post bail is not entitled to the unconditional bail release, but must consent to pre-trial conditions to receive release. The conditions must be reasonable under the circumstances. The court must consider the relationship of the condition to the crime, defendant's background, prior criminal conduct and totality of the circumstances.[114] The *York* case, distinguishes the pre-trial releasee from the ordinary citizen, in that the ordinary citizen has not been charged with a crime, and therefore the pre-trial releasee does not enjoy the same rights as the ordinary citizen. The *York* case allows pre-trial releasees to consent to conditions in order to be released awaiting trial provided that those conditions are reasonable.[115] The majority in *Scott*, held that pre-trial releasees cannot consent to conditions of searches that are not subject to the same standard as an ordinary citizen, probable cause.[116] Thus, *York*, is contradicted by the *Scott* holding.

In balancing the Fourth Amendment with the pre-trial releasee conditions the federal courts must look to state law and may consider state precedent.[117] Nevada may impose reasonable conditions on pre-trial releasees to protect health, safety and welfare of the community to ensure the accused will appear in court.[118] Nevada applies a reasonable suspicion standard to probationary searches.[119] Although there is no case law to support applying the reasonable suspicion standard to pre-trial releasees, the Dissent believes it is likely in the future.[120] There is a legitimate interest of the state to protect the public. "Nevada's concern for the safety of the public is not 'general law enforcement' when it is manifested in pre-trial conditions tai-

113. *Id.* (citing *In re* York, 892 P.2d at 806).
114. *Id.* (citing *In re* York, 892 P.2d at 814-15).
115. *In re* York, 892 P.2d 804 (Cal. 1995).
116. *Scott*, 450 F.3d at 874-75 (Bybee, J., dissenting).
117. *Id.* (citing United States v. Ooley, 116 F.3d 370, 372 (9th Cir. 1997)).
118. NEV. REV. STAT. § 178.484(8) (2005).
119. Allan v. State, 746 P.2d 138 (Nev. 1987).
120. *Scott*, 450 F.3d at 882 (Bybee, J., dissenting).

lored to this defendant."[121] The accused enjoys the presumption of innocence as a trial right, not as an ordinary citizen right.[122] "The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials . . . [b]ut it has no application to a determination of the rights of a pre-trial detainee during confinement before his trial has even begun."[123] "Individuals on pre-trial release may be treated differently than ordinary citizens without violating the presumption of innocence."[124]

The court must weigh the state's interests against the accused's interests. The state's interest in supervising individuals on pre-trial release, securing attendance at trial, and drug testing ensures the accused is physically and mentally fit for trial. Ensuring the accused is physically and mentally fit for trial preserves judicial resources from delays and ensures that the accused understands the proceedings and participates in the defense.[125] Scott's interest of privacy in his own home is protected by the Fourth Amendment. There has been no criminal judgment or sanction. Scott's rights are greater than a probationer, parolee or pre-sentencing releasee, but less than an ordinary citizen. His expectation of privacy is diminished by his consent.[126]

Pre-trial releasees suffer great burdens and are scarcely free citizens at liberty.[127] In *Albright v. Oliver*, the defendant was required to appear in court at the state's command and seek formal permission from the court on travel.[128] The Dissent asserts that a defendant who cannot post bail or receive release on his own recognizance suffers greater deprivation of liberty.[129] If he has to remain in jail, it may imperil his job, interrupt his source of income and impair his family relationships.[130] It can even limit his access to his attorney and potential witnesses.[131]

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121. *Id.*
122. *Id.*
123. *Id.* at 883 (Bybee, J., dissenting) (quoting Bell v. Wolfish, 441 U.S. 520, 533 (1979)).
124. *Id.*
125. *Id.* at 883-84 (Bybee, J., dissenting).
126. *Id.* at 885 (Bybee, J., dissenting).
127. Albright v. Oliver, 510 U.S. 266, 279 (1994) (Ginsburg, J., concurring).
128. *Id.* at 278.
129. *Scott*, 450 F.3d at 885-86 (Bybee, J., dissenting).
130. *Id.* at 885 (citing Gerstein v. Pugh, 420 U.S. 103, 114 (1975)).
131. *Id.* at 885-86 (citing Stack v. Boyle, 342 U.S. 1, 4 (1951)).

There can even be a loss of reputation.[132] The question is whether inducement is reasonable. Scott may give up one freedom for another. Consent to warrantless searches for freedom to go home. Scott, in essence, is inducing the government to waive bail if he waives his Fourth Amendment rights.[133] The Dissent believes the Majority strikes down Nevada's pre-trial process of allowing detainees to consent to pre-trial release conditions in order to sleep in their own beds at night.[134]

The Dissent concludes that "pre-trial releasees are subject to a balancing test that weighs the legitimate interests of the state against the individual privacy interests at stake in light of the unique circumstances and facts alleged."[135] The search and seizure was valid and only reasonable suspicion was required to administer the drug test and once the test was administered, the police had probable cause to arrest Scott and search his home.[136]

III. Impact of *Scott* and the Potential for Appeal

A. Scott *and the Law Prior to the* Scott *Decision*

Scott affords pre-trial releasees more rights than the probationer, presentencing releasee, and parolee. Prior to the decision in *Scott*, there were two leading cases decided by the Supreme Court, *Ferguson*, decided in 2001 and *Edmond*, decided in 2000, which the majority relied on. Neither case concerned the rights of a pre-trial releasee. The defendants in *Ferguson* were women arrested for drug use while in a hospital seeking obstetrical care[137] and the defendants in *Edmond* were individuals stopped at a vehicle checkpoint to interdict unlawful drugs.[138] In both cases the Supreme Court determined the programs violated the Fourth Amendment rights of the defendants.

In *Ferguson*, the issue presented to the Court was

132. *Id.* at 886 (quoting United States v. Motamedi, 767 F.2d 1403, 1414 (9th Cir. 1985) (Boochever, J., concurring and dissenting in part)).
133. *Id.*
134. *Id.* at 887-88 (Bybee, J., dissenting).
135. *Id.* at 889 (Bybee, J., dissenting).
136. *Id.*
137. Ferguson v. City of Charleston, 532 U.S. 67 (2001).
138. City of Indianapolis v. Edmond, 531 U.S. 32 (2000).

> whether a state hospital's performance of a diagnostic test to obtain evidence of a patient's criminal conduct for law enforcement purposes is an unreasonable search if the patient has not consented to the procedure. More narrowly, the question is whether the interest in using the threat of criminal sanctions to deter pregnant women from using cocaine can justify a departure from the general rule that an official non-consensual search is unconstitutional if not authorized by a valid warrant.[139]

The issue is very similar to that in *Scott*, whether anything less than probable cause is required to search an individual's person or property.[140] The main difference in the facts is that Scott was arrested prior to the search and the defendants in *Ferguson* were arrested after the search. It can be argued that the defendants in *Ferguson* were ordinary citizens and Scott was not. The Supreme Court stated in *Ferguson*, "[w]hile respondents are correct that drug abuse both was and is a serious problem, 'the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose.'"[141] The Court held, "[t]he Fourth Amendment's general prohibition against non-consensual, warrantless, and suspicionless searches necessarily applies to such a policy."[142] *Scott* applies this principal of a mere threat not being enough to substantiate warrantless, non-consensual searches to pre-trial releasees, whether consent has been given or not.

In *Edmond*, the Court considered "the constitutionality of a highway checkpoint program whose primary purpose is the discovery and interdiction of illegal narcotics."[143] The Court stated that approved checkpoints generally involved individualized suspicion. Furthermore, checkpoint programs, whose primary purpose was to detect ordinary crime, had never been approved by the Supreme Court.[144] The Court refused to uphold a checkpoint "justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any

139. *Ferguson*, 532 U.S. at 69-70.
140. *Scott*, 450 F.3d 863.
141. *Ferguson*, 532 U.S. at 86 (quoting *Edmond*, 531 U.S. at 42).
142. *Id. at* 86.
143. *Edmond*, 531 U.S. at 34.
144. *Id.* at 41.

given motorist has committed some crime."[145] The Court held that the checkpoints violated the Fourth Amendment because the primary purpose was general crime control.[146] The court in *Scott* also struck down the primary purpose of protecting the community against pre-trial releasee crimes as general crime control.[147] Therefore, *Scott* places pre-trial releasees in the same category as ordinary citizens not awaiting trial, but whose Fourth Amendment rights were violated resulting in arrest. The defendants in both *Ferguson* and *Edmond* were arrested as a result of a search based on less than probable cause.

Scott requires pre-trial releasees to be subject to searches and seizures based on probable cause.[148] Probationers, who are subject to more restrictions than pre-trial releasees, do not waive their Fourth Amendment rights as conditions of their probation.[149] "Any search made pursuant to the condition included in the terms of probation must necessarily meet the Fourth Amendment's standard of reasonableness."[150] Therefore, the government should not be able to induce the waiver of the pre-trial releasee's Fourth Amendment rights as a condition of his release.

The State of Wisconsin upheld the search of a probationer's home without probable cause.[151] In *Griffin*, the probation officer assigned to Griffin, a probationer, received a tip from a police officer that Griffin might have a gun in his apartment. The probation officer searched the home of Griffin and found a handgun.[152] Griffin was convicted of a firearms violation, which was affirmed by both the Wisconsin Court of Appeals and Wisconsin Supreme Court.[153] The Wisconsin Supreme Court "held that the 'reasonable grounds' standard of Wisconsin's search regulation satisfied . . . the Federal Constitution, . . ."[154] The Court also held that the search of the probationer's residence

145. *Id.* at 44.
146. *Id.* at 48.
147. United States v. Scott, 450 F.3d 863, 870 (9th Cir. 2006).
148. *Id.*
149. United States v. Consuelo-Gonzalez, 521 F.2d 259, 261 (9th Cir. 1975) (en banc).
150. *Id.* at 262.
151. Griffin v. Wisconsin, 483 U.S. 868, 870 (1987).
152. *Id.* at 871.
153. *Id.* at 872.
154. *Id.*

was "reasonable" within the meaning of the Fourth Amendment because it was conducted pursuant to a valid regulation governing probationers.[155] The Court reasoned that the special needs of supervision over probationers justified searches without a warrant and based on less than probable cause. The probationer did not enjoy absolute liberty, but only "conditional liberty dependent on observance of special [probation] restrictions."[156] *Scott* can be distinguished from *Griffin*, because Scott was not a probationer. The court in *Scott* has distinguished pre-trial releasees from probationers, in that the former is subject to the probable cause standard and the latter is subject to a reasonable suspicion standard.

Every state has a rule similar to Nevada granting state judges broad discretion in the fashioning of pre-trial release conditions.[157] California requires a "defendant's promise to obey all reasonable conditions imposed by the court or magistrate" before he can be released on his own recognizance.[158] Arizona permits "trial courts to impose such reasonable conditions on the person as it deems necessary to protect the health, safety, and welfare of the community to ensure that the person will appear at all times and places ordered by the court."[159] The decision in *Scott* may make state statutes obsolete concerning pre-trial release conditions.

The potential effects of *Scott* on state pre-trial release procedures will inhibit the ability of states to condition pre-trial releases. The states may decide to detain pre-trial releasees, rather than release them on their own recognizance. The result may very well be that pre-trial releasees will not actually enjoy being released on their own recognizance, when states decide not to offer such a choice.

155. *Id.* at 880.

156. *Id.* at 874 (quoting Morrisey v. Brewer, 408 U.S. 471, 480 (1972)).

157. NEV. REV. STAT. §§ 178.484-.4853 (2005).

158. CAL. PENAL CODE § 1318(a)(2) (West 2006).

159. ARIZ. R. CRIM. P. 7.3(b)(4) (2006).

B. *The Aftermath of* Scott

In December of 2005, the Federal Court for the District of Oregon decided *United States v. Skirving*.[160] The defendant, Robert Skirving, was arrested. His pre-trial release was conditioned on his submission to searches of his person, home or vehicle as directed by the government's Pre-trial Services department.[161] The police received anonymous information, prompting concern over the possibility that Skirving would destroy evidence on his home computer once his co-defendants Brink and Ferguson were arrested.[162] Pre-trial Services was contacted and Skirving's home computers were confiscated.[163] Skirving argued that probable cause did not exist to search his home for the computers.[164]

> Skirving notes that the veracity of the anonymous sources is unknown, that the sources did not know the true names of the people communicating with Brink over the internet, and that Brink and Skirving did not want information saved to hard drives, making the need to search the computers less obvious.[165]

Skirving relied on *Scott*,[166] "which the government concedes holds that warrantless searches of pre-trial releasees require a showing of probable cause, despite any pre-release consent to search given by the releasee as a condition of the release."[167] The government argued probable cause existed, however the Court was persuaded by Skirving's argument.[168]

The Court in *Skirving* relied on *Scott*, holding, "I will not allow the government to retain and use the copies of the computer hard drives unless, under *Scott*, there is a showing of probable cause. That issue will be decided in an evidentiary hearing, if the government decides to pursue it."[169] The Court

160. United States v. Skirving, No. 01-321-04-KI, 2005 U.S. Dist. LEXIS 38854 (D. Or. Dec. 14, 2005).

161. *Id.* at *1-*2.

162. *Id.* at *3.

163. *Id.*

164. *Id.* at *5.

165. *Id.* at *5-*6.

166. United States v. Scott, 450 F.3d 863, 888 (9th Cir. 2006).

167. *Skirving*, 2005 U.S. Dist. LEXIS 38854, at *4.

168. *Id.* at *5-*9.

169. *Id.* at *9.

then stated that if the government did not pursue the hearing, the copies of the hard drives would be returned to Skirving.[170]

The *Skirving* case is the first case to follow *Scott*. The federal courts will now scrutinize probable cause even when the government argues that probable cause existed. In *Scott* the government conceded that probable cause did not exist and only a reasonable suspicion was required for pre-trial releasees, who consent to searches as a condition of their release.[171] In *Skirving* the government argued that probable cause did exist when the hard drives were confiscated.[172] Therefore, the aftermath of *Scott*, includes not only the ability of a pre-trial releasee to waive his Fourth Amendment rights and consent to searches, but also a stricter review of the validity of probable cause to perform those searches, even though there was consent, as a condition of release.

In an article recently published by the Harvard Law Review, the Ninth Circuit's reasoning in *Scott* is criticized with two significant limitations.[173] "Although the Ninth Circuit's decision in *Scott* boldly sought to protect against the 'downward ratchet of privacy rights,'[174] two significant limitations in the [C]ourt's reasoning may open the way for future courts to significantly diminish the Fourth Amendment safeguards the court sought to protect."[175] The first limitation on the court's reasoning occurred when the court asserted that "Scott's 'consent to any search is only valid if the search in question . . . was reasonable,' [the court] also reasoned that it should take 'consent into account' in determining whether a search was 'reasonable.'"[176] The Harvard Law Review case comment explains that "[c]onsent that has not yet been determined 'valid' should play no role in the 'reasonableness' analysis, given that such analysis, under the Ninth Circuit's approach, is intended to deter-

170. *Id.*

171. *Scott*, 450 F.3d 863.

172. *Skirving*, 2005 U.S. Dist. LEXIS 38854, at *4.

173. Case Comment, *Criminal Law - Fourth Amendment - Ninth Circuit Holds That Search of Pretrial Releasee Is Unconstitutional Despite Releasee's Consent*, United States v. Scott, 119 HARV. L. REV. 1630 (2006).

174. *Id.* at 1634 (quoting United States v. Scott, 424 F.3d 888, 892 (9th Cir. 2005)).

175. *Id.* at 1634.

176. *Id.* at 1634 (quoting *Scott*, 424 F.3d at 893).

mine whether it was appropriate to extract the consent in the first place."[177] Thus, the reasoning of the Ninth Circuit is faulted for not determining whether the consent was first valid before determining whether the search was reasonable. One cannot give consent to a reasonable or unreasonable search, if the consent was not considered valid in the first place.

The second limitation in the Ninth Circuit's reasoning is that the Court undermined its assertion that induced, blanket consent to searches should not, "by itself make an otherwise unreasonable search reasonable."[178] The case comment explains that when taking consent into account, there are three possible conclusions: (1) the search is reasonable regardless of consent; (2) the search would be unreasonable, however the consent factored into the reasonableness analysis, effectively makes the search reasonable; and (3) the search is unreasonable with our without consent.[179] Consent is immaterial in the first and third conclusions because it does not play a role in determining the reasonableness of the search.[180] However, in the second conclusion, the article explains that there is a direct conflict in the Ninth Circuit's assertion in *Scott* that "induced blanket consent should not have the effect of making reasonable an unreasonable search conducted pursuant to such consent. The formal difference [in] the second category, [is that] the court has not declared the search unreasonable before it concludes that the consent makes it otherwise . . . ."[181] According to the Harvard Law case comment the reasoning of the Ninth Circuit threatens its purpose in protecting privacy and liberty interests "by preventing governmental end-runs around the barriers to direct commands."[182] The determination of reasonableness for searches should be analyzed separately from the consent. Whether Scott can consent to waive his Fourth Amendment rights to be free of reasonable searches, depends on first determining whether the search was reasonable to begin with. If the search was unreasonable, consent may no longer be an issue.

177. *Id.* at 1634-35 (citing *Scott*, 424 F.3d at 893).
178. *Id.* at 1636 (citing *Scott*, 424 F.3d at 896).
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.* at 1637 (quoting Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1492 (1989)).

C. *Potential of* Scott *for Appeal*

The *Scott* case has the potential for appeal because there is currently no federal standard for pre-trial releasees and very few states have been presented with the issue. The Supreme Court would probably review the case in order to establish a standard for pre-trial releasees who waive their Fourth Amendment rights in order to be free on their own recognizance while awaiting trial. The Fourth Amendment rights are fundamental rights explicitly granted in the Constitution of the United States. The issue of whether a pre-trial releasee enjoys the same rights as an ordinary citizen or a person on probation needs to be certified by the Supreme Court. The Supreme Court must decide whether the pre-trial releasee is an ordinary citizen, in a class with probationers and those awaiting sentence, or in a class all his own, distinguished from ordinary citizens, probationers, or those released awaiting sentencing. Ordinary citizens are subject to probable cause, while probationers are subject to reasonable suspicion under the Fourth Amendment as interpreted by the cases discussed.

D. *How the Supreme Court May Analyze* Scott *on Appeal*

The Supreme Court may strictly scrutinize the government's ability to persuade or induce a pre-trial releasee to waive his Fourth Amendment rights, when reviewing *Scott*, on appeal because these are fundamental rights granted by the Constitution. The Government will have to prove a compelling state interest to condition pre-trial release on the waiver of one's Fourth Amendment rights. In addition, the compelling interest must be narrowly tailored to ensure the state's interest outweighs the fundamental rights of the pre-trial releasee to be free from unreasonable searches and seizures.[183]

The Supreme Court may also use the equal protection clause analysis under the Fourteenth Amendment when reviewing the *Scott* case. The government may be viewed as discriminating between those individuals accused, but not convicted of a crime and ordinary citizens. If you have been accused of a crime, the government is subjecting you to reasonable suspicion: if you have not been accused of a crime, the police

183. *See* Shapiro v. Thompson, 394 U.S. 618 (1969).

must have probable cause to search you or your home.[184] The Constitution does not distinguish between those accused and those not accused where Fourth Amendment rights are concerned. Therefore, if the government discriminates based on pre-trial releasees and ordinary citizens, the conditions must then be rationally related to the important interest of the state.[185] If the interest of the state is to ensure the pre-trial releasee shows up to court drug free and the means of accomplishing that are subjecting the pre-trial releasee to searches and seizures without probable cause, the Supreme Court may strike it down, without specific findings that pre-trial releasees do not consistently show up for court or show up so impaired that they cannot comprehend the proceedings.

The fundamental rights granted in the Constitution are the essence of our nation and the Supreme Court will more than likely look to preserve them. The government, if it chooses to appeal must prove that the compelling government interest substantially outweighs the fundamental right of an individual to be free from unreasonable searches and seizures.[186] There must be a compelling reason that is narrowly tailored to the government interest as to why a pre-trial releasee should be required to waive his Fourth Amendment rights in order to forego imprisonment, while awaiting trial.

IV. Conclusion

Pre-trial Releasees are neither ordinary citizens nor convicted felons. There must be a balance between the expectation of privacy intrusion and the legitimate interests of the state.

The pre-trial releasee should not have to forego one freedom, the right to an expectation of privacy, for another freedom, the right to be released on his own recognizance pending trial. The balancing approach discussed by the Dissent is consistent with the analysis used by the Supreme Court in deciding fundamental rights cases. The Dissent proposes weighing the legitimate interests of the state against the individual privacy interests at stake in light of the unique circumstances and facts

184. U.S. CONST. amend. IV.
185. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886).
186. *See Shapiro*, 394 U.S. 618.

alleged. This would allow the judge to decide whether or not in each individual case the state's interests are greater than the privacy interests of the alleged criminal. Individual application would allow the Court to chose which crimes pending trial are serious enough to allow an individual to consent to searches and seizures based on reasonable suspicion. However, the standard would then become very subjective and it would be difficult to predict which pre-trial releasees would be subject to probable cause and which would be subject to reasonable searches.

The importance of the *Scott* case is that it created a standard of review for pre-trial releasees equivalent to ordinary citizens. It reinforced that individuals are presumed innocent until proven guilty. Although Fourth Amendment rights can be waived, the standard for searching a pre-trial releasee's person or home will remain probable cause, thus making the waiver obsolete. *Scott* has simultaniously undermined the ability of the states to condition pre-trial releases and to induce individuals to waive their Fourth Amendment rights. As a result, many states may decide not to allow pre-trial releasees to be released on their own recognizance, therefore creating a burden on both those unable to post bail and the capacity of state penitentiaries. Many states may decide as a matter of public policy that the overall community is best served by imprisoning all alleged criminals pending trial. The burden on the state penitentiaries may then be so great that trials may be delayed even longer, restricting the freedom of those accused of crimes even more. The pre-trial releasee will then be subject to an even greater fundamental right, the right to his very own liberty. An individual should have the opportunity to decide which right he would rather forego, the right to liberty or the right to unreasonable searches and seizures. The *Scott* case may very well, revoke the individual's right to make that choice.