No. 19 - _____

In the Supreme Court of the United States

ANGELA HAMM AND DAVID HAMM, PETITIONERS

v.

STATE OF TENNESSEE.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Following an unsubstantiated tip that David Hamm was engaged in drug-related activity, police—believing that they had insufficient evidence for a search warrant—learned that his wife, Angela Hamm, was on probation. Tennessee, like many States, imposes a "warrantless search" condition on probationers, which subjected Mrs. Hamm to "a search, without a warrant, of [her] person, vehicle, property, or place of residence by any Probation/Parole Officer or law enforcement officer, at any time." When neither Mr. nor Mrs. Hamm were home, the police entered and searched their residence. Following discovery of a small quantity of drugs, Mr. and Mrs. Hamm were arrested and charged with possession of controlled substances with intent to distribute.

A divided Supreme Court of Tennessee reversed the trial court's suppression of the evidence, concluding that because Mrs. Hamm was on probation, the Fourth Amendment does not require police to possess reasonable suspicion to search the home she shared with her family.

The question presented is:

Whether police violate the Fourth Amendment when they conduct a suspicionless search of a probationer's home.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTION AND STATUTES

OTHER MATERIALS

OPINIONS BELOW

The opinion of the Supreme Court of Tennessee (Pet. App. 1a–69a) is reported at 589 S.W.3d 765. The opinion of the Tennessee Court of Criminal Appeals (Pet. App. 70a–115a) is unreported but available at 2017 WL 3447914. The opinion of the state trial court (Pet. App. 118a–120a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Tennessee was entered on November 21, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> 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.

STATEMENT

1. Factual Background

In November 2015, Officer Ben Yates received a tip that there were people "doing it big" by trafficking drugs in the small town of Glass, Tennessee. Pet. App. 120a. The information was second-hand from an unidentified informant who had attempted (unsuccessfully) to purchase drugs in Glass. *Id.* Separately, Officer James Hall arrested a methamphetamine user who told him that there were "heavy players" trafficking the drug in Glass. *Id.* at 119a. When the arrestee refused to elaborate or identify the traffickers, Officer Hall asked if petitioner David Hamm was one of them. *Id.* The arrestee "winked and smiled." *Id.*

Officer Hall told this to Officer Yates, and the two discovered that, although Mr. Hamm had no criminal record, his wife, petitioner Angela Hamm, was on probation for a non-violent drug offense. Mot. to Suppress Hr'g Tr. at 60 ("Tr."). Tennessee, like many States around the country, imposes a "warrantless search" condition on probationers. This provision subjected Mrs. Hamm to "a search, without a warrant, of [her] person, vehicle, property, or place of residence by any Probation/Parole Officer or law enforcement officer, at any time." Pet. App. 118a. Mrs. Hamm's probation condition did not specify whether reasonable suspicion was required for such a search.

Armed only with the "wink and smile" tip regarding Mr. Hamm, the police recognized that they lacked probable cause for a search warrant. Tr. 19. Nevertheless, the police decided to search the home that Mr. and Mrs. Hamm shared, relying on Mrs. Hamm's probation condition. *Id.* When four officers arrived at the Hamm residence, neither petitioner was home, but their thirteen-year-old son was playing outside. Tr. 31. The officers knocked on the door, and after receiving no response, opened the unlocked door and searched every room in the house except for a little girl's room. Pet. App. 3a; 76a.

In Mr. and Mrs. Hamm's shared bedroom, the police found pills, two glass pipes, scales, and an eyeglasses case with methamphetamine inside. Pet. App. 3a; 76a. The police seized the drugs and later arrested both Mr. and Mrs. Hamm.

2. Procedural Background

Following their arrest, Mr. and Mrs. Hamm were charged with multiple counts of possession with intent to distribute. Pet. App. 3a–4a. After the court appointed counsel, both Mr. and Mrs. Hamm moved to suppress the evidence found in their home, arguing that it was the fruit of an illegal search in violation of the Fourth Amendment. *Id.* at 4a. Following a hearing where Officers Hall and Yates testified, the trial court granted the motion to suppress, concluding that there was "nothing by way of articulable facts to support the

reasonable suspicion" necessary to search the home of a probationer. *Id.* at 5a. Because the State could not proceed without the evidence, the trial court dismissed the indictment. *Id.* at 116a–117a. The State appealed, and the Tennessee intermediate appellate court affirmed, concluding that police lacked the reasonable suspicion required by the Fourth Amendment. *See id.* at 70a–115a.

The State petitioned the Supreme Court of Tennessee for discretionary review, arguing that review was necessary to weigh in on "a split of authority across the nation" regarding "what level of suspicion is required" to lawfully search a probationer. State Br. at 9, *Tennessee v. Hamm*, 589 S.W.3d 765 (Tenn. 2019) (No. W2016-01282-SC-R11-CD). The Supreme Court of Tennessee granted review, and in a 3–2 decision, reversed the trial court's suppression of the evidence. *See Tennessee v. Hamm*, 589 S.W.3d 765 (Tenn. 2019).

The majority concluded that it need not address the trial court's conclusion that police lacked reasonable suspicion because "probation search conditions" permitting warrantless searches "do not require law enforcement to have reasonable suspicion." Pet. App. 22a. Ignoring well-established precedent that subjective intentions play no role in Fourth Amendment analysis, *see Whren v. United States*, 517 U.S. 806, 813, (1996), the majority concluded that the "suspicionless search of a probationer" here was reasonable because it was neither performed "in an arbitrary

manner," to "cause the defendant any harm," nor done "out of personal animosity" as part of "a pattern of repetitive searches while the defendant was at work or asleep." Pet. App. 26a. Thus, the majority concluded that the suspicionless search met the minimum constitutional threshold of reasonableness required by the Fourth Amendment. *Id.*

Two Justices dissented. Imploring the "United States Supreme Court [to] undo the injustice of the majority's decision," Justice Lee concluded that, at a minimum, reasonable suspicion is required to search a probationer's home. Pet. App. 69a. Applying this Court's decisions in *United States v. Knights*, 534 U.S. 112 (2001) and *Samson v. California*, 547 U.S. 843 (2006), Justice Lee concluded that these cases have held that "probationers and parolees are different" because, "[u]nlike parolees, probationers have greater privacy expectations, and the government has a lesser interest in supervising them." Pet. App. 66a. Thus, if the distinction between parolees and probationers is to have any meaning, she would hold that the law must "require law enforcement to have at least a reasonable suspicion of criminal activity before searching a probationer's home." *Id.* She further explained that the importance of this issue was waxing—not waning—because the modern trend in criminal justice reform is to place more defendants on probation and into other rehabilitative programs. *Id.* at 67a.

Writing separately, Justice Clark also recognized that the "United States Supreme Court still has not answered [the] question" of whether reasonable suspicion is required to search probationers. Pet. App. 40a. She also read *Samson* and *Knights* to say that "probationers retain greater expectations of privacy than parolees." *Id.* at 48a. Therefore, "searches of probationers must be based on reasonable suspicion." *Id.* at 47a. Such a conclusion was particularly necessary here, she noted, where the "suspicionless search occurred in the probationer's home where her expectation of privacy was at its most robust." *Id.* at 49a. Indeed, Justice Clark observed requiring reasonable suspicion "is not overly burdensome, and it strikes the appropriate balance between the State's legitimate interests in rehabilitation, prevention of recidivism, and reintegration into society, and the probationer's significantly diminished, but not extinguished, expectation of privacy." *Id.* at 50a.

Justice Clark further explained that the "majority's decision cannot logically be limited to supervised probationers who have been convicted of felony offenses," and found the majority's freestanding reasonableness approach would give insufficient guidance to officers in the field. *Id.* at 51a. Instead, the "reasonable suspicion standard would provide some guidance for" police. *Id.* at 50a. She further observed the majority's decision "authorizing warrantless, suspicionless searches actually may impede the State's legitimate

goals of rehabilitation and reintegration" by making it impossible for probationers to live with their support system without taking away their cohabitant's Fourth Amendment rights. *Id.* Justice Clark concluded her analysis by saying that the "United States Supreme Court should grant review on this issue and restore this core Fourth Amendment protection for probationers." *Id.* at 53a.

REASONS FOR GRANTING THE PETITION

This case presents an excellent vehicle for this Court to resolve an acknowledged split of authority and decide that the Fourth Amendment prohibits States from adopting a blanket rule that subjects millions of probationers—and their families—to search without any individualized suspicion.

The question presented here was left open by this Court in *United States v. Knights*, 534 U.S. 112 (2001). In *Knights*, this Court held that, because the search of the probationer was supported by reasonable suspicion, no Fourth Amendment violation occurred. The Court left unresolved, however, whether officers may conduct suspicionless searches of probationers' homes. Five years later, in *Samson v. California*, 547 U.S. 843 (2006), the Court concluded that the Fourth Amendment permits suspicionless searches of parolees. But the decision—which hinged on parolees' diminished expectation of privacy—determined that, on the "continuum of possible punishments," "parole is more akin to imprisonment than probation is to imprisonment" and thus "parolees have fewer expectations of privacy than probationers." *Id.* at 850. This Court should grant the petition for a writ of certiorari and make clear that probationers retain an expectation of privacy in their homes, and therefore, police generally require reasonable suspicion for a search.

I. Lower courts have struggled to interpret *Knights* and *Samson*, resulting in deep divisions of authority over whether police may constitutionally conduct suspicionless searches of probationers. Fourteen state high courts conclude that reasonable suspicion is required, while eight conclude that suspicionless searches are permissible. The federal circuits also have adopted conflicting standards and rules. The result is a split of authority—among States and federal circuits, and between federal circuits and the States within their geographic bounds. Certiorari is warranted to resolve this split and harmonize Fourth Amendment law nationwide.

II. The Tennessee Supreme Court was wrong to ignore this Court's observation in *Samson* that probationers enjoy greater Fourth Amendment rights than parolees. Instead, the lower court held that police could search the home of a probationer with no suspicion of criminal wrongdoing solely to investigate an unconfirmed tip about her husband. That holding violates both basic principles of reasonableness and the sanctity of the home, which is at the core of Fourth Amendment. This Court has repeatedly reaffirmed that suspicionless searches are constitutional only in exceptional circumstances. By endorsing a rule that permits suspicionless searches of the homes of the more than 3.5 million probationers, that exception would become the new Fourth Amendment rule.

III. This case is the ideal vehicle to answer a recurring question of substantial national importance affecting millions of Americans. The issue was preserved at every level, squarely addressed by every court below, and is ripe for this Court's review and resolution.

I. State and Federal Courts are Split Over Whether Reasonable Suspicion is Required to Search a Probationer's Home

Lower courts are divided over whether probationers are subject to search absent reasonable suspicion: State courts to consider the question are split over whether suspicionless searches are ever allowed, and federal circuit courts have created differing standards for when a probationer is subject to searches without reasonable suspicion. The result is conflicting law across the country, as well as intra-circuit splits among state high courts and federal circuits with jurisdiction over the same geographic area. Only this Court can resolve the conflicting law and bring nationwide uniformity on this important issue that affects millions of probationers and their families.

A. State High Courts are Split Over Whether the Fourth Amendment Authorizes Suspicionless Searches of Probationers

States are split over whether the Fourth Amendment permits searches of probationers without reasonable suspicion. The majority of States to address the question (14 States) have held that the Fourth Amendment requires reasonable suspicion before searching a probationer, while 8 States, including the Supreme Court of Tennessee, have authorized suspicionless searches.

After *Knights*, courts around the country, including the Supreme Court of Tennessee below, have pointed to a split of authority on the question presented. *See*, *e.g.*, *Kansas v. Toliver*, 417 P.3d 253, 258 (Kan. 2018) ("[C]ourts have split over whether probationers can be subjected to suspicionless searches."); Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 10.10 (5th ed. 2019) ("LaFave") (recognizing the "disagreement as to whether a probationer's Fourth Amendment rights are diminished to the same extent and degree as those of a parolee"); *id.* at n.12 (aggregating state supreme court cases on either side of the split).

The majority and dissents below similarly recognized that "States have differing standards with re-

gard to the distinction between parolees' and probationers' expectations of privacy, and thus, the level of suspicion required to support a warrantless search." Pet. App. 20a; *see id.* at 40a (Clark, J., dissenting) ("The United States Supreme Court still has not answered [the] question for probationers."); *id.* at 67a (Lee, J., dissenting) (noting divided State authority).

1. Tennessee is in the Minority of States to Allow Suspicionless Searches of Probationers

Tennessee joins only 7 other States—Alaska, Arizona, California, Indiana, New Hampshire, Nebraska, and Wyoming—to authorize suspicionless searches of probationers, 4 of which have not revisited their holdings in the 14 years since *Samson* was decided. The States authorizing suspicionless searches generally echo the rationale advanced by the Supreme Court of Tennessee here, concluding that a probationer's expectation of privacy is so diminished that they can be subject to searches even without any reasonable suspicion of wrongdoing.

For example, noting that the question "is one that has divided other courts," the Supreme Court of Arizona held that "a warrantless probationary search may be carried out without . . . reasonable suspicion." *Arizona v. Adair*, 383 P.3d 1132, 1135 (Ariz. 2016). To reach that conclusion, the Arizona court ignored the distinction drawn in *Samson* between parolees and

probationers and simply extended *Samson*'s holding to conclude that "reasonable suspicion is not necessarily required for a probationary search." *Id.* at 1137 (quoting *Indiana v. Vanderkolk*, 32 N.E.3d 775, 779–80 (Ind. 2015)).

The Supreme Courts of Indiana and California reached similar conclusions to uphold suspicionless search conditions imposed on probationers. *See Vanderkolk*, 32 N.E.3d at 779 (Ind.) ("Indiana probationers . . . who have consented or been clearly informed that the conditions of their probation [] program unambiguously authorize warrantless and suspicionless searches, may thereafter be subject to such searches."); *In re Jaime P.*, 146 P.3d 965, 968 (Cal. 2006) ("An officer acting in reliance on a [suspicionless] search condition may act reasonably, even in the absence of any particularized suspicion of criminal activity, and such a search does not violate the suspect's reasonable expectation of privacy.").

Four other States have upheld suspicionless searches, but in decisions that have not been updated or revisited since *Samson*. *See Soroka v. Alaska*, 598 P.2d 69, 71 n.5 (Alaska 1979) ("Searches authorized in connection with grants of probation or parole may be executed without the need for additional justification, as long as they are reasonably conducted and not made for purposes of harassment."); *New Hampshire v. Zeta Chi Fraternity*, 696 A.2d 530, 540 (N.H. 1997) ("[R]andom warrantless searches of probationers not

based on particularized suspicion of misconduct are constitutionally permissible if such searches are authorized as part of the defendant's conditions of probation."); *Nebraska v. Morgan*, 295 N.W.2d 285, 289 (Neb. 1980) (concluding that search of probationer's "premises was a 'consent' search under the authority contained in" state probation condition); *Wyoming v. McAuliffe*, 125 P.3d. 276 (Wyo. 2005) ("[P]robation search conditions permitting random drug searches [of probationer's vehicle] by law enforcement officers pass Fourth Amendment muster.").

2. The Majority of States to Address the Question Conclude That Reasonable Suspicion is Necessary to Search a Probationer

On the opposite side of the split are 14 States that have held reasonable suspicion is required before searching a probationer. These States generally have found that probationers retain a greater expectation of privacy than parolees, which requires at least reasonable suspicion. *Accord* LaFave, § 10.10, n.12 (reading *Samson* to say that "parolees (but presumably not probationers) may be subjected to suspicionless searches").

For example, the Supreme Court of North Dakota faced a situation strikingly similar to the present case. Following a guilty plea for non-violent drug offenses,

North Dakota imposed a condition that the probationer "submit to a search of his person, place and vehicle at the request of law enforcement without a warrant." *North Dakota v. Ballard*, 874 N.W.2d 61, 62 (N.D. 2016). A police officer, seeing the probationer and knowing he was on probation, pulled him over in front of his home without any reasonable suspicion of criminal activity or probation violations. *Id.* at 63. The officer entered the probationer's home, searched his bedroom, and found a small quantity of methamphetamine. *Id.* The Supreme Court of North Dakota concluded that such searches were impermissible. *Id.* at 72. The court recognized that *Samson* authorized suspicionless searches of parolees, but would "not equate Samson's extensive parole constraints with [the defendant's] modest conditions of unsupervised probation." *Id.* The North Dakota court therefore concluded that a "suspicionless search of [the probationer's] person and his home" was not reasonable under the Fourth Amendment. *Id.*

The Supreme Court of Kansas echoed this holding in striking down a standard probation condition that permitted a probation officer to search a probationer's home in conjunction with a probation visit. *Kansas v. Bennett*, 200 P.3d 455, 459 (Kan. 2009). The court concluded that "because probationers have a greater expectation of privacy than parolees, searches of probationers in Kansas must also be based on a reasonable suspicion." *Id.* at 463. In so holding, the court

rejected the argument that "imposing a reasonable suspicion standard will thwart the purposes of community corrections officers." *Id.* The court observed that this "argument fails to recognize that although probationers' privacy rights are more limited than are the rights of free citizens, probationers do enjoy some expectation of privacy in their persons and property," and that "[r]easonable suspicion is not an overly-burdensome standard of proof." *Id.*

The Supreme Court of Virginia similarly declared that a "suspicionless search" condition was facially unconstitutional. *See Murry v. Virginia*, 762 S.E.2d 573, 580 (Va. 2014). The *Murry* court concluded that such a condition conflicted with this Court's "decision in *Knights* that probationers retain some expectation of privacy, albeit diminished." *Id.* at 578–79. The court concluded that the State's interest in rehabilitation does "not justify the total surrender of [the probationer's] Fourth Amendment rights." *Id.* at 580.

These three States are emblematic of the majority, each of which have held that a search of a probationer must be supported by reasonable suspicion. *See Sierra v. Delaware*, 958 A.2d 825, 828 (Del. 2008) (holding that "search of a probationer's residence requires the probation officer to have 'reasonable suspicion' or 'reasonable grounds' for the search"); *Moran v. Georgia*, 805 S.E.2d 856, 858–59 (Ga. 2017) (requiring that "a probationer may be subject to a warrantless

search if there is reasonable suspicion of criminal activity"); *Idaho v. Garnett*, 453 P.3d 838, 843 (Idaho 2019) ("The proper legal standard to be used in determining the permissible scope of a search of a probationer's belongings is reasonable suspicion."); *Massachusetts v. LaFrance*, 525 N.E.2d 379, 380 (Mass. 1988) (reaffirmed in *Massachusetts v. Feliz*, 119 N.E.3d 700, 711 (Mass. 2019)) ("[T]he Fourth Amendment to the Constitution of the United States forbid[s] the search of a probationer or her premises unless the probation officer has at least a reasonable suspicion that a search might produce evidence of wrongdoing."); *Montana v. Moody*, 148 P.3d 662, 665 (Mont. 2006) ("[A] probation officer may search a probationer's residence without a warrant so long as the officer has reasonable cause for the search."); *Vermont v. Cornell*, 146 A.3d. 895, 909 (Vt. 2016) ("We do not join these courts in this extension of *Samson*, and continue to hold that reasonable suspicion for search and seizure imposed on probationers is required by the Fourth Amendment.").[1]

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[1] Five States held as much before this Court's opinion in *Samson* and have not revisited that conclusion in the 14 years since *Samson* was decided. *See Connecticut v. Smith*, 540 A.2d 679, 691 (Conn. 1988). ("The standard required to justify the search here by a probation officer while properly less stringent than probable cause, we determine, is that which may be found in the emerging and now rather stabilized concept of reasonable

Still other States have legislatively provided protections for probationers that guarantee at least reasonable suspicion, which frequently obviates the need for the state high courts to consider the Fourth Amendment question. *See*, *e.g., Pennsylvania v. Wilson*, 67 A.3d 736, 745 (Pa. 2013) ("Accordingly, we hold that, under this statutory construct, sentencing courts are not empowered to direct that a probation officer may conduct warrantless, suspicionless searches of a probationer as a condition of probation.") (citing 41 Pa. Cons. Stat. § 9912).[2] And Iowa has determined, as a

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suspicion.") (internal quotation marks omitted); *Grubbs v. Florida*, 373 So. 2d 905, 910 (Fla. 1979) ("[T]he search condition set forth unilaterally by the judge in the probation order which requires a probationer to consent at any time to a warrantless search by a law enforcement officer is a violation of . . . the [F]ourth [A]mendment to the United States Constitution."); *Hawaii v. Fields*, 686 P.2d 1379, 1390 (Haw. 1984) (requiring search of probationer "must still be justified by a reasonable suspicion"); *Illinois v. Lampitok*, 798 N.E.2d 91, 106 (Ill. 2003) (noting that "a probation search of the residence of a probationer . . . complies with the [F]ourth [A]mendment reasonableness requirement only if the searching officers had reasonable suspicion of a probation violation"); *Parks v. Kentucky*, 192 S.W.3d 318, 330 (Ky. 2006) (holding that warrantless search condition "will support a warrantless search if the officer has a 'reasonable suspicion' that the person who gave the consent is presently engaged in criminal activity").

[2] *See also*, *e.g.*, Ala. Bd. of Pardons and Parole, *Probation and Parole Officers Manual*, ¶ 166.04 (Jan. 1988) ("A search of a probationer's or parolee's quarters or property may be conducted

matter of *state* constitutional law, that reasonable suspicion is required to search a probationer. *See Iowa v. Short*, 851 N.W.2d 474, 506 (Iowa 2014) ("[T]he [suspicionless] search by general law enforcement authorities of the home in this case was unlawful under article I, section 8 of the Iowa Constitution.").

Given the number of state high courts that have definitively addressed this question—many of which have openly acknowledged a split of authority—there is no serious question that the States are divided over whether the Fourth Amendment protects probationers from suspicionless searches.

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by an officer of the Department if there are reasonable grounds to believe that the quarters or property contain contraband."); La. Code Crim. Proc. § 895(13)(a) (requiring probationers to submit "to searches . . . by the probation or parole officer assigned to him . . . with or without a search warrant, when the probation officer or the parole officer has reasonable suspicion"); S.C. Code § 24-21-410 ("Before a defendant may be placed on probation, he must agree in writing to be subject to a search or seizure, without a search warrant, based on reasonable suspicions"); Wash. Rev. Code. § 9.94A.631(1) ("If there is reasonable cause to believe that an offender has violated a condition or requirement of the [probation] sentence, a community corrections officer may require an offender to submit to a search."); Wis. Admin. Code. Dep't of Corr. § 328.22(2) (authorizing search of probationer only with "reasonable grounds to believe the offender possesses contraband or evidence of a rule violation on or within his or her person or property").

B. Federal Circuit Courts of Appeals Also Disagree Over the Propriety of Suspicionless Searches of Probationers

Not only are States deeply divided, but the federal courts of appeals are also confused as to whether and in what circumstances the Fourth Amendment requires reasonable suspicion to search a probationer. Although the Sixth and Seventh Circuits do not require reasonable suspicion to search a probationer, the Second Circuit has stated that reasonable suspicion is required to search a probationer unless a suspicionless search can be justified under the "special needs" doctrine. Still other circuits have adopted inconsistent constitutional standards for probation searches, making it impossible to reconcile the various opinions. Without this Court's guidance, the circuits will continue to vary in their approach to this important question.

On one side are the Sixth and Seventh Circuits holding the Fourth Amendment permits suspicionless searches of probationers. The Sixth Circuit in *United States v. Tessier*, 814 F.3d 432 (2014), extended *Samson*'s holding to probationers, reasoning that the State has the same interest in supervising probationers as parolees. *See id.* at 433.

The Seventh Circuit reached the same conclusion, but on different grounds. Rather than performing a reasonableness analysis, as the Sixth Circuit

did, the Seventh Circuit held that a general search condition operated as a "blanket waiver" of the probationer's Fourth Amendment rights. *United States v. Barnett*, 415 F.3d 690, 692–93 (2005). In the Seventh Circuit's view, reasonable suspicion is not required because "[c]onstitutional rights, like other rights, can be waived" and the probationer waived those rights because he "didn't want to go to prison." *Id.* at 691.

The consent rationale adopted by the Seventh Circuit in *Barnett* does not follow from *Samson*, where this Court expressly declined to decide the rights of parolees on the basis of consent and instead analyzed the reasonableness of a search by balancing the parolee's reasonable expectation of privacy against the law enforcement interest in conducting suspicionless searches. *See* 547 U.S. at 852 n.3; *see also id.* at 863 n.4 (Stevens, J., dissenting) (describing the argument that a "parolee 'consents' to the suspicionless search condition" as "sophistry"; the parolee "has no 'choice' concerning the search condition; he may either remain in prison, where he will be subjected to suspicionless searches, or he may [be on parole] and still be subject to suspicionless searches").

On the other side of the divide, the Second Circuit declined to extend *Samson* to probationers, noting that this Court "expressly acknowledged that probationers have a greater expectation of privacy than [do] parolees" and that probationers' Fourth Amendment rights were "diminished—but far from extinguished."

United States v. Amerson, 483 F.3d 73, 79, 84 (2007). The court concluded that "nothing in *Samson* suggests that a general balancing test should replace special needs as the primary mode of analysis of suspicionless searches outside the context of the highly diminished expectation of privacy [for parolees] presented in *Samson*." *Id.* at 79.

Although the *Amerson* court disclaimed answering the question presented here, district courts in the Second Circuit have read that decision—along with the categorical language in *Nicholas v. Goord*, 430 F.3d 652, 660 (2d Cir. 2005), requiring searches be "based upon some quantum of individualized suspicion"—to require reasonable suspicion before endorsing a probationer search. (alterations and internal quotation marks omitted). *See, e.g.*, *United States v. DiTomasso*, 56 F. Supp. 3d. 584, 594–95, 595 n.72 (S.D.N.Y. 2014) (holding that a search condition does not give "probation officers carte blanche to perform truly suspicionless searches"); *Pollard v. United States Parole Comm'n*, No. 15-cv-9131 (KBF), 2016 WL 4290607, at *11 (S.D.N.Y. Aug. 11, 2016) ("After *Samson*, the Second Circuit has limited its approval of suspicionless searches to parolees, rather than probationers.").

The Second Circuit approach is also in line with federal guidelines, which require federal probation officers to have reasonable suspicion before searching a probationer. *See* Admin. Office of the U.S. Courts,

Overview of Probation and Supervised Release Conditions, 78 (2016) (requiring "reasonable suspicion . . . that [the probationer] violated a condition of supervision" before conducting a search).

Other federal courts cannot agree on how to determine the line between permissible and impermissible searches of probationers. For example, the Ninth Circuit requires reasonable suspicion to conduct a search of a non-violent probationer's cell phone but not to search a violent probationer's person. *Compare United States v. Lara*, 815 F.3d 605, 612 (9th Cir. 2016) (requiring reasonable suspicion), *with United States v. King*, 736 F.3d 805, 810 (9th Cir. 2013) (not requiring reasonable suspicion). *See also United States v. Job*, 871 F.3d 852, 860 (9th Cir. 2017) (reading *King* and *Lara* to control suspicionless searches of a non-violent probationer pursuant to a general condition).

This confusion in the circuits has also created conflicts between federal courts of appeals and the state high courts within their geographic bounds. For example, a defendant in Kentucky will face a materially different constitutional result depending on whether he is tried in state or federal court because the Sixth Circuit rule conflicts with the Kentucky Supreme Court rule. *Compare Tessier*, 814 F.3d at 433 (6th Cir.) (concluding that "probationer whose probation order contains a search condition may be sub-

jected to a search in the absence of reasonable suspicion"), *with Parks*, 192 S.W.3d at 330 (Ky.) (describing standard for warrantless search of a probationer as whether "officer has a 'reasonable suspicion' that the person who gave the consent [by signing a probation condition] is presently engaged in criminal activity"). The same conundrum arises in Idaho. *Compare King*, 736 F.3d at 807 (9th Cir.) (concluding that "search of [probationer's] residence satisfied the Fourth Amendment even though police lacked reasonable suspicion"), *with Garnett*, 453 P.3d at 843 (Idaho) ("The proper legal standard to be used in determining the permissible scope of a search of a probationer's belongings is reasonable suspicion.").

This Court should grant review to resolve this dispute and harmonize Fourth Amendment rights nationwide. The alternative would leave probationers subject to different Fourth Amendment standards depending on where they live or whether their cases are litigated in state or federal court.

II. Contrary to the Supreme Court of Tennessee's Decision, the Suspicionless Search of Petitioners' Home Violated the Fourth Amendment

The flaws with the minority approach are highlighted by this case. Without a warrant or reasonable suspicion, four police officers entered Mr. and Mrs. Hamm's home while they were out and conducted an

intrusive search of nearly every room of the house on the basis that Mrs. Hamm (but not Mr. Hamm or his minor son) was on probation for a non-violent drug offense. The Tennessee Supreme Court incorrectly found the suspicionless search of the Hamms' home was "constitutionally reasonable." Pet. App. 23a. This Court should grant review and conclude that the Fourth Amendment normally requires at least reasonable suspicion to search a probationer's home.

A. The Fourth Amendment Places Reasonable Limits on Government Intrusion into the Homes of Probationers and Their Families

"The touchstone of the Fourth Amendment is reasonableness"—an analysis that depends on "the degree to which [a search] intrudes upon an individual's privacy" in relation to "the degree to which [the search] is needed for the promotion of legitimate government interests." *Knights*, 534 U.S. at 118–19. The Tennessee rule, which permits invasive searches of homes of probationers *and their family*, for any reason and without suspicion, is not reasonable. In finding otherwise, the Tennessee Supreme Court made two errors: It incorrectly belittled the Hamms' privacy interests by characterizing the extensive search of their shared residence as only a "slight intrusion," Pet. App. 22a, and it incorrectly found that the expectation of privacy for non-violent probationers (and by extension, their families) are indistinguishable from the

limited privacy interests retained by parolees. *Id.* at 23a–24a.

The wide-ranging search of the Hamms' residence by four police officers was a substantial invasion of the most sacred area protected by the Fourth Amendment: the home. This Court has repeatedly rejected the Tennessee court's view that the search of a home is only a "slight invasion" of privacy. In *Chimel v. California*, for example, this Court refused to "characteriz[e] the invasion of privacy that results from a top-to-bottom search of a man's house as 'minor,'" even where the resident was subject to arrest and the corresponding diminished expectation of privacy. 395 U.S. 752, 766–67 & n.12 (1969); *see also Riley v. California*, 573 U.S. 373, 392 (2014) (observing search of a residence is a "substantial invasion [of privacy] beyond the arrest itself").

"[W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Florida v. Jardines*, 569 U.S. 1, 6 (2013) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)); *see also Payton v. New York,* 445 U.S. 573, 585–86 (1980) ("[T]he physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.") (internal quotation and citation omitted).

Moreover, although this Court in *Knights* recognized that probationers have a diminished expectation of privacy, it has never equated the privacy interests of probationers and parolees. 534 U.S. at 119 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987)). To the contrary, in *Samson*, this Court explained that, on the "continuum" of state-imposed punishments, "parolees have *fewer* expectations of privacy than probationers, because parole is more akin to imprisonment than probation." 547 U.S. at 850 (emphasis added). That is because parolees, are—"by definition[—]offenders that have been ordered to serve their sentences in confinement," and under Tennessee law (and the law of most States), include only those who have "committed more severe criminal offenses than probationers." Pet. App. 46a–47a (Clark, J., dissenting). For that reason, this Court explained, "[i]n most cases, the State is willing to extend parole only because it is able to condition it upon compliance with certain requirements." *Samson*, 547 U.S. at 850 (quoting *Pennsylvania Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 365 (1998)).

By contrast, probation is an alternative to incarceration that is usually imposed for offenders whose crimes are generally less serious, who have more limited criminal history, or who pose less danger to society than a parolee. *See* Am. Bar Ass'n, *Project on Minimum Standards for Criminal Justice: Standards Relating to Probation* § 1.3 (1979) (recommending that

probation "should be the sentence unless the sentencing court finds that: (i) confinement is necessary to protect the public from further criminal activity by the offender; or (ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or (iii) it would unduly depreciate the seriousness of the offense if a sentence of probation were imposed"). The Tennessee scheme is illustrative—it reserves eligibility for probation for individuals convicted of misdemeanors or lower-level, non-violent felonies and who have limited criminal history. *See* Pet. App. 43a–47at (Clark, J. dissenting); *see also* Tenn. Code §§ 40-35-102(6), 40-35-303(a) (2018). Thus, in *Griffin*, this Court observed that the "permissible degree" of state intrusion on probationer's privacy interests in "not unlimited." 483 U.S. at 875.

Finally, although the nature of the government interest in supervision and reintegration is similar for parolees and probationers, the strength of such interests is not equivalent. Because parolees are on release from prison and tend to have committed more serious offenses, have more significant criminal history, and may pose greater risk to the community, the government's interest in monitoring parolees is heightened compared with those only on probation status. That is particularly true given that probation may be imposed for a wide range of offenses—from summary misdemeanors through felony offenses—yet, the Tennessee Supreme Court imposed a blanket rule that permits

suspicionless searches of any probationer regardless of the severity of the underlying offense.[3]

B. A Search of a Non-Violent Probationer's Home Must be Supported by Reasonable Suspicion

The Court in *Griffin* and in *Knights*, had no occasion to decide the outer limits of police intrusion on probationer's privacy interests because the searches in those cases were supported by reasonable suspicion in each instance. This case offers the opportunity to answer the question left open in those cases and to hold that the reasonable balance—struck by the ma-

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[3] Particularly in light of the broad scope of offenses and offenders covered by state probation regimes, a blanket policy that permits suspicionless search conditions is unconstitutional. But that holding would not necessarily foreclose a narrowly tailored suspicionless search condition imposed after an individualized determination that such a condition is warranted in a particular offender's case. *See, e.g., United States v. Lifshitz*, 369 F.3d 173, 190 (2d Cir. 2004) (holding that, "to comply with the requirements of the Fourth Amendment," a supervised release condition requiring computer monitoring "must be narrowly tailored, and not sweep so broadly as to draw a wide swath of extraneous material into its net"); *accord United States v. Matteson*, 327 F. App'x 791, 793 (10th Cir. 2009) (non-precedential opinion) (Gorsuch, J.) (citing cases).

jority of jurisdictions to consider the issue—is a general rule requiring searches of a probationer's home to be supported by reasonable suspicion.

After balancing the probationer's privacy interests against the government interest in supervision of the probationer, this Court in *Knights* found "no more than reasonable suspicion" was required "to conduct a search of [that] probationer's home." 534 U.S. at 121. The Tennessee Supreme Court was wrong, however, to extend this statement to mean that *no constitutional limits* constrain the government's ability to search a probationer's home.

Reasonable suspicion strikes an appropriate constitutional balance. It is not a high bar, requiring only an articulable, individualized basis for believing that evidence of criminal activity will be found. *See United States v. Sokolow*, 490 U.S. 1, 7 (1989) (noting the reasonable suspicion standard is "considerably less than proof of wrongdoing by a preponderance of the evidence," and "obviously less" than is necessary for probable cause"). But that minimal protection is crucial to guard against arbitrary and intrusive government searches. *See Terry v. Ohio*, 392 U.S. 1, 22 (1968) ("Anything less [than reasonable suspicion] would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches.").

This Court has repeatedly noted the potential danger for abusive and excessive intrusions without the critical check of individualized suspicion. For example, in *Delaware v. Prouse*, this Court struck down a law enforcement practice of stopping vehicles for "discretionary spot checks" without individualized suspicion, finding "[t]his kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent." 440 U.S. 648, 661 (1979). *Prouse* thus underscored the need for constitutional restraints. *See also City of Indianapolis v. Edmond*, 531 U.S. 32, 43–44 (2000) (noting the Court has been "particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends"); *United States v. Brignoni-Ponce*, 422 U.S. 873, 882–83 (1975) (rejecting suspicionless "roving-patrol stops of all vehicles in the border area" because "the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government").

These concerns are fully presented here, where the status of an individual as a probationer could open not only her, but her entire family, to unlimited suspicionless searches of their home by law enforcement at any time and for any reason. Indeed, the trial court

found in this case that the police had *no reason whatsoever* to suspect Mrs. Hamm of any wrongdoing. Pet. App. 117a. Rather, they used her probation status as pretext to search the Hamms' shared home for evidence of supposed drug activity by Mr. Hamm. A reasonable suspicion requirement would guard against this end-run around the Fourth Amendment protections for family members and cohabitants of probationers (like Mr. Hamm and his son). It would ensure that a probation search is predicated on reasonable suspicion of criminal activity or a violation of probation conditions by *the probationer*, not by her family member or by another person sharing her home.[4]

Moreover, because the legitimacy of searches are evaluated objectively, the Tennessee Supreme Court is incorrect that any "constitutional guardrail" would be imposed on suspicionless searches if "the search

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[4] No reasonable argument exists that the Hamms consented to the search of their home. Mr. Hamm was not subject to—and certainly did not agree to—Mrs. Hamm's probation terms. Pet. App. 5a. This Court also should readily reject the Tennessee Supreme Court's suggestion that "[n]on-probationers who choose to live with probationers 'assume the risk that they too will have diminished Fourth Amendment rights in areas shared with the probationer.'" *Id.* at 28a. As to Mrs. Hamm, her probation condition spoke of warrantless, but not suspicionless searches. *Id.* at 2a. Even if a probation condition could constitute "consent" (which it should not), that rationale is inapplicable here.

was conducted for reasons other than valid law enforcement concerns." Pet. App. 23a–24a. No support exists for the Tennessee Supreme Court's invitation to evaluate the subjective motives of law enforcement. Indeed, the Court in "*Knights* found that such inquiries into the purpose underlying a probationary search are themselves impermissible," *United States v. Williams*, 417 F.3d 373, 377–78 (3d Cir. 2005), just as they are generally in conducting a Fourth Amendment analysis. *See Whren*, 517 U.S. at 813 (establishing a purely objective standard for evaluating the constitutional reasonableness under the Fourth Amendment).

In *Samson*, this Court recognized that it "has only sanctioned suspicionless searches in limited circumstances"—and generally only where the government has articulated a "special need[]" beyond routine law-enforcement interests.[5] 547 U.S. at 855 n.4. A rule

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[5] In *Griffin*, this Court recognized that probation searches, conducted by a probation officer, may be justified under the "special needs" doctrine, which "may justify departures from the usual warrant and probable-cause requirements" when the government acts to advance objectives other than "normal law enforcement" interests. 483 U.S. at 873–74. Here, however, the police searched the Hamm residence during a criminal investigation of Mr. Hamm, unconnected to any "special needs" of probation officers.

This Court, in resolving this case, would not need to resolve whether probation officers may retain greater latitude to conduct searches in the course of administering their duties and within

that permitted suspicionless searches of the more than **3.5 million** probationers nationwide (comprising approximately ***1 in 68 adults*** in the United States), as well as their spouses, children, and co-residents, would transform suspicionless searches from the exception to the norm.[6]

III. This Case is the Ideal Vehicle to Decide an Open Question of Nationwide Importance that is Ripe for this Court's Review

This case is the ideal vehicle to resolve a question over which courts have struggled for years. The case presents a single issue that has been preserved at every stage of the litigation. The Supreme Court of

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the confines of this Court's "special needs" jurisprudence. *See Ferguson v. City of Charleston,* 532 U.S. 67, 74 n.7 (2001) (noting that the "special needs" doctrine "should only be applied in those *exceptional circumstances* in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable") (emphasis added).

[6] Indeed, the sheer number of probationers eclipses the number of parolees by over four-fold: In 2016, more than 3.5 million people were on probation in the United States compared with approximately 875,000 parolees. U.S. Dep't of Justice, Bureau of Justice Statistics, *Probation and Parole in the United States* (Apr. 2018), available at https://tinyurl.com/tuek3a4. Notably, probationers are not evenly distributed in the United States—in some States as many as 1 in 37 adults are on probation. *Id.* at 13–14 (tbl 2).

Tennessee expressly declined to address whether the officers had reasonable suspicion, Pet. App. 57a–58a, resting the entirety of its opinion on the question presented to this Court. Thus, no competing questions confound the case nor does any state law provide an independent basis for affirmance.[7]

Whether the Fourth Amendment protects probationers against suspicionless searches of their homes has not been resolved by this Court. The question was expressly left open in *Knights*, 534 U.S. at 121, and is squarely presented here. The Hamms' petition presents an opportunity for this Court to clarify the extent of probationers' Fourth Amendment rights.

It is a question of substantial importance to more than 3.5 million Americans who are on probation.[8] This issue also affects untold millions of family members—like Mr. Hamm—who are potentially stripped of their Fourth Amendment rights by sharing a home with a person on probation. Although of critical importance to probationers and their families, a ruling

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[7] The court below briefly addressed the Tennessee Constitution's protections against unreasonable searches, but only to explain that state protections are coextensive with the Fourth Amendment. Pet. App. 81a.

[8] *See* U.S. Dep't of Justice, Bureau of Justice Statistics, *Probation and Parole in the United States* (Apr. 2018), available at https://tinyurl.com/tuek3a4.

in favor of Fourth Amendment protections here will not be a watershed change in the law of many States. As described above, the majority of States to address this issue already have concluded reasonable suspicion is required to search a probationer's home either as a matter of constitutional law or as a statutory requirement. But for individuals like the Hamms, who live in one of the few States permitting suspicionless searches, this Court's confirmation of their Fourth Amendment rights is essential.

Given the depth of this split, the issue is ripe for this Court's review. Most States has weighed in on the issue, obviating the need for further lower-court development before this Court can resolve it. The Court should grant review of this case to resolve the conflict among the States and to preserve probationers' Fourth Amendment right to be free from suspicionless searches of their homes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 19, 2020

APPENDIX

APPENDIX A

SUPREME COURT OF TENNESSEE
AT JACKSON

No. W2016-01282-SC-R11-CD

STATE OF TENNESSEE

v.

ANGELA CARRIE PAYTON HAMM AND
DAVID LEE HAMM

Filed: Nov. 21, 2019

Appeal by Permission from the Court of Criminal Appeals, Circuit Court Obion County, No. CC-16-CR-15, Jeff Parham, Judge

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OPINION

ROGER A. PAGE, J.

I. Facts and Procedural History

The Obion County Drug Task Force conducted a warrantless search of the residence of probationer Angela Hamm and her husband, David Hamm, which yielded illegal drugs and drug related contraband. Defendant Angela Hamm had agreed, pursuant to probation conditions imposed in a prior case, to a warrantless search of her person, property, or vehicle at any time. We granted the State's appeal in this case to consider whether the warrantless search of a probationer's residence who is

subject to a search condition requires officers to have reasonable suspicion of illegal activity prior to conducting the search. We conclude that it does not and therefore reverse the trial court's judgment and the Court of Criminal Appeals' decision affirming the same.

In November 2013, an Obion County jury convicted defendant Angela Hamm (formerly Angela Carrie Payton) of manufacturing a controlled substance. The trial court ordered her to serve a six-year sentence. The sentence was suspended, and she was placed on supervised probation. Notably, the probation order included a warrantless search condition which stated: "I agree to a search, without a warrant, of my person, vehicle, property, or place of residence by any Probation/Parole Officer or law enforcement officer, at any time."

Thereafter, it appears that Angela Hamm married defendant David Hamm and moved into his Obion County home. The record indicates that Clifton Hamm also resided with the defendants.

Approximately two years later, on November 16, 2015, Officer James Hall with the Obion County Sheriff's Department/Obion County Drug Task Force received information from an informant that "heavy players" were trafficking methamphetamine in Glass, a community in Obion County. The informant, who had drug charges pending against her, volunteered information about certain drug traffickers bringing methamphetamine to Obion County from across the river. She did not indicate how she obtained the information nor would she identify the traffickers by name. However, when specifically asked about David Hamm, the informant smiled and nodded.

On November 17, 2015, drug task force agents went to the defendants' house to conduct a warrantless "probation search" pursuant to Angela Hamm's probation order. The agents assumed they had reasonable suspicion to conduct such a search based on the information gathered from the above-mentioned informant. When officers knocked on the door of the residence, no one answered. Clifton Hamm's teenage son was standing in the front yard and told them that the defendants had just left but that Clifton Hamm and others were in the shop behind the house. The agents walked behind the house to the detached shop where they encountered Clifton Hamm and two other men. The group appeared to be watching security camera footage, but Clifton Hamm quickly turned off the television.

The agents then entered the house through an unlocked side door and proceeded to perform a warrantless search of the residence, including the defendants' shared bedroom. Therein, the agents found pills, two glass pipes, methamphetamine, and scales.

The defendants were each arrested and later jointly indicted for six counts of possession of controlled substances with intent to sell or deliver and one count of possession of drug paraphernalia. Tenn. Code Ann. § 39-17-434(a) (possession with intent to sell or deliver 0.5 grams or more of a Schedule II controlled substance, methamphetamine); -417(a) (4) (possession with intent to deliver a Schedule IV controlled substance, alprazolam); -417(a)(4) (possession with intent to sell or deliver a Schedule II controlled substance, morphine); -417(a)(4) (possession with intent to sell or deliver a Schedule II controlled substance, amphetamine); -417(a)(4) (possession with intent to sell or deliver

a Schedule IV controlled substance, clonazepam); -417(a)(4) (possession with intent to sell or deliver a Schedule II controlled substance, hydrocodone); and -425(a) (possession of drug paraphernalia). Both defendants filed motions to suppress the evidence seized as a result of the warrantless search of their home. At the hearing on the defendants' motions, the State presented the testimony of Officers James Hall and Ben Yates.

Officer Hall testified that he received the information in question from the informant in November 2015. He confirmed that the decision to search the defendants' home was made based on the information provided to him by the informant. He acknowledged that the informant was a "known methamphetamine user." However, Officer Hall believed the informant to be reliable because she was not a paid informant nor was she "throw[ing] bones at somebody else to keep [] attention off of [herself].... She was already caught."

Officer Yates added that agents were also armed with previously obtained relevant information from two additional informants at the time of the search. He had received second-hand information from a "reliable informant" that the defendants were "doing it big in Glass." When asked about the informant's reliability, Officer Yates replied, "This informant has been involved in numerous narcotic cases, the seizure of narcotics, [and] made numerous cases for the drug task force."

He acknowledged, however, that the informant received his information from "friends that purchase methamphetamine" and that the informant had not personally observed the illegal activity.

In addition, an informant cooperating with drug task force agents had previously attempted to purchase methamphetamine—albeit unsuccessfully—from Clifton Hamm at his residence. However, agents were unaware that Clifton Hamm was residing with the defendants at the time.

Both agents testified that prior to performing the search of the defendants' home, they confirmed with the local probation office that Angela Hamm was on probation and that the probation order subjected her to a warrantless search. Conversely, both acknowledged that David Hamm was not on probation at the time of the search. According to their testimony, the agents were unaware that the defendants shared a bedroom until they entered the home.

In its May 2, 2016 order, the trial court granted the motions to suppress, stating that it could "find nothing by way of articulable facts to support the reasonable suspicion of the officer to justify a search pursuant to the probation order...." The trial court reviewed the factors upon which the State relied to establish reasonable suspicion and addressed each in turn:

1) Officer James Hall received a tip from a person he had pulled over on a traffic stop that generally said there were some "heavy players" in the Obion County Glass Community.

2) This person however never mentioned a name or how she knew this information.

3) Officer Hall suggested the name of Defendant David Hamm, to the person *770 who winked and smiled, but never mentioned the Defendant Angela Hamm.

4) Officer Ben Yates testified he received information from a reliable informant that there were some people in Glass "doing it big."

5) The informant was not identified, nor was there any indication as to why the informant was reliable.

6) The informant's information was second-hand information from another informant who had attempted unsuccessfully to purchase drugs from another resident (Clifton Hamm) at the location.

(emphasis removed).

The State appealed to the Court of Criminal Appeals, which affirmed the trial court's decision to grant the motions to suppress in a plurality opinion authored by Judge Camille McMullen. *State v. Hamm*, No. W2016-01282-CCA-R3-CD, 2017 WL 3447914, at *1 (Tenn. Crim. App. Aug. 11, 2017). It concluded that the State was required to have reasonable suspicion to support the probation search and that the State lacked such suspicion in the case at hand. *Id.* at *9. Judge John Everett Williams filed a separate concurring opinion agreeing that the State lacked reasonable suspicion to conduct the search and further concluding that Angela Hamm's signature on the probation order did not constitute a valid consent to search. *Id.* at *10-16 (Williams, J., concurring). Finally, Judge Alan Glenn filed a separate dissenting opinion concluding that the agents had reasonable suspicion to search Angela Hamm's house and that the search was also lawful as to David Hamm under the doctrine of common authority. *Id.* at *17-18 (Glenn, J., dissenting). We granted the State's application for permission to appeal in this case to consider "[w]hether law enforcement must have reasonable

suspicion of a probationer's criminal wrongdoing to support a search of the probationer's residence under an agreed-to warrantless-search condition of probation."

II. Standard of Review

On appeal from a ruling on a motion to suppress, we will uphold the trial court's findings of fact unless the evidence preponderates against those findings. *State v. Stanfield*, 554 S.W.3d 1, 8 (Tenn. 2018) (citing *State v. Hawkins*, 519 S.W.3d 1, 32 (Tenn. 2017); *State v. Bell*, 429 S.W.3d 524, 528 (Tenn. 2014); *State v. Climer*, 400 S.W.3d 537, 556 (Tenn. 2013); *State v. Turner*, 297 S.W.3d 155, 160 (Tenn. 2009); *State v. Day*, 263 S.W.3d 891, 900 (Tenn. 2008); *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996)). "'Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact.'" *Id.* (quoting *Hawkins*, 519 S.W.3d at 32; *Odom*, 928 S.W.2d at 23). "The party prevailing in the trial court on a motion to suppress 'is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence.'" *Id.* (quoting *Turner*, 297 S.W.3d at 160; *Odom*, 928 S.W.2d at 23). We review the trial court's application of the law to the facts de novo with no presumption of correctness. *Id.* (citing *Hawkins*, 519 S.W.3d at 32-33; *State v. Walton*, 41 S.W.3d 75, 81 (Tenn. 2001)); *Turner*, 297 S.W.3d at 160.

III. Analysis

A. *The Fourth Amendment*

The Fourth Amendment to the United States Constitution guarantees 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....'" *State v. Christensen*, 517 S.W.3d 60, 68 (Tenn. 2017) (quoting U.S. Const. amend. IV); *State v. McCormick*, 494 S.W.3d 673, 678 (Tenn. 2016). Similarly, article I, section 7 of the Tennessee Constitution provides that "'the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures[.]'" *Christensen*, 517 S.W.3d at 68 (quoting Tenn. Const. art. I, § 7).

The search and seizure provisions of the federal and state constitutions are " 'identical in intent and purpose.' " *Id.* (quoting *Sneed v. State*, 221 Tenn. 6, 423 S.W.2d 857, 860 (1968)). "Under both constitutional guarantees, reasonableness is 'the ultimate touchstone.'" *Stanfield*, 554 S.W.3d at 9 (citing *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403, (2006); *McCormick*, 494 S.W.3d at 679). Determining whether a particular search is "unreasonable" and therefore a violation of the rights guaranteed by the Fourth Amendment "'depends upon all of the circumstances surrounding the search ... and the nature of the search ... itself.'" *Turner*, 297 S.W.3d at 160 (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985)). While a search is presumptively reasonable when conducted on the basis of probable cause and with a warrant, warrantless searches and seizures are pre-

sumptively unreasonable regardless of whether law enforcement actually had probable cause to conduct a search. *See McCormick*, 494 S.W.3d at 678-79 (citations omitted). However, there are circumstances where the reasonableness standard of the Fourth Amendment and article I, section 7 requires neither probable cause nor a warrant. *See Samson v. California*, 547 U.S. 843, 846-47 (2006); *Turner*, 297 S.W.3d at 157.

B. *Warrantless and Suspicionless*[1] *Search of Angela Hamm's Residence (Probationer)*

In *State v. Stanfield*, this Court recently considered whether reasonable suspicion must support a warrantless search of a parolee's residence. *Stanfield*, 554 S.W.3d at 4. Relying on *Samson v. California* and *State v. Turner*, we held that the search of defendant Winsett's residence was constitutionally reasonable based solely upon Winsett's status as a parolee, even though officers neither had a search warrant nor sought to obtain a warrant[2] prior to searching the residence. *Id.* at 11.

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[1] At the outset, we note that the analysis employed herein is confined to whether reasonable suspicion is required for a probation search pursuant to search conditions. "Reasonable suspicion is a less demanding standard than probable cause" and "can be established with information that is different in quantity or content than that required to establish probable cause and . . . can arise from information that is less reliable than that required to show probable cause." *State v. Keith*, 978 S.W.2d 861, 866 (Tenn. 1998) (internal citations omitted).

[2] Because we decided the *Stanfield* case based on defendant Winsett's status as a parolee, we did not reach the question of whether officers had or needed reasonable suspicion to conduct the search of his residence

Also, initially at issue in *Stanfield* was the relative expectation of privacy attending co-defendant Stanfield, who was on probation at the time of the search. *Id.* at 8. However, it was not necessary for us to reach the issue of whether reasonable suspicion was required to conduct a warrantless search of a probationer's residence because the search of defendant Stanfield's belongings fell within the purview of common authority. *Id.* at 15. We now address whether, under Tennessee law, reasonable suspicion is required for law enforcement officers to conduct a warrantless search of a probationer's residence.

1. *State v. Stanfield*

In reaching our decision in *Stanfield*, this Court undertook a thorough review of *Samson v. California* and *State v. Turner*,[3] both of which addressed parole searches conducted without reasonable suspicion pursuant to a search condition. We noted that in *Turner*, this Court adopted the rationale and holding of *Samson*, stating:

> "The [United States] Supreme Court has recognized that a criminal conviction subjects the offender to 'a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service.' *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987). An offender's place on this continuum alters what is "reasonable" for purposes of the Fourth Amendment. For instance, incarcerated felons have *no* legitimate expectation of privacy in their prison cells...."

[3] For a more comprehensive review of these cases, *see State v. Stanfield*, 554 S.W.3d at 9-13.

Stanfield, 554 S.W.3d at 10 (quoting *Turner*, 297 S.W.3d at 161). This Court in *Turner* expressly held that under both federal and Tennessee state constitutional protections, "[a] parole condition requiring that the parolee submit to warrantless searches is reasonable in light of the parolee's significantly diminished privacy interests; the goals sought to be attained by early release; and society's legitimate interest in protecting itself against recidivism." *Id.* at 11 (quoting *Turner*, 297 S.W.3d at 166 (footnote omitted)). Moreover, the "State has an 'overwhelming interest' in supervising parolees because 'parolees . . . are more likely to commit future criminal offenses.'" *Id.* (quoting *Turner*, 297 S.W.3d at 163) (quoting *Samson*, 547 U.S. at 853). In *Stanfield*, this Court made clear that the search of a parolee's residence could be constitutional without consideration of reasonable suspicion. *Id.*

Stanfield echoed the holdings of *Samson* and *Turner* in emphasizing that courts must consider "the totality of the circumstances" in assessing the reasonableness of a search. *Id.* at 9 (quoting *Samson*, 547 U.S. at 848) (internal quotation marks omitted). That determination requires a balancing, "'on the one hand, the degree to which [a search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Id.* (alteration in original) (quoting *Samson*, 547 U.S. at 848 (internal quotation marks omitted). Integral to this "balancing" is the fact that "'parolees ... have severely diminished expectations of privacy by virtue of their status alone.'" *Id.* at 10 (quoting *Samson*, 547 U.S. at 852).

In *Samson*, the United States Supreme Court also found it "salient," as did we, that the search

condition at issue in that case was "clearly expressed" to the defendant. *Id.* (internal quotation marks and citations omitted) (citing *Samson*, 547 U.S. at 852). The United States Supreme Court pointed out that Samson "signed an order submitting to the condition and thus was unambiguously aware of it." *Id.* (quoting *Samson*, 547 U.S. at 852) (internal quotation marks omitted).

In balancing the diminished expectation of privacy enjoyed by a parolee "with the State's 'overwhelming interest' in supervising parolees, '[who] are more likely to commit future criminal offenses,' and the State's interests in reducing recidivism and in promoting reintegration and positive citizenship," this Court concluded that the State's substantial interest in supervising parolees " 'warrant[s] privacy intrusions that would not otherwise be tolerated under the Fourth Amendment.' " *Id.* (quoting *Samson*, 547 U.S. at 853). "The *Turner* Court described *Samson* as 'a narrow exception to the usual rule: an exception which is hardly misguided given the minimal privacy interests retained by parolees and the government's "overwhelming interest" in ensuring that a parolee complies with the conditions of her parole.'" *Id.* at 10-11 (quoting *Turner*, 297 S.W.3d at 164). While *Stanfield* is instructive in the matter at hand, it is not dispositive because the defendant in this case was on probation, not parole. "'On the continuum of possible punishments and reductions in freedoms, parolees occupy a place between incarcerated prisoners and probationers.'" *Id.* at 10 (quoting *Turner*, 297 S.W.3d at 161). Thus, we look to the United States Supreme Court, federal circuit courts, and our sister states to survey various approaches to

warrantless and suspicionless searches of probationers' residences.

2. Warrantless Search of a Probationer's Residence

It is undisputed that the Obion County Drug Task Force did not obtain a warrant prior to searching the defendant's residence but that the officers were aware of her status as a probationer. We must next consider what degree of suspicion, if any, is necessary to support a warrantless search of a probationer.

a. United States Supreme Court

In *United States v. Knights*, the United States Supreme Court considered the constitutionality of a search that was premised on the probation condition requiring Knights to "[s]ubmit his ... person, property, place of residence, vehicle, personal effects, to search at any time, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." *United States v. Knights*, 534 U.S. 112, 114 (2001) (internal quotation marks omitted). Three days after Knights was placed on probation, evidence obtained during an investigation into the arson of a utilities transformer and telecommunications vault led law enforcement officers to conduct a search of Knights' apartment. *Id.* at 115. The detective leading the investigation was aware of Knights' status as a probationer and, accordingly, thought obtaining a search warrant was unnecessary. *Id.* The 3:10 a.m. search revealed evidence connecting Knights with the crimes and subsequently resulted in his being indicted for conspiracy to commit arson, possession of an unregistered

destructive device, and being a felon in possession of ammunition. *Id.* at 115-16.

Knights filed a motion to suppress the evidence in the district court. *Id.* at 116. In granting the motion, the district court concluded that although the detective had reasonable suspicion to believe that Knights was involved with incendiary materials, the search was impermissible because its purpose was "investigatory" rather than "probationary." *Id.* The Court of Appeals for the Ninth Circuit affirmed. *Id.* (citation omitted). The United States Supreme Court granted certiorari "to assess the constitutionality of searches made pursuant to this common California probation condition." *Id.*

The district court found, and Knights conceded on appeal, that the search in question was supported by reasonable suspicion. *Id.* at 122. In reversing the district court and the Ninth Circuit, the United States Supreme Court addressed the following:

> The State has a dual concern with a probationer. On the one hand is the hope that he will successfully complete probation and be integrated back into the community. On the other is the concern, quite justified, that he will be more likely to engage in criminal conduct than an ordinary member of the community.

Id. at 120-21. As such, stated the Court, "the balance of these considerations requires *no more than* reasonable suspicion[4] to conduct a search of

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[4] This is consistent with prior United States Supreme Court precedent, which has held that

> [w]hen the balance of interests precludes insistence on a showing of probable cause, we have usually required "some quantum of individualized suspicion" before concluding that a search is reasonable. We made it clear, however, that a

[the] probationer's house." *Id.* at 121 (emphasis added).

Because the search at issue in *Knights* was supported by reasonable suspicion, the search passed Fourth Amendment muster. *Id.* at 122. Accordingly, the Court held "that the warrantless search of Knights, supported by reasonable suspicion and authorized by a condition of probation, was reasonable within the meaning of the Fourth Amendment." *Id.* Of note, however, was the question left unanswered:

> We do not decide whether the probation condition so diminished, or completely eliminated, Knights' reasonable expectation of privacy (or constituted consent . . .) that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment. The terms of the probation condition permit such a search, but we need not address the constitutionality of a suspicionless search because the search in this case was supported by reasonable suspicion.

> showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable. In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.

Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 624 (1989).

Id. at 120 n.6.[5] Thus, the precise question of whether reasonable suspicion must attend the search of a probationer's residence is yet unresolved by our highest Court.

b. Other Jurisdictions

Although the Sixth Circuit Court of Appeals' decisions interpreting Tennessee law are not binding on this Court, *see Payne v. State*, 493 S.W.3d 478, 492 (Tenn. 2016), we nonetheless find that court's decision in *United States v. Tessier*, 814 F.3d 432 (6th Cir. 2016), to be instructive. In that case, the Sixth Circuit upheld a search based on the same Tennessee probation condition at issue in this case. *Tessier*, 814 F.3d at 433. Tessier was on probation for a 2011 Tennessee felony conviction for sexual exploitation of a minor. *Id.* His probation order contained the provision, "I agree to a search, with-

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[5] The Supreme Court declined to address whether Knights' acceptance of the search condition constituted consent because it concluded "that the search of Knights was reasonable under our general Fourth Amendment approach of 'examining the totality of the circumstances,' . . . , with the probation search condition being a salient circumstance." *Knights*, 534 U.S. at 118 (citing *Ohio v. Robinette*, 519 U.S. 33, 39, 117 (1996)). Our holding today is consistent with *Knights* and *Robinette* in that we need not address whether the defendant's acceptance of the search condition in her probation agreement constituted consent because the totality of the circumstances establish that the search was constitutionally reasonable. The *Knights* Court also rejected the "dubious logic [] that an opinion upholding the constitutionality of a particular search implicitly holds unconstitutional any search that is not like it" because such reasoning "runs contrary to *Griffin*'s express statement that its 'special needs' holding made it 'unnecessary to consider whether' warrantless searches of probationers were otherwise reasonable within the meaning of the Fourth Amendment." *Id.* at 117-18 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 878, 880(1987)).

out a warrant, of my person, vehicle, property, or place of residence by any Probation/Parole officer or law enforcement officer, at any time."[6] *Id.*

Law enforcement officers searched Tessier's residence as a part of "Operation Sonic Boom," a joint operation between the United States Marshal's Office and Metro Nashville/Davidson County law enforcement and probation officers. *United States v. Tessier*, No. 3:13-00077, 2014 WL 4851688, at *1 (M.D. Tenn. Sept. 29, 2014). Officers searched residences of all known sex offenders in the jurisdiction during the three-day operation. *Id.* During the search of Tessier's residence, which all parties agreed was not supported by reasonable suspicion, officers seized evidence of child pornography. *Tessier*, 814 F.3d at 433. He pleaded guilty to a federal child pornography charge but reserved the right to challenge the denial of his motion to suppress based on the warrantless, suspicionless search. *Id.*

The district court's order denying Tessier's motion to suppress reframed the pivotal issue as follows: "Consistent with the Fourth Amendment, can a probationer who has been convicted of a felony and who has executed a probation order in which he 'agree[s] to a search, without a warrant' be subjected to a search in the absence of reasonable suspicion?" *Tessier*, 2014 WL 4851688, at *3 (alteration in original). Noting that "[t]his question is yet unanswered by the United States Supreme Court or the Court of Appeals for the Sixth Circuit[,]" the court relied on "cases from those courts as well as

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[6] The *Tessier* court characterized this search provision as being a "standard" search condition that applies to all probationers in Tennessee. *Id.* at 433.

other circuit courts and the Tennessee Supreme Court [to] provide guidance . . . to answer the question in the affirmative."[7] *Id.*

The district court began with two "non-controversial" premises:

> First, constitutional rights can be waived, and "[i]t is well settled that a person may waive his Fourth Amendment rights by consenting to a search." *United States v. Carter*, 378 F.3d 584, 587 (6th Cir. 2004) (citing *Davis v. United States*, 328 U.S. 582, 593-94 (1946)). Second, even though entering into a probation order allows the possibility of home searches, the alternative is likely imprisonment and constant surveillance, a far greater encroachment on Fourth Amendment rights.

Tessier, 2014 WL 4851688, at *6 (alteration in original). The court then "'examin[ed] ... the totality of the circumstances' and . . . 'assess[ed], on the one hand, the degree to which [the search] intrudes upon an individual's privacy and, on the other hand, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Id.* at *7 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

The district court reasoned that a defendant's status as a probationer subject to a search condition was integral to both sides of that balance because "'[i]nherent in the very nature of probation is that probationers do not enjoy the absolute liberty to which every citizen is entitled.'" *Id.* (alteration

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[7] The *Tessier* court "adopted" the district court's reasoning contained in the order denying the motion to suppress. *Id.* (citing *Tessier*, 2014 WL 4851688, at *1).

in original) (quoting *Knights*, 534 U.S. at 119 (internal quotation marks omitted)). Moreover, "'it is reasonable to conclude that the search condition would further the two primary goals of probation—rehabilitation and protecting society from future criminal violations.'" *Id* (quoting *Knights*, 534 U.S. at 119).

The court found that the search of Tessier's residence did not violate the Fourth Amendment and, accordingly, denied his motion to suppress. *Id.* In doing so, the district court dispelled the defendant's argument that "his probation order d[id] not contain language about a search 'with or without reasonable cause' and . . . that the absence of such language mean[t] that a search could only be conducted based upon reasonable suspicion." *Id.* The court summarized the defendant's argument: "After all, a search warrant requires 'probable cause,' and so, the argument goes, in the absence of a search warrant there must be reasonable suspicion." *Id.* Rejecting the defendant's argument, the court relied on Tennessee law, reasoning that

> as the Tennessee Supreme Court in *Turner* held, a logical reading of that language is that no warrant will be required, not that, in its stead, reasonable suspicion is required. While *Turner* involved a parolee[,] ... the *point* the language is intended to make cannot be any different for probationers—the language informs them, as well, that judicial preview is not necessary before a search may occur.

Id. at *7 (emphasis added); *see Turner*, 297 S.W.3d at 167 n.12); *see also United States v. King,* 736 F.3d 805, 809 (9th Cir. 2013) (explaining that while a probationer had a greater expectation of privacy

than that of a parolee, *id.* (citing *Samson*, 547 U.S. at 852), the probationer nonetheless began with a "lower expectation of privacy than the average citizen" that was "significantly diminished" by the probation search condition, *id.* at 809 (citing *Knights*, 534 U.S. at 120), and concluding that the probationer-defendant's expectation of privacy was lessened and that the search conducted in that case intruded on his legitimate expectation of privacy "only slightly").

States have differing standards with regard to the distinction between parolees' and probationers' expectations of privacy, and thus, the level of suspicion required to support a warrantless search in each case. *See* 5 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 10.10, n.12 (5th ed. 2019), (Oct. update) *available at* Westlaw SEARCHSZR10.10 ("compar[ing] *State v. Cornell*, [202 Vt. 19, 146 A.3d 895 (2016)] (notwithstanding *Samson*, reasonable suspicion still required for *searches* directed at probationers), and *Murry v. Commonwealth*, [288 Va. 117, 762 S.E.2d 573 (2014)] (rejecting a probation condition extending to suspicionless searches by police for 'purely investigative' reasons, noting *Samson* [] made distinction between parolees and probationers); with *State v. Vanderkolk*, 32 N.E.3d 775 (Ind. 2015) (while 'the facts in *Samson* involved a parolee, not a probationer, and the *Samson* Court made a point of distinguishing the two,' 'despite the differences on the continuum of personal liberty, we nevertheless find that parolees and probationers both share equivalent understandings that their freedom from incarceration is conditional and subject to monitoring,' and thus *both* 'who have consented or been clearly informed that the conditions of their proba-

tion or community corrections program unambiguously authorize warrantless and suspicionless searches, may thereafter be subject to such searches'")); *see also* Jay M. Zitter, Annotation, *Validity of Requirement That, as Condition of Probation, Defendant Submit to Warrantless Searches*, 99 A.L.R.5th 557, § 9(a), (b) (2002) (citing cases distinguishing probationers from parolees and requiring reasonable suspicion for probation searches and cases aligning probationers' and parolees' expectations of privacy, thereby not requiring reasonable suspicion).

c. Tennessee

Upon consideration of the United States Supreme Court's opinions, the Sixth Circuit Court of Appeals' decision in *Tessier,* the varying opinions from other federal circuits and states, and our decisions in *Stanfield* and *Turner,* we acknowledge that the State's substantial interests in supervising probationers as well as parolees "'warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment.'" *Stanfield*, 554 S.W.3d at 10 (quoting *Samson*, 547 U.S. at 853). "[T]he state has an interest in a probationer's successful completion of probation and in his or her reintegration into society." *King*, 736 F.3d at 809 (citing *Knights*, 534 U.S. at 120-21). In balancing the diminished expectation of privacy attending a probationer with the State's interests in reducing recidivism and promoting reintegration and positive citizenship, we conclude that it is logical to extend the same reduced expectation of privacy to

probationers that we do to parolees.[8] Accordingly, a probation condition of which a defendant unquestionably is aware, coupled with the slight intrusion upon her privacy, weigh in favor of the State's interests. Therefore, we hold that probation search conditions that permit a search, without warrant, of a probationer's person, vehicle, property, or place of residence by any Probation/Parole Officer or law enforcement officer, at any time, do not require law enforcement to have reasonable suspicion.[9]

Our decision is supported by public policy concerns. "'[T]he very assumption of the institution of probation' is that the probationer 'is more likely than the ordinary citizen to violate the law.'" *Knights*, 534 U.S. at 120 (quoting *Griffin*, 483 U.S. at 880). The Supreme Court has recognized 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, in proceedings in which the trial rights of a jury and proof beyond a reasonable doubt, among other things, do not apply[.]

Id.

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[8] The case before this Court concerns a felon placed on supervised probation. The expectation of privacy of misdemeanants placed on probation is not addressed herein.

[9] Whether reasonable suspicion was established by the facts of this case is pretermitted by our decision that reasonable suspicion is not required for the search of a probationer's residence.

3. Application

Just as in *Stanfield*, as a condition of defendant Angela Hamm's probation, she signed a probation order that contained the condition, among other things, that "***I agree to a search, without a warrant, of my person, vehicle, property, or place of residence by any Probation/Parole officer or law enforcement officer, at any time***." Her signature on the document clearly illustrates that the defendant was "unambiguously" aware of the search condition contained in the probation document, and the officer conducting the search was aware of her status as a probationer. *See Stanfield*, 554 S.W.3d at 10 (citing *Samson*, 547 U.S. at 852). Thus, the search of defendant Hamm's residence was constitutionally reasonable.

Justice Lee asserts that suspicionless searches "hinder[] one of the primary goals of probation—rehabilitating and reintegrating probationers into society"—and that probationers who feel they have been mistreated by law enforcement lack a firm foundation upon which to rebuild their lives. Justice Clark posits that "[r]equiring reasonable suspicion for probationer searches also would lessen, and perhaps even eliminate, the risk of repeated, disruptive, and potentially harassing searches of probationers at their homes, schools, places of employment, or other public places." Contrary to the concerns espoused in the dissents in this case, we again emphasize that this decision does not afford law enforcement unfettered and unreviewable discretion. *See id.* at 12.

A constitutional guardrail is still in place to prevent the intrusions described by the dissenting justices. Like a parolee, a warrantless and suspicion-

less search of a probationer could be deemed unreasonable and therefore unconstitutional under circumstances indicating that the search was conducted for reasons other than valid law enforcement concerns. Such a search would also be unconstitutional if conducted without knowledge that the person searched was a probationer who was subject to warrantless and suspicionless searches. *See id.* (citing *Turner*, 297 S.W.3d at 166-67). Accordingly, we reiterate that as a procedural safeguard, "'the totality of the circumstances surrounding a warrantless, suspicionless search . . . must be examined to determine whether the search is constitutionally unreasonable.'" *Id.* (quoting *Turner*, 297 S.W.3d at 167). We note, however, just as we determined with respect to a parolee, that a suspicionless search of a probationer "subject to a warrantless search condition, and which is conducted out of valid law enforcement concerns, is not unreasonable." *See id.* (quoting *Turner*, 297 S.W.3d at 167).

In her dissent, Justice Lee emphasizes our state and national trend toward reforming criminal justice systems to encourage rehabilitation over incarceration. The majority does not subscribe to the proposition that rehabilitation and probation search conditions are mutually exclusive. Indeed, the United States Supreme Court noted, "Just 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." *Knights*, 534 U.S. at 119. Similarly, Justice Clark addresses at length the trial court's discretion in suspending a defendant's sentence and ordering the defendant to submit to supervised

probation. Nothing in the majority opinion limits that discretion. To the contrary, *Knights* explained that "[t]he judge who sentenced Knights to probation determined that it was necessary to condition the probation on Knights' acceptance of the search provision. It was reasonable to conclude that the search condition would further the two primary goals of probation-rehabilitation and protecting society from future criminal violations." *Id.* The trial court in this case also determined that the search condition was necessary. This is supported by Deputy Hall's testimony that "[s]ome documents of State probation or parole are somewhat similar, somewhat different."

4. Reasonableness

"A probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.'" *Griffin,* 483 U.S. at 873. Pursuant to *Turner*, we must now engage in a review of the totality of the circumstances, " 'of which [the] [d]efendant's status as a [probationer] and her agreement to the warrantless search condition are salient circumstances, and determine whether the search of [the] [d]efendant's residence was reasonable.'" *Stanfield*, 554 S.W.3d at 12 (alteration in original) (quoting *Turner*, 297 S.W.3d at 168 (footnote omitted)).

Here, the record demonstrates that the search was constitutionally reasonable. Officers Hall and Yates were aware of Angela Hamm's probation status and conducted a search based upon what they deemed to be credible information to determine whether she was engaging in drug activity—a valid law enforcement concern. The officers arrived at the home during the daylight hours, not during the

night. There is no evidence in the record that suggests that the officers were acting in an arbitrary manner. The record is devoid of any proof that they sought to cause the defendant any harm, that they acted out of personal animosity, or that the search was one of a pattern of repetitive searches while the defendant was at work or asleep.

The majority opinion in this case strikes a balance between a probationer's reduced expectation of privacy and promotion of the State's legitimate interests. Concerns enumerated by the dissents, such as probationers being subjected to repetitive, disruptive, or harassing searches at their homes, schools, places of employment, or public places are assuaged by the touchstone of reasonableness.

Accordingly, considering the totality of the circumstances, the search of the defendant's bedroom was clearly permissible. We conclude that because Officers Hall and Yates knew about the defendant's status as a probationer and because the defendant was aware that she was subject to warrantless searches at any time as a condition of her probation, officers did not err in searching certain areas of the defendant's residence. Absent any evidence whatsoever that the search in question was unreasonable in a constitutional sense and keeping in mind the State's significant interests in combating recidivism and thwarting illegal drug activity by probationers, we hold that evidence seized during the warrantless search of the defendant's residence was admissible against her and that the trial court erred in suppressing the evidence. We reverse the trial court's decision granting the defendant Angela Hamm's motion to suppress and the Court of Criminal Appeals' opinion affirming the decision.

We next address the trial court's decision to grant defendant David Hamm's motion to suppress. As stated *supra*, defendants David and Angela Hamm shared a bedroom within the residence, thus, their legal statuses intertwine. Therefore, it is necessary to consider whether the doctrine of common authority applies to the search of belongings that were found within the bedroom but that clearly belonged to David Hamm.

In *Stanfield*, we expressly adopted the doctrine of common authority as it applies to parole searches of areas of a residence over which a parolee has common authority. 554 S.W.3d at 13-15 (citing *United States v. Matlock*, 415 U.S. 164, 171 (1974); *People v. Pleasant*, 123 Cal. App. 4th 194, 19 Cal. Rptr. 3d 796, 798 (2004); *People v. Smith*, 95 Cal. App. 4th 912, 116 Cal. Rptr. 2d 694, 697 (2002); *State v. Bartram*, 925 S.W.2d 227, 230-31 (Tenn. 1996)); *see also United States v. Cantley*, 130 F.3d 1371, 1377 (10th Cir. 1997) (concluding that parole search was lawful as to parolee's wife because officers only searched common areas and the one bedroom that was identified as belonging to Cantley); *United States v. Davis*, 932 F.2d 752, 758-59 (9th Cir. 1991) (rejecting co-defendant's argument that officers exceeded scope of warrantless search of probationer's residence when they searched a safe that was under the apparent joint control of probationer and co-defendant); *State v. Yule*, 905 So. 2d 251, 264 (Fla. Dist. Ct. App. 2005) ("The nonprobationer's diminished expectation of privacy extends to those portions of the shared residence over which the probationer and nonprobationer have joint dominion. 'Persons who live with probationers cannot reasonably expect privacy in areas of a residence that they share with probationers.'" *Pleas-*

ant, 19 Cal. Rptr. 3d at 798.); *State v. West*, 185 Wis.2d 68, 517 N.W.2d 482, 491 (1994) (stating that a "parole search may extend to all parts of the premises to which the probationer or parolee has common authority, just as if it were a consent search"). In doing so, this Court relied on language from a Minnesota decision that held, "Non-probationers who choose to live with probationers 'assume the risk that they too will have diminished Fourth Amendment rights in areas shared with the probationer.'" *State v. Bursch*, 905 N.W.2d 884, 890 (Minn. Ct. App. 2017) (quoting *State v. Adams*, 788 N.W.2d 619, 623 (N.D. 2010)). We conclude that the privacy intrusion upon an individual sharing a bedroom (i.e., an area with common authority) with a probationer is not so invasive that it would not be tolerated under the Fourth Amendment.[10] *See Stanfield*, 554 S.W.3d at 15.

Nevertheless, the government bears the burden of proving the common authority doctrine applies. *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990). The State has satisfied its burden in this case. The officers believed the defendants to be either married or "seeing each other," and Angela Hamm had been living in David Hamm's home "for quite some time." Angela Hamm and David Hamm shared a

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[10] We find extension of the doctrine of common authority to warrantless probation searches to be reasonable, especially in consideration of the fact that this Court has applied the doctrine in a case involving spousal consent, where neither party was subject to diminished privacy interests. *State v. Pritchett*, 621 S.W.2d 127, 134 (Tenn. 1981) ("A wife can consent to the search of her home, and if objects are found [that] would incriminate her husband, such objects are admissible in evidence."); *see also State v. Talley*, 307 S.W.3d 723, 734 (Tenn. 2010) (holding that a live-in girlfriend can consent to search based on the doctrine of common authority).

bedroom in the residence. Thus, by virtue of the doctrine of common authority, law enforcement officers did not err in searching and seizing all items of contraband found in the shared bedroom.[11] The trial court, therefore, erred in suppressing the evidence against David Hamm. We reverse the trial court's granting of defendant David Hamm's motion to suppress and the Court of Criminal Appeals' decision affirming that decision.

CONCLUSION

We hold that because of the probation conditions to which defendant Angela Hamm was subject, the probation search of portions of defendant Angela

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[11] In her dissent, Justice Clark espouses concerns that a probationer might encounter difficulty finding suitable housing because "[a]nyone sharing a residence with a probationer loses a portion of his or her own constitutional protections because areas of the residence over which the probationer exercises common authority also will be subject to warrantless, suspicionless searches under the common authority doctrine." The dissent continues by noting that in this case, officers did not limit their search to areas of the residence over which the defendant exercised common authority. Roommates or house-mates of probationers need not be concerned with searches of their private quarters. That issue was foreclosed by *Stanfield*. 554 S.W.3d at 18 ("To give clear guidance to law enforcement officers, we emphasize that law enforcement is only permitted to conduct a search of a certain area of a parolee's residence if 'the facts available to the officers . . . support a reasonable belief that the [parolee] has at least common authority over the area searched.' [*State v.*] *Davis*, 965 P.2d [525] at 533 [(Utah App. 1998)]. By so holding, this Court is balancing the State's interests in enforcing the terms of parole by not allowing parolees to create a 'loophole' by residing with a non-parolee while simultaneously respecting the Fourth Amendment rights of an unencumbered citizen by not allowing law enforcement officers unfettered access to all areas inside the parolee's residence.") (alteration in original).

Hamm's residence was constitutionally permissible. Because the defendants shared a bedroom, the search of David Hamm's personal belongings located within that bedroom was proper pursuant to the doctrine of common authority. The trial court erred in suppressing the evidence against both defendants. Therefore, we reverse the Court of Criminal Appeals' decision to the contrary and remand this cause to the trial court for proceedings consistent with this opinion.

It appearing that the defendants Angela Hamm and David Hamm are indigent, costs of this appeal are taxed to the State of Tennessee.

APPENDIX B

SUPREME COURT OF TENNESSEE
AT JACKSON

No. W2016-01282-SC-R11-CD

STATE OF TENNESSEE

v.

ANGELA CARRIE PAYTON HAMM AND
DAVID LEE HAMM

Filed: Nov. 21, 2019

Appeal by Permission from the Court of Criminal Appeals, Circuit Court Obion County,
No. CC-16-CR-15, Jeff Parham, Judge

DISSENTING OPINION

CORNELIA A. CLARK, J., dissenting.

I respectfully dissent from the majority's decision upholding the constitutionality of the warrantless and suspicionless search of Angela Payton Hamm's home. In so holding, the majority erroneously equates the privacy interests of probationers and parolees despite statements by the United States Supreme Court and this Court that probationers have greater expectations of privacy than parolees. *Samson v. California*, 547 U.S. 843, 850(2006); *State v. Stanfield*, 554 S.W.3d 1, 10 (Tenn. 2018); *State v. Turne*r, 297 S.W.3d 155, 162 (Tenn. 2009). I would hold that the state and feder-

al constitutional safeguards against unreasonable searches and seizures require law enforcement officers to establish reasonable suspicion for a warrantless search of a probationer. Here, as the courts below concluded, the State failed to establish reasonable suspicion for the search. Accordingly, I would hold that the search violated the Fourth Amendment to the United States Constitution and article I, section 7 of the Tennessee Constitution and affirm the Court of Criminal Appeals' judgment upholding the trial court's decisions granting the defendant's motion to suppress and dismissing the indictments.

I. Constitutional Analysis

The Fourth Amendment to the United States Constitution[1] and article I, section 7 of the Tennessee Constitution[2] protect against unreasonable searches and seizures. *State v. Hawkins*, 519 S.W.3d 1, 33 (Tenn. 2017). "[A]rticle I, section 7 is identical in intent and purpose with the Fourth Amendment." *State v. Downey*, 945 S.W.2d 102, 106 (Tenn. 1997) (quoting *Sneed v. State*, 221 Tenn. 6, 423 S.W.2d 857, 860 (1968)). The hallmark protections of these constitutional provisions are the warrant requirement and the probable-cause requirement.[3] These requirements serve the "essential

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[1] 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. . . .").

[2] Tenn. Const. art. I, § 7 ("[T]he people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures. . . .").

[3] *See Kentucky v. King*, 563 U.S. 452, 459 (2011) ("The text of the [Fourth] Amendment thus expressly imposes two requirements. First, all searches and seizures must be reasonable. Second, a warrant may not be issued unless probable cause is

purpose[s]" of assuring citizens "that such intrusions are not the random or arbitrary acts of government agents[,] ... that the intrusion is authorized by law, and that it is narrowly limited in its objectives and scope." *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 621-22 (1989) (citations omitted). These requirements "also provide[] the detached scrutiny of a neutral magistrate, and thus ensure[] an objective determination whether an intrusion is justified in any given case." *Id.* at 622 (citations omitted). Searches and seizures conducted pursuant to warrants are presumptively reasonable, but warrantless searches and seizures are presumptively unreasonable. *Kentucky v. King*, 563 U.S. 452, 459 (2011); *State v. McCormick*, 494 S.W.3d 673, 678-79 (Tenn. 2016).

Nevertheless, the ultimate touchstone of analysis under the Fourth Amendment and article I, section 7 is reasonableness, *see King*, 563 U.S. at 459; *State v. Reynolds*, 504 S.W.3d 283, 304 (Tenn. 2016), so exceptions to the warrant or the probable cause requirement have been recognized, and in certain limited circumstances, neither is required. *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665 (1989) ("[N]either a warrant nor probable cause, nor, indeed, any measure of individualized

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properly established and the scope of the authorized search is set out with particularity."); *see also Chandler v. Miller*, 520 U.S. 305, 308 (1997) (stating that officials are generally barred "from undertaking a search or seizure absent individualized suspicion"); *State v. Scarborough*, 201 S.W.3d 607, 617 (Tenn. 2006) ("Under certain circumstances, searches conducted without a warrant but pursuant to individualized suspicion of criminal wrongdoing are also considered reasonable.")

suspicion, is an indispensable component of reasonableness in every circumstance.").

In a number of cases, this Court and the United States Supreme Court have upheld the constitutionality of searches and seizures based on individualized suspicion that does not rise to the level of probable cause. *See, e.g., Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975); *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *State v. Hanning*, 296 S.W.3d 44, 49 (Tenn. 2009). For example, warrantless, suspicionless searches designed to serve "special needs, beyond the normal need for law enforcement" have been upheld as reasonable under the Fourth Amendment and article I, section 7. *See, e.g., City of Indianapolis v. Edmond*, 531 U.S. 32, 37-40 (2000) (collecting cases approving suspicionless searches to serve special needs); *Downey*, 945 S.W.2d at 104 ("We, therefore, conclude that the use of a sobriety roadblock, although a seizure, can be a reasonable seizure under the Tennessee Constitution, provided it is established and operated in accordance with predetermined operational guidelines and supervisory authority that minimize the risk of arbitrary intrusion on individuals and limit the discretion of law enforcement officers at the scene."). The United States Supreme Court relied on this special needs doctrine in the first case in which it addressed probationer searches. *Griffin v. Wisconsin*, 483 U.S. 868 (1987).

In *Griffin v. Wisconsin*, a Wisconsin regulation permitted probation officials to search a probationer's home when the officials had "'reasonable grounds' to believe [the residence contained] contraband—including any item that the probationer

[could not] possess under the probation conditions." 483 U.S. at 870-71 (citing Wis. Admin. Code HSS §§ 328.21(4), 328.16(1) (1981)). The probation officials in Griffin received information from a police detective "that there were or might be guns in [Mr.] Griffin's apartment." *Id.* at 871. Two probation officers and three plainclothes policemen went to Mr. Griffin's apartment to conduct a search, but the probation officers alone searched Mr. Griffin's apartment under the authority of Wisconsin's probation regulation. *Id.* They discovered a handgun and charged Mr. Griffin with felony possession of a handgun. *Id.* at 872. He moved to suppress the evidence, but the trial court denied his motion, and the Wisconsin courts affirmed. *Id.*

The United States Supreme Court affirmed as well and upheld the constitutionality of the regulation authorizing the warrantless search based on "'reasonable grounds' (not probable cause)." *Id.* The Griffin Court explained:

> Although we usually require that a search be undertaken only pursuant to a warrant (and thus supported by probable cause, as the Constitution says warrants must be), we have permitted exceptions when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."

Id. at 873 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment)) (citations omitted). The *Griffin* Court concluded that "[a] State's operation of a probation system . . . presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause require-

ments" of the Fourth Amendment. *Id.* at 873-74. In reaching this conclusion, the *Griffin* Court articulated and relied upon a continuum of privacy rights that has guided the Supreme Court's analysis in subsequent cases involving probationers and parolees. Specifically, the *Griffin* Court described probation as "simply one point . . . on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service." *Id.* at 874. As a result, said the Supreme Court, probationers "do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions.'" *Id.* (alteration in original) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)). Therefore, states are permitted "a degree of impingement upon privacy [during the course of such supervision] that would not be constitutional if applied to the public at large." *Id.* at 875. The *Griffin* Court held that strict enforcement of the Fourth Amendment's warrant requirement "would interfere to an appreciable degree with the probation system, setting up a magistrate rather than the probation officer as the judge of how close a supervision the probationer requires." *Id.* at 876. The Supreme Court commented that "even more than the requirement of a warrant, a probable-cause requirement would reduce the deterrent effect of the supervisory arrangement." *Id.* at 878. The *Griffin* Court concluded that it is "reasonable to permit information provided by a police officer, whether or not on the basis of firsthand knowledge, to support a probationer search . . . if the information provided indicates, as it did [in *Griffin*], only the likelihood ('had or might have guns') of facts justifying the search." *Id.* at 879-80.

The *Griffin* Court therefore upheld the warrantless search conducted pursuant to Wisconsin's constitutionally valid regulation, which required probation officials to have individualized suspicion, i.e. "reasonable cause" to believe that contraband was present. The *Griffin* Court therefore found it "unnecessary to consider whether . . . *any* search of a probationer's home by a probation officer is lawful when there are 'reasonable grounds' to believe contraband is present." *Id.* at 880. Nevertheless the *Griffin* Court emphasized that the "permissible degree" a state may impinge upon a probationer's expectation of privacy is "not unlimited." *Id.* at 875.

The Supreme Court revisited the subject of probationer searches in *United States v. Knights* when it considered whether law enforcement officers could constitutionality conduct a warrantless search of a probationer's home if the officers had reasonable suspicion to believe the probationer had engaged in criminal activity. 534 U.S. 112 (2001). In *Knights*, the defendant, who was charged with committing various crimes while on probation, moved to suppress the State's evidence because it was seized by law enforcement officers in a warrantless search of his apartment that was supported by reasonable suspicion. *Id.* at 114-16. The *Knights* search was conducted pursuant to a condition of probation—not a regulation—that required the defendant to "'submit his . . . person, property, place of residence, vehicle, [and] personal effects, to [a] search at anytime, *with or without a search warrant, warrant of arrest[,] or reasonable cause* by any probation officer or law enforcement officer.'" *Id.* at 114 (emphasis added). The *Knights* Court declined to analyze the case according to the special needs doctrine it had used in Griffin. *Id.* at 117-18.

Rather, the *Knights* Court evaluated the reasonableness of the search "under [its] general Fourth Amendment approach of 'examining the totality of the circumstances,' with the probation search condition being a salient circumstance." *Id.* at 118 (quoting *Ohio v. Robinette*, 519 U.S. 33, 39 (1996)). Under this approach, the *Knight*s Court explained, "the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Id.* at 118-19 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). Mr. Knights' "status as a probationer subject to a search condition inform[ed] both sides of that balance." *Id.* at 119.

In assessing the degree to which the search intruded upon Mr. Knights' privacy, the Supreme Court reiterated that "[p]robation is 'one point ... on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service.'" *Id.* (quoting *Griffin*, 483 U.S. at 874). Because the "probation order clearly expressed the search condition and [Mr.] Knights was unambiguously informed of it" the Supreme Court concluded that "[t]he probation condition . . . *significantly diminished* [Mr.] Knights' reasonable expectation of privacy." *Id.* at 119-20 (emphasis added) (footnote omitted).

Next the *Knights* Court considered "the governmental interest side of the balance," emphasizing the government's interest in reducing recidivism and noting that probationers are "'more likely than the ordinary citizen to violate the law.'" *Id.* at 120 (quoting *Griffin*, 483 U.S. at 880). The *Knights*

Court also acknowledged the State's interests in rehabilitating and reintegrating probationers into society. *Id.* at 120-21.

After weighing the degree to which the search intruded upon Mr. Knights' significantly diminished privacy interest against the governmental interests in conducting the search, the *Knights* Court concluded that "the balance of these considerations requires no more than reasonable suspicion to conduct a search of this probationer's house." *Id.* at 121. The *Knights* Court explained:

> 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. Those interests warrant a lesser than probable-cause standard here. *When an officer has reasonable suspicion that a probationer* ***subject to a search condition*** *is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable.*
>
> The same circumstances that lead us to conclude that reasonable suspicion is constitutionally sufficient also render a warrant requirement unnecessary.

Id. (emphasis added) (citations omitted). Importantly for purposes of this appeal, the *Knights* Court *both* reaffirmed the continuum of privacy rights that it had enunciated in *Griffin and* reiterated that a probationer subject to a search condition retains an expectation of privacy for purposes of constitutional analysis, although it is significant-

ly diminished. *Id.* at 119-22. What the *Knights* Court did not decide is

> whether the probation condition so diminished, or completely eliminated, [Mr.] Knights' reasonable expectation of privacy (or constituted consent that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment. The terms of the probation condition permit such a search, but we need not address the constitutionality of a suspicionless search because the search in this case was supported by reasonable suspicion.

Id. at 120 n.6 (citation omitted).

The United States Supreme Court still has not answered that question for probationers. But the Supreme Court has addressed "a variation of" that question in *Samson v. California*, a case involving parolees. 547 U.S. 843, 847 (2006). In a six-to-three decision, the Court in *Samson* upheld a California law requiring every prisoner released on parole to "'agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause.'" *Id.* at 846 (quoting Cal. Penal Code Ann. § 3067(a) (West 2000)). The *Samson* Court discussed *Griffin* and *Knights* and reiterated that "parolees are on the 'continuum' of state-imposed punishments." Id. at 850 (quoting *Knights*, 534 U.S. at 119 (internal quotation marks omitted)). The Samson Court explained that "[o]n this continuum, *parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment.*" *Id.* (emphasis added). After ex-

amining the conditions of parole in California, the *Samson* Court declared that "*parolees . . . have severely diminished expectations of privacy by virtue of their status alone*." *Id.* at 851-52 (emphasis added) (citations, quotation marks, and brackets omitted). The *Samson* Court next discussed the impact the parole search condition had on Mr. Samson's severely diminished expectation of privacy and contrasted it with the impact the probation search condition had on the probationer in *Knights*, stating: the parole search condition under

> California law—requiring inmates who opt for parole to submit to suspicionless searches by a parole officer or other peace officer at any time,—was clearly expressed to petitioner. He signed an order submitting to the condition and thus was "unambiguously" aware of it. *In Knights, we found that acceptance of a clear and unambiguous search condition significantly diminished [Mr.] Knights' reasonable expectation of privacy. Examining the totality of the circumstances pertaining to petitioner's status as a parolee, an established variation on imprisonment, including the plain terms of the parole search condition,* ***we conclude that petitioner did not have an expectation of privacy that society would recognize as legitimate.***

Id. at 852 (emphases added) (citations, footnote, quotation marks, and brackets omitted). The *Samson* Court concluded then, that, unlike the probationer in *Knights*—who retained some expectation of privacy *despite* his status and acceptance of the search condition—the parolee in *Samson*—by virtue of his status and acceptance of the search condition—had no expectation of privacy. The *Samson* Court, which began its analysis by noting that it

was addressing an issue left open in *Knights*, thus explicitly and plainly distinguished between the privacy interests of probationers and parolees. *Id.* at 846, 850-53.

The *Samson* Court drew fewer distinctions between the State's interests in supervising probationers and parolees, except to describe the State's interests in supervising parolees as "'overwhelming' . . . because 'parolees . . . are more likely to commit future criminal offenses.'" *Id.* at 853 (quoting *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 365 (1998)). The *Samson* Court confirmed "that a State's interests in reducing recidivism and . . . promoting reintegration and positive citizenship among probationers and parolees warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment." *Id.* (citing *Griffin*, 483 U.S. at 879; *Knights*, 534 U.S. at 121). The *Samson* Court concluded that "[i]mposing a reasonable suspicion requirement . . . would give parolees greater opportunity to anticipate searches and conceal criminality." *Id.* at 855 (citing *Knights*, 534 U.S. at 120; *Griffin*, 483 U.S. at 879). After considering the State's interests and the parolee's lack of any legitimate expectation of privacy, the Samson Court held that "the Fourth Amendment does not prohibit a police officer from conducting a warrantless, suspicionless search of a parolee." *Id.* at 857.

In *State v. Turner*, a majority of this Court "adopt[ed] the reasoning of Samson and h[e]ld that the Tennessee Constitution permits a parolee to be searched without any reasonable or individualized suspicion where the parolee has agreed to warrantless searches by law enforcement officers." 297 S.W.3d at 166 (footnote omitted). We emphasized,

however, that Samson is "a narrow exception to the usual rule." *Id.* at 164. *Turner* also expressly adopted the distinction *Samson* had drawn between the privacy interests of probationers and parolees, stating: "On the continuum of possible punishments and reductions in freedoms, parolees occupy a place between incarcerated prisoners and probationers." *Id.* at 162. We opined that "parole status is . . . much more akin to incarceration than probation . . . in determining the reasonableness of a search." *Id.* at 166. In other words, we held that probationers have greater expectations of privacy than parolees. In the more recent *State v. Stanfield* decision, this Court reaffirmed *Turner* and its adoption of the *Samson* analysis and again quoted with approval the distinction *Turner* and *Samson* had drawn between the privacy interests of probationers and parolees. 554 S.W.3d at 10-11.

In upholding the warrantless and suspicionless search in this case, three of the justices in the *Stanfield* majority now abandon this distinction, equate the privacy interests of parolees and probationers, and uphold warrantless and suspicionless searches of probationers, citing "logic[ ]" and "public policy concerns" in support of its ruling. The majority is not alone in extending *Samson* to probationers, as courts in other jurisdictions have done so as well.[4] However, I remain convinced that the

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[4] *See, e.g., United States v. Williams*, 650 F. App'x 977, 980 (11th Cir. 2016) (upholding the constitutionality of a suspicionless search of the home of a probationer subject to a warrantless search provision where the search was conducted primarily by probation officers); *United States v. Tessier*, 814 F.3d 432, 434-35 (6th Cir. 2016) (upholding a warrantless, suspicionless search of the residence of a Tennessee probationer who was subject to a warrantless search condition because the search served

distinction drawn in *Griffin*, *Knights*, *Samson*, *Turner*, and *Stanfield* remains valid and that probationers retain greater expectations of privacy than parolees. Indeed, Tennessee statutes illustrate why this distinction is appropriate.

Under the Criminal Sentencing Reform Act of 1989 ("the 1989 Act"), trial judges are encouraged "to use alternatives to incarceration," Tenn. Code Ann. § 40-35-103(6) (2014), including probation, to promote effective rehabilitation, *id.* § 40-35-102(3)(C) (2014). But the 1989 Act reserves favorable consideration for alternative sentencing to offenders who have committed less serious crimes—especially mitigated and standard offenders who have been convicted of Class C, D, or E felonies—and for offenders who have less lengthy criminal histories. Tenn. Code Ann. § 40-35-102(6) (A) (2014). Only offenders who receive sentences of ten years or less are eligible for probation consideration. *Id.* § 40-35-303(a) (2018 Supp.). Persons convicted of certain offenses, such as vehicular homicide by driving while intoxicated, aggravated kid-

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a legitimate law enforcement or probationary purpose); *United States v. King*, 736 F.3d 805, 810 (9th Cir. 2013) (concluding that "a suspicionless search, conducted pursuant to a suspicionless-search condition of a violent felon's probation agreement, does not violate the Fourth Amendment"); *State v. Vanderkolk*, 32 N.E.3d 775, 779 (Ind. 2015) (applying the holding in Samson to probationers and community corrections participants). *Cf. State v. Adair*, 241 Ariz. 58, 383 P.3d 1132, 1135-38 (2016) (upholding as constitutionally valid a warrantless search of a probationer's home conducted by probation officers pursuant to valid probation conditions but declining to address whether law enforcement officers may constitutionally conduct a warrantless, suspicionless search as there was sufficient evidence in this case).

napping, aggravated robbery, aggravated sexual battery, statutory rape by an authority figure, aggravated child abuse and neglect, certain drug offenses, and certain sexual exploitation offenses, are not eligible for probation. *Id.*

Even if an offender satisfies the criteria for favorable consideration for alternative sentencing and eligibility for probation, trial judges retain discretion to deny probation entirely or to impose a sentence of full or partial confinement for other reasons, including if the trial judge determines that (1) "[c]onfinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;" (2) "[c]onfinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide effective deterrence to others likely to commit similar offenses;" or (3) "[m]easures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant." Tenn. Code Ann. § 40-35-103(1) (2014). If a trial court "determines that a period of probation is appropriate, the court shall sentence the defendant to a specific sentence but shall suspend the execution of all or part of the sentence and place the defendant on supervised or unsupervised probation either immediately or after a period of confinement for a period of time no less than the minimum sentence allowed under the classification and up to and including the statutory maximum time for the class of the conviction offense." *Id.* § 40-35-303(c)(1) (2014). Trial courts may also impose probation for misdemeanor offenses, and in certain limited circumstances, may sentence misdemeanor offenders to up to two years on probation. *Id.* § 40-35-303(c)(2).

These Tennessee statutes are designed to give trial courts wide discretion in imposing probation as a sentence and afford trial courts plenty of discretion to deny probation, should the trial court determine that releasing an offender will pose too many risks to the public. No Tennessee statute suggests that the General Assembly believes warrantless, suspicionless searches are required to advance the State's interests in supervising probationers. For example, there is no Tennessee law, like the California law at issue in *Samson*, requiring courts to condition probation on a probationer's willingness to accept a warrantless, suspicionless search condition. Rather, Tennessee statutes are designed to ensure that probation is reserved for offenders who commit less serious offenses, who have minimal criminal histories, and who pose the least recidivism risk and the least risk of danger to the public. Tennessee statutes give trial courts the discretion needed to determine which offenders should be incarcerated and which offenders should be probated.

On the other hand, parolees, by definition, are offenders that have been ordered to serve their sentences in confinement. Tenn. Code Ann. § 40-35-501(a)(1) (2014) ("An inmate shall not be eligible for parole until reaching the inmate's release eligibility date. . . ."); *id.* § 40-35-501(a)(2) ("[O]nly inmates with felony sentences of more than two (2) years or consecutive felony sentences equaling a term greater than two (2) years shall be eligible for parole consideration."). This fact alone is significant because, under the 1989 Act, "first priority regarding sentencing involving incarceration" is given to "*convicted felons committing the most severe offenses, possessing criminal histories evincing a*

clear disregard for the laws and morals of society and evincing failure of past efforts at rehabilitation." Tenn. Code Ann. § 40-35-102(5) (emphasis added). These Tennessee statutes illustrate that parolees are, by definition, closer on the continuum to incarceration than probationers. Parolees have committed more severe criminal offenses than probationers, have more lengthy criminal records than probationers, and have failed at past efforts of rehabilitation.

These statutory differences between probationers and parolees fully warrant the distinction that the United States Supreme Court and this Court have drawn between the privacy interests of probationers and parolees. Therefore, I would reaffirm our prior decisions distinguishing between the expectations of privacy of probationers and parolees. I would hold, as some courts in other jurisdictions have held, that searches of probationers must be based on reasonable suspicion.[5]

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[5] *See, e.g., State v. Bennett*, 288 Kan. 86, 200 P.3d 455, 463 (Kan. 2009) (holding that a probationer may not be searched by a probation or law enforcement officer absent reasonable suspicion and that a condition imposed by the trial court subjecting the probationer to random, suspicionless searches was unconstitutional); *State v. Cornell*, 202 Vt. 19, 146 A.3d 895, 909 (2016) (declining to extend *Samson* to searches of probationers and holding that "reasonable suspicion for search and seizure imposed on probationers is required by the Fourth Amendment"); *see also State v. Ballard*, 874 N.W.2d 61, 62 (N.D. 2016) (concluding that the suspicionless search of the home of an unsupervised probationer subject to a warrantless search condition was unreasonable under the Fourth Amendment); *Murry v. Commonwealth*, 288 Va. 117, 762 S.E.2d 573, 581 (2014) (concluding that a probation condition subjecting a probationer to a warrantless, suspicionless search by any probation or law enforcement officer at any time was not reasonable in light to the

This holding would be consistent with the *Samson* Court's express recognition that probationers retain greater expectations of privacy than parolees. It also would recognize that the United States Supreme Court has never approved as constitutionally permissible warrantless and suspicionless searches of probationers. In *Griffin* and in *Knights*, some level of individualized suspicion supported the searches. In Griffin, the Supreme Court approved a regulation that permitted warrantless searches based on "reasonable grounds" to believe that contraband was present, 483 U.S. at 871, and in *Knights*, the Supreme Court upheld a warrantless search that was supported by reasonable suspicion, 534 U.S. at 121-22. This Court certainly is free to interpret the Tennessee Constitution as affording greater protection than the United States Constitution, *Doe v. Norris*, 751 S.W.2d 834, 838 (Tenn. 1988). On the other hand,

> [w]e are bound by the interpretation given to the United States Constitution by the Supreme Court of the United States. This is fundamental to our system of federalism. The full, final, and authoritative responsibility for the interpretation of the federal constitution rests upon the Supreme Court of the United States. This is what the Supremacy Clause means.

Miller v. State, 584 S.W.2d 758, 760 (Tenn. 1979), overruled on other grounds by State v. Pruitt, 510 S.W.3d 398 (Tenn. 2016).

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probationer's background, his offenses, and the surrounding circumstances).

Therefore, the United States Constitution, as interpreted by the United States Supreme Court, establishes the minimal, "floor . . . of constitutional protection" to which all citizens are entitled. *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1269 (3d Cir. 1992). I fear that the majority in this case has opened a trap door in the floor of minimal protection, without any sound legal basis for doing so, by approving warrantless and suspicionless searches of probationers when the United States Supreme Court has never done so and has expressly distinguished between probationers and parolees.

Here, as in *Knights*, the warrantless, suspicionless search occurred in the probationer's home where her expectation of privacy was at its most robust. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995) ("What expectations are legitimate varies, of course, with context, depending, for example, upon whether the individual asserting the privacy interest is at home, at work, in a car, or in a public park." (citation omitted)). The "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. U.S. Dist. Court*, 407 U.S. 297, 313 (1972); *see also Silverman v. United States*, 365 U.S. 505, 511 (1961) ("At the very core [of the Fourth Amendment] stands the right of a [person] to retreat into his own home and there be free from unreasonable governmental intrusion."). Therefore, I would require the State to establish that the search was based on reasonable suspicion of the probationer's criminal activity. *Knights*, 534 U.S. at 121-22 (upholding a search based on "reasonable suspicion that [the probationer] . . . is engaged in criminal activity" (citations omitted)). This lesser standard of individualized suspicion is not overly

burdensome, and it strikes the appropriate balance between the State's legitimate interests in rehabilitation, prevention of recidivism, and reintegration into society, and the probationer's significantly diminished, but not extinguished, expectation of privacy.

The reasonable suspicion standard would provide some guidance for and restraint upon the discretion law enforcement officers exercise in probationer searches. Requiring reasonable suspicion for probationer searches also would lessen, and perhaps even eliminate, the risk of repeated, disruptive, and potentially harassing searches of probationers at their homes, schools, places of employment, or other public places. Indeed, authorizing warrantless, suspicionless searches actually may impede the State's legitimate goals of rehabilitation and reintegration. *State v. Hamm*, No. W2016-01282-CCA-R3-CD, 2017 WL 3447914, at *13 (Tenn. Crim. App. Aug. 11, 2017) (Williams, J., concurring). Such searches call attention to a probationer's criminal conduct and have the potential to stigmatize probationers. Many probationers will have little recourse should warrantless, suspicionless searches become repetitive or harassing. As Judge John Everett Williams explained in his separate opinion in the Court of Criminal Appeals:

> While such intimidating and harassing searches might be challengeable in a motion to suppress if officers happen to discover evidence of illegal activity, a probationer who is following the law and the conditions of probation but nevertheless continues to be subject to intimidating and harassing searches has little recourse.

> A suspicionless search of a probationer at ... her place of employment runs the risk of disrupting the business and could subject the employer and other employees to a search that would not otherwise be constitutionally permissible. As a result, an employer has less of an incentive to hire a probationer subject to this condition.

Hamm, 2017 WL 3447914, at *13–14 (Williams, J., concurring).

Warrantless, suspicionless searches also may hamper rehabilitation by making it difficult for probationers to find housing. Anyone sharing a residence with a probationer loses a portion of his or her own constitutional protections because areas of the residence over which the probationer exercises common authority also will be subject to warrantless, suspicionless searches under the common authority doctrine. *Id.* In addition, searches often are not confined to common areas. As Judge Williams noted, the officers in this case did not limit their search to areas over which Angela Payton Hamm exercised common authority but searched every room of the residence except one. *Id.*

Another troubling aspect is that the majority's decision cannot logically be limited to supervised probationers who have been convicted of felony offenses, like Angela Payton Hamm, although the majority purports to do so by including a single footnote. The decision discusses "probationers" broadly and provides no basis for distinguishing between felons on supervised probation and persons serving sentences on community corrections or unsupervised probationers. Although the majority by that same footnote also purports to exempt from its analysis misdemeanants placed on probation, the majority again offers no reasoned basis for this

exemption. The basis for such an exemption certainly is not apparent from the majority's analysis. For example, if the severity of an offense could serve as a reason for distinguishing between felony and misdemeanor probationers, why would it not also serve as a basis for distinguishing between parolees and probationers? While the full breadth of the majority's decision allowing warrantless, suspicionless searches remains to be seen, it clearly encompasses 57,832 probationers that the Tennessee Department of Correction reported supervising as of June 30, 2018. Tenn. Dep't of Corr., Annual Report 6 (2018) (available at https://www.tn.gov/content/dam/tn/correction/ documents/AnnualReport2018.pdf).[6] This number rises to 65,541 Tennesseans if the majority's decision extends to persons serving sentences on community corrections. *Id.*

The majority's ruling and the rulings of courts in other jurisdictions upholding the constitutionality of such warrantless, suspicionless searches of probationers constitute a serious erosion of the Fourth Amendment's protection against unreasonable searches and seizures. "The historical record demonstrates that the framers believed that individualized suspicion was an inherent quality of reasonable searches and seizures." Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches & Seizures*, 25 U. Mem. L. Rev. 483, 489 (1995). The United States Supreme Court should grant review on this

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[6] There are over five times more probationers (57,832) in Tennessee than parolees (11,163). Tenn. Dep't of Corr., Annual Report 6 (2018) (available at https://www.tn.gov/content/dam/tn/correction/documents/AnnualReport2018.pdf).

issue and restore this core Fourth Amendment protection for probationers by holding that warrantless searches of probationers are constitutionally permissible only if based upon reasonable suspicion of a probationer's involvement in criminal activity. Until the United States Supreme Court acts, however, the Tennessee General Assembly should restore this minimal protection by enacting a statute that requires law enforcement officials to establish reasonable suspicion for warrantless searches of probationers. *E.g.*, Kan. Stat. Ann. § 21-6607(c)(5) (West 2011) (requiring that searches of probationers by law enforcement and probation officials be "based on reasonable suspicion" of probation violations or criminal activity). As already explained herein, a statute imposing this minimal individualized suspicion requirement would advance the State's interests in rehabilitation and reintegration.

II. Reasonable Suspicion Was Not Established

Here, the trial court found that the State had failed to establish that the search of Angela Payton Hamm's home was supported by reasonable suspicion. A trial court's findings of fact in a suppression hearing are upheld on appeal unless the evidence preponderates against those findings. *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). "The credibility of witnesses, the weight and value of the evidence, and the resolution of conflicts in the evidence are matters entrusted to the trial judge." *State v. Climer*, 400 S.W.3d 537, 556 (Tenn. 2013) (citing *Odom*, 928 S.W.2d at 23). The evidence does not preponderate against the trial court's findings.

Courts consider the totality of the circumstances when determining whether specific and articulable facts establish reasonable suspicion. *State v. Watkins*, 827 S.W.2d 293, 294 (Tenn. 1992) (citing *United States v. Cortez*, 449 U.S. 411, 417 (1981)). The relevant non-exclusive circumstances are "[the officer's] objective observations, information obtained from other police officers or agencies, information obtained from citizens, and the pattern of operation of certain offenders." *Id.* (citing *Cortez*, 449 U.S. at 418). "A court must also consider the rational inferences and deductions that a trained police officer may draw from the facts and circumstances known to him." *Id.* (citing *Terry*, 392 U.S. at 21). But, reasonable suspicion must be based on something more than an officer's "inchoate and unparticularized suspicion or 'hunch.'" *Hanning*, 296 S.W.3d at 49 (quoting *Terry*, 392 U.S. at 27). The officers here had only second hand non-specific information, and only one statement from an unidentified informant who had friends that claimed to have purchased methamphetamine from the defendants.

In particular, Deputy James Hall of the Obion County Sheriff's Office received information from a female, Lindsey Gream, when he served her with an arrest warrant arising from an incident in Dyer County. After thanking him "for taking her to the hospital and keeping her alive," she told Deputy Hall "there [were] some heavy players in Obion County that [law enforcement officers] needed to watch." When Deputy Hall asked her to identify them, she refused "to say specifically who exactly,"

but told him that they were located in "Glass."[7] When Officer Hall said "David Hamm," Ms. Gream "looked at [him], nodded her head, and smiled." Ms. Gream told Deputy Hall that "they" had been trafficking ice methamphetamine to Obion County and "making trips frequently across the river." She gave no indication of how she knew of these illegal activities but indicated that she believed "they" had "re-upped that day, [or] a couple of days prior . . . which mean[t] receiving, buy[ing] more methamphetamine or narcotics." Deputy Hall used the pronoun "they" in his testimony but identified David Hamm as the only person Ms. Gream identified. If he had information implicating Angela Payton Hamm in any illegal activities, Deputy Hall did not discuss it in his testimony.

Officer Ben Yates of the Union City Police Department provided the only testimony about information implicating Angela Payton Hamm in illegal activity. Officer Yates said that he received information from "a reliable informant" one day before the warrantless, suspicionless search at issue here. This reliable informant told Officer Yates "that David Hamm and Angela Payton were 'doing it big in Glass.'"[8] According to Officer Yates, this informant "had been involved in numerous narcotic cases, the seizure of narcotics, made numerous cases for the

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[7] In footnote five of its brief to this Court, the State appears to interpret Glass as a common street name for methamphetamine, but the record belies this interpretation and indicates that, as used in this case, the word refers to a location not a drug.

[8] In the transcript on appeal, quotation marks that apparently were intended to indicate the statement the informant made to Officer Yates appear only around the words "doing it big in Glass."

drug task force" but had not personally observed David Hamm or Angela Payton Hamm involved in illegal drug activities or transactions and had never personally been inside the residence that was searched. The informant's secondhand information came from the informant's "friends [who] purchase[d] methamphetamine."

Officer Yates did not interview the informant's friends or corroborate by any other means the informant's information. Officer Yates acknowledged that another informant "who was cooperating with the drug task force" went to the residence that was searched and attempted to purchase methamphetamine from Clifton Hamm, who also lived there, but was unable to do so. Officer Yates did not explain why the controlled drug buy failed. The State has also suggested that Clifford Hamm's suspicious conduct concerning the security cameras also established reasonable suspicion. But Angela Payton Hamm was not on the property when this conduct occurred, and it bore no connection to her. In short, the record overwhelmingly supports the trial court's finding that the officers lacked specific and articulable facts necessary to establish reasonable suspicion that Angela Hamm was engaged in criminal activity.

III. Consent

In the Court of Criminal Appeals, the State also sought to justify the search by arguing that Angela Payton Hamm consented to warrantless, suspicionless searches when she accepted the probation search condition. *See Hamm*, 2017 WL 3447914, at *16 (Williams, J., concurring) (discussing consent). The State has not raised that issue in this Court, and for good reason, because the record wholly be-

lies the assertion. The unrefuted proof in the record establishes that the probation search condition Angela Payton Hamm accepted should be understood as waiving only the warrant and probable cause requirements and requiring reasonable suspicion. The search condition stated: "I agree to a search, without warrant, of my person, vehicle, property, or place of residence by any Probation/Parole Officer or law enforcement officer, at any time." Deputy Hall testified that this search condition required the officers to have reasonable suspicion for any search. Deputy Hall was asked: "Why did you think you needed reasonable suspicion, when [Angela Payton Hamm's probation] document says nothing about it?" He responded: "Some documents of State probation or parole are somewhat similar, somewhat different. *On some documents it actually has in there without reasonable suspicion. This document, however, does not say without reasonable suspicion. That's why I established reasonable suspicion prior to the search.*" (Emphasis added.) Therefore, even assuming a probationer's acceptance of a probation search condition may, in some circumstances, be deemed consent to suspicionless searches, the unrefuted proof establishes that this is not one of those circumstances and that Angela Payton Hamm did not consent to suspicionless searches by her acceptance of the probation search condition here.

Finally, in light of Deputy Hall's unrefuted testimony that the probation search condition obligated the State to establish reasonable suspicion for any search, the majority could have avoided deciding whether warrantless, suspicionless probationer searches are constitutionally permissible and resolved this appeal by deciding whether this search

was supported by reasonable suspicion. *See Keough v. State*, 356 S.W.3d 366, 371 (Tenn. 2011) ("This Court decides constitutional issues only when absolutely necessary for determination of the case and the rights of the parties. Where an appeal can be resolved on non-constitutional grounds, we avoid deciding constitutional issues." (citations omitted)). The majority has instead chosen to resolve the constitutional issue and approve warrantless, suspicionless searches of probationers. Therefore, I am constrained to respectfully dissent from the majority's decision.

APPENDIX C

SUPREME COURT OF TENNESSEE
AT JACKSON

No. W2016-01282-SC-R11-CD

STATE OF TENNESSEE

v.

ANGELA CARRIE PAYTON HAMM AND
DAVID LEE HAMM

Filed: Nov. 21, 2019

Appeal by Permission from the Court of Criminal Appeals, Circuit Court Obion County,
No. CC-16-CR-15, Jeff Parham, Judge

DISSENTING OPINION

SHARON G. LEE, J., dissenting.

One afternoon in November 2015, while David and Angela Hamm were not at home, four law enforcement officers entered and conducted a search of their home. The officers had neither a warrant nor reasonable suspicion of criminal activity. Ms. Hamm was on probation; the officers used her probationary status to justify the intrusive home search. The majority's decision to uphold this unreasonable search deprives Ms. Hamm and her husband of their rights to be free from unreasonable searches under the Fourth Amendment to the United States Constitution and Article I, section 7

of the Tennessee Constitution. The majority's decision also casts a cloud over the lives of more than 65,000 Tennessee probationers[1] and thousands of citizens living with probationers, all of whom are at risk of having their homes searched by law enforcement lacking reasonable suspicion of criminal activity.

Law enforcement should have, at the least, a reasonable suspicion of criminal activity before conducting a warrantless search of a probationer's home. The majority bases its ruling on the faulty premise that probationers and parolees should be treated the same. But they are not the same.

All parolees have committed felonies. Yet some probationers have committed only misdemeanors.[2] Trial courts carefully screen offenders before deciding whether or not to grant probation, considering the circumstances of the offense; the offender's criminal record, background, social history, physical and mental condition; and the deterrent effect on the offender. *State v. Souder*, 105 S.W.3d 602, 607 (Tenn. Crim. App. 2002); *see also State v. Grear*, 568 S.W.2d 285, 286 (Tenn. 1978). Trial courts also examine the offenders' potential for rehabilitation or treatment. *Souder*, 105 S.W.3d at 607 (citing Tenn. Code Ann. § 40-35-103(5)). Trial

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[1] In Tennessee, there are 57,832 probationers and 7,709 offenders in the Community Corrections program as of June 30, 2018. Tenn. Dep't of Correction, Annual Report (FY 2018), *available at* https://www.tn.gov/content/dam/tn/correction/documents/AnnualReport2018.pdf.

[2] The majority notes that its decision concerns only a felon who is on probation. Yet this should offer no solace to misdemeanants because the rationale and broad language used by the majority make no distinction between probationary felons and misdemeanants.

courts may deny probation to protect society from offenders with a history of criminal conduct, to avoid depreciating the seriousness of the offense, to deter others likely to commit similar offenses, or where measures less restrictive than confinement have not succeeded. Tenn. Code Ann. § 40-35-103(1) (2014).

Thus probationers, unlike parolees, have generally committed less serious crimes,[3] receive shorter sentences,[4] have few or no previous convictions,[5] are less likely to reoffend,[6] and are less of a threat to the public.[7] Probationers are entitled to all the constitutional rights that flow from the degree of liberty that comes with probation rather than in-

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[3] Offenders convicted of certain offenses, including aggravated kidnapping, aggravated sexual battery, statutory rape by an authority figure, aggravated child abuse and neglect, and sexual exploitation of a minor, are not eligible for probation. Tenn. Code Ann. § 40-35-303(a) (2014).

[4] An offender may be granted probation only if the sentence imposed is ten years or less. *Id.*

[5] *See id.* § 40-35-103(1)(A) (When imposing a sentence involving confinement, a court should consider whether "[c]onfinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct.").

[6] *See id.* § 40-35-103(5) ("The potential or lack of potential for the rehabilitation . . . of the defendant should be considered in determining the sentence alternative or length of a term to be imposed.").

[7] *See id.* § 40-35-103(1)(A). A trial court's decision to grant probation implicitly signals the trial court's assessment that the offender poses no significant threat to society. Sean P. Dawson, *Castles Made of Sand: The Disappearing Fourth Amendment Rights of Probationers and Parolees*, 79 U. Pitt. L. Rev. 285, 300 (2017).

carceration.[8] The majority's blanket approval of suspicionless searches of probationers is disproportionate and fails to reflect the nature of the crimes committed.[9]

By lumping probationers in with parolees, the majority ignores the well-established prisoner-parolee-probationer continuum relied on by courts. This Court and the United States Supreme Court have reasoned that probationers and parolees should be treated differently. In *State v. Turner*, 297 S.W.3d 155, 163 (Tenn. 2009) and *State v. Stanfield*, 554 S.W.3d 1, 9-10 (Tenn. 2018), a majority of this Court acknowledged that probationers have a greater expectation of privacy and less need for supervision than parolees.[10]

In *Turner*, the majority held that law enforcement may, without reasonable suspicion, search parolees who are subject to a warrantless search parole condition. 297 S.W.3d at 167. The majority noted that offenders are subject to a continuum of possible punishments based on their criminal con-

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[8] *See* Roni A. Elias, *Fourth Amendment Limits on Warrantless Searches of Probationers' Homes*, 25 Widener L.J. 13, 47 (2016); *see also State v. Ballard*, 874 N.W.2d 61, 72 (N.D. 2016) (comparing constraints on a parolee's liberty with those imposed on a probationer).

[9] *See* Dawson, *supra*, at 308-09.

[10] I dissented in *Turner* and *Stanfield* because, in my view, a search of a parolee without reasonable suspicion violates a parolee's rights under Article I, section 7 of the Tennessee Constitution. Blanket approval of suspicionless searches precludes meaningful judicial oversight of law enforcement's power to search parolees. *Turner*, 297 S.W.3d at 174 (Lee, J., dissenting); *Stanfield*, 554 S.W.3d at 21 (Lee, J., dissenting). The search of a probationer without reasonable suspicion is more offensive than a suspicionless search of a parolee.

viction. *Id.* at 161 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987)). On this continuum, the punishment for offenders can range from solitary confinement to community service. The offender's place in the continuum determines the reasonableness of a search for Fourth Amendment purposes. An incarcerated felon has no expectation of privacy and a greater need for supervision, so prison officials can search the felon's cell without probable cause or reasonable suspicion. A probationer, who has a much greater expectation of privacy and a lesser need for supervision, is further along on the continuum. *Id.* A parolee falls somewhere between the incarcerated felon and the probationer on the continuum. *Id.* at 162.

In *Stanfield*, the majority expanded the holding in *Turner*, allowing law enforcement to search a parolee's home with neither a warrant nor reasonable suspicion, based on his status as a parolee. 554 S.W.3d at 4. As in *Turner*, the *Stanfield* majority referenced the difference between parolees and probationers, explaining that "'parolees occupy a place between incarcerated prisoners and probationers'" on the continuum of possible limitations to freedoms. *Id.* at 10 (quoting *Turner*, 297 S.W.3d at 162).

The United States Supreme Court has also distinguished between parolees and probationers and relied on the continuum analysis. In *Griffin v. Wisconsin*, 483 U.S. 868, 872 (1987), the Court upheld a warrantless search of a probationer's home. A state regulation authorized probation officers to search a probationer's home without a warrant when the officers had reasonable grounds to believe that the home contained contraband or prohibited items. *Id.* at 870-71. The Court found that the spe-

cial needs of the state's probation system made the warrant requirement impracticable and justified a lower "reasonable grounds" standard for the warrantless search of a probationer. *Id.* at 875-76. The *Griffin* Court reasoned that "[p]robation is simply one point ... on a continuum of possible punishments" and that the "permissible degree [of impingement upon a probationer's privacy] is not unlimited." *Id.* at 874-75.

Next, in *United States v. Knights*, 534 U.S. 112, 122 (2001), the United States Supreme Court upheld a warrantless search of a probationer's home. The search was based on law enforcement's reasonable suspicion of criminal activity *and* on a probation condition allowing a search with neither a warrant nor reasonable cause.[11] In upholding the search, the Court departed from the special needs rationale in *Griffin* and examined whether the search was reasonable under the "general Fourth Amendment approach of examining the totality of the circumstances, with the probation search condition being a salient circumstance." *Id.* at 117-18 (internal quotation marks and citation omitted). The Court explained that "[t]he touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.' " *Id.* at 118–19 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). Applying this test, the Court found that the probationer had a diminished reasonable ex-

[11] Ms. Hamm's probation condition was not as broad, authorizing only warrantless searches.

pectation of privacy based on the search provision in the probation order. *Id.* at 119–20. The Court then observed that a probationer is more likely to violate the law than an ordinary citizen and has a greater incentive to hide criminal activities because of the chance of probation revocation and incarceration. *Id.* at 120. Thus, the government had reason to focus more on probationers than on ordinary citizens. *Id.* at 121.

After balancing these considerations, the Court held that law enforcement needed "*no more than* reasonable suspicion to conduct a search of this probationer's house." *Id.* at 120-21 (emphasis added). In a footnote, the Court in *Knights* explained that it was not deciding "whether the probation condition so diminished, or completely eliminated, Knights' reasonable expectation of privacy . . . that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment." *Id.* at 120 n.6. The warrantless search in *Knights* was supported by reasonable suspicion *and* the probation search condition, so the Court did not address the constitutionality of a suspicionless search based solely on a probation condition.

Five years later, in *Samson v. California*, 547 U.S. 843, 855-56 (2006), the Supreme Court upheld the suspicionless search of a parolee's home after weighing the parolee's significantly diminished expectation of privacy and the government's substantial interest in supervising the parolee. Contrasting the privacy interests of parolees with those of probationers, the Court noted that parolees have a lesser expectation of privacy than probationers because "parole is more akin to imprisonment than probation is to imprisonment." *Id.* at 850. Addi-

tionally, the State's interest in supervising parolees is overwhelming because parolees are more likely to commit additional criminal offenses and the State has an interest in reducing recidivism. *Id.* at 853-54. After applying the *Knights* balancing test, the Court determined that law enforcement could conduct a suspicionless search of a parolee. *Id.* at 857.

The upshot of *Turner*, *Stanfield*, *Griffin*, *Knights*, and *Samson* is that probationers and parolees are different. Unlike parolees, probationers have greater privacy expectations and the government has a lesser interest in supervising them. Thus, assuming that the Fourth Amendment allows law enforcement to search a parolee's home without reasonable suspicion, it makes sense to require law enforcement to have at least a reasonable suspicion of criminal activity before searching a probationer's home.

In addition, law enforcement searches that are not based on reasonable suspicion of criminal activity are at odds with the need for criminal justice reform recognized by our nation and our state. *See* Tenn. Exec. Order No. 6 (Mar. 5, 2019) (recognizing the state's duty to address educational, mental health, and substance abuse issues in support of offenders' "successful reentry into society" and establishing a Criminal Justice Reinvestment Task Force to develop recommendations for, among other things, revising sentencing guidelines and parole and probation standards); First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5224–25 (requiring grant applicants to provide "a plan for analysis of the statutory, regulatory, rules-based, and practice-based hurdles to reintegration of offenders into the community" and prioritizing grant

applications that "best . . . review the process by which the applicant adjudicates violations of parole, probation, or supervision following release from prison, jail, or a juvenile facility"); *see also* The Pew Charitable Trusts, *Fact Sheet: 35 States Reform Criminal Justice Policies Through Justice Reinvestment* (July 2018) (summarizing the post-2007 "wave of reforms" to sentencing and correction policies, including supervision laws that guide how parolees and probationers are monitored).

A search not based on suspicion hinders one of the primary goals of criminal justice reform—more rehabilitation and less incarceration. These intrusive searches also hamper the aims of probation—rehabilitating and reintegrating probationers into society. *See Knights*, 534 U.S. at 113 (2001). A probationer whose privacy is invaded by a suspicionless search is prone to resent law enforcement and lose trust in the Rule of Law. Probationers who believe they have been mistreated by law enforcement do not have a firm foundation on which to successfully rebuild their lives and become productive, law-abiding citizens. The majority suggests that probationers are protected from searches that are repetitive, disruptive, or harassing. Yet *any* illegal search invades our privacy, disrupts our lives, violates our constitutional rights, and is unacceptable.

Tennessee would not be alone in requiring reasonable suspicion to justify the warrantless search of a probationer; some other states require it. *See, e.g.*, *People v. Lampitok*, 207 Ill.2d 231, 278 Ill. Dec. 244, 798 N.E.2d 91, 105 (2003) (finding that the warrantless search of a probationer's motel room would be constitutional if the police had reasonable suspicion of a probation violation); *Ballard*, 874

N.W.2d at 72 (quoting *Samson*, 547 U.S. at 850) (concluding that a suspicionless search of a probationer's home was constitutionally unreasonable based on a continuum in which "parole is more akin to imprisonment than probation"); *see also State v. Bennett*, 288 Kan. 86, 200 P.3d 455, 463 (2009) (concluding that searches of probationers require reasonable suspicion because probationers have a greater expectation of privacy than parolees and, under Kansas law, parolees cannot be searched without reasonable suspicion); *Commonwealth v. LaFrance*, 402 Mass. 789, 525 N.E.2d 379, 382-83 (1988) (explaining that the state constitution forbids probation condition allowing a warrantless search condition of a probationer's person or home unless a probation officer has at least reasonable suspicion that a search might produce evidence of wrongdoing); *Murry v. Commonwealth*, 288 Va. 117, 762 S.E.2d 573, 580 (2014) (concluding that a probation condition authorizing a warrantless and suspicionless search by law enforcement of a probationer was unreasonable because the search was unnecessary to facilitate rehabilitation and protect the public); *State v. Cornell*, 202 Vt. 19, 146 A.3d 895, 910 (2016) (emphasizing that warrantless searches of probationers must follow the state constitution's requirement of reasonable suspicion); *State v. Lucas*, 56 Wash. App. 236, 783 P.2d 121, 126 (1989) (concluding that the state constitution requires a well-founded suspicion that a probation violation has occurred to justify a warrantless search of a probationer).

Ms. Hamm was subject to a probation condition that allowed law enforcement to search her home without a warrant, but the probation condition did not provide for a suspicionless search. Law en-

forcement had no warrant and lacked reasonable suspicion that Ms. Hamm was engaging in criminal activity. Police officers decided to search the home where Ms. Hamm lived with her husband based on an unconfirmed tip from a criminal informant that there were some "heavy players" in the Glass community. The informant did not mention the Hamms by name. When an officer suggested Mr. Hamm's name, the informant nodded her head and smiled. A nod and a smile cannot justify a home search. The police also learned from another informant that there were people in the Glass community "doing it big." This unidentified informant's information was second-hand from another unidentified informant and its meaning unclear. The evidence does not preponderate against the trial court's conclusion that law enforcement did not have reasonable suspicion to search the home where Ms. Hamm lived. Mr. Hamm was collateral damage to the illegal search of Ms. Hamm's home. He was on neither parole nor probation. Mr. Hamm had to endure a home search because he chose to share a bedroom with his wife.

In sum, the majority's decision to uphold the suspicionless search of the Hamms' home violated the Hamms' federal and state constitutional rights to be free from unreasonable searches. The United States Supreme Court can undo the injustice of the majority's decision; let's hope it does.

In the interest of justice, I dissent.

APPENDIX D

IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE AT JACKSON
January 4, 2017 Session

No. W2016-01282-CCA-R3-CD
STATE OF TENNESSEE

v.

ANGELA CARRIE PAYTON HAMM
AND DAVID LEE HAMM

Appeal from the Circuit Court of Obion County
No. CC-16-CR-15
Jeff Parham, Judge

Filed: August 11, 2017

OPINION

The State appeals the trial court's order granting the Defendants' motions to suppress evidence seized as a result of a warrantless search of their house. The trial court found that, although Defendant Angela Hamm was on probation at the time of the search and was subject to warrantless searches as a condition of her probation, the search was invalid because the police officers did not have reasonable suspicion to justify the search. On appeal, the State contends that (1) the search was supported by reasonable suspicion; (2) the search was reasonable based upon the totality of the circumstanc-

es; (3) Angela Hamm consented to the search by agreeing to the warrantless search probation condition; and (4) the warrant search was valid as to Defendant David Lee Hamm under the doctrine of common authority. Upon review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

CAMILLE R. MCMULLEN, J., delivered the opinion of the court. JOHN EVERETT WILLIAMS, J., filed a separate concurring opinion. ALAN E. GLENN, J., filed a separate dissenting opinion.

Herbert H. Slatery III, Attorney General and Reporter; Andrew C. Coulam, Assistant Attorney General; Tommy A. Thomas, District Attorney General; and James Cannon, Assistant District Attorney General, for the appellant, State of Tennessee.

Charles S. Kelly, Sr., Dyersburg, Tennessee, for the appellee, Angela Carrie Payton Hamm.

James T. Powell, Union City, Tennessee, for the appellee, David Lee Hamm.

In November 2015, police officers conducted a warrantless search of the Defendants' home and seized various drugs and drug paraphernalia. As a result, the Defendants were arrested and subsequently indicted for possession of more than 0.5 grams of a substance containing methamphetamine with the intent to sell or deliver, possession of alprazolam with the intent to sell or deliver, possession of morphine with the intent to sell or deliver, possession of amphetamine with the intent to sell or deliver, possession of clonazepam with the intent to sell or deliver, possession of hydrocodone

with the intent to sell or deliver, and possession of drug paraphernalia.

The Defendants each filed a motion to suppress, challenging the warrantless search of their home. Angela Hamm argued that, although she was on probation at the time of the search, the police officers did not have reasonable suspicion to conduct the search. David Hamm argued that neither he nor Angela Hamm consented to the search and that he retained a reasonable expectation of privacy in the home despite Angela Hamm's status as a probationer. The State did not file a written response.

During an evidentiary hearing, the State presented the testimony of Officer James Hall, who was a member of the Obion County Sheriff's Department Drug Task Force in November 2015. Officer Hall testified that, on November 16, 2015, he served a drug related arrest warrant on Lindsey Gream from Dyer County, Tennessee. Officer Hall stated that Gream thanked him for taking her to the hospital and keeping her alive and mentioned "heavy players in Obion County" whom the officers should watch. When Officer Hall asked Gream who the people were, Gream replied, "Well, I'm not going to say specifically who exactly. I will let you know of the location, and they're in Glass," a community in Obion County. Officer Hall asked Gream whether the person was David Hamm, and Gream nodded her head and smiled. Officer Hall said Gream told him that "they" had been trafficking ice methamphetamine to Obion County from "across the river" on a frequent basis. Gream did not indicate how she knew this information. Officer Hall stated Gream did not provide "concrete" information regarding how often the trips across the river had occurred. Rather, she stated that "they"

made the trips often and had "re-upped" or had purchased more drugs a few days prior to her conversation with Officer Hall. Officer Hall shared this information with other members of the drug task force, including Officer Ben Yates.

On cross-examination, Officer Hall testified that he did not attempt to secure a search warrant based on Gream's information because he did not believe that the information was sufficient to establish probable cause for a search warrant. Rather, he believed that, based on this information, the officers had reasonable suspicion to conduct a "probation search" on Angela Hamm. Officer Hall stated that, according to one of the rules in Angela Hamm's probation order, she had agreed '"to a search, without a warrant, of her person, vehicle, property, place of residence by any probation/parole officer or law enforcement officer at any time." Officer Hall testified that he also believed that reasonable suspicion was necessary to conduct the search because Angela Hamm's probation order did not include the "without reasonable suspicion" language that some probation orders did.[1] Officer Hall

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[1] Defense counsel sought to question Officer Hall about a Westate Corrections Network Community Corrections Rules form signed by defendants who receive community corrections supervision through Westate Corrections Network. The State objected, arguing that the form and its contents were irrelevant because Angela Hamm never signed the form and was not subject to the rules. The trial court sustained the State's objection but allowed defense counsel to submit the form as an offer of proof. One of the rules on the form provides:

> Offenders will allow the Case Officer to visit his/her home, employment site, or elsewhere at any time during the day or night and shall carry out all instructions given by the Case Officer, whether oral or in writing. Offenders will allow law enforcement to conduct a search of offender and all areas of the

did not believe that he had the probation order in his possession prior to conducting the search but said officers confirmed through the State probation office that Angela Hamm had signed the order.

Officer Hall acknowledged that, while Angela Hamm was on probation at the time of the search, David Hamm was not on probation and had not signed any forms agreeing to have his residence searched. Officer Hall also stated that David Hamm owned the residence but that Angela Hamm was either married to David Hamm or was in a relationship with him and had been living in the residence for "quite some time" prior to the search.

Officer Hall testified that Gream was a defendant in one of the cases which he had investigated in Dyer County and was a "known methamphetamine user." He said Gream was neither a citizen informant nor a "paid informant." When defense counsel asked Officer Hall how he classified Gream as credible and reliable, Officer Hall replied,

> In my experience in working narcotics, it is common for some users—dealers, users to throw bones at somebody else to keep their attention off of them. And whether this is the case with her, I don't think so. She was already caught. And what she got in Dyer County, there was no deal made, no money passed, no signing of her being on some sort of program to work with the [drug task force]. She just gave me that information.

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house upon request to control contraband or locate missing or stolen property.

Officer Hall acknowledged that Gream provided the information while a drug charge was pending against her.

Officer Hall acknowledged that Gream never told him that she had ever been inside of the Defendants' home or that she had ever purchased drugs from the Defendants. Office Hall did not know whether Gream was relaying information that someone else told her, and he did not corroborate any of the information that she provided.

Officer Hall testified that neither of the Defendants was home when the officers searched the house and that David Hamm never consented to the search. Officer Hall believed that Clifton Hamm allowed the officers inside of the residence. When defense counsel asked whether Clifton Hamm opened the door and allowed the officers inside the house, Officer Hall replied, "We asked . . . [where] the bedroom was, and I believe he pointed us in the direction and said that's the bedroom." Officer Hall acknowledged that the officers first learned that the Defendants slept in the same bedroom after the officers entered the house.

Based on the information that he received from Gream, Officer Hall and three other officers went to the Defendants' house. The officers knocked on the front and side doors, but no one answered. The officers asked a boy, who was approximately thirteen or fourteen years old, and who was outside the home, whether either of the Defendants was there. The teenager replied that the Defendants had just left to visit the parole or probation officer. The teenager stated that Clifton Hamm and others were in the shop behind the house. Officer Yates and Officer Kelly walked to the shop located ap-

proximately twenty to thirty yards behind the house where they met Clifton Hamm, Vernon Harrell, and Mark Payton. Clifton Hamm lived at the home, Payton was Angela Hamm's ex-husband, and Harrell was a friend. Officer Hall stated that Officer Yates told him that when he approached the shop, the men were watching the security system camera and that Clifton Hamm turned off the security camera when Officer Yates walked into the shop. Officer Hall said Officer Yates and Officer Kelly remained at the shop for approximately five minutes. The officers reported that Clifton Hamm told them where the Defendants' bedroom was located.

Officer Hall testified that the officers opened the side door and entered the residence. They searched the entire house, except a little girl's bedroom. While searching the Defendants' bedroom, Officer Kelly found pills in the nightstand on Angela Hamm's side of the bed. Inside a closet shared by the Defendants, Officer Hall found a magnetic eye glass case that contained weighing scales and two bags of ice methamphetamine. Two glass pipes were also located in the Defendants' bedroom. No evidence was found in the remainder of the house.

Officer Ben Yates of the Union City Police Department testified that, on November 17, 2015, while he was a member of the drug task force, he participated in a "probation search" at Angela Hamm's residence. Officer Yates stated that on November 16, he received information from Officer Hall about a conversation that Officer Hall had with Gream. Officer Yates said that, prior to his conversation with Officer Hall, a reliable informant told Officer Yates that the Defendants were "doing it big in Glass." Officer Yates explained that the

informant had provided information in the past that led to the seizure of narcotics in numerous cases. The informant had not observed the drugs transactions but said that he "has friends that purchase methamphetamine." Officer Yates said that he did not believe that he had sufficient evidence to procure a search warrant because the informant had not been in the residence or seen the drug transactions.

Officer Yates also testified that, prior to receiving the information about Gream from Officer Hall, an informant who was cooperating with the drug task force went to Clifton Hamm's residence to purchase methamphetamine from Clifton Hamm but was unable to do so. Officer Yates said that, at that time, he was unaware that Clifton Hamm was living with the Defendants.

Officer Yates testified that he and other officers confirmed with the probation office that Angela Hamm was on probation as a result of a conviction for manufacturing a controlled substance. The officers also confirmed that the probation order provided that Angela Hamm was subject to a warrantless search. Officer Yates could not recall whether he obtained a copy of Angela Hamm's probation order before going to the Defendants' home. He said he may have spoken to Angela Hamm's probation officer before going to the home and obtained a copy of the probation order later.

Officer Yates testified that when he, Officer Hall, Agent Andrew Kelly, and Investigator David Crocker arrived at the Defendants' house, Officer Yates came in to contact with Clifton Hamm's teenaged son, who was standing at the side door near a detached garage. When Officer Yates asked

the teenager whether the Defendants were home, the teenager stated that the Defendants had just left for the probation office in Union City, Tennessee. Officer Yates asked if anyone else was there, and the teenager replied that everyone else was in the shed.

Officer Yates stated that he and other officers walked behind the house to a detached shop and stopped Harrell as he was leaving the shop. Harrell said he was a visitor and did not live at the residence. Officer Yates said he and Officer Hall entered the shop, and Officer Yates saw Clifton Hamm and Payton holding pool sticks and watching a television that depicted video from four security cameras set up around the property. When Officer Yates entered the shop and asked the men how they were doing, Clifton Hamm quickly turned off the television. Officer Yates asked Clifton Hamm where the Defendants were, and Clifton Hamm told him that they had just left to go to Union City. When Officer Yates asked Clifton Hamm why he was acting nervous and why he had turned off the television, Clifton Hamm denied that the television was on. Officer Yates stated that, at that time, he did not know where Clifton Hamm was residing, but that he later learned that Clifton Hamm was living at the Defendants' home.

Officer Yates returned to the Defendants' home where he saw Clifton Hamm's son standing at the door with another officer. Officer Yates asked him whether he lived at the home. The teenager confirmed that he, Clifton Hamm, and the Defendants lived at the home. Officer Yates asked the teenager which bedroom belonged to the Defendants, and the teenager stated that their bedroom was located in the back of the house on the right. All of the evi-

dence seized during the search was located in the Defendants' bedroom.

On cross-examination, Officer Yates acknowledged that David Hamm never consented to the search and that, to his knowledge, David Hamm was not on probation at the time of the search. Officer Yates did not know who owned the Defendants' house.

Officer Yates acknowledged that, although he received information from a reliable informant who had previously provided information that Jed to convictions, he did not believe that the information provided by the informant regarding the Defendants was sufficient to establish probable cause because the informant had not been inside the Defendants' home and had not observed illegal activity. Rather, the informant was providing secondhand information. Defense counsel asked, "So, what we have here is a lot of people telling other people stuff, and that's how that information came to be; would you say that's pretty fair?" Officer Yates responded, "That's pretty fair."

Defense counsel for David Hamm presented the testimony of Evelyn Stigler, Angela Hamm's probation officer. Stigler testified that she had been supervising Angela Hamm since November 8, 2013, and that Angela Hamm signed a form agreeing to a warrantless search as a condition of probation. Stigler said that to her knowledge, David Hamm was not on probation and had not signed a form agreeing to a search of his person or home. She also said that she had never spoken to David Hamm or informed him that he was subject to a lesser expectation of privacy. Stigler stated that Angela Hamm's name was Angela Payton when she signed

the probation order, and that it appeared she had married since signing the order.

Following the suppression hearing, the trial court entered an order granting the Defendants' motion to suppress. The trial court found that, although Officer Hall received a tip of some "heavy players" in the Glass community of Obion County, the person "never mentioned a name or how she knew this information." The trial court noted that when Officer Hall suggested the name of David Hamm, the person "winked and smiled" but did not mention Angela Hamm. The trial court found that, while Officer Yates testified that he received information from a reliable informant about people in Glass "doing it big," the informant was not identified and no evidence was presented establishing the informant's reliability. The trial court also found that "[t]he informant's information was second-hand information from another informant who had attempted unsuccessfully to purchase drugs from another resident (Clifton Hamm) at the location." The trial court concluded that the evidence did not establish "articulable facts to support the reasonable suspicion of the officer to justify a search pursuant to the probation order."

The State represented to the trial court that it was unable to proceed with the prosecution as a result of the order suppressing the evidence. Accordingly, the trial court granted the Defendants' motions to suppress and dismissed the indictment. It is from this order that the State now timely appeals.

ANALYSIS

On appeal, the State contends that the warrantless search of the Defendants' home was constitutional because it was supported by reasonable suspicion and authorized as a condition of Angela Hamm's probation. The State asserts that, even if the search was not supported by reasonable suspicion, the search was reasonable based upon the totality of the circumstances. Next, the State contends that Angela Hamm consented to the search by agreeing to be subject to warrantless searches as a condition of her probation. Finally, the State maintains that the warrantless search was valid as to David Hamm under the doctrine of common authority.

A trial court's factual determination in a suppression hearing will be upheld on appeal unless the evidence preponderates otherwise. **State v. Odom**, 928 S.W.2d 18, 23 (Tenn. 1996). Questions regarding the credibility of witnesses, the weight or value of the evidence, and determinations regarding conflicts in the evidence are matters entrusted to the trial judge as trier of fact. **State v. Valley**, 307 S.W.3d 723, 729 (Tenn. 2010). "The party prevailing in the trial court is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence." **State v. Williamson**, 368 S.W.3d 468, 473 (Tenn. 2012) (quoting Odom, 928 S.W.2d at 23). The trial court's application of the law to the facts is reviewed de novo. **State v. Carter**, 16 S. W.3d 762, 765 (Tenn. 2000).

Both the Fourth Amendment to the United States Constitution and article I, section 7 of the

Tennessee Constitution provide protection for individuals against unreasonable searches and seizures. **State v. Day**, 263 S.W.3d 891, 900-901 (Tenn. 2008); see **State v. Randolph**, 74 S.W.3d 330, 314 (Tenn. 2002) (recognizing that Tennessee's constitutional provision against unreasonable searches and seizures is "identical in intent and purpose with the Fourth Amendment") (quoting **Sneed v. State**, 423 S.W.2d 857, 860 (Tenn.1968)). "[A] warrantless search or seizure is presumed unreasonable, and evidence discovered as a result thereof is subject to suppression unless the State demonstrates that the search or seizure was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement." **State v. Yeargan**, 958 S.W.2d 626,629 (Tenn. 1997).

The general prohibition against warrantless searches is "relaxed if the person being searched has been convicted of a criminal offense and is serving a sentence." State v. Turner, 297 S.W.3d 155, 161 (Tenn. 2009). A defendant who has been convicted of a criminal offense is subject to "a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service." **Griffin v. Wisconsin**, 483 U.S. 868, 874 (1987). "An offender's place on this continuum alters what is 'reasonable' for purposes of the Fourth Amendment." Turner, 297 S.W.3d at 161. The least protected in this continuum are incarcerated defendants who do not have an expectation of privacy in their prison cells. See **Hudson v. Palmer**, 468 U.S. 517, 526 (1984); Turner, 297 S.W.3d at 161. Because probationers fall further along the continuum, their privacy interests under the Fourth Amendment are reduced but are not as diminished

as the privacy interests of prisoners. Turner, 297 S.W.3d at 161.

In **United States v. Knights**, the United States Supreme Court applied the totality of the circumstances test in determining the constitutionality of the warrantless search of a probationer's home. 534 U.S. 112, 118 (2001). The defendant accepted as a condition of his probation that he would "(s]ubmit his . . . person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." Id. at 114. In applying the totality of the circumstances test, the Court characterized the defendant's probation search condition as a "salient circumstance" and analyzed the reasonableness of the search by balancing "'the degree to which it intrudes upon an individual's privacy [against] the degree to which it is needed for the promotion of legitimate governmental interests.'" Id. at 118-19 (quoting **Wyoming v. Houghton**, 526 U.S. 295, 300 (1999)). The Court concluded that the defendant's "status as a probationer subject to a search condition informs both sides of that balance." Id.

The Court examined the degree of intrusion upon a probationer's privacy interest and determined that

> [i]nherent in the very nature of probation is that probationers do not enjoy the absolute liberty to which every citizen is entitled. Just 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.

Id. at 119 (internal quotation marks and citations omitted). The Court determined that the search condition "would further the two primary goals of probation—rehabilitation and protecting society from future criminal violations" and that the defendant's reasonable expectation of privacy was "significantly diminished" as a result of the search condition. Id. at 119-20.

In examining the governmental interest, the Court recognized that

> it must be remembered that the very assumption of the institution of probation is that the probationer is more likely titan the ordinary citizen to violate the law. The recidivism rate of probationers is significantly higher than the general crime rate. And 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, in proceedings in which the trial rights of a jury and proof beyond a reasonable doubt, among other things, do not apply.

Id. at 120 (internal quotation marks and citations omitted). The Court also recognized that states have a dual concern with a probationer. Id. The Court explained that "[o]n the one hand is the hope that [the probationer] will successfully complete probation and be integrated back into the community. On the other is the concern, quite justified, that he will be more likely to engage in criminal

conduct than an ordinary member of the community." Id. at 120-21.

The Court concluded that 'the balance of these considerations requires no more than reasonable suspicion to conduct a search of [the) probationer's house." Id. at 121 (emphasis added). The Court noted that "[t]he degree of individualized suspicion required of a search is a determination of when there is a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable." Id. (citation omitted). The Court recognized that, although the Fourth Amendment ordinarily requires probable cause, "a lesser degree satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable." Id. (citation omitted). The Court determined that "[w]hen an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable." Id. The Court noted that the same circumstances upon which the Court relied in determining that "reasonable suspicion is constitutionally sufficient also render a warrant requirement unnecessary." Id. at 121-22 (citing **Illinois v. McArthur**, 531 U.S. 326, 330 (2001) (noting that general or individual circumstances, including "diminished expectations of privacy," may justify an exception to the warrant requirement)).

The Court held that the warrantless search of the defendant. which was supported by reasonable suspicion and authorized by a condition of his probation, was reasonable under the Fourth Amendment. Id. at 122. The Court left open the question

of "whether the probation condition so diminished, or completely eliminated, [the probationer's) reasonable expectation of privacy . . . that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment." Id. at 120 n.6.

This court first addressed the issue of probation searches in **State v. Davis**, 191 S.W.3d 118 (Tenn. Crim. App. 2006). The defendant in Davis appealed the revocation of his probation for marijuana and methamphetamine offenses stemming from his violation of a condition of his probation in which he agreed "to a search, without a warrant, of my person, vehicle, property, or place of residence by any Probation/Parole officer or law enforcement officer, at any time." 191 S.W.3d at 119. The defendant's probation officer and two law enforcement officers requested permission to search the defendant's residence following numerous complaints of traffic in and out of the home and surveillance which revealed that people known to be involved in the manufacture of methamphetamine were entering the home. Id. The defendant refused to allow the officers to search his home, and the defendant's probation was revoked as a result. Id.

On appeal, this court applied the analysis in Knights and concluded that the search was permitted because: (1) the warrantless search provision was reasonably related as a condition of the [defendant's] probation; and (2) the attempted warrantless search of the [defendant's] residence was supported by reasonable suspicion." Id. at 121-22. Accordingly, the defendant's refusal to submit to the search constituted a violation of a condition of his probation. Id. at 122.

I. Reasonable Suspicion. The State contends that, like the search in Knights and the attempted search in Davis, the search of the Defendants' home was supported by reasonable suspicion. Reasonable suspicion requires "a lower quantum of proof than probable cause." **State v. Pulley**, 863 S.W.2d 29, 31 (Tenn. 1993). The Tennessee Supreme Court has recognized that

> "[r]easonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause."

Id. at 32 (quoting **Alabama v. White**, 496 U.S. 325, 330 (1990)). In evaluating whether a police officer has a reasonable suspicion, supported by specific and articulable facts to believe a crime, a court must consider the totality of the circumstances. **State v. Binette**, 33 S.W.3d 215, 218 (Tenn. 2000). "Those circumstances include the objective observations of the police officer, information obtained from other officers or agencies, information obtained from citizens, and the pattern of operation of certain offenders." **State v. Day**, 263 S.W.3d 891, 903 (Tenn. 2008). Additionally, the court "must also consider the rational inferences and deductions that a trained police officer may draw from the facts and circumstances known to him." **State v. Watkins**, 827 S.W.2d 293,294 (Tenn. 1992) (citing **Terry v. Ohio**, 392 U.S. 1, 21 (1968)).

The evidence presented at the suppression hearing established that Officer Hall received information from Gream, a known methamphetamine user, as he was serving her with an arrest warrant. She mentioned "heavy players" in the Glass community in Obion County but declined to identify anyone. When Officer Hall mentioned David Hamm, Gream smiled and nodded her head. Gream told Officer Hall that "they" had been trafficking ice methamphetamine to Obion County from "across the river" on a frequent basis and had purchased more drugs within the past few days. Officer Hall did not testify who "they" were, and the State did not ask Officer Hall to clarify the identities of the referenced persons. Regardless of the reliability of the information, none of Gream's information implicated Angela Hamm in any illegal activity.

The only information linking Angela Hamm to any illegal activity is the conclusory statement from the confidential informant that David and Angela Hamm were '"doing it big in Glass." The informant had not observed the drug transactions and provided secondary information from "friends [who] purchase methamphetamine." No evidence was presented at the suppression hearing to establish that the informant was able to clarify how the Defendants were "doing it big," from whom his friends had purchased drugs, or where the drugs transactions occurred. This conclusory statement fails to establish reasonable suspicion that Angela Hamm, the probationer subject to the warrantless search provision, had engaged or was engaging in legal activity justifying the warrantless search of her home.

Likewise, the officers' attempted controlled purchase of methamphetamine from Clifton Hamm at the Defendants' residence failed, and the officers were unable to establish through an independent investigation that any illegal activity was occurring in the Defendant's house or that Angela Hamm was involved. No explanation of their failure to purchase drugs was offered at the suppression hearing. If anything, the attempt at corroboration tended to disprove the allegation that David or Angela Hamm was engaged in the sale of methamphetamine. Furthermore, Angela Hamm's association with those who may have been engaged in illegal drug-related activity was neither illegal nor a violation of any conditions of her probation.

The State also relies upon the officers' interaction with Clifton Hamm in the shop behind the Defendants' house to establish reasonable suspicion. However, we note that the presence of security cameras around the property where Angela Hamm lived as observed by the officers was not unlawful. While Clifton Hamm falsely denied watching the video feed of the cameras around the property and turning off the television once the officers entered the shop, his untruthfulness did not implicate Angela Hamm. Moreover, the officers continued to the Defendants' backyard into an outbuilding, with the knowledge that the Defendants' were not at home.

We conclude that the information possessed by the officers at the time of the search was insufficient to establish reasonable suspicion that Angela Hamm was engaged in illegal drug-related activity at the home.

II. Totality of the Circumstances. The State also asserts that reasonable suspicion to support

the probation search was not required and that the search of the Defendants' house was reasonable based upon the totality of the circumstances. While neither the United States Supreme Court nor the Tennessee Supreme Court have squarely addressed whether something less than reasonable suspicion would permit searches of probationers, this court has previously held that, "[w]hen a person has signed a probation agreement providing written consent for a warrantless search of the person's residence, such a search may be conducted if reasonable suspicion for the search exists." **State v. Tracy Lynn Carman-Thacker**, No. M2014-01859-CCA-R3-CD, 2015 WL 5240209, at *5 (Tenn. Crim. App. Sept. 8, 2015) (citing **United States v. Knights**, 534 U.S. 112 (2001), and **State v. Davis**, 191 S.W.3d 118 (Tenn. Crim. App. 2006)) (no perm. app. filed); **State v. Janet Michelle Stanfield, Tony Alan Winsett, and Justin Bradley Stanfield**, No. W2015-02503-CCA-R3-CD, 2017 WL 1205952 (Tenn. Crim. App. Mar. 31, 2017), **perm. app. granted** (Tenn. July 19, 2017). "When determining whether an officer had reasonable suspicion, a court must consider the totality of the circumstances, as well as the rational inferences and deductions that a trained officer may draw from the facts known by the officer." **State v. Robert Lee Hammonds**, No. M2005-01352-CCA-R3-CD, 2006 WL 3431923, at *11 (Tenn. Crim. App. Nov. 29, 2006) (citing **State v. Watkins**, 827 S.W.2d 293, 294 (Tenn. 1992)).

Applying the above authority, we conclude that there was no reasonable suspicion to support the search in this case. The record simply does not show that, at the time the officers searched the house; they had reasonable suspicion that Hamm

was engaged or was engaging in criminal activity. To be clear, the officers admitted that they received vague information that the Hamms may be engaged in drug activity. The officers attempted to buy drugs from the Hamm house but were unable to do so. After their unsuccessful attempt, the officers went to Hamm's house again, and she was not there. They continued to the backyard area of Hamm's house to an outbuilding, where they encountered other individuals who were not engaged in criminal activity. Nevertheless, they continued to search Hamm's house. Under the totality of the circumstances approach, the officers' subsequent search of Hamm's house was not supported by reasonable suspicion; and therefore, did not comport with Constitutional limits. See Knights, 534 U.S. at 114; **Tessier**, 814 F.3d at 433; **Tracy Lynn Carman-Thacker**, 2015 WL 5240209, at *2; **State v. Janet Michelle Stanfield, Tony Alan Winsett, and Justin Bradley Stanfield**, 2017 WL 1205952, at *9.

We are compelled to note the State's reliance upon **Tessier**, 814 F.3d 432, to advance its position that reasonable suspicion is not required to search a probationer subject to a warrantless search condition. In **Tessier** the United States Court of Appeals for the Sixth Circuit held that the search of the home of a Tennessee probationer who was subject to a warrantless search condition was constitutional under the totality of the circumstances and absent reasonable suspicion. 814 F.3d at 433-35. The defendant was subject to the same warrantless search condition as Angela Hamm, which the Sixth Circuit described as a "'standard' search condition that applies to all probationers in Tennessee." Id. at 433. The court held that, due to the existence of

this "standard" condition and its conclusion that the search served legitimate law enforcement and/or probationary purposes, the search was constitutional. Id. at 432-35.

We find **Tessier** distinguishable because the warrantless search condition to which Angela Hamm was subject was not a "standard" provision to which all probationers in Tennessee are subject. Our state legislature has not expressly authorized warrantless searches as a condition of probation. See T.C.A. § 40-35-303(d) (listing conditions of supervised probation that a trial court may require of a defendant). While the conditions listed in section 40-35-303(d) are not exhaustive, there is not a uniform warrantless search provision to which every probationer in Tennessee is subject. Moreover, the evidence presented at the suppression hearing established that three different warrantless search provisions are used by probation officers in that district alone.[2] It appears that the language of a warrantless search provision differs according to the office, division, or entity supervising the probationer.

III. Consent. It is unnecessary to resolve the State's remaining issues concerning common authority and whether Angela Hamm consented to the search of her home by agreeing to the warrantless search provision as a condition of her proba-

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[2] While one of the warrantless search provisions presented during the hearing was utilized by a private probation service which provides supervision for the community corrections program, a defendant may be sentenced to probation to be supervised under the community corrections program. See **State v. Christopher Schurman,** No. M2011-01460-CCA-R3-CD, 2012 WL 1657057, at *2 (Tenn. Crim. App. May 10, 2012) (discussing probation supervised by community corrections).

tion because we have concluded that the search of Hamm's house was not supported by reasonable suspicion.

CONCLUSION

Based on a thorough review of the record. we affirm the trial court's ruling suppressing the evidence and dismissing the indictment as to both Defendants.

CAMILLE R. MCMULLEN, JUDGE

APPENDIX E

IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE AT JACKSON
January 4, 2017 Session

No. W2016-01282-CCA-R3-CD
STATE OF TENNESSEE

v.

ANGELA CARRIE PAYTON HAMM
AND DAVID LEE HAMM

Appeal from the Circuit Court of Obion County
No. CC-16-CR-15
Jeff Parham, Judge

Filed: August 11, 2017

CONCURRING OPINION

JOHN EVERETT WILLIAMS, J., concurring.

I concur in the majority opinion, but I write separately to express my views regarding the additional issues that arise from warrantless, suspicionless searches of probationers conducted pursuant to a condition of probation.

Totality of the Circumstances/ Reasonable Suspicion

I believe that at a minimum, reasonable suspicion is required before the State may conduct a warrantless search of a probationer who is subject

to a warrantless search requirement as a condition of probation. While neither the United States Supreme Court nor the Tennessee Supreme Court have addressed whether something less than reasonable suspicion would permit searches of probationers, both courts have addressed the issue as it related to parolees. *See Samson v. California,* 547 U.S. 843 (2006); *State v. Turner,* 297 S.W.3d 155 (Tenn. 2009).

Samson involved a challenge by a parolee to a California law requiring every prisoner eligible for parole to "'agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause.'" 547 U.S. at 846 (quoting Cal. Penal Code Ann. § 3067). The issue before the Court was "whether a suspicionless search, conducted under the authority of this statute, violates the Constitution." *Id.* The Court held that the statute was constitutional under the Fourth Amendment. *Id* at 857.

The Court noted that "parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment." *Id.* at 850. The Court further noted that "'[t]he essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abides by certain rules during the balance of the sentence."' *Id.* (quoting *Morrisey v. Brewer,* 408 U.S. 471,477 (1972)). Applying the totality of the circumstances approach, the Court concluded that searches under the California law were constitutional. *Id.* at 852. The Court stated, "Examining the totality of the circumstances pertaining to petitioner's status as a parolee, 'an established variation on imprison-

ment,' . . . including the plain terms of the parole search condition, we conclude that petitioner did not have an expectation of privacy that society would recognize as legitimate." *Id.*

The Court concluded that the State's interests were substantial, reasoning that a State has an "'overwhelming" interest" in supervising parolees because "parolees . . . are more likely to commit future criminal offenses." Similarly, this Court has repeatedly acknowledged that a State's interests in reducing recidivism and thereby promoting reintegration and positive citizenship among probationers and parolees warrant privacy intrusions that would not otherwise be tolerated under the tolerated under the Fourth Amendment.

Id. at 853 (quoting *Pa. Bd of Prob. and Parole v. Scott,* 524 U.S. 357,365 (1998)). The Court recognized that "[t]he California Legislature has concluded that, given the number of inmates the State paroles and its high recidivism rate, a requirement that searches be based on individualized suspicion would undermine the State's ability to effectively supervise parolees and protect the public from criminal acts by reoffenders," and agreed that the conclusion made "eminent sense." *Id* at 854. The Court further reasoned that "[i]mposing a reasonable suspicion requirement . . . would give parolees greater opportunity to anticipate searches and conceal criminality." *Id.*

In *Turner,* the Tennessee Supreme Court held that "parolees who are subject to a warrantless search condition may be searched without reasonable or individualized suspicion." 297 S.W.3d at 157. Unlike *Sampson,* the holding was not based upon a statute that authorized warrantless searches of pa-

rolees. Rather, the parolee in *Turner* signed a document which provided that she "agree[d] to a search, without a warrant, of [her] person, vehicle, property, or place of residence by any Probation/Parole Officer or law enforcement, at any time." *Id.*

Our supreme court discussed the holding in *Sampson* that warrantless, suspicionless searches of parolees subject to a warrantless search condition did not violate the Fourth Amendment and concluded that such searches also did not violate the Tennessee Constitution. *Id* at 162-66. The court concluded that the analysis in *Samson* "strikes the correct balance between the severely diminished privacy interests of a convicted felon serving the remainder of his or her sentence on parole release in the community, and society's interests *in* both reintegrating that felon and protecting itself against recidivism." *Id* at 165.

In examining the nature of parole, the court recognized that "[o]n the continuum of possible punishments and reductions in freedoms, parolees occupy a place between incarcerated prisoners and probationers." *Id.* at 162. The court recognized that while on parole, parolees remain under the confinement of their sentences and in the legal custody of the warden and are subject all of the conditions of their parole. *Id.* at 163 (citations omitted). The court noted that rather than a right, parole is a privilege that the State "may accord to persons incarcerated for committing serious felonies in spite of worrisome statistics of recidivism." *Id* at 165. The court stated that "this very real danger of recidivism" must be taken into account in determining the constitutional parameters of what is "reasonable" for parolees. *Id.*

The court concluded that "[a]lthough a parolee's constitutional protections against unreasonable searches may not be extinguished as completely as those of incarcerated prisoners, parole status is a 'powerful circumstance' much more akin to incarceration than probation or freedom in determining the reasonableness of a search." *Id.* (footnotes and citations omitted). In reaching this conclusion, the court cited with approval a concurring opinion in *United States v. Crawford,* which explained that in contrast to probationers; parolees "'have been sentenced to prison for felonies and released before the end of their prison terms'" and are "'deemed to have acted more harmfully than anyone except those felons not released on parole.'" *Id* at 165-66 (quoting *United States* v. *Crawford,* 372 F.3d 1048, 1077 (9th Cir. 2004) (en banc) (Kleinfeld, J., concurring)). The court held that "[a] parole condition requiring that the parolee submit to warrantless searches is reasonable in light of the parolee's significantly diminished privacy interests; the goals sought to be attained by early release; and society's legitimate interest in protecting itself against recidivism." *Id.* at 166. The court employed the totality of the circumstances approach to determine whether the search of the parolee's home was reasonable and held that a "suspicionless search of a parolee subject to a warrantless search condition, and which is conducted out of valid law enforcement concerns, is not unreasonable." *Id* at 167. The court, however, was careful to note that its resolution of the issue of warrantless searches of parolees pursuant to a condition of parole did not require the court to resolve the issue as it related of probationers. *Id.* at 162 n.4.

There is a conflict among jurisdictions regarding the constitutionality of a warrantless search absent reasonable suspicion of a probationer who is subject to warrantless searches as a condition of probation. Some jurisdictions have held that the warrantless search of a probationer subject to a warrant search condition was constitutional even absent reasonable suspicion based on the totality of the circumstances. *See, e.g. United States v. Williams,* 650 Fed. App'x. 977, 980 (11th Cir. 2016) (holding that the suspicionless search the home of a probationer subject to a warrantless search provision was constitutional where the search was conducted primarily by probation officers); *United States v. Tessier,* 814 F.3d 432, 434-35 (6th Cir. 2016) (upholding a warrantless search of a Tennessee probationer's residence that was not based on reasonable suspicion where the probationer was subject to a warrantless search condition and the search served a legitimate law enforcement or probationary purpose); *United States* v. *King,* 736 F.3d 805, 810 (9th Cir. 2013) (concluding that "a suspicionless search, conducted pursuant to a suspicionless-search condition of a violent felon's probation agreement, does not violate the Fourth Amendment"); *State v. Adair,* 383 P.3d 1132, 1135-38 (Ariz. 2016) (holding that a search of a probationer's home, conducted by probation officers pursuant to valid probation conditions, need not be supported by reasonable suspicion but declining to address the constitutionality of the same search conducted by law enforcement instead of probation officers); *State v. Vanderkolk,* 32 N.E.3d 775, 779 (Ind. 2015) (concluding that the holding in *Samson* also applies to probationers and community corrections participants).

Other jurisdictions have held that warrantless searches of probationers subject to a warrantless search condition must be supported by reasonable suspicion. *See, e.g. State v. Bennett,* 200 P.3d 455, 463 (Kan. 2009) (holding that a probationer may not be searched by a probation or law enforcement officer absent reasonable suspicion and that a condition imposed by the trial court subjecting the probationer to random, suspicionless searches was unconstitutional); *State v. Cornell,* 146 A.3d 895, 909 (Vt. 2016) (declining to extend *Sampson* to searches of probationers and holding that "reasonable suspicion for search and seizure imposed on probationers is required by the Fourth Amendment"); *see also State v. Ballard,* 874 N.W.2d 61, 62 (N.D. 2016) (concluding that the suspicionless search of the home of an unsupervised probationer who was subject to a warrantless search condition was unreasonable under the Fourth Amendment); *Murry v. Commonwealth, 162* S.E.2d 573, 581 (Va. 2014) (concluding that a probation condition subjecting a probationer to a warrantless, suspicionless search by any probation or law enforcement officer at any time was not reasonable in light to the probationer's background, his offenses, and the surrounding circumstances).

Probationers have more limited privacy rights than those of free citizens, but probations do enjoy some expectation of privacy in their persons and property. *See Knights,* 534 U.S. at 121 (describing a probationer's privacy interests as "significantly diminished'"); *Bennett,* 200 P. 3d at 463 (stating that "although probationers' privacy rights are more limited than are the rights of free citizens, probationers do enjoy some expectation of privacy in their persons and property"); *People v. Hale,* 714

N.E.2d 861, 863 (N.Y. 1999) (concluding that "a probationer loses some privacy expectations and some of the protections of the Fourth Amendment, but not all of both"); *Murry,* 162 S.E.2d at 578 (recognizing that "probationers retain some expectation of privacy, albeit diminished").

Although warrantless, suspicionless searches of parolees pursuant to a condition of parole are permissible, probationers have a greater expectation of privacy than parolees. *See Samson,* 547 U.S. at 850; *Bennett,* 200 P.3d at 462. The Tennessee Supreme Court has in fact described parole as more closely akin to incarceration than it is to probation. *Turner,* 297 S.W.3d at 165. Moreover, the degree to which searches may impinge on probationers' expectations of privacy is "not unlimited." *Griffin v. Wisconsin,* 483 U.S. 868, 875 (1987).

Our state legislature has determined that certain offenders are eligible for probation or some other alternative sentence rather than imprisonment based upon the nature of the offenses, the sentences imposed, and the offenders' criminal histories. *See* T.C.A. § 40-35-102(5), (6)(A) (providing that a defendant who is sentenced as an especially mitigated or standard offender and who has committed a Class C, D, or E felony should be considered a favorable candidate for alternative sentence if certain conditions are met); *id.* § 40-35-303(a) (providing that a defendant is eligible for probation if the sentence imposed is ten years or less). Unlike parolees, probationers generally have been convicted of less serious felonies and have relatively short criminal histories. *Id* § 40-35-102(5) (providing that "convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society

and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration"). As a result, probationers are deemed to have acted less harmfully than parolees or prison inmates.

The probation condition subjected Mrs. Hamm to searches of her person, property, residence, and vehicle at any time by any probation or law enforcement officer without a warrant and for both probation and investigative purposes. To adopt the State's argument that law enforcement may conduct warrantless searches pursuant to this condition at any time and without reasonable suspicion would, in reality, extinguish any Fourth Amendment rights that Mrs. Hamm has as a probationer.

The two primary goals of probation are "rehabilitation and protecting society from future criminal violations." *Knights*, 534 U.S. at 119. The State has a legitimate concern that a probationer is more likely to engage in illegal activities than an ordinary citizen. *See id.* at 121. The State also has an interest in ensuring that a petitioner will successfully complete the term of probation and be integrated back into society as a productive, law-abiding citizen. One of the purposes of sentencing is to impose punishment "to prevent crime and promote respect for the law by . . . [e]ncouraging effective rehabilitation of those defendants, where reasonably feasible, by promoting the use of alternative sentencing and correctional programs that elicit voluntary cooperation of defendants." T.C.A. § 40-35-102(3)(C). To that end, probationers should be encouraged to obtain and maintain employment, further their education, support their families, and maintain housing.

Allowing suspicionless searches of probationers and their property at any time could hamper the goals of rehabilitation. A warrantless, suspicionless search condition subjects a probationer to a search of his or her person and belongings at any time and any place, whether it is at the probationer's employment, school, or home or while in a public area such as a store or restaurant. Tue probation condition. therefore, could sanction intimidating and harassing searches that are unrelated to the probationer's rehabilitation or public safety, thus undermining the purpose of the probation conditions. While such intimidating and harassing searches might be challengeable in a motion to suppress if officers happen to discover evidence of illegal activity, a probationer who is following the. law and the conditions of probation but nevertheless continues to be subject to intimidating and harassing searches has little recourse.

A suspicionless search of a probationer at her or her place of employment runs the risk of disrupting the business and could subject the employer and other employees to a search that would not otherwise be constitutionally permissible. As a result, an employer has less of an incentive to hire a probationer subject to this condition. Furthermore, a warrantless, suspicionless search of a probationer runs the risk of usurping the privacy rights of those who would otherwise be protected under the United States and Tennessee constitutions but who happen to work, socialize, or live with the probationer.

The impact of a warrantless search on the rights of both probationers and regular citizens is too great to authorize without requiring reasonable suspicion. Absent, at minimum, a reasonable suspi-

cion requirement, a probation or law enforcement officer may search a probationer subject to a warrantless search condition at any time and place. It appears that this warrantless search condition applies to probationers convicted of either felonies or misdemeanors. As a result, in two years, hundreds of thousands of probationers scattered throughout the State of Tennessee will be subject to searches heretofore unheard of, and its negative impact could be immeasurable. Not only can the condition negatively affect a probationer's employment opportunities, it can also affect his or her relationship with family and friends. A probationer whose person or property is being searched may subject the persons and property of those surrounding the probationer to a search. For example, in the present case, the officers did not limit their search to those portions of the house over which Mrs. Hamm maintained authority or control. Rather, the officers searched every room in the house with the exception of a small girl's room and despite information that Mr. Clifford Hamm and his teenage son lived in and maintained personal property in the home.

While a search conducted pursuant to a warrantless search condition may be unreasonable even absent a reasonable suspicion requirement if the search is based upon harassment or some other purpose that does not constitute a legitimate law enforcement purpose, the probationer only has a viable action of recourse if he or she is charged with a criminal offense as a result of evidence seized during the search. Under such circumstances, the probationer may seek to have the evidence seized during the search suppressed. However, if no incriminating evidence is discovered, the probationer does not have a viable recourse of action

even if the probationer is subjected to multiple warrantless, suspicionless searches. A reasonable suspicion requirement recognizes that probationers have less privacy rights than regular citizens but protects probationers from multiple and continuing warrantless searches when there is no indication that the probationers are engaging in illegal activity.

While the privacy rights of petitioners are more limited than the rights of free citizens, probationers do have some expectation of privacy in their persons and property. "Law enforcement efforts must be · reasonably calculated with reference to the probationers' privacy rights." *Bennett,* 200 P.3d at 463. I conclude that a reasonable suspicion standard properly recognizes the reduced privacy rights of probationers while balancing the State's goals of rehabilitation and, protection of the public from any further illegal activity by the probationer. Reasonable suspicion is not an overly burdensome standard of proof. *See Griffin,* 483 U.S. at 879-80.

In the present case, the search of the Defendants' home was not supported by reasonable suspicion. Therefore, the search was not reasonable based on the totality of the circumstances, and the trial court properly granted the Defendants' motions to suppress on this basis.

Consent

I also believe that it is necessary to address the State's contention that Mrs. Hamm consented to the search of her home by agreeing to the warrantless search provision as a condition of probation. In making its argument, the State relies upon the order setting out the conditions of probation, which was signed by Mrs. Hamm, the probation officer,

and the trial court. While the document signed by Mrs. Hamm listing the conditions of probation is entitled "Probation Order," it is a preprinted form prepared by the Field Services Division of the Tennessee Department of Correction that includes blanks in which information regarding Mrs. Hamm, her conviction, and her sentence were handwritten. The form also includes the signatures of Mrs. Hamm, the trial judge, and the probation officer as a "witness." The form was not signed by the prosecutor or Mrs. Hamm's attorney, and there is no indication that Mrs. Hamm was allowed to review the form with counsel before signing it or was otherwise informed that she was foregoing her Fourth Amendment rights as a condition of probation. Such a practice does not appear to be uncommon. During the suppression hearing, the defense presented a preprinted form of community correction rules utilized by Weststate Corrections Network, a private company, which provides for warrantless searches and only requires the signature of the defendant.

In *State v. Davis,* this court recognized that "[a] probationer's waiver of his Fourth Amendment rights is no less voluntary than the waiver of rights by a defendant who pleads guilty to gain the benefit of a plea bargain." 191 S.W.3d 118, 122 (Tenn. Crim. App. 2006) (citing *Bordenkricher v. Hayes,* 434 U.S. 357, 360-64 (1978)). When a defendant seeks to waive his rights and enter a guilty plea, however, defense counsel and the trial court are required to take actions to ensure that the defendant's waiver is knowingly, intelligently, and voluntarily made. The defendant's counsel must advise the defendant of the rights that he or she is waiving by pleading guilty to ensure that the defendant

understands his rights and the implications of the plea. There then must be an affirmative showing in the trial court that the defendant is knowingly and voluntarily entering the plea and was m:ade aware of the significant consequences of the plea. *See Boykin v. Alabama,* 395 U.S. 238, 242 (1969); *State v. Pettus,* 986 S.W.2d 540, 542 (Tenn. 1999); *State v. Mackey,* 553 S.W.2d 337,340 (Tenn. 1977). The trial court must determine if the guilty plea is knowingly entered by questioning the defendant to ensure that the defendant understands the plea and its consequences. *Pettus,* 986 S.W.2d at 542; *Blankenship v. State,* 858 S.W.2d 897, 904 (Tenn. 1993).

Defense counsel must advise a "noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Padilla v. Kentucky,* 559 U.S. 356, 369 (2010). Likewise, a trial court must advise a defendant who is entering a plea of guilty or nolo contendere that the plea may affect the defendant' s immigration or naturalization status, and the trial court must determine that counsel has advised the defendant of the "immigration consequences of a plea." Tenn. R Crim. P. 11(b)(J). A trial court also must advise a defendant, who is entering a plea of guilty or nolo contendere to an offense for which the defendant will receive a sentence of community supervision for life, that the defendant will receive the additional sentence, and the trial court must determine that counsel has advised the defendant of the community supervision for life sentence and its consequences. Tenn. R. Crim. P. 11(b)(K).

However, these precautions are not taken when a probationer signs a form agreeing to warrantless searches as a condition of probation and, thus,

waiving one of the most basic constitutional rights. Rather, a probationer is required to sign a preprinted form prepared by the probation office generally after the probationer has been sentenced to probation and without the advice of counsel or any questioning by the trial court to ensure that the probationer understands the consequences of the condition. The consequences of a probationer waiving his or her Fourth Amendment rights and being subjected to a warrantless search condition are too great to base its validity on a preprinted form prepared by either a State-run or private probation office and signed by a probationer with little bargaining power and without the advice of counsel or any actions by the trial court to ensure that the waiver is knowing, voluntary, and intelligent. A person's Fourth Amendment rights are of such importance that any waiver of those rights as a condition of probation should be made as part of the plea colloquy rather than in a backroom of a courthouse without the presence of counsel. If a person's Fourth Amendment rights can be waived with such little formality as evidenced in this case, why cannot the right to an attorney, notice, and a hearing also be waived as it relates to future probation violations or other prosecutions?

Another troubling aspect made apparent by this particular case is that the "consent" to search as alleged by the State was given to the probation office or to a probation officer in furtherance of the mission of rehabilitation. Traditionally, probation officers are not trained in crime detection, investigation. or the constitutional requirements that protect a citizen's full panoply of rights. Moreover, as this case illustrates, this "consent" can be used by any law enforcement agency in this state, other ju-

risdictions, or the federal government to justify a search of any area where the probationer might be located regardless of whether it furthers the goal of rehabilitation of the probationer subject to the warrantless search condition. *See Murry v. Commonwealth,* 762 S.E.2d 573, 580 (Va. 2014) ("Law enforcement officers, however, do not have the same responsibility as probation officers with respect to rehabilitating probationers."). This "consent," when taken to its logical conclusion and without a minimum standard of reasonable suspicion, would allow federal law enforcement officers to compare their federal gun registration database against the records of all known felons who are on probation and search for guns in homes where the probationers reside and vehicles in which the probationers have an ownership interest notwithstanding the rights of other citizens. This concern is why court action is necessary in limiting the substantial authority granted to law enforcement through the practice of a warrantless search condition.

While the risk of recidivism has been utilized as a justification for the warrantless search condition, this risk of recidivism continues even after the probationer completes his or her term of probation. A defendant who is convicted of a criminal offense committed after the defendant has completed a term of probation is still considered a recidivist; yet, the defendant retains his or her Fourth Amendment rights upon completion of probation.

Even if a probationer may voluntarily consent to suspicionless, warrantless searches as a condition of probation and thus waive his or her Fourth Amendment rights, the State has failed to present any evidence surrounding the circumstances lead-

ing to Mrs. Hamm signing the order that included the warrantless search condition. "The consent exception to the warrant requirement applies when a person voluntarily consents to a search." *State v. Reynolds,* 504 S.W.3d 283, 306 (Tenn. 2015) (citing *Schneckloth v. Bustamante,* 412 U.S. 218,219 (1973); *State v. Berrios,* 235 S.W.3d 99, 109 (Tenn. 2007)). The State bears the burden of establishing that "'consent was, in fact, freely and voluntarily given.'" *Reynolds,* 504 S.W.3d at 306 (quoting *Schneckloth,* 412 U.S. at 222). "'The pertinent question is . . . whether the [individual's] act of consenting is the product of an essentially free and unconstrained choice. If the [individual's] will was overborne and his or her capacity for self-determination critically impaired, due process is offended.'" *Id.* at 306-07 (quoting *State v. Cox,* 171 S.W.3d 174, 185 (Tenn. 2005)). The issue of whether a person voluntarily consented to a search is determined based upon the totality of the circumstances in each case. *Id* at 307.

Although the prosecutor referenced a guilty plea during the suppression hearing, no evidence was presented during the hearing establishing the terms of any plea agreement that resulted in the convictions for which Mrs. Hamm was on probation. It is unknown whether probation was agreed to by the parties under the terms. of the plea agreement or whether probation was ordered by the trial court following a sentencing hearing. No evidence was presented to establish whether the warrantless search condition was ordered by the trial court as a condition of Mrs. Hamm's probation or whether the condition was imposed by the office supervising Mrs. Hamm's probation. No evidence was presented regarding the time and place where

Mrs. Hamm signed to order that included the warrantless search condition, whether her counsel was present, whether the condition was reviewed with Mrs. Hamm before she signed it, and whether she understood the implications of the warrantless search condition. Finally, no proof was presented regarding Mrs. Hamm's "age, education, intelligence, knowledge, maturity, sophistication, [and] experience," all of which are relevant circumstances. *Cox,* 171 S.W.3d at 185. Most of this evidence could have been presented through Mrs. Hamm's probation officer, who testified at trial, but that the State failed to question the probation officer about any of the circumstances under which Mrs. Hamm signed the probation order. Thus, the State failed to meet its burden of establishing that Mrs. Hamm voluntarily consented to warrantless searches by signing the order that included the condition.

In conclusion, I concur with the majority opinion affirming the trial court's granting of the Defendants' motion to suppress evidence seized during the search of their home. At a minimum, reasonable suspicion should be required for a government agency to conduct a warrantless search of a probationer who is subject to a warrantless search condition of his or her probation. Moreover, the trial court should inform a defendant of the warrantless search condition during any plea colloquy and any knowing and intelligent waiver of a defendant's Fourth Amendment rights as a condition of probation should be affirmed in open court. Finally, limits should be placed on what agencies and jurisdictions may utilize the warrantless search condition to conduct a warrantless search of the probationer based on reasonable suspicion.

JOHN EVERETT WILLIAMS, JUDGE

APPENDIX F

IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE AT JACKSON
January 4, 2017 Session

No. W2016-01282-CCA-R3-CD
STATE OF TENNESSEE

v.

ANGELA CARRIE PAYTON HAMM
AND DAVID LEE HAMM

Appeal from the Circuit Court of Obion County
No. CC-16-CR-15
Jeff Parham, Judge

Filed: August 11, 2017

DISSENTING OPINION

ALAN E. GLEN, J., dissenting.

I dissent from the majority opinion for reasons which I will explain.

The majority is correct that there is a split of authority as to whether reasonable suspicion must exist before a search may be made pursuant to a probation order providing that, as a condition of probation, the probationer is subject to warrantless searches. See Jay M. Zitter, **Validity of Requirement That as Condition of Probation, Defendant Submit to Warrantless Searches**,

99 A.L.R.5th 557 (2002). However, I do not believe it is necessary for this court to make a determination as to this question, for it is clear that the officers had reasonable suspicion to search Angela Hamm's residence.

Regarding the addictive nature of methamphetamine, the Tennessee Court of Appeals has explained:

> "Methamphetamine is powerfully addictive. It has one of the highest recidivism rates of all abused substances. Research demonstrates that a severe methamphetamine abuser's brain functioning does not return to normal for up to one year after the abuse ends. According to Dr. John Averitt, a psychologist and drug treatment counselor in Cookeville, Tennessee, "[a] chronic meth user's brain is never the same again. Normal pleasures, like a trip to the beach or a pleasant meal, no longer feel good. You've got to keep using the drug to feel that pleasure, or take the drug to stop the terrible feelings that result." For these reasons, the Tennessee Governor's Task Force recommends treatment programs with durations of at least twelve months to help recovering methamphetamine addicts."

In the matter of April F., Dylan F., and Devin F., No. W2010-00803-COA-R3-PT, 2010 WL 4746245, at *5 n.9 (Tenn. Ct. App. Nov. 22, 2010) (quoting **In re M.J.M. JR., L.P.M., & C.A.O.M**., No. M2004-02377-COA-R3-PT, 2005 WL-873302, at *10 (Tenn. Ct. App. Apr. 14, 2005)).

Considering the totality of the circumstances, it is clear that the officers had reasonable suspicion to make the limited search of the Defendants' residence. They knew that Angela Hamm was on pro-

bation for the manufacture of a controlled substance and had received information from sources, of uncertain reliability, that she was in possession of methamphetamine, a powerfully addictive drug. So, officers went to the residence and, not receiving a response to their knock, asked a teenaged boy in the yard if others were present. He replied that they were in a shop behind the house, which officers then entered. They saw three men, monitoring feeds from four surveillance cameras aimed around the residence. One of the men quickly turned off the monitor, after seeing the officers, and then denied that it had been turned on. Given all of this, the officers clearly had reasonable suspicion that Angela Hamm had returned to the drug business. Thus, their search of the Defendants' residence was permitted by the probation order.

I further disagree with the majority in concluding that officers did not have the right to seize items, apparently, of David Hamm, who was not on probation. In fact, it is difficult to envision how they could have avoided doing so, since the Defendants shared a bedroom and a closet. Thus, under the doctrine of common authority, I believe that David Hamm's drugs were lawfully seized as well.

Accordingly, I would reverse the trial court's determination that the search and the seizure of the drugs were unlawful and would reinstate the indictment as to both Defendants.

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ALAN E. GLENN, JUDGE

APPENDIX G

IN THE CIRCUIT COURT OF
OBION COUNTY, TENNESSEE

Docket No. CC-16-CR-15

STATE OF TENNESSEE

v.

ANGELA CARRIE PAYTON HAM AND
DAVID LEE HAMM

Filed: June 6, 2016

ORDER DISMISSING INDICTMENT

On March 22, 2016, the Court heard Motions to Suppress the evidence in this cause as to both defendants and took the matter under advisement.

On May 2, 2016, the Court ruled that a valid probation agreement providing in paragraph 7 that, "I agree to a search, without a warrant, of my person, vehicle, property, or place or residence by any Probation/Parole Officer or law enforcement officer, at any time" still requires reasonable suspicion and that the facts of this case did not support a finding of reasonable suspicion. The Court further ruled that it was not required under the circumstances to determine the second issue of whether the Probationer by executing a probation agreement gives third-party consent to search of the residence of her later acquired husband, the Co-Defendant in the case.

On June 6, 2016, the State appeared before the Court and announced its inability to proceed with the prosecution. Upon motion of the defendants to dismiss the indictment, the Court granted the motion to dismiss

IT IS SO ORDERED.

Entered this 6th day of June, 2016.

/s/[Illegible]
CIRCUIT JUDGE

APPROVED FOR ENTRY:

/s/ [Illegible]
Assistant District Attorney

/s/ [Illegible]
Attorney for Defendant Angela Hamm

/s/ [Illegible]
Attorney for Defendant David Hamm

APPENDIX H

IN THE CIRCUIT COURT OF TENNESSEE FOR THE TWENTY SEVENTH JUDICIAL DISTRICT AT UNION CITY, OBION COUNTY

Docket No. CC-16-CR-15

STATE OF TENNESSEE,

v.

ANGELA CARRIE PAYTON HAMM,
DEFENDANT

Docket No. CC-16-CR-15A

STATE OF TENNESSEE,

vs.

DAVID LEE HAMM,
DEFENDANT

Filed: May 2, 2016

ORDER ON MOTION TO SUPRRESS

THIS MATTER is before the Court on Co-Defendant's Motions to Suppress evidence seized as a result of a Warrantless search, where Defendant, Angela Hamm, is subject to a valid probation agreement. The agreement provides under paragraph 7 that, "I agree to · a search, without a warrant, of my person, vehicle, property, or place of residence by any Probation/Parole Officer or law enforcement officer, at any time."

It is undisputed that agents of the 27th Judicial Drug Task force went to the residence of the Defendant to search based on the fact the Defendant was on probation. It is further undisputed that the officer would not have enough probable cause to support the application of a search warrant.

Previous case law set forth the proposition that an officer can search a probationer's residence pursuant to the probation agreement, if the officer has reasonable suspicion of criminal activity or violation of the order.

"When an officer has reasonable suspicion that the probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interest is reasonable", U.S. vs Knight, 534 U.S. 121.122(2001).

The state takes the position that reasonable suspicion is present in the case. However, the Court disagrees with the interpretation of the evidence for the following reasons:

1) Officer James Hall received a tip from a person he had pulled over on a traffic stop that generally said there were some "heavy players" in the Obion County Glass Community.

2) This person however never mentioned a name or how she knew this information.

3) Officer Hall suggested the name of Defendant David Hamm, to the person who winked and smiled, but never mentioned the Defendant Angela Hamm.

4) Officer Ben Yates testified he received information from a reliable informant that

there were some people in Glass "doing it big."

5) The informant was not identified, nor was there any indication as to why the informant was reliable.

6) The informant's information was second-hand information from another informant who had attempted unsuccessfully to purchase drugs from another resident (Clifton Hamm) at the location.

The Court can find nothing by way of articulable facts to support the reasonable suspicion of the officer to justify a search pursuant to the probation order and therefore Grants the Motion to Suppress.

The Court is not required under the circumstances to determine the second issue of whether the Probationer by executing a probation agreement gives third-party consent to search the residence of her later acquired husband, the Co-Defendant herein.

ENTERED this 2 day of May, 2016.

/s/ Jeff Parham
JEFF PARHAM, CIRCUIT JUDGE