PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4440

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

JAVION SCOTT,

Defendant – Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Malcolm J. Howard, Senior District Judge. (5:17-cr-00136-H-1)

Argued: September 18, 2019 Decided: October 25, 2019

Before KING and KEENAN, Circuit Judges, and Joseph R. GOODWIN, United States District Judge for the Southern District of West Virginia, sitting by designation.

Affirmed by published opinion. Judge King wrote the opinion, in which Judge Keenan and Judge Goodwin joined.

ARGUED: Jaclyn Lee DiLauro, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Raleigh, North Carolina, for Appellant. Phillip Anthony Rubin, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee. **ON BRIEF:** G. Alan DuBois, Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Raleigh, North Carolina, for Appellant. Robert J. Higdon, Jr., United States Attorney, Jennifer P. May-Parker, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

KING, Circuit Judge:

Defendant Javion Scott pleaded guilty in the Eastern District of North Carolina to possession of a firearm after having been convicted of a felony, in contravention of 18 U.S.C. § 922(g)(1). As part of a conditional guilty plea, Scott reserved his right to appeal the denial of his motion to suppress the firearm evidence underlying his conviction. On appeal, he maintains that the firearm evidence was seized during an unconstitutional warrantless search of his apartment.

At the time of the contested search, Scott was a North Carolina post-release supervisee. As part of his supervision, Scott was subject to a statutory search condition (the "statutory condition") that authorized warrantless searches of his residence by *a* probation officer. He was also subject to a search condition contained in his supervision agreement (the "agreement condition") that authorized warrantless searches of his residence by *his* assigned probation officer. Scott claims that the agreement condition — rather than the statutory condition — must control, and that his Fourth Amendment rights were violated because his assigned probation officer did not attend the search of his apartment. He also contends that, regardless of which condition controls, his Fourth Amendment rights were contravened because the search was conducted for purposes not reasonably related to his post-release supervision and without any individualized suspicion of criminal activity. As explained below, we reject Scott's contentions and affirm the district court's denial of his motion to suppress.

I.

A.

In June 2010, Scott was convicted in the Superior Court of Cumberland County, North Carolina, of violating North Carolina General Statute section 14-27.5(A), which resulted in an adjudication of guilt on a second-degree sexual offense. The state court sentenced Scott to a term of imprisonment ranging from 60 to 81 months. Upon his release, Scott was placed on state post-release supervision, which the North Carolina Post-Release Supervision and Parole Commission (the "Commission") administered.

North Carolina General Statute section 15A-1368.4 governed Scott's post-release supervision. That statute lists a bevy of requirements, some mandatory and others discretionary. For example, section 15A-1368.4(b) — entitled "Required Condition" — mandates that the Commission impose an express condition forbidding supervisees from committing additional crimes while on supervision. Section 15A-1368.4(c), on the other hand, lists several discretionary conditions that the Commission "may impose" on any supervisee.

Scott's adjudication of guilt subjected him to more required conditions than the average post-release supervisee. Section 15A-1368.4(b1) — entitled "Additional Required Conditions for Sex Offenders and Persons Convicted of Offenses Involving Physical, Mental, or Sexual Abuse of a Minor" — lists eight additional controlling conditions that apply to individuals, like Scott, who were convicted of certain sexual offenses. Scott's

appeal involves one of those additional controlling conditions — the statutory condition. The statutory condition provides that a supervisee shall

> [s]ubmit at reasonable times to warrantless searches by *a* post-release supervision officer of the supervisee's person and of the supervisee's vehicle and premises while the supervisee is present, for purposes reasonably related to the post-release supervision, but the supervisee may not be required to submit to any other search that would otherwise be unlawful. For purposes of this subdivision, warrantless searches of the supervisee's computer or other electronic mechanism which may contain electronic data shall be considered reasonably related to the post-release supervision.

N.C. Gen. Stat. § 15A-1368.4(b1)(8) (emphasis added).

In drafting Scott's supervision agreement, however, the Commission failed to recite the statutory condition verbatim. Instead, the Commission came up with the agreement condition, which required that Scott "[s]ubmit at reasonable times to searches of my person, premises, or any vehicle under my control by *my* supervising officer for purposes reasonably related to my supervision." *See* J.A. 38 (emphasis added).[1]

B.

In November 2016, Courtney Thomas, a probation and parole officer with the North Carolina Department of Public Safety ("NCDPS"), took over supervision of Scott from another NCDPS officer.[2] When Thomas began supervising Scott, he was classified as a

[1] Citations herein to "J.A.__" refer to the contents of the Joint Appendix filed by the parties in this appeal.

[2] In reviewing the denial of a motion to suppress, we "defer to the district court's factual findings and do not set them aside unless [they are] clearly erroneous." *United States v. Stevenson*, 396 F.3d 538, 541 (4th Cir. 2005). We thus accept the facts related in the magistrate judge's Memorandum and Recommendation, which the district court

validated gang member due to his refusal to remove or cover gang-related tattoos. And Thomas knew that Scott had previously violated his curfew and had been disrespectful to NCDPS officers. Although Thomas had no such issues with Scott, his failure to obtain employment or enroll in continuing education classes bothered her. Thomas became concerned when she later observed Scott wearing "flashy" things — a necklace, mouth grill, watch, and "expensive looking" shoes — because she did not understand how Scott could afford those luxuries without a job. *See* J.A. 300.

At some point during Thomas's supervision of Scott, NCDPS asked Thomas to identify a few supervisees to be searched as part of Operation Spring Sweep, a multi-agency operation involving federal and state law enforcement agencies. The Sweep had two main purposes — to locate and arrest individuals with outstanding warrants or who had absconded from NCDPS, and to conduct warrantless searches of supervisees subject to search conditions. Thomas decided that Scott should be searched as part of the Sweep because of her suspicions regarding his extravagant jewelry and because NCDPS policy mandated a search of Scott within the succeeding forty-five days.[3]

On March 29, 2017 — the second day of Operation Spring Sweep — a search team arrived at Scott's apartment in Fayetteville at approximately 7:20 a.m. NCDPS officer

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adopted by its Order denying Scott's motion. We recite the facts in the light most favorable to the government. *See United States v. Palmer*, 820 F.3d 640, 644 (4th Cir. 2016).

[3] NCDPS policy requires a search of supervisees with actively validated gang affiliations at least every 180 days. And supervisees convicted of certain sexual offenses must also be searched at least every 180 days. Scott fell into both categories.

Becky Staley led the search team. She was accompanied by three other NCDPS officers, ATF special agent Thomas Wishon, an additional ATF special agent, a deputy sheriff from the Cumberland County Sheriff's Office, a K-9 unit from the State Department of Corrections, an officer from the Fayetteville Police Department, and a trooper from the North Carolina Highway Patrol. Thomas did not attend the search, though she did attempt to delegate her authority to conduct warrantless searches of Scott to Staley.

Upon arriving at the apartment building, the four NCDPS officers led the search team up the stairs to Scott's apartment. One of the NCDPS officers knocked on Scott's door and announced the presence of the search team. The other three NCDPS officers stood directly outside the door on a landing at the top of the stairs. Wishon and his ATF colleague stood on the staircase descending from the landing; the remaining officers stood behind them. After the knock on the door, Staley heard noises coming from inside the apartment. She then heard the occupants say that they were getting dressed. But several minutes passed without anyone opening the door. The NCDPS officer who had knocked on Scott's door then knocked again. This time, an unclothed Scott opened the apartment door. Scott's girlfriend joined him at the door, wearing only her underwear. Staley advised Scott that the officers were there to conduct a warrantless search of his apartment. Scott permitted the officers to enter his apartment, though he would have been arrested had he denied them entry.

The NCDPS officers entered the apartment first, handcuffing Scott and his girlfriend after allowing Scott to use the restroom. ATF agent Wishon and the remaining law enforcement officers entered the apartment only after being told to do so by one of the

NCDPS officers. Thereafter, the NCDPS and other officers began searching the apartment. Soon after the search began, Wishon noticed that a door leading out onto the apartment's balcony was slightly ajar. As Wishon stepped onto the balcony and looked over the railing, he noticed two objects resembling firearms on the ground below. Upon further investigation, Wishon confirmed that the two objects he saw were indeed handguns. He also located — within the immediate vicinity of the two firearms — a high-capacity magazine, ammunition, and a purse that contained identification belonging to Scott's girlfriend.

Shortly thereafter, Wishon discovered that one of the handguns had been reported stolen. Because Wishon found the firearms near the identification card of Scott's girlfriend, he decided to question her. After waiving her *Miranda* rights, Scott's girlfriend admitted to Wishon that she had purchased the stolen handgun from unknown men in Fayetteville and that she had purchased the other handgun from a cousin. She told Wishon that she obtained the firearms because of ongoing threats against Scott's family and that she kept them on a chair in the bedroom she shared with Scott. She also admitted that Scott had previously pulled the slide back on the stolen handgun to "check it." *See* J.A. 305.

As Wishon conducted his investigation into the two firearms, the other members of the search team continued to search Scott's apartment. The officers located several items during the search, including marijuana. Pursuant to the statutory condition, officers also searched Scott's cell phone after he provided the phone's access code. The search of the phone revealed a photograph of Scott holding a handgun. But the handgun in the photograph did not match either of the firearms Wishon had located and seized from the

ground outside the apartment. While searching for the handgun in the photograph, officers discovered that a Black Kia Optima located outside the apartment was registered to Scott. A search of the Kia revealed more marijuana and a third firearm that appeared to be the same make and model as the handgun in the photograph on Scott's cell phone. Federal law enforcement officers subsequently arrested Scott.

C.

On April 24, 2017, a grand jury in the Eastern District of North Carolina indicted Scott for possession of a firearm after having been convicted of a felony, in contravention of 18 U.S.C. § 922(g)(1). Scott moved to suppress the evidence seized during the warrantless search of his apartment (along with the evidence found in his automobile and on his cell phone), asserting that the search team did not comply with the requirements of the agreement condition because Thomas — his assigned probation officer — did not attend the search. Scott also contended that the warrantless search violated the requirements of the statutory condition because the search was not reasonably related to his supervision and because the search team lacked any individualized suspicion that he had engaged in criminal activity.

Approximately three months after Scott filed his motion to suppress, the magistrate judge conducted a suppression hearing in Greenville. At the hearing, the magistrate judge heard evidence from Thomas, Staley, Wishon, and Scott's mother. Thomas, Staley, and Wishon described the search of Scott's apartment, explaining how Thomas had selected Scott for the search and how Staley and Wishon had conducted their aspects of the search. In seeking to justify Scott's possession of the firearms, Scott's mother testified about his

tumultuous tenure in prison. And to undercut Thomas's testimony regarding her suspicions about Scott's jewelry, Scott's mother stated that the "flashy" jewelry likely belonged to Scott's deceased brother.

The magistrate judge questioned the lawyers about the discrepancy between the language of the statutory condition and that of the agreement condition. Scott's lawyer asserted that the Commission's decision to deviate from the specific terms of the statutory condition in writing the agreement condition amounted to a controlling interpretation of the ambiguous post-release supervision statute. The government disagreed, contending that the statutory condition controlled.

After considering the evidence and the arguments, the magistrate judge submitted her Memorandum and Recommendation to the district court, recommending that the motion to suppress be denied. *See United States v. Scott*, No. 5:17-cr-00136 (E.D.N.C. Dec. 20, 2017), ECF No. 43. The magistrate judge agreed with the government that the statutory condition — not the agreement condition — controlled. The magistrate judge then concluded that the search did not violate Scott's Fourth Amendment rights because it complied with the statutory condition, in that it was conducted by NCDPS officers for purposes reasonably related to Scott's post-release supervision. By its Order, the district court adopted the magistrate judge's Memorandum and Recommendation, overruling Scott's objections. *See United States v. Scott*, No. 5:17-cr-00136 (E.D.N.C. Feb. 13, 2018), ECF No. 53.

Scott thereafter pleaded guilty to the single-count indictment, expressly reserving his right to appeal the denial of his motion to suppress. The district court sentenced Scott

to seventy-eight months in prison. Scott timely noted this appeal, and we possess jurisdiction pursuant to 28 U.S.C. § 1291.

II.

In assessing a district court's denial of a motion to suppress evidence, "we review the court's factual findings for clear error and its legal determinations de novo." *United States v. Abramski*, 706 F.3d 307, 313-14 (4th Cir. 2013).

III.

A.

Scott first challenges the warrantless search of his apartment on the ground that Thomas, his assigned probation officer, was not present during the search. In so doing, Scott points to the agreement condition, which states that Scott must submit to warrantless searches by *his* supervision officer — a deviation from the language of the statutory condition, which only requires that *a* supervision officer conduct the search.

Scott claims that by changing the wording of the statute in his supervision agreement, the Commission interpreted an ambiguous statute, and that its interpretation is entitled to deference under the Supreme Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). But it is far from clear that the *Chevron* deference principles can ever apply to state agency interpretations of state law. *See id.* at 843-44 ("If *Congress* has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute

by regulation." (emphasis added)). Moreover, assuming *Chevron* applies in the state context, the Commission's interpretation of the statutory condition would not be entitled to any deference, in that it does not bear any of the hallmarks of formal rulemaking or adjudication necessary to trigger *Chevron* deference. *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

Scott next contends that the agreement condition modified the statutory condition as it applied to him. Because, however, Scott's post-release supervision stemmed from a sexual offense conviction, the statutory condition was mandated under state law, and the Commission was powerless to modify the statutory condition. *See* N.C. Gen. Stat. § 15A-1368.4(b1) (listing the statutory condition under the heading "Additional Required Conditions for Sex Offenders and Persons Convicted of Offenses Involving Physical, Mental, or Sexual Abuse of a Minor" and noting that the conditions specified in that provision are "controlling conditions"). That the Commission had no authority to modify the required statutory condition is further bolstered by the General Assembly's decision to include in the post-release supervision statute a section entitled "Discretionary Conditions" — that the Commission "may impose." *See id.* § 15A-1368.4(c).

Finally, Scott urges that the district court should have at least read the language of the statutory condition in concert with the language of the agreement condition. But the court could not have read the clear language of the statutory condition in concert with the language in a supervision agreement drafted by the Commission. *See Crespo v. Holder*, 631 F.3d 130, 133 (4th Cir. 2011) ("It is well established that when the statute's language is plain, the sole function of the courts — at least where the disposition required by the text

is not absurd — is to enforce it according to its terms." (internal quotation marks omitted)). The statutory condition specifically provides that warrantless searches of supervisees may be undertaken by any post-release supervision officer. That ends our inquiry. Scott's reliance on the agreement condition is therefore rejected.

B.

Scott next challenges the warrantless search of his apartment on the ground that it did not comply with the statutory condition, as he contends that the search was not conducted for purposes reasonably related to his post-release supervision. Specifically, Scott recognizes that the statutory condition is generally constitutional under the Supreme Court's decision in *Griffin v. Wisconsin*, 483 U.S. 868 (1987), but he asserts that the search of his apartment contravened the Fourth Amendment because it did not adhere to the statutory condition.

The *Griffin* Court approved the warrantless search of a probationer's home conducted in accordance with a Wisconsin regulation authorizing such a search, reasoning that the search was justified under the "special needs" doctrine. *See* 483 U.S. at 873-74 ("A State's operation of a probation system, like its operation of a school, government office or prison, . . . presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements."). As the Court explained, the warrantless search in *Griffin* "was 'reasonable' within the meaning of the Fourth Amendment because it was conducted pursuant to a valid regulation governing probationers." *Id.* at 880. We subsequently relied on the *Griffin* decision to uphold a North Carolina probationer supervision statute that is nearly identical to the statutory condition

at issue in this appeal, as well as a search conducted in conformity with the probation statute. *See United States v. Midgette*, 478 F.3d 616, 622-24 (4th Cir. 2007).[4]

Scott's contention that the warrantless search of his apartment breached the statutory condition focuses on the statutory condition's requirement that a supervision search be conducted "for purposes reasonably related to the post-release supervision." *See* N.C. Gen. Stat. § 15A-1368.4(b1)(8). As an initial matter, we must discern the meaning of the term "reasonably related," as used in the statutory condition. In interpreting that term, "we must take [the statute] as it has been interpreted by . . . state courts." *See Griffin*, 483 U.S. at 875. "Whether or not we would choose to interpret a similarly worded federal [provision] in [a similar] fashion, we are bound by the state court's interpretation, which is relevant to [the] constitutional analysis only insofar as it fixes the meaning of the [statute]." *Id.*

The state courts in North Carolina have not provided us with a comprehensive definition of "reasonably related," as used in the statutory condition. Nevertheless, the Court of Appeals of North Carolina recently discussed the General Assembly's decision to amend the probationer supervision statute, which contains nearly identical language to the statutory condition. *See State v. Powell*, 800 S.E.2d 745 (N.C. Ct. App. 2017). The General Assembly, in amending the probation statute, replaced the term "reasonably related" with

[4] Although the Supreme Court's *Griffin* decision and our *Midgette* opinion involved probationers rather than post-release supervisees, such as Scott, the "special needs" doctrine does not turn on any such distinction. Rather, the doctrine requires a determination of whether the statute "assure[s] that the searches conducted pursuant to it are justified by the State's special needs." *See Midgette*, 478 F.3d at 624.

"directly related." *Id.* at 751. In evaluating the effect of that amendment, the court of appeals observed that "'[r]easonable' is defined, in pertinent part, as 'being or remaining within the bounds of reason.'" *Id.* (quoting Webster's Third New International Dictionary 1892 (1966)). Because the term "reasonably related" remains in the statutory condition, we accord the *Powell* definition some weight in evaluating Scott's contentions.

Bearing that definition in mind, we proceed to assess Scott's contention that the warrantless search of his apartment was not reasonably related to his supervision. Scott asserts, inter alia, that the search had nothing to do with his supervision because it occurred as part of Operation Spring Sweep, which he says the U.S. Marshals Service organized for generalized law enforcement purposes. As evidence of that theory, Scott points to the large number of law enforcement agencies involved. He also identifies press releases in which local law enforcement officials thank the Marshals Service for spearheading the operation. But pursuant to our precedent, the involvement of the Marshals Service and other law enforcement agencies does not render the warrantless search invalid.

In *Midgette*, Judge Niemeyer explained that "[w]hile North Carolina's probation law authorizes only probation officers to conduct warrantless searches, that authorization does not preclude the probation officer from obtaining help from the police department for the purpose of physically conducting the search." *See* 478 F.3d at 625-26. He further concluded — after examining two North Carolina state court decisions — that a probationer search would be valid even if a police officer had suggested the search, "so long as the search is authorized and directed by the probation officer." *See id.* at 626.

Here, NCDPS initiated and supervised the warrantless search of Scott's apartment. Although the Marshals Service organized Operation Spring Sweep, Thomas selected Scott for a search after her NCDPS supervisor asked her to choose a few supervisees to be searched as part of the Sweep. And a team of four NCDPS officers led the search team into Scott's apartment. Only after the NCDPS officers made initial contact with Scott did they request that the rest of the search team — comprised of police officers and federal agents — enter Scott's apartment to assist with the physical search of the premises. Additionally, NCDPS officer Staley, the team leader, actually supervised the search of Scott's apartment. Because Thomas decided that Scott's apartment should be searched and NCDPS officers initiated and supervised the search, *Midgette* compels the conclusion that the participation of law enforcement officers in the search did not render it invalid.

Scott also contends that the search was not reasonably related to his supervision because Thomas's proffered reasons for deciding to search Scott's apartment "do not hold up." *See* Br. of Appellant 20. But Thomas's two reasons for selecting Scott for a search are reasonably related to his post-release supervision. First, Thomas decided to search Scott because she had suspicions regarding how he had obtained his "flashy" jewelry without a job. Though Scott's mother later testified that the jewelry came from Scott's dead brother, the record does not indicate that Thomas had any such knowledge when she selected Scott for a search. And a search of Scott's apartment could certainly shed light on the source of the jewelry and Scott's employment status. The search based on the suspicions surrounding the jewelry thus supported the purposes of two conditions of Scott's

supervision — the requirement that he maintain employment and the requirement that he refrain from engaging in new criminal conduct.

Second, Thomas selected Scott for a search because he was about forty-five days away from the deadline for a mandatory search pursuant to NCDPS policy. That policy requires that NCDPS conduct searches of validated gang members and those on supervision for certain sexual offenses every 180 days. Scott asserts that he should not have been subject to the 180-day search policy because he repeatedly told Thomas that he no longer associated with a gang. But Scott remained a validated gang member subject to the 180-day policy because he declined to remove or cover his gang tattoos. And even if he had not been a validated gang member, he would have been subject to the 180-day policy because his supervision stemmed from an adjudication of guilt on a sexual offense. Additionally, although Scott suggests that the search occurred too soon before the 180-day mark to be reasonably related to his supervision, NCDPS officers have discretion to decide precisely when to conduct the mandatory search within each 180-day period. Because routine searches of gang members and sexual offenders are required for those high-risk supervisees, Thomas's decision to search Scott's apartment under the 180-day policy was reasonably related to his supervision.

At bottom, the record supports the district court's determination that the warrantless search of Scott's apartment was not for the purpose of furthering general law enforcement goals. Rather, NCDPS officers undertook the search to ensure Scott's continued compliance with the terms of his supervision agreement.

C.

Finally, we briefly address Scott's attack on the warrantless search of his apartment for lack of individualized suspicion of criminal activity. In the circumstances of this case — where the search complied with the statutory condition because it was reasonably related to Scott's post-release supervision — our *Midgette* decision makes clear that no such individualized suspicion is required. *See* 478 F.3d at 624 (observing that Midgette's argument that the North Carolina probation statute was unconstitutional because it did not require reasonable suspicion "misunderstands *Griffin*'s 'special needs' rationale, which did not make individualized suspicion the *sine qua non* of a valid probation scheme"). Because the search of Scott's apartment complied with the statutory condition, we conclude — in accordance with the *Griffin* decision — that no Fourth Amendment violation occurred.[5]

IV.

Pursuant to the foregoing, we affirm the district court's denial of Scott's motion to suppress.

AFFIRMED

[5] Having concluded that the search of Scott's apartment did not violate the Fourth Amendment under the framework established by the Supreme Court in *Griffin*, we decline Scott's invitation to evaluate the constitutionality of the search under the framework established by the Court in *United States v. Knights*, 534 U.S. 112 (2001) (applying traditional Fourth Amendment balancing test where warrantless search of probationer did not qualify as *Griffin*-type "special needs" search).

UNITED STATES DISTRICT COURT

Eastern District of North Carolina

UNITED STATES OF AMERICA
v.
JAVION SCOTT

JUDGMENT IN A CRIMINAL CASE

Case Number: 5:17-CR-136-1H

USM Number: 63388-056

Jennifer A. Dominguez
Defendant's Attorney

THE DEFENDANT:

☑ pleaded guilty to count(s) 1 (Indictment)

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 922(g)(1), 18 U.S.C. § 924(a)(2)	Possession of a Firearm by a Felon	3/29/2017	1

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

6/14/2018
Date of Imposition of Judgment

Signature of Judge

Honorable Malcolm J. Howard, Senior United States District Judge
Name and Title of Judge

6/14/2018
Date

AO 245B (Rev. 09/17) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: JAVION SCOTT
CASE NUMBER: 5:17-CR-136-1H

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

78 months

☑ The court makes the following recommendations to the Bureau of Prisons:

The court recommends the defendant be reviewed for medical and psychological issues at the earliest time possible.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 09/17) Judgment in a Criminal Case
Sheet 3 — Supervised Release

DEFENDANT: JAVION SCOTT
CASE NUMBER: 5:17-CR-136-1H

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

3 years

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

AO 245B (Rev. 09/17) Judgment in a Criminal Case
Sheet 3A — Supervised Release

DEFENDANT: JAVION SCOTT
CASE NUMBER: 5:17-CR-136-1H

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: JAVION SCOTT
CASE NUMBER: 5:17-CR-136-1H

ADDITIONAL STANDARD CONDITIONS OF SUPERVISION

The defendant shall not incur new credit charges or open additional lines of credit without approval of the probation office.

The defendant shall provide the probation office with access to any requested financial information.

DEFENDANT: JAVION SCOTT
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SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall participate as directed in a program approved by the probation office for the treatment of narcotic addiction, drug dependency, or alcohol dependency which will include urinalysis testing or other drug detection measures and may require residence or participation in a residential treatment facility.

2. The defendant shall participate in a program of mental health treatment, as directed by the probation office.

3. The defendant shall participate in such vocational training program as may be directed by the probation office.

4. The defendant shall consent to a warrantless search by a United States Probation Officer or, at the request of the probation officer, any other law enforcement officer, of the defendant's person and premises, including any vehicle, to determine compliance with the conditions of this judgment.

5. The defendant shall cooperate in the collection of DNA as directed by the probation officer.

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CASE NUMBER: 5:17-CR-136-1H

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 100.00	$	$ 2,500.00	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☑ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☑ the interest requirement is waived for the ☑ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____ , or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☑ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☑ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

Payment of the special assessment and fine is due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
NO. 5:17-CR-136-1H

UNITED STATES OF AMERICA,	)	
	)	
v.	)	
	)	
JAVION SCOTT,	)	**ORDER**
	)	
Defendant.	)	

This matter is before the court on defendant's motion to suppress [DE #20], to which the government responded and defendant replied. Following an evidentiary hearing on September 28, 2017, and submission of supplemental memoranda by both parties, United States Magistrate Judge Kimberly A. Swank entered a memorandum and recommendation (M&R) on December 20, 2017 recommending denial of the motion. The defendant filed objections, and this matter is ripe for adjudication. Under Rule 59(b) of the Federal Rules of Criminal Procedure, a district judge must consider de novo any portion of the M&R to which objection is properly made.

Defendant objects to the M&R, noting the following specific objections:

(A) The M&R omits and minimizes material facts.

First, defendant objects that the M&R omits the fact Scott's apartment was searched pursuant to Operation Spring Sweep, a large-

scale law enforcement operation initiated and led by the United States Marshal's Service. This objection is without merit. The M&R states "Operation Spring Sweep was a multi-agency operation organized by the United States Marshal Service, ATF, NCDPS, and local law enforcement which took place March 28-29, 2017." This statement, along with other information in the M&R, appropriately gives the facts and circumstances of the organization of the search. Next, defendant objects that the M&R omits the fact that the specific conditions of Scott's post-release supervision provided that only his supervising officer could conduct a warrantless search for purposes reasonably related to his supervision. This objection is also without merit. The M&R thoroughly analyzes this issue and correctly concludes that the supervision language does not override the statutory authority granted by the General Assembly of North Carolina

(B) The defendant makes the following legal objections: (1) the M&R erroneously concludes that the warrantless search is lawful; (2) the M&R erroneously construes N.C. Gen. Stat. § 15A-1368.4(b1)(8); (3) the M&R erroneously concludes that the warrantless search of Scott's cell phone was lawful.

These last three objections are also without merit. This court notes the difficult issues each of these warrantless search cases raise. The court has carefully reviewed the facts and

circumstances of this particular search as well as completed a thorough analysis of the existing case law. After careful consideration, the court finds the magistrate judge has made proper and correct legal conclusions.

This court, having conducted a de novo review of the M&R and other documents of record, finds the recommendation of the magistrate judge is in accordance with the law and should be approved.

Accordingly, the court hereby adopts the recommendation of the magistrate judge as its own; and, for the reasons stated therein, the defendant's motion to suppress [DE #20] is hereby DENIED.

This 13th day of February 2018.

Malcolm J. Howard
Senior United States District Judge

At Greenville, NC
#26

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:17-CR-136-1H(2)

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	**MEMORANDUM &**
JAVION SCOTT,	)	**RECOMMENDATION**
	)	
Defendant.	)	

This matter is before the court on Defendant's motion to suppress [DE #20], which has been referred to the undersigned for memorandum and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). The Government filed a response in opposition to the motion to suppress [DE #26], to which Defendant replied [DE #29]. To further develop the record, the undersigned conducted an evidentiary hearing on September 28, 2017, at which the Government and Defendant, with counsel, appeared. Defendant submitted supplemental briefing on October 10, 2017 [DE #37], and the Government filed a notice of supplemental authority on October 19, 2017 [DE #38]. Accordingly, the matter is now ripe for decision.

STATEMENT OF THE CASE

On April 24, 2017, a federal grand jury returned a one-count indictment charging Javion Scott ("Scott") with possession of a firearm by a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).[1] On June 21, 2017, Scott filed the instant motion

[1] Scott was initially charged via criminal complaint on March 29, 2017 [DE #1].

to suppress. Scott contends that his home was subjected to an unlawful warrantless search and that evidence was seized in violation of the Fourth Amendment. He also contends that his cellular telephone and automobile were searched unlawfully in the same course of action as the home search. He demands that any evidence obtained as a result of these searches be suppressed. The Government argues that Scott's state post-release supervision conditions rendered the search reasonable under the Fourth Amendment and, in the alternative, that the tangible evidence Scott seeks to suppress had been abandoned. For the reasons set forth below, the Government's argument that the conditions of Scott's post-release supervision rendered the search constitutional is meritorious. Accordingly, the undersigned recommends that Scott's motion be denied.

STATEMENT OF THE FACTS

At the evidentiary hearing on Scott's motion to suppress, the court heard the testimony of North Carolina Department of Public Safety ("NCDPS") Probation/Parole Officers Courtney Thomas and Becky Staley; Special Agent Jarrett Wishon of the United States Department of Justice's Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"); and the mother of Defendant, Ms. Brenda Scott. Based upon the witnesses' testimony and documentary evidence received, the undersigned makes the following findings of fact.

On June 8, 2010, Defendant was sentenced to a term of 60 to 81 months' imprisonment in the North Carolina Department of Corrections for Second-Degree

Sexual Offense.[2] Scott was released from North Carolina prison on November 14, 2016, and immediately placed on post-release supervision.[3]

North Carolina General Statute § 15A-1368.4 governed Scott's post-release supervision, and he was subject to a battery of conditions imposed by state law and the North Carolina Post-Release Supervision and Parole Commission. As a person convicted of a reportable offense as defined in N.C. Gen. Stat. § 14-208.6(4), Scott was subject to conditions beyond those imposed in standard, post-release supervision cases. *See* N.C. Gen. Stat. § 15A-1368.4(b1) (listing eight additional required post-release supervision conditions). Relevant here, Scott was subject to the following condition:

> Submit at reasonable times to warrantless searches by a post-release supervision officer of the supervisee's person and of the supervisee's vehicle and premises while the supervisee is present, for purposes reasonably related to the post-release supervision, but the supervisee may not be required to submit to any other search that would otherwise be unlawful. For purposes of this subdivision, warrantless searches of the supervisee's computer or other electronic mechanism which may

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[2] Scott pled guilty to N.C. Gen. Stat. § 14-27.5(A). (Def. Ex. 5.) That statute has since been amended and recodified as N.C. Gen. Stat. § 14-27.7. *See* 2015 N.C. Sess. Laws 181, §§ 9.(a), 9.(b).

[3] For purposes of this Memorandum & Recommendation, "parole/parolee" and "post-release supervision/post-release supervisee" are used interchangeably. Under North Carolina law, a person who is released from prison but who remains under state correctional supervision is a post-release supervisee. *See* N.C. Gen. Stat. § 15A-1368. North Carolina post-release supervision is administered by the state Post-Release Supervision and Parole Commission. N.C. Gen. Stat. § 15A-1368(b). This is consistent with the Supreme Court's definition of "parole" as described in *Samson v. California*, 547 U.S. 843, 850 (2006) ("[P]arole is an established variation on imprisonment of convicted criminals . . . . The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence." (quoting *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972))).

> contain electronic data shall be considered reasonably related to the post-release supervision.

N.C. Gen. Stat. § 15A-1368.4(b1)(8).

Courtney Thomas is a probation/parole officer employed by NCDPS who has worked for four years as a probation/parole officer in Cumberland County, North Carolina. She has no law enforcement experience beyond her career with NCDPS. She supervises approximately sixty people, all of whom have been convicted of a sex offense or validated as a gang member. Scott was added to her caseload in November 2016. Scott was previously supervised by four different Cumberland County probation/parole officers before his transfer to Officer Thomas' caseload.

Becky Staley is a probation/parole officer employed by NCDPS who has worked as a probation/parole officer for two years in Cumberland County, North Carolina. She works as a veterans' court officer and supervises approximately fifty people on probation or post-release supervision. At no point did she supervise Scott. She had, however, met Scott prior to the search at issue and was aware that he had previously violated the terms of his post-release supervision.

Special Agent Thomas Jarrett Wishon works for ATF and primarily investigates federal firearms offenses. He has worked for ATF since May 2014. He is the lead law enforcement agent in this case.

In November 2016, Scott's supervision was transferred to Officer Thomas. At that time, Officer Thomas knew that Scott had been validated as a gang member, had previously violated curfew while on post-release supervision, and had allegedly been disrespectful toward a prior probation/parole officer. At some point between

November 2016 and the end of March 2017, Officer Thomas removed Scott's curfew condition because he had no major violations or issues.

Officer Thomas had no information, either from her personal supervision of Scott or from local police, that Scott was active in a gang. Indeed, Scott had repeatedly stated to the Cumberland County probation/parole office that he was not in a gang. Nevertheless, Scott remained validated as a gang member by NCDPS primarily due to his refusal to cover or remove his gang-affiliated tattoos.

Although Officer Thomas had no major issues with Scott, Scott's lack of employment and lack of continuing education bothered Officer Thomas. In particular, Officer Thomas had observed Scott wearing "flashy" things, such as a necklace, grill, watch, and "expensive-looking" shoes and was suspicious as to how he came to acquire such items without employment. Scott's mother testified that Scott had received his deceased brother's jewelry after his death on June 23, 2016.

Pursuant to the local probation/parole office's policy, Scott was subject to an unannounced warrantless search every 180 days because of his sex offender status and an unannounced warrantless search every 180 days because of his gang validation status.[4] Historically, Officer Thomas has conducted such warrantless searches even if a supervisee was in compliance with the terms of his probation or parole.

[4] Documentation admitted into evidence indicates that this policy specifically required a search of "the offender's premises." (Gov't Ex. 1B.)

Operation Spring Sweep was a multi-agency operation organized by the United States Marshals Service, ATF, NCDPS, and local law enforcement which took place March 28–29, 2017. The operation had two primary purposes: (i) to locate and arrest people with outstanding warrants or who had absconded from probation/parole, and (ii) to conduct warrantless searches of probationers and parolees subject to warrantless searches as part of their conditions of supervision.

Officer Thomas was asked to select some of her supervisees for warrantless searches to be conducted as part of Operation Spring Sweep. Officer Thomas selected three or four supervisees from her caseload, including Scott. Officer Thomas selected Scott for a warrantless search because (1) she was suspicious of his "flashy" jewelry in the absence of any employment and (2) Scott was approximately forty-five days away from the deadline to be searched pursuant to the probation office's warrantless search policies for sex offenders and gang members.

On March 27, 2017, an Operation Spring Sweep planning meeting was held at the United States Courthouse in Fayetteville, North Carolina. At this meeting, federal, state, and local law enforcement officers participating in the operation (approximately 200 in all) were divided into teams.

On March 29, 2017, an Operation Spring Sweep search team searched the apartment at which Scott resided. The search team—comprised of Officer Staley, Agent Wishon, three other NCDPS probation/parole officers, ATF Special Agent Harrell, a deputy sheriff from the Cumberland County Sheriff's Office, a K9 unit from the state Department of Corrections, an officer from the Fayetteville, North Carolina,

Police Department, and a trooper from the North Carolina Highway Patrol—arrived at the apartment at approximately 7:20 a.m. (Gov't Ex. 5.) Officer Thomas was not part of the team that searched Scott's apartment. Officer Staley led the search team.

Scott's apartment was on either the second or third floor of an apartment building, which had balconies at the rear of the building.[5] Multiple staircases with landings led to the upper floors of the apartment building. Scott's balcony overlooked a yard of common area that was accessible to the public.

The four parole officers led the team to Scott's apartment. NCDPS Probation/Parole Officer Victor Brown[6] knocked on the door and announced the team's presence. The remaining parole officers stood on the landing immediately outside the apartment door. ATF Agents Wishon and Harrell stood on the staircase descending from this landing and thus were behind the parole officers. The remaining members of the search team were positioned behind Agents Wishon and Harrell on the staircase. After Officer Brown knocked and announced, Officer Staley heard

[5] The Government entered into evidence a photograph (Gov't Ex. 4, Photograph #008) of the rear of Defendant's apartment building, but neither Officer Thomas, Officer Staley, nor Agent Wishon testified to whether Defendant's apartment was on the second or third floor of the building. Agent Wishon testified that immediately before the search team entered Defendant's apartment, he and Agent Harrell were standing on the second-floor staircase behind the four probation officers. Officer Staley testified she could not remember whether the apartment was on the second or third floor.

[6] Officer Staley testified that "Officer Brown" knocked on the door and announced the search team's presence, but did not specify whether this was NCDPS Probation/Parole Officer Victor Brown or Akendra Brown. Officer Staley subsequently used the masculine pronoun "he" to refer to the person who knocked on Defendant's door. Therefore, the undersigned infers that this refers to Officer Victor Brown.

noises coming from inside the apartment and the apartment's occupants yelling that they were getting dressed. When the apartment's occupants did not open the door for several minutes, Officer Brown knocked and announced their presence a second time. Scott, unclothed, opened the apartment door after the second knock-and-announce. His girlfriend, Keisha Washington, appeared at the door shortly thereafter clothed only in her underwear. The parole officers then advised Scott and Washington they were there to conduct a warrantless search of the apartment. Scott "allowed" the parole officers to enter, although Officer Staley testified that Scott would have been arrested had he refused to permit them to enter.

Officer Victor Brown escorted Scott to the restroom so he could clothe and relieve himself. Both Scott and Washington were subsequently handcuffed by the parole officers for officer safety. Agent Wishon entered the apartment only after being told to do so by one of the parole officers. Scott was in the process of being handcuffed when Agent Wishon entered the apartment. The remaining search team members entered the apartment after Agent Wishon.

Once inside the apartment, the search team members fanned out to conduct the search. Both Officer Staley and Agent Wishon observed frozen meat on the kitchen counter, which they found odd. Agent Wishon quickly saw that the balcony door was cracked open, opened the door fully, and stepped onto the apartment balcony. He noticed trash on the balcony, and then peered over the railing. From his vantage point on the balcony, he saw what appeared to be firearms located on the ground below. He immediately went downstairs, circled around the outside of the

building to arrive at the rear of the building, verified that the objects were two handguns, and secured the scene. He also located a firearm magazine, ammunition, and a purse with Washington's identification card in the immediate vicinity of the handguns. Photographs entered into evidence also depict other objects on the ground next to the firearms. (Gov't Ex. 4, Photograph ##001–007.)

The team continued to search the apartment and discovered marijuana, children's toys, "new" items in shopping boxes and bags, an inflatable mattress in the second (not master) bedroom, and multiple sets of car keys. The parole officers also searched Scott's cellular telephone after he provided the passcode upon their request. The search of the cellular telephone revealed use of several social media websites and at least one photograph of Scott holding what appeared to be a firearm. The firearm observed in the cellular telephone photograph did not match either of the two handguns located on the ground below the apartment balcony. In search of the firearm depicted in the photograph, the Fayetteville Police Department officer identified a black Kia Optima automobile (Gov't Ex. 4, Photographs ##009–011) as being registered in Scott's name, and the probation officers located a set of car keys that matched this car. A search of the black Kia Optima registered in Scott's name revealed more marijuana and another firearm. The firearm discovered in the automobile appeared to be the same make and model as that depicted in the photograph located on Scott's cellular telephone.

As a result of locating the firearms below the balcony and Washington's identification card, Agent Wishon interrogated Washington about the firearms.

Agent Wishon verified that one of the firearms seized (a Glock handgun) was reported as stolen before initiating his interrogation of Washington. He first advised Washington of her *Miranda* rights, which she subsequently waived. Washington stated that she purchased one of the firearms (a Springfield handgun) from a cousin and the other firearm (the Glock) from unknown men in Fayetteville. Washington stated that Scott had at some time pulled the slide back on the Glock to check it. Washington stated she purchased the firearms because of ongoing threats against Scott's family and that she kept the guns on a black chair inside the bedroom she shared with Scott. During this interrogation of Washington, Scott was yelling at Washington to stop talking to Agent Wishon and to request an attorney.

Scott was subsequently arrested by federal law enforcement for being a felon in possession of a firearm that had traveled in or affected interstate commerce.

DISCUSSION

The Fourth Amendment guarantees the right of the people to be secure against unreasonable searches and seizures "of their persons, houses, papers, and effects." U.S. Const. amend. IV. "[T]he physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Payton v. New York*, 445 U.S. 573, 585 (1980) (quoting *United States v. United States District Court*, 407 U.S. 297, 313 (1972)). "[S]earches and seizures inside a home without a warrant are presumptively unreasonable." *Id.* at 586.

The Supreme Court has, however, "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 Fourth Amendment." *Samson v. California*, 547 U.S. 843, 853 (2006) (citing *Griffin v. Wisconsin*, 483 U.S. 868, 879 (1987), and *United States v. Knights*, 534 U.S. 112, 121 (2001)).

Moreover, "[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." *Knights*, 534 U.S. at 118–19 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

I. Standing and Abandonment

When the Government seeks to introduce evidence obtained through a warrantless search, it must prove by a preponderance of the evidence that the search was reasonable, i.e. one of the exceptions to the Fourth Amendment's warrant requirement applies. *See Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971) (government bears burden to show legality of warrantless search); *United States v. Matlock*, 415 U.S. 164, 177 n.14 (1974) (burden of proof applicable to a motion to suppress is preponderance of the evidence). However, a defendant seeking to suppress evidence must show that he had a reasonable expectation of privacy in the area searched. *United States v. Gray*, 491 F.3d 138, 144 (4th Cir. 2007) (citing *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980)). Thus, the burden of proof applicable to a suppression motion shifts from the defendant to the Government if and only if the defendant carries his burden to show that he had a reasonable expectation of privacy

that was infringed upon by Government action. *See United States v. Hill*, 649 F.3d 258, 263 (4th Cir. 2011) (noting that defendant had to concede that police had "reason to believe" he resided at a particular location in order to have reasonable expectation of privacy in the particular residence); *United States v. Pollins*, 145 F. Supp. 3d 525, 538 (D. Md. 2015) (explaining burden shifting). A defendant may point to evidence introduced by the Government to meet his burden and need not affirmatively introduce his own evidence. *United States v. Castellanos*, 716 F.3d 828, 846 (4th Cir. 2013) (Davis, J., dissenting) (quoting *United States v. Zermeno*, 66 F.3d 1058, 1062 (9th Cir. 1995)); *see also* 6 Wayne R. LaFave, Search & Seizure: A Treatise on the Fourth Amendment § 11.2(b) (5th ed. 2012).

The Government contends that Defendant abandoned the handguns found beneath his apartment balcony and, therefore, lacked a reasonable expectation of privacy in these objects. (Gov't Resp. Mot. Suppress [DE #26] at 6–8.) "When a person voluntarily abandons his privacy interest in property, his subjective expectation of privacy becomes unreasonable, and he is precluded from seeking to suppress evidence seized from it." *United States v. Stevenson*, 396 F.3d 538, 546 (4th Cir. 2005) (citing *United States v. Leshuk*, 65 F.3d 1105, 1111 (4th Cir. 1995), and *Abel v. United States*, 362 U.S. 217, 241 (1960)).

Here, no evidence was presented that Defendant abandoned the objects found beneath his apartment balcony. Agent Wishon testified that Keisha Washington reportedly threw the objects over the balcony. Therefore, the undersigned determines that the abandonment doctrine does not apply here.

The inevitable discovery doctrine is also inapplicable. Although the weapons were found in a publicly accessible area of the apartment complex, having apparently been tossed over the balcony after the search team knocked and announced its presence, no evidence was presented to suggest that the search team would have found the items beneath the apartment balcony but for the search of Scott's apartment. *See United States v. Thomas*, 955 F.2d 207, 209 (4th Cir. 1992) ("[T]he premise of the inevitable discovery doctrine is that the illegal search played no real part in discovery of incriminating evidence." (alteration in original) (quoting *United States v. Whitehorn*, 813 F.2d 646, 650 n.4 (4th Cir. 1987))).

All search team members were located in the stairwell and on the landing leading to Scott's apartment, and all search team members entered the apartment. Defendant has shown by a preponderance of the evidence that he had a reasonable expectation of privacy in his apartment and the items seized as a result of its search. The evidence further shows that the items located beneath the balcony were only discovered as a result of the search of Scott's apartment and, specifically, Agent Wishon's presence on the apartment balcony. Because the search team's presence played a very "real part" in the discovery of the incriminating items located beneath the balcony, the Government has not demonstrated that the evidence in question would have been discovered but for the challenged search. Accordingly, the court must determine whether the search was unreasonable.

II. Warrantless Searches of Parolees

Scott challenges the reasonableness of the search, contending (1) that it did not comply with the state law governing warrantless searches of parolees and the specific terms of Scott's post-release supervision; and (2) that it fails the general Fourth Amendment balancing test articulated in *Knights*. (Def. Reply Gov't Resp. Mot. Suppress ("Def. Reply") [DE #29] at 4–8.)

Warrantless searches of a parolee are lawful pursuant to the special needs exception to the warrant requirement, as articulated in *Griffin v. Wisconsin*, 483 U.S. 868 (1987), if such searches comply with a constitutional state law or regulation authorizing said searches.[7] Thus, if the state law or regulation authorizing a warrantless parolee search reasonably serves the state's special needs of supervision and if a particular search complies with that state law or regulation, then the search is legal. *See Griffin*, 483 U.S at 880. A federal court is "bound by the state court's interpretation" of the statute or regulation, if such exists. *Id.* at 875.

If, on the other hand, the warrantless parole search was not conducted for the purposes of the special needs of parole (i.e. the search does not comply with a statute authorizing warrantless searches based upon the state's special needs, or the statute purporting to authorize such searches is itself unconstitutional), then the search should be evaluated under the general Fourth Amendment balancing test articulated

[7] Even though *Griffin* addressed a probation search, the special needs analysis applies with equal force to warrantless searches of parolees. *See, e.g., United States v. Pickens*, 295 F. App'x 556, 557 (4th Cir. 2008) (per curiam) (unpublished) (applying *Griffin* to supervised release); *United States v. Freeman*, 479 F.3d 743, 746 (10th Cir. 2007) (applying *Griffin* to parole).

in *Knights*, 534 U.S. at 118–20 (applying balancing test to warrantless search of a probationer's home), and *Samson*, 547 U.S. at 850–54 (applying balancing test to warrantless and suspicionless search of a parolee's person).

The Government can establish the legality of a warrantless parole search in either of two ways: by demonstrating that the search was authorized under the special needs exception to the warrant requirement, or by showing that the search was reasonable under general Fourth Amendment principles. *See Samson*, 547 U.S. at 853–54 n.3 (acknowledging that the Court was not evaluating "whether [the State]'s parole search condition is justified as a special need under *Griffin v. Wisconsin*" because "such an examination [is] unnecessary" given that the search passed constitutional muster under "general Fourth Amendment principles"); *see also Jones v. Lafferty*, 173 F. Supp. 3d 493, 499 (E.D. Ky. 2016) (noting that *Griffin* and *Knights* "represent two distinct analytical approaches under which a warrantless probationer search may be excused" (quoting *United States v. Herndon*, 501 F.3d 683, 688 (6th Cir. 2007))).

A. Special Needs Exception

Scott contends the search of his home does not satisfy the special needs exception as articulated in *Griffin*. (Def. Mot. Suppress at 6; Def. Reply at 4–6). Scott makes two arguments in support of this contention: (1) that only his assigned supervision officer could conduct the search, and (2) that the search was not "reasonably related" to the purposes of his post-release supervision. (Def. Mot. Suppress at 6–8; Def. Reply at 4–7). Neither argument persuades.

First, Scott's argument that only his assigned supervision officer could conduct warrantless searches of his home ignores the plain language of N.C. Gen. Stat. § 15A-1368.4(b1)(8). The text of that statute does not limit the authority to conduct warrantless searches of North Carolina parolees to the particular officer assigned to the parolee, nor does it give discretion to the state Post-Release Supervision and Parole Commission to impose such a limitation on the search condition applicable to parolees, such as Scott, with reportable convictions. *Compare* N.C. Gen. Stat. § 15A-1368.4(b1) *with* N.C. Gen. Stat. § 15A-1368.4(c).

That the state Post-Release Supervision and Parole Commission provided Scott with a copy (Gov't Ex. 1A) of his conditions of post-release supervision containing language that purported to narrow the authority to conduct warrantless searches to his assigned supervising officer does not override the statute *requiring* that any supervising officer be permitted to conduct such searches. To credit such an interpretation would, in effect, permit a state agency to override the clear mandate of the North Carolina General Assembly.

Moreover, people are generally presumed to be on notice of the law. *See McFadden v. United States*, 135 S. Ct. 2298, 2304 (2015) (ignorance of the law is no defense to criminal prosecution). "Exceptions to [the] venerable rule [that ignorance of the law is no excuse] should be construed narrowly in the absence of clear [legislative] intent to the contrary." *United States v. Bishop*, 740 F.3d 927, 934 (4th Cir. 2014). The undersigned declines to interpret Scott's conditions of post-release supervision to permit warrantless searches only by his assigned supervising officer.

The undersigned further rejects Scott's argument that the search of his apartment was not "reasonably related" to the purposes of his post-release supervision. Recently, the North Carolina Court of Appeals interpreted identical phrasing in North Carolina's warrantless probation search statute to mean "being or remaining within the bounds of reason." *State v. Powell*, 800 S.E.2d 745, 751 (N.C. Ct. App. 2017) (quoting Webster's Third New International Dictionary 1892 (1966)). The *Powell* court specifically held that the "reasonably related" standard imposed a lesser burden on state probation officers to justify a warrantless search than the "directly related" standard which currently governs warrantless searches of North Carolina probationers. *Id.* Furthermore, the presence and cooperation of other law enforcement officers in a warrantless parole search does not, by itself, render a search a general law enforcement search as opposed to a search reasonably related to supervision. *See United States v. Midgette*, 478 F.3d 616, 625–26 (4th Cir. 2007) (citing *State v. Church*, 110 N.C. App. 569, 576, 430 S.E.2d 462, 466 (1993), and *State v. Howell*, 51 N.C. App. 507, 509, 277 S.E.2d 112, 114 (1981)).

Here, Officer Thomas, Scott's supervising officer, personally selected Scott for a search as part of Operation Spring Sweep. Because of his prior North Carolina conviction for Second-Degree Sexual Offense, Scott was required to submit to warrantless searches of his person, home, automobile, and electronic devices pursuant to N.C. Gen. Stat. § 15A-1368.4(b1)(8). Four probation officers led the search team to Scott's apartment at a reasonable time in the morning, made initial contact with Scott, and then requested that the remaining search team members

enter the apartment to assist with the search. In light of these facts, the undersigned determines that it is "within the bounds of reason" to say that the search was "reasonably related" to the purposes of Scott's post-release supervision. *See Powell*, 800 S.E.2d at 751.

In sum, the undersigned determines that the search of Scott's apartment complied with N.C. Gen. Stat. § 15A-1368.4(b1)(8). The undersigned has identified no court opinion specifically countenancing the constitutionality of N.C. Gen. Stat. § 15A-1368.4. The Fourth Circuit has, however, determined that North Carolina's similarly worded statute governing warrantless searches of probationers is constitutional, *see Midgette*, 478 F.3d at 623–24, and Scott has not argued that the statute in question is constitutionally infirm. Accordingly, it is recommended that Scott's motion to suppress be denied.[8]

B. Reasonableness Balancing Test

Scott also contends that the search of his apartment violated general Fourth Amendment reasonableness principles as articulated in the balancing test applied in

[8] In a footnote, Scott appears to question whether the portion of N.C. Gen. Stat. § 15A-1368.4(b1)(8) authorizing warrantless searches of Scott's cellular telephone qua an electronic device is constitutional in light of the Supreme Court's recent decisions in *Riley v. California*, 134 S. Ct. 2473 (2014), and *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017). (Def. Reply. at 3 n.2.) Absent further development of this argument, and more importantly, based on the special needs rationale articulated in *Griffin*, the searches of Scott's cellular telephone and automobile appear to be in compliance with N.C. Gen. Stat. § 15A-1368.4(b1)(8) and, therefore, constitutional. *See United States v. Jackson*, 866 F.3d 982, 985–86 (8th Cir. 2017) (holding that *Griffin* and *Samson* control in the context of a parolee cell phone search).

Knights and *Samson*. (Def. Reply at 7–8.) However, because the search satisfies the special needs exception to the warrant requirement articulated in *Griffin*, it is unnecessary to determine whether it also satisfies the *Knights/Samson* balancing test.

CONCLUSION

For the foregoing reasons, the undersigned RECOMMENDS that Defendant's Motion to Suppress [DE #20] be DENIED.

IT IS DIRECTED that a copy of this Memorandum and Recommendation be served on each of the parties or, if represented, their counsel. Each party shall have until **January 3, 2018**, to file written objections to the Memorandum and Recommendation. The presiding district judge must conduct his or her own review (that is, make a de novo determination) of those portions of the Memorandum and Recommendation to which objection is properly made and may accept, reject, or modify the determinations in the Memorandum and Recommendation; receive further evidence; or return the matter to the magistrate judge with instructions. *See, e.g.,* 28 U.S.C. § 636(b)(l); Fed. R. Crim. P. 59(b); Local Crim. R. 1.1 (permitting modification of deadlines specified in local rules), 5.3(c) (E.D.N.C. Dec. 2017).

A party that does not file written objections to the Memorandum and Recommendation by the foregoing deadline, will be giving up the right to review of the Memorandum and Recommendation by the presiding district judge as described above, and the presiding district judge may enter an order or judgment based on the Memorandum and Recommendation without such review. In addition, a party's

failure to file written objections by the foregoing deadline may bar the party from appealing to the Court of Appeals from an order or judgment of the presiding district judge based on the Memorandum and Recommendation. *See United States v. Jones*, 658 F. App'x 188, 189 (4th Cir. 2016).

This 20th day of December 2017.

KIMBERLY A. SWANK
United States Magistrate Judge