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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

August 3, 1999

Jack Sinclaire, Deputy Solicitor
Ninth Judicial Circuit
2144 Melbourne Avenue
North Charleston, South Carolina 29405

Dear Mr. Sinclaire,

Thank you for your letter, dated October 5, 1998, requesting an opinion from this Office. You ask whether the South Carolina Department of Probation, Parole, and Pardon Services may require, as a condition to probation, a probationer to submit to reasonable, warrantless searches by Probation Officers.

Section 24-21-430 of the South Carolina Code of Laws grants power to the court to modify the conditions of probation or add any condition permissible by law. The provision begins:

> The court may impose by order duly entered and may at any time modify the conditions of probation and may include among them any of the following or any other condition not prohibited by the section. To effectively supervise probationers, the director shall develop policies and procedures for imposing conditions of supervision on probationers.
> These conditions may enhance but must not diminish court imposed conditions.

The section then lists thirteen possible conditions of probation that may be included in the court's order.

This Office has previously opined that in certain circumstances additional conditions of probation may be imposed. In an opinion dated May 18, 1984, we concluded that a circuit court judge could require public service as a condition of probation. Similarly, the State Supreme Court, while noting that the payment of reparations was not included in the list of conditions, construed the phrase "or any other" in Section 24-21-430 as authorizing a judge to impose reparations to a victim of crime as a condition of probation. *See State v. Wilson*, 274 S.C. 352, 264 S.E.2d 414 (1980).

On the other hand, the Supreme Court of South Carolina has also addressed the validity of a sentence which imposed castration as a condition to the suspension of a sentence and a term of probation. *See State v. Brown*, 284 S.C. 407, 326 S.E.2d 410 (1985). The Court said the trial judges are authorized to suspend sentences upon conditions they deem fit and proper, but they do not have "unlimited discretion in imposing conditions of suspension or probation and they cannot impose conditions which are illegal and void as against public policy." 326 S.E.2d at 411.

Noting that public policy in South Carolina is derived from the law of this State as provided by the Constitution, statutes, and judicial decisions, the Court particularly found the castration sentence before it to be violative of the constitutional provision prohibiting cruel and unusual punishment and thus, void. *See also Henry v. State*, 276 S.C. 515, 280 S.E.2d 536 (1981) (trial judge without authority to impose banishment from the State as a condition of probation inasmuch as sentence violates public policy).

Thus, because we have concluded that the judges have wide, but not unlimited, discretion in imposing additional conditions to probation, the proposed condition must be analyzed in light of public policy. In this instance public policy is most questioned by a Constitutional challenge of the requirement. The condition that the probationer submit to warrantless searches by Probation Officers would most likely be protested on the grounds that it violates the Fourth Amendment's prohibition against unreasonable searches and seizures.

The Supreme Court of the United States has held that generally, searches conducted without a warrant based on probable cause are per se unreasonable. *Vernonia School Dist. v. Acton*, 515 U.S. 646 (1995). However, the Court has recognized certain circumstances in which the "special needs" of the government have made the warrant requirement impracticable and justified the replacement of the standard of probable cause by "reasonable grounds." Special needs searches have been upheld in numerous contexts by balancing a significant government interest against the privacy interests of the individual *See Skinner v. Railway Labor Executives Ass'n* 489 U.S. 602 (1989)(protection of the traveling public justified the compulsion of railroad employees to submit to blood tests after involvement in major train accidents); *Vernonia School Dist. v. Acton*, 515 U.S. 646 (1995) (the protection of children from the influence of prevalent drug abuse by school athletes justified random drug testing for those participating in the athletic program).

South Carolina's interest in supervising probationers probably falls within the category of a special need circumstance. Fortunately, the United States Supreme Court has ruled on this issue. In 1987, the Court upheld a provision in the Wisconsin Department of Health and Human Services probation regulations that required probationers to permit any probation officer to search a probationer's home without a warrant, but with approval of the supervisor and upon reasonable grounds to believe the presence of contraband. *Griffin v. Wisconsin*, 483 U.S. 868, 870-871 (1987). The Court said that the requirement "assure[s] that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large." *Id* at 875. Furthermore, the quasi-custodial status of the probationer to the State during his probation reduced his privacy interest somewhat. *Id* at 874 (stating 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." *citations omitted*). Supervision by the State of the probationer was a special need that justified the intrusion into a lessened expectation of privacy. *Id* at 875. *See also State v. Church,* 430 S.E.2d 462 (N.C. Ct. App. 1993)(upholding officer's search after she noticed marijuana plants growing near building); *Purdy v. State*, 708 N.E.2d 20 (Ind. Ct. App. 1999) (upholding search by officer after he smelled marijuana smoke).

The parameters of the requirement are not limitless, however, and the importance of the reasonableness of the search must be noted. Most jurisdictions require some level of suspicion, but not necessarily a level of suspicion rising to probable cause. "Reasonable," in accordance with *Griffin v. Wisconsin*, means a search based upon reasonable grounds to believe evidence of contraband is present. *See generally Purdy* at 23 (stating focus of the constitutional analysis is on reasonableness of the search). If challenged probation officers should be able to provide some evidence that the standards of "reasonable grounds" have been met before searching the probationer.

Therefore, in light of the Supreme Court's holding in *Griffin v. Wisconsin* and other jurisdictions which have addressed the issue, a requirement that as a condition of probation a probationer submit to a reasonable, warrantless search would likely withstand a Constitutional challenge in the courts. A circuit court judge could impose this condition to individual probationers, or the condition could be incorporated into the current consent form signed by each probationer.

This letter is an informal opinion only. It has been written by a designated Senior Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General not officially published in the manner of a formal opinion.

With kind regards, I remain

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General