11-2006

The Price of Pretrial Release: Can We Afford to Keep Our Fourth Amendment Rights?

Melanie Wilson

The Price of Pretrial Release: Can We Afford to Keep Our Fourth Amendment Rights?

Melanie D. Wilson[*]

* Associate Professor, John Marshall Law School, Atlanta; former Assistant United States Attorney (1999–2005); J.D., University of Georgia School of Law. I thank Professors Anne Proffitt Dupre, Michael J. Lynch, and Daniel F. Piar for their insightful comments on an early draft of this Article.

INTRODUCTION

The Fourth Amendment[1] is designed "'to prevent arbitrary and oppressive interference by law enforcement officials with the privacy and personal security of individuals.'"[2] The Eighth Amendment prohibits the government from imposing excessive bail in cases where it is proper to grant bail.[3] This Article looks at the intersection of these two federal constitutional provisions in the context of federal bail determinations and asks whether arrested persons can "choose" to relinquish some or all of their Fourth Amendment rights in exchange for pretrial release from detention and, if so, under what circumstances and with what, if any, limits.

The ability or inability of an arrested person to relinquish some privacy and liberty rights to gain pretrial release is a significant issue because tens of thousands of people are charged with federal crimes every year.[4] Once charged, each person appears before a federal judicial officer, usually a magistrate judge, for a decision on whether he or she will await trial while enjoying the comforts of home or, instead, be confined in jail until the charges are adjudicated.[5] Many defendants are detained in jail until trial.[6]

The Bail Reform Act establishes the standard for pretrial release in federal court.[7] The presiding judicial officer applies the Bail Reform Act to determine whether there are conditions of release that will ensure the arrested person's appearance at trial and protect the safety of the

1. The Fourth Amendment states:

> 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.

U.S. CONST. amend. IV.

2. United States v. Mendenhall, 446 U.S. 544, 553–54 (1980) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1975)).

3. U.S. CONST. amend. VIII ("Excessive bail shall not be required . . . ."); Carlson v. Landon, 342 U.S. 524, 545 (1952).

4. For instance, in 2003, 94,916 persons were prosecuted by the United States Attorney's Offices and 83,419 pretrial criminal cases were conducted in federal court. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2003, at 1 (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs0303.pdf.

5. In 2003, sixty-four percent of pretrial defendants in the federal system (or approximately 53,388) were detained in jail following an initial appearance or a detention hearing. *Id.* at 42.

6. *Id.*

7. Bail Reform Act of 1984 § 203, 18 U.S.C. § 3142 (2000); *see* Bell v. Wolfish, 441 U.S. 520, 524 (1979) (noting that the Bail Reform Act requires that a person in the federal system be committed to a detention facility if less drastic measures will not assure the person's presence at trial).

community in the meantime.[8] However, the Bail Reform Act does not address whether defendants can be asked or required to relinquish some of their Fourth Amendment rights as one of the conditions of pretrial release.[9]

Likewise, the United States Supreme Court has not decided whether an arrested person is legally permitted to exchange Fourth Amendment rights for pretrial freedom. In fact, the Court has never resolved whether someone *convicted* of a crime validly waives his Fourth Amendment rights by "agreeing" to a blanket-search provision as part of his post-conviction release on probation or his post-incarceration supervised release.[10] Although the Court has not settled either of these issues, it has, in other contexts, made relevant observations about a criminal defendant's relinquishment of one right to save another.[11] For instance, in the context of reviewing a habeas petition in which an inmate claimed that he was put to an "impermissible choice" between exercising his right to appeal a criminal conviction and risking a potentially harsher sentence if he prevailed on such an appeal, the Supreme Court declared:

> "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. . . . Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." . . . [T]he "threshold question is whether

8. *See* 18 U.S.C. §§ 3141–3142; *see also* United States v. Salerno, 481 U.S. 739, 741 (1987) (upholding the constitutionality of the Bail Reform Act against a facial attack).

9. 18 U.S.C. § 3142(c)(1)(B)(i)–(xiv) (listing conditions that a magistrate judge may impose when releasing a pretrial defendant but lacking any mention of Fourth Amendment rights or waivers).

10. The Supreme Court, in its 2005 term, held that a government officer who conducts a suspicionless search of a state parolee based merely on the parolee's status as a parolee, does not violate the Fourth Amendment, where, as a condition of release, the parolee agrees in writing that he will submit to searches or seizures by a peace officer at any time, with or without cause. Samson v. California, 126 S. Ct. 2193, 2196 (2006). Nevertheless, the Court expressly warned that its decision in *Samson* did not rest on the "consent" of the parolee. *Id.* at 2199–2200 n.3 ("[W]e decline to rest our holding today on the consent rationale.").

11. *See, e.g.*, North Carolina v. Pearce, 395 U.S. 711, 723–24 (1969) (noting that it would be a "flagrant" due-process violation for a sentencing court to impose a heavier sentence (in a re-sentencing situation) as a price for the defendant's successful exercise of his right to appeal a conviction); Simmons v. United States, 390 U.S. 377, 390 (1968) (holding that the testimony a criminal defendant gives during a pretrial hearing to establish standing to support the exclusion of evidence in accordance with the Fourth Amendment is not admissible against the same defendant at trial on the issue of his guilt or innocence). *But see, e.g.*, Chaffin v. Stynchcombe, 412 U.S. 17, 27–28 (1973) (refusing to extend the rule of *Pearce* to situations in which a jury decides a defendant's punishment following a defendant's successful appeal, provided that "improper and prejudicial information regarding the prior sentence is withheld" from the second jury).

> compelling the election impairs to an appreciable extent any of the policies behind the rights involved."[12]

While the Court has never excused criminal defendants from making tough choices, more than three decades ago it recognized that the government's power is not unlimited when it "needlessly chill[s] the exercise of basic constitutional rights."[13] In some circumstances, the Court has deemed it "intolerable that one constitutional right should have to be surrendered in order to assert another."[14] A recent decision from the Ninth Circuit reiterates the concept that the government's power is not boundless when it asks a criminal defendant to give up one constitutional right in favor of another.[15] In an issue of first impression in the federal courts of appeal, a

12. *Chaffin*, 412 U.S. at 32 (first alteration in original) (quoting Crampton v. Ohio, 402 U.S. 183, 213 (1971)). In *Chaffin*, a defendant was tried and convicted by a Georgia jury of a capital offense of robbery. *Id.* at 18. After the jury convicted the defendant, the trial court instructed the jury on sentencing, advising the jury that it was legally authorized to impose a sentence of death, life, or a term of years. *Id.* The jury sentenced the defendant to fifteen years of imprisonment. *Id.* The defendant appealed to the state court of appeals and lost but was later successful in convincing a federal district court to grant his petition for habeas corpus, arguing that the trial judge had incorrectly instructed the jury on an alibi defense. *Id.* at 18–19. Upon granting the habeas writ, the district court ordered the defendant returned to state court for a retrial. *Id.* at 19. The defendant was again convicted by the new jury. *Id.* As before, the jury was then instructed on the authorized range of punishments. *Id.* The second jury returned a sentence of life in prison. *Id.* at 20. The second jury was unaware of the fifteen-year sentence chosen by the first. *Id.* The Supreme Court affirmed the imposition of the higher sentence. *Id.* at 35. The Supreme Court has also authorized a criminal defendant to choose to plead guilty and forego his right to trial by jury, even when the plea is "encouraged" by the defendant's fear of receiving the death penalty. *See* Brady v. United States, 397 U.S. 742, 747–48 (1970) (holding that such guilty pleas are legally valid, as long as they are voluntary and intelligent).

13. United States v. Jackson, 390 U.S. 570, 581–82 (1968). In *Jackson*, three defendants challenged the constitutionality of the federal kidnapping statute that created an offense punishable by death, if the jury recommended that sentence. *Id.* at 570–71. There was no comparable death provision in the kidnapping statute for defendants who waived the right to a jury trial or for those who pled guilty. *Id.* at 571. The district court held the statute unconstitutional, reasoning that the statute made "'the risk of death' the price for asserting the right to jury trial." *Id.* (quoting United States v. Jackson, 262 F. Supp. 716, 718 (D. Conn. 1967)). Although the Supreme Court ultimately saved most of the federal kidnapping statute by severing the death-penalty provision, the Court agreed that as constructed by Congress, the Act "impose[d] an impermissible burden upon the exercise of a constitutional right." *Id.* at 572. Justice Stewart wrote for the majority in *Jackson*. *Id.* at 570. In this 6-2 decision in which Justice Marshall took no part, Justices White and Black dissented. *Id.* at 591–92.

14. *Simmons*, 390 U.S. at 394. Justice Harlan wrote the majority opinion in *Simmons*. *Id.* at 379. As in *Jackson*, Justice Marshall took no part. *Id.* at 394. Justices White and Black concurred in part and dissented in part. *Id.* at 377, 399. Obviously, since the decisions in *Jackson* and *Simmons*, the composition of the Supreme Court has changed significantly. Not one Justice who decided these cases remains on the Court today. As a result, these decisions offer only limited insight into how the current Court will view the subordination of one constitutional right to another.

15. *See generally* United States v. Scott, 450 F.3d 863 (9th Cir. 2006). The Ninth Circuit first issued its *Scott* decision on September 9, 2005. United States v. Scott, 424 F.3d 888, 888 (9th Cir. 2005). Later, on June 9, 2006, the court issued an order denying rehearing en banc,

divided panel of the Ninth Circuit concluded that an arrested person does not necessarily waive his Fourth Amendment rights even when he executes a rights waiver as a means of negotiating his pretrial release.[16]

In contrast to the conclusion reached by the Ninth Circuit, this Article contends that with appropriate judicial oversight, an arrestee can appropriately and effectively waive some Fourth Amendment rights as collateral for his liberty. This Article acknowledges that if a defendant is permitted to bargain with his Fourth Amendment rights, an undeniable tension results. The tension naturally creates a pressure-filled situation that will almost always end with the subordination of Fourth Amendment rights. But, the choice is the accused's to make. Only the accused can fully evaluate the importance of his Fourth Amendment rights and decide whether or not to relinquish such rights to gain pretrial liberty. The Article maintains that although the choice is always the defendant's, the key to judging whether a particular defendant's waiver is knowing and voluntary rests with the limits to such a waiver. A Fourth Amendment waiver must not be an unbridled, whole-sale waiver of all constitutional and statutory rights. It must be sufficiently tailored to further the reasonable law-enforcement goals for imposing the waiver.

Various constitutional provisions will serve to limit the extent to which the government can extract a Fourth Amendment waiver from a criminal defendant. For instance, the Eighth Amendment proscribes excessive bail.[17] Thus, bail set at a figure higher than an amount reasonably calculated to assure the presence of an accused at trial, or for an amount more than necessary to protect the public pending trial, is excessive within the meaning of the Eighth Amendment.[18] Similarly, the Fourth Amendment, which requires that all searches and seizures be "reasonable,"[19] will prohibit an unreasonable search of an arrested person during the pretrial period, even

withdrawing the September 9 opinion and replacing that decision with an amended opinion and amended dissent. *Scott*, 450 F.3d at 864. In the June 2006 decision, seven circuit judges dissented from denial of rehearing en banc. *Id.* at 889.

16. *Scott*, 450 F.3d at 863–64; *id.* at 871 ("Scott's assent to his release conditions does not by itself make an otherwise unreasonable search reasonable . . . .").

17. In pertinent part, the Eighth Amendment states that "[e]xcessive bail shall not be required . . . ." U.S. CONST. amend. VIII.

18. The right to bail found in the Eighth Amendment is not absolute. United States v. Salerno, 481 U.S. 739, 753 (1987). Nevertheless, "bail shall not be excessive in those cases where it is proper to grant bail." Carlson v. Landon, 342 U.S. 524, 545–46 (1952). "The command of the Eighth Amendment that 'Excessive bail shall not be required . . .' *at the very least* obligates judges passing upon the right to bail to deny such relief only for the strongest of reasons." Sellers v. United States, 89 S. Ct. 36, 38 (1968) (alterations in original) (quoting U.S. CONST. amend. VIII).

19. Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (expressing that all Fourth Amendment searches must be reasonable); *see also* Samson v. California, 126 S. Ct. 2193, 2197 (2006) (explaining that the Court's general Fourth Amendment jurisprudence requires the Court "to determine whether a search is reasonable").

if the person has "consented" to such a search or has "waived" the usual probable-cause requirement.

In short, the answer to whether an arrested person can validly and effectively waive (at least some of) his Fourth Amendment rights in exchange for freedom from pretrial detention is not a simple yes or no. Instead, the solution hinges on the now familiar "'totality of the circumstances'" test.[20] That test will require the magistrate judge[21] to consider all of the relevant facts and circumstances known about the defendant, the crime alleged, and the defendant's background, and decide whether the pressure on the accused to waive her Fourth Amendment rights is so great that it results in an "impermissible burden upon the exercise of a constitutional right"[22] or whether, in contrast, the accused's decision is a "knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences."[23] Under some circumstances, a pretrial waiver is valid, and under other more coercive conditions, it is not.

This Article develops in three parts. Part I looks at pretrial detention and pretrial release conditioned on a waiver of Fourth Amendment rights. It begins with an overview of the Bail Reform Act and explores the recent decision from the Ninth Circuit, *United States v. Scott*, which held that an arrested person does not waive all of the privacy protections afforded by the Fourth Amendment, even when he signs a written Fourth Amendment waiver of rights to gain pretrial release.[24] The Ninth Circuit's decision in *Scott* is discussed as a tool for analyzing whether the government violates the Constitution or illegally coerces an arrested person when it asks an arrestee to choose between liberty, with limited Fourth Amendment privacy, and incarceration. Part I also briefly reviews the Supreme Court precedent that nibbles at the fringes of the pretrial Fourth Amendment consent issue and reviews other circuit court decisions that have decided analogous, but not identical, issues regarding post-conviction Fourth Amendment waivers.

Part II considers the tension created when an arrested person is asked to choose between sacrificing the privacy rights he normally enjoys under

20. *Samson*, 126 S. Ct. at 2197 (quoting United States v. Knights, 534 U.S. 112, 118 (2001)) (stating that the Court examines the "totality of the circumstances" to decide if a search is reasonable within the meaning of the Fourth Amendment); Illinois v. Gates, 462 U.S. 213, 238–39 (1983) (applying the "totality of the circumstances test").

21. Or another appropriate judicial officer. *See* Bail Reform Act of 1984 § 203, 18 U.S.C. § 3141(a) (2000) (allowing any judicial officer authorized to order the arrest of a person in accordance with § 3041 to make a bail determination); *see also* FED. R. CRIM. P. 41(b)(1) (authorizing "a magistrate judge with authority in the district—or if none is available, a judge of a state court of record in the district—to issue a warrant to . . . seize a person . . . within the district").

22. United States v. Jackson, 390 U.S. 570, 572 (1968).

23. Brady v. United States, 397 U.S. 742, 748 (1970) (approving of voluntarily and intelligently entered guilty pleas, which, nevertheless, sacrifice constitutional rights).

24. United States v. Scott, 450 F.3d 863, 871 (9th Cir. 2006).

the Fourth Amendment and forgoing an opportunity to avoid indefinite pretrial detention with even fewer rights. Part II identifies the policies for and against allowing a pretrial waiver in exchange for release on conditions, examines the proper legal standard by which a magistrate judge should evaluate such a waiver, and concludes that the person facing pretrial detention is in the best position to gauge the value of his or her Fourth Amendment rights.

Part III asserts that the key to a legally permissible pretrial Fourth Amendment waiver is the limits on that waiver. It declares that if Fourth Amendment waivers are permitted, established legal principles effectively confine them. Part III concludes that the Constitution already limits every waiver and that the unconstitutional conditions doctrine, the Bail Reform Act, and basic contract concepts also restrict the scope of such waivers.

I. THE LAW GOVERNING PRETRIAL DETENTION AND RELEASE CONDITIONED ON A FOURTH AMENDMENT WAIVER

A. THE BAIL REFORM ACT OF 1984

The Bail Reform Act of 1984 authorizes detention of arrested persons in some instances and their release with conditions in other situations.[25] In federal criminal cases, an arrested person is typically brought before a United States magistrate judge for a bond or bail determination.[26] To determine bail, the magistrate judge conducts a hearing to determine whether there is a condition or a combination of conditions that will reasonably assure the appearance of the arrested person at a subsequent trial.[27] If the magistrate judge decides in favor of release, she must impose any conditions necessary to ensure the safety of other persons (such as witnesses) and the community pending the trial.[28]

At a detention hearing, an arrested person has the statutory right to legal counsel and, if financially unable to obtain such representation, a right to the appointment of counsel.[29] In addition, the arrestee has the benefit of

25. 18 U.S.C. § 3142(a) (outlining the four possible outcomes of a detention hearing, including: (1) release on personal recognizance or an unsecured-appearance bond; (2) release on a condition or combination of conditions; (3) temporary detention; or (4) detention pending trial).

26. *Id.* § 3141(a). Any other judicial officer authorized to order the arrest of someone for allegedly committing a federal crime may also make a bond or bail decision. *Id.*

27. *Id.* § 3142(e)–(f).

28. *Id.* For example, the magistrate judge might release an arrestee, provided he agrees to live with a designated person, maintain his current employment with a specified employer at a designated location, and avoid the excessive use of alcohol or any use of unprescribed narcotic drugs. *See id.* § 3142(c)(1)(B). The judge might release the arrested person to a half-way house, where he could leave during the day to work, but would be expected to return by a certain time each day. *See id.*

29. *Id.* § 3142(f).

a clear and convincing standard of proof requirement imposed on the government.[30] The arrestee is also afforded an opportunity to testify, to present witnesses, to cross-examine witnesses, and to present other pertinent information.[31] The rules of evidence governing the admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the bail hearing.[32] Therefore, a defendant can proffer evidence in favor of his pretrial release.[33]

Following the hearing, the magistrate judge is required to "issue an order" indicating that, pending trial, the person should be either released or detained.[34] The judge may release the arrested person on personal recognizance after execution of an unsecured-appearance bond, subject to the condition that the person not commit a crime during the pretrial-release period.[35] If, however, the magistrate judge determines that release on personal recognizance or after execution of an unsecured-appearance bond will not assure the appearance of the person at trial, or will endanger other persons or the community, the judicial officer can release the arrestee only on a condition or combination of conditions.[36]

In determining whether there are conditions of release that will satisfy the appearance and safety requirements, the judge considers many factors, taking into account the totality of the circumstances.[37] In this regard, the Bail Reform Act provides a nonexclusive list of conditions that a judicial officer may impose.[38] The magistrate judge must choose the conditions that

30. 18 U.S.C. § 3142(f); *see also* United States v. Salerno, 481 U.S. 739, 751 (1987) (explaining that when the government establishes by clear and convincing evidence that an arrested person poses a threat to an individual or the community, a court may detain the person pending trial to abate the threat).

31. 18 U.S.C. § 3142(f).

32. *Id.*

33. *Id.*

34. *Id.* § 3142(a).

35. *Id.* § 3142(a)(1), (b).

36. 18 U.S.C. § 3142(c)(1)(A), (B).

37. *Id.* § 3142(g). These factors include: (1) "the nature . . . of the offense charged, including whether the crime is [one] of violence"; (2) "the weight of the evidence against the [accused]"; (3) "the history and characteristics of the [arrestee], including the person's physical and mental condition, . . . employment, financial resources, . . . ties to the community, criminal history, [etc.]"; and (4) "the nature and seriousness of the danger to . . . the community [if the arrestee is released.]" *Id.*

38. *Id.* § 3142(c)(1)(B). A judicial officer may require that the arrestee: (1) "remain in the custody of a designated person[] who agrees [to supervise the arrestee] and . . . report any violation of a release condition to the court"; (2) "maintain employment[] or . . . actively seek employment"; (3) attend school; (4) restrict the arrestee's personal associations and travel; (5) "avoid . . . contact with [the] alleged victim[s] of the crime and any potential witness[es] who may testify"; (6) report to pretrial services on a regular basis; (7) abide by a curfew; (8) avoid possession of a firearm; (9) avoid "excessive use of alcohol" or narcotic drugs without a prescription; (10) undergo medical or other treatment, "including treatment for drug or alcohol dependency"; (11) "execute an agreement to forfeit [property for] failing to appear";

are the "least restrictive."[39] In other words, the Bail Reform Act establishes a liberal policy in favor of pretrial release.[40]

When a magistrate judge releases an arrested person, the judge must include a clear and specific written statement to "serve as a guide for the person's conduct," listing the conditions to which the releasee is subject.[41] The Bail Reform Act also directs the magistrate judge to advise the person of the penalties and consequences for violating any condition of release.[42]

If the court were to permit an arrested person to offer his Fourth Amendment rights as a type of collateral for his pretrial release under the applicable provisions of the Bail Reform Act, the arrestee would acquire an additional tool for negotiating pretrial liberty during the detention-hearing process.[43] Section 3142(c)(1)(B) of the Bail Reform Act instructs the magistrate judge to choose the least-restrictive conditions to serve the goals of the Act.[44] Also, section 3142(c)(1)(B)(xiv) provides that in addition to the condition(s) expressly identified in the Act, the magistrate judge may release a putative defendant subject to "any other condition that is reasonably necessary" to assure her appearance and the safety of the community.[45] Because the Act allows for the possibility that other conditions may adequately fulfill the goals of the Bail Reform Act, an arrested person seeking freedom from detention could offer to waive some of her Fourth Amendment rights as an additional assurance to convince the judge that waiver of her Fourth Amendment rights is the least-restrictive condition necessary to justify her putative release under the Bail Reform Act. An arrested person acquires this additional bargaining chip when she holds the power to deal away some of her privacy. This leverage can prove especially important to indigent defendants who have no property and few, if any, other assurances to give the magistrate judge that she will appear at trial and avoid criminal conduct in the meantime. In an appropriate case, a

(12) "execute a bail bond with solvent sureties"; (13) "return to custody for specified hours"; and (14) "satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community." *Id.* There is no specific mention of a Fourth Amendment-type waiver in the Bail Reform Act. *See id.*

39. *Id.*

40. *See id.* § 3142(b) (requiring that the magistrate judge release an arrested person on personal recognizance or pursuant to an unsecured bond, *unless* the judge affirmatively finds that such release will not serve the goals of the Bail Reform Act); Bell v. Wolfish, 441 U.S. 520, 536 n.18 (1979) (noting that the Bail Reform Act of 1966 implemented a "liberal policy in favor of . . . release"). This demand for the least-restrictive conditions is consistent with the Eighth Amendment's prohibition on excessive bail.

41. 18 U.S.C. § 3142(h).

42. *Id.* An arrested person may appeal the magistrate judge's decision on detention or release. *Id.* § 3145(a).

43. *Id.* § 3142(c)(1)(B) (explaining that the magistrate judge may choose from several conditions for release and should choose the least-restrictive conditions).

44. *Id.*

45. *Id.* § 3142(c)(1)(B)(xiv).

magistrate judge may be satisfied that even if an arrested person is released pending trial, she will not pose an undue risk of flight or danger to the community, provided she agrees to unannounced, warrantless, suspicionless searches of her person and/or property.[46] In some instances, such a concession may be the only condition that will convince the judge to release the putative defendant from pretrial detention.

In an apparent effort to protect the Fourth Amendment rights of arrested persons, the Ninth Circuit has effectively denied arrested persons this bargaining tool by holding that such waivers of Fourth Amendment rights are ineffective.[47]

B. THE NINTH CIRCUIT'S DECISION IN UNITED STATES V. SCOTT

In a matter of first impression in the federal courts of appeal,[48] the Ninth Circuit recently held in *United States v. Scott* that an arrested person does not waive his Fourth Amendment rights, even when he "agrees," as a means of acquiring pretrial release, to allow his home to be searched at any time without a warrant.[49] The Ninth Circuit concluded that such searches can be unreasonable despite the arrestee's "consent" and, therefore, invalid under the Fourth Amendment.[50] Accordingly, the police may violate an arrested person's Fourth Amendment rights by searching his home without probable cause, even if the person consented to just such a warrantless search as a condition of his pretrial release.[51]

The defendant in *Scott* had been arrested for drug-possession crimes and charged in a Nevada state court.[52] While awaiting trial, he was released on his own recognizance after "agreeing" to a blanket-search provision.[53] In other words, to gain his liberty:

> Scott agreed to submit to "random drug and alcohol testing, anytime of the day or night by any peace officer without a warrant"; and to submit himself, his residence and his vehicle "to search and

46. For instance, in a drug case in which the defendant has no criminal history, or in a case alleging the solicitation of a minor for sex over the Internet, there may be no better check on the suspect's criminal behavior than random, unannounced, warrantless searches of his home and/or computer.

47. United States v. Scott, 450 F.3d 863, 887–88 (9th Cir. 2006) (Bybee, J., dissenting) (opining that the majority's decision, far from being a "liberty-enhancing" decision, will deny many pretrial detainees the option of "being released on [their own recognizance] and sleeping in their own beds in exchange for agreeing to a limited number of conditions that the state believes will protect the public and secure the attendance of the accused at trial").

48. *Id.* at 864 (majority opinion).

49. *Id.* at 868, 872.

50. *Id.* at 871–72.

51. *Id.* at 868 ("Scott's consent to any search is only valid if the search in question (taking the fact of consent into account) was reasonable.").

52. *Scott*, 450 F.3d at 865.

53. *Id.*

> seizure by any peace officer anytime day or night without a warrant for C/S [controlled substances and] ALCOHOL."[54]

Shortly after Scott's pretrial release from state detention, officers received a tip from an informant indicating that Scott was using drugs and storing weapons in his home.[55] Because of the tip, officers went to Scott's home to conduct a "compliance visit."[56] Officers first administered a urine test to Scott.[57] That test initially (albeit incorrectly) indicated that Scott had recently used methamphetamine.[58] When Scott's urine tested positive, the officers arrested him and began to search his house.[59] The officers' search uncovered a shotgun.[60] The government conceded that there was no probable cause for the search but argued that the search was, nevertheless, valid because the government had two special needs to search: protecting the community from defendants during their pretrial release and ensuring this defendant's presence at trial.[61]

A federal grand jury indicted Scott for unlawful possession of the shotgun uncovered during the search.[62] Scott moved to suppress the gun, and the district court granted the motion, reasoning that the officers needed but lacked probable cause to justify the search.[63] A Ninth Circuit panel, with one judge dissenting, affirmed the district court's ruling suppressing the shotgun.[64] In evaluating whether the search of Scott's home violated the Fourth Amendment, given that Scott had signed a form agreeing to such searches, the Ninth Circuit framed the pertinent inquiries as: (1) "whether the searches—the drug test and the search of Scott's house—were valid because Scott consented to them as a condition of his release," and (2) "whether the government can *induce* Scott to waive his Fourth Amendment rights by conditioning pretrial release on such a waiver."[65]

In deciding these issues, the Ninth Circuit first noted the general rule that "whether a search has occurred depends on whether a reasonable

54. *Id.* at 875 (Bybee, J., dissenting) (alterations in original) (quoting pretrial-release conditions). Read literally and logically, the search provision to which Scott agreed could have been interpreted to require probable cause, but no warrant. The *Scott* court did not draw this fine of a distinction. *See id.* at 873 (majority opinion) (noting that the form Scott signed explicitly waived the warrant requirement and "implicitly" the probable-cause requirement).

55. *Id.* at 876 (Bybee, J., dissenting).

56. *Id.*

57. *Scott*, 450 F.3d at 876 (Bybee, J., dissenting); *id.* at 865 (majority opinion).

58. *Id.* at 865 n.2 (majority opinion).

59. *Id.* at 865.

60. *Id.*

61. *Id.* at 865, 869.

62. *Scott*, 450 F.3d at 865.

63. *Id.*

64. *Id.* at 875.

65. *Id.* at 865 & n.4.

expectation of privacy has been violated."[66] Next, the court reasoned that someone released pretrial retains "'his or her Fourth Amendment right to be free of unreasonable seizures.'"[67] After analyzing these issues, the Ninth Circuit declared that "Scott's consent to any search [was] only valid if the search in question (taking the fact of consent into account) was reasonable."[68] According to the court, "Scott's assent to his release conditions does not by itself make an otherwise unreasonable search reasonable. . . . [T]o the extent his assent decreased his reasonable expectation of privacy, we hold that the decrease was insufficient to eliminate his expectation of privacy in his home."[69] In reaching its conclusion that the search was not reasonable using a "totality of the circumstances" approach,[70] the court distinguished between probationers

66. *Id.* at 867 (citing Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

67. *Scott*, 450 F.3d at 868 (quoting Cruz v. Kavai County, 279 F.3d 1064, 1068 (9th Cir. 2002)).

68. *Id.* By itself, this conclusion is unremarkable. For if a search is totally unrelated to a legitimate law-enforcement need to search or is conducted simply to harass, this author agrees that the reasonableness requirement in the Fourth Amendment could be breached in spite of consent.

69. *Id.* at 871–72.

70. *Id.* at 872. The Supreme Court evaluates "'the totality of circumstances' to determine whether a search is reasonable within the meaning of the Fourth Amendment." Samson v. California, 126 S. Ct. 2193, 2197 (2006) (quoting United States v. Knights, 534 U.S. 112, 118 (2001)). As part of this totality analysis, the Court assesses the "degree to which [a search or seizure] intrudes upon an individual's privacy" and compares the intrusion against the degree of need for the search or seizure to promote "legitimate governmental interests." *Id.*

As part of the Ninth Circuit's evaluation of the totality of the circumstances, the court in *Scott* considered that Scott had reduced his expectations of privacy by signing the form that waived a warrant requirement. *Scott*, 450 F.3d at 873–74. But the court also considered that Scott was merely charged with a crime, not a post-conviction probationer with far fewer privacy and liberty interests. *Id.* In addition to analyzing the facts using the totality-of-the-circumstances standard, the Ninth Circuit deemed the search of Scott and his home unreasonable under a "special needs" analysis. *Id.* at 872. As the *Scott* court explained, the "reasonableness" required by the Fourth Amendment normally demands that a search or seizure be supported by probable cause. *Id.* at 868; *see also* Griffin v. Wisconsin, 483 U.S. 868, 873 (1987). However, in limited circumstances, the government can search or seize on less than probable cause, for instance, when "'special needs,' beyond the normal need for law enforcement" demand such search or seizure. *Scott*, 450 F.3d at 868 (quoting *Griffin*, 483 U.S. at 873); *see* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 447, 455 (1990) (holding that a state's use of highway-sobriety checkpoints, which allowed for seizure of cars on less than individualized suspicion to check for intoxicated drivers, was consistent with the Fourth Amendment's requirement of reasonableness). *But see* Indianapolis v. Edmond, 531 U.S. 32, 41–42 (2000) (finding that a highway-checkpoint program with the primary purpose of intercepting drugs violated the Fourth Amendment). "Thus, when probable cause would normally be required, 'special needs' can justify searches based on less . . . ." *Scott*, 450 F.3d at 868 (citing Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653, 664–65 (1995)). The Ninth Circuit found that both of the government's proffered special needs were legally inadequate to justify the search of Scott's home. *Id.* at 872. In this regard, the court concluded that "[t]he government in this case has relied on nothing more than a generalized need to protect the community and a blanket

(the Supreme Court has upheld searches of probationers based on reasonable suspicion, rather than probable cause),[71] and persons on pretrial release.[72] A majority of the panel deemed the distinction "constitutionally relevant."[73]

The court accepted that "Scott had a reduced expectation of privacy because he had signed a form that, on its face, explicitly waived the warrant requirement and implicitly . . . waived the probable cause requirement for drug testing."[74] But the court fastened on the fact that Scott had not been convicted of the charged crime.[75] "'Probation, like incarceration, is a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty.'"[76] The court distinguished probationers from arrestees: "People released pending trial, by contrast, have suffered no judicial abridgment of their constitutional rights."[77] Thus, according to the court, "Scott, far from being a post-conviction conditional releasee, was out on his own recognizance before trial. His privacy and liberty interests were far greater than a probationer's."[78] The *Scott* court reasoned:

> Since the government concedes there was no probable cause to test Scott for drugs, Scott's drug test violated the Fourth Amendment. Probable cause to search Scott's house did not exist until the drug test came back positive. The validity of the house search . . . is derivative of the initial drug test. That search is likewise invalid; its fruits must be suppressed.[79]

The court ultimately resolved that "[a] search of Scott or his house on anything less than probable cause is not supported by the totality of the circumstances in this case."[80]

Accordingly, the Ninth Circuit, the only federal court of appeals to have decided the issue, has held that an arrested person does not necessarily relinquish her Fourth Amendment rights even when she signs a Fourth Amendment waiver to gain her pretrial release.[81]

---

assertion that drug-testing is needed to ensure Scott's appearance at trial. Both are insufficient." *Id.*

71. *Griffin*, 483 U.S. at 873–74.

72. *Scott*, 450 F.3d at 873.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 872 (quoting *Griffin*, 483 U.S. at 874).

77. *Scott*, 450 F.3d at 872.

78. *Id.* at 873–74.

79. *Id.* at 874–75.

80. *Id.*

81. The court did not hold that a pretrial waiver can never be valid. *Id.* at 872 & n.12. Instead, it balanced the government's asserted interests in conducting the search against Scott's interests in privacy in his home, taking into account that Scott signed the waiver form. *Id.* at

C. THE WORD FROM THE SUPREME COURT

The United States Supreme Court has yet to decide whether an arrested person can validly waive his Fourth Amendment rights as a means to gain release from pretrial detention. In fact, the Court has never specifically addressed whether someone *convicted* of a crime[82] waives her Fourth Amendment rights by "agreeing" to blanket searches as part of her post-conviction release.[83] Although the Court has avoided resolving the consent issue in these contexts,[84] it has addressed and authorized invasive conditions during pretrial detention,[85] has upheld warrantless searches of post-conviction probationers on grounds other than consent,[86] and has counted

872, 874. Under both the special-needs analysis and the reasonableness-under-the-totality-of-the-circumstances approach, the court concluded that the search required probable cause. *Id.* The outcome of the case may well have been different if the search had involved Scott's car or his workspace. *See id.* at 871 (focusing on the unique privacy interests of the home and noting a special "reluctan[ce]" to "indulge" the government's claimed special need "because Scott's privacy interest in his home . . . is at its zenith").

82. Whether following a jury trial or through entering a plea of guilty.

83. In *United States v. Knights*, the Supreme Court was presented with an opportunity to resolve the consent issue. 534 U.S. 112, 114–23 (2001). In *Knights*, a sentencing court ordered a defendant released on probation, provided he agreed to submit to random, warrantless searches as part of that probation. *Id.* at 114. The defendant agreed and executed the requisite written consent for his release. *Id.* Later, when officers conducted a search of the probationer's apartment (based on reasonable suspicion), as permitted by the terms of the defendant's probation, the defendant contended that the search violated his Fourth Amendment rights. *Id.* at 114–15. When the case reached the United States Supreme Court, the government asked the Court to declare the search valid based on the defendant's consent. *Id.* at 118. The Court did not reach this issue. *Id.* Instead, it found the search reasonable under a totality-of-the-circumstances analysis. *Id.* ("We need not decide whether Knights' acceptance of the search condition constituted consent . . . because we conclude that the search of Knights was reasonable under our general Fourth Amendment approach of examining the totality of the circumstances.").

In the Supreme Court's 2005 term, it again encountered a case that raised a post-conviction-consent-to-search issue. Samson v. California, 126 S. Ct. 2193 (2006). In *Samson*, the Court was asked to determine whether a California statute violated the Fourth Amendment. *Id.* at 2194. The statute required all prisoners released on parole to sign a written agreement in which the parolee consented to searches or seizures by any peace officer at any time without a warrant and without cause. *Id.* at 2196. Once again, rather than decide the case based solely on the parolee's consent to suspicionless searches, the Court considered the parolee's written acceptance of the search provision as one factor among the totality of the circumstances, suggesting that the search in question was reasonable as the Fourth Amendment requires. *Id.* at 2199 ("Examining the totality of the circumstances pertaining to petitioner's status as a parolee . . . including the plain terms of the parole search conditions, we conclude that petitioner did not have an expectation of privacy that society would recognize as legitimate."); *id.* at 2199 n.3 ("[W]e need not reach the issue whether 'acceptance of the search condition constituted consent in the *Schneckloth* [*v. Bustamonte*] sense of a complete waiver of his Fourth Amendment rights.'" (alteration in original) (quoting United States v. Knights, 534 U.S. 112, 118 (2001))).

84. *See Samson*, 126 S. Ct. at 2199 n.3; *Knights*, 534 U.S. at 118.

85. Bell v. Wolfish, 441 U.S. 520 (1979); *see infra* Part I.C.1 (discussing *Bell*).

86. Griffin v. Wisconsin, 483 U.S. 868 (1987); *see infra* Part I.C.2 (discussing *Griffin*).

consent as a factor weighing in favor of Fourth Amendment reasonableness.[87]

1. The Government Can Detain Arrested Persons Prior to Trial

The Supreme Court has authorized the government to subject arrested persons to pretrial detention entailing sobering restrictions and invasive searches. In *Bell v. Wolfish*, the Supreme Court held that "the Government . . . may detain [an arrested person] to ensure his presence at trial and may subject him to restrictions and conditions . . . so long as those conditions and restrictions do not amount to punishment, or otherwise violate the Constitution."[88] The Supreme Court in *Bell* declared that the "[l]oss of freedom of choice and privacy are inherent incidents of confinement in a [pretrial detention] facility."[89] The Court rejected the Fourth Amendment claims of pretrial detainees, including their challenge to a detention facility's requirement that detainees submit to visual body-cavity strip searches following every "contact" visit with someone from outside the institution.[90] Emphasizing that the Fourth Amendment "prohibits only unreasonable searches," the Court rejected the argument that such invasive strip searches were unreasonable.[91]

Not only has the Court accepted the government's power to subject pretrial detainees to such intensely intrusive detention conditions as strip searches, but it has also endorsed the government's view that pretrial *release* may be accompanied by significant restrictions on privacy and liberty.[92] The Court has commented that the government can impose "burdensome conditions" on an arrested person during pretrial release.[93] The Court has also said that "[t]here are many kinds of pretrial release and many degrees of conditional liberty."[94] In short, the Supreme Court has interpreted the Fourth Amendment as tolerating restrictions on the rights and liberties of arrested persons, whether detained or conditionally released.[95]

87. *See supra* note 83 (discussing *Knights* and *Samson*).

88. *Bell*, 441 U.S. at 536–37. *Bell* was a class-action lawsuit challenging numerous conditions of pretrial confinement at a federally operated short-term custodial facility in New York City. *Id.* at 523, 525.

89. *Id.* at 537

90. *Id.* at 558.

91. *Id.* at 558–59 (citation omitted).

92. *See* United States v. Salerno, 481 U.S. 739, 739 (1987) (rejecting a claim that the Bail Reform Act, which expressly authorizes an array of extensive conditions for pretrial release, was facially unconstitutional); Gerstein v. Pugh, 420 U.S. 103, 114 (1975) (noting, in dicta, that pretrial release may be accompanied by extensive conditions).

93. *Gerstein*, 420 U.S. at 114. *Gerstein* was a class action in which the plaintiffs claimed that criminal defendants maintain a constitutional right to a judicial hearing on probable cause when charged by information, rather than by a grand-jury indictment. *Id.* at 107.

94. *Id.* at 125 n.26 (citations omitted).

95. *Bell*, 441 U.S. at 536–37; *Gerstein*, 420 U.S. at 125.

The Court's validation of pretrial detention and its approval of restrictions on those persons released pretrial does not answer the Fourth Amendment waiver issue. However, the Court's acceptance of the government's power to infringe on a detainee's most personal right of bodily integrity,[96] and its acceptance of burdensome conditions on other, less dangerous persons who have never been adjudged guilty beyond a reasonable doubt, shows the Court's general willingness to allow the government to intrude on rights of arrested persons. This general willingness suggests that the Court would also look favorably at Fourth Amendment waivers in the pretrial context.

2. The Government Can Search Probationers' Homes Without a Warrant

In addition to its precedent addressing some of the Fourth Amendment burdens that detained persons and those released on conditions must endure while awaiting trial, the Supreme Court has twice considered the Fourth Amendment rights of post-conviction probationers whose homes were searched without a warrant. The first time was in *Griffin v. Wisconsin*[97] and the second in *United States v. Knights*.[98]

In *Griffin*, the Court evaluated the warrantless search of a probationer's home.[99] Griffin was on probation for resisting arrest, disorderly conduct, and obstructing an officer.[100] Under Wisconsin law, as a probationer, Griffin was in the legal "custody" of the State Department of Health and Social Services.[101] A regulation issued by that agency permitted any probation officer to search a probationer's home on "reasonable grounds," rather than probable cause.[102] Pursuant to that regulation, probation officers searched Griffin's home following a tip from a police detective that there might be guns in Griffin's apartment.[103] Officers found a handgun during their search,[104] so Griffin was charged with possession of a firearm by a convicted felon.[105] Prior to his jury trial, Griffin moved to suppress the gun.[106]

The Court did not decide whether, as a probationer, Griffin had "consented" to such searches as a term of his probation. Rather, the Court

96. The Court has unquestionably recognized a right of personal privacy within the Constitution, although the source of the right has been hotly disputed. *See* Roe v. Wade, 410 U.S. 113, 152 (1973).

97. Griffin v. Wisconsin, 483 U.S. 868, 870–71 (1987).

98. United States v. Knights, 534 U.S. 112, 114–15 (2001).

99. *Griffin*, 483 U.S. at 870–71.

100. *Id.* at 870.

101. *Id.*

102. *Id.* at 870–71.

103. *Id.* at 871.

104. *Griffin*, 483 U.S. at 871.

105. *Id.* at 872.

106. *Id.*

applied a "special needs" analysis and held that the warrantless search did not violate the Fourth Amendment because the search "was carried out pursuant to a regulation that itself satisfie[d] the Fourth Amendment's reasonableness requirement."[107] The Supreme Court observed that it had previously held that "in certain circumstances government investigators conducting searches pursuant to a regulatory scheme need not adhere to the usual warrant or probable-cause requirements as long as their searches meet 'reasonable legislative or administrative standards.'"[108] In other words, the Court was content to allow a warrantless search conducted pursuant to a regulation, as long as the regulation was reasonable in that it furthered a legitimate government interest for conducting the search.[109] After finding that the regulation satisfied the Fourth Amendment, the Court expressed, more generally, 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 requirements. Probation, like incarceration, is 'a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty.'"[110]

Although the Court in *Griffin* did not evaluate the consent issue, it addressed the impact of probation on a person's expectation of privacy under the Fourth Amendment when it emphasized that 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.'"[111] While the Court distinguished probationers from other, unconvicted persons, it nevertheless expressly acknowledged that even a probationer's home, "like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.'"[112]

More than a decade after *Griffin*, the Supreme Court again considered a probationer's Fourth Amendment challenge to a search of his home in *United States v. Knights*.[113] As in *Griffin*, the Court decided the case on grounds other than consent, but still validated the warrantless search.[114] This

107. *Id.* at 873.

108. *Id.* (quoting Camara v. Mun. Court, 387 U.S. 523, 538 (1967)).

109. *Griffin*, 483 U.S. at 873.

110. *Id.* at 873–74 (quoting GEORGE G. KILLINGER, HAZEL B. KERPER & PAUL F. CROMWELL, PROBATION AND PAROLE IN THE CRIMINAL JUSTICE SYSTEM 14 (1976) [hereinafter PROBATION AND PAROLE]).

111. *Id.* at 874 (alterations in original) (quoting Morrissey v. Brewer, 408 U.S. 471, 480 (1972)).

112. *Id.* at 873.

113. United States v. Knights, 534 U.S. 112, 114–15 (2001).

114. *Id.* at 118. The Court deemed it unnecessary to decide "whether Knights' acceptance of the [probation] search condition constituted consent" to waive his Fourth Amendment rights. *Id.* Rather, the Court weighed the degree of intrusion upon Knights's privacy against the government's legitimate need for the search. *Id.* at 118–19. On balance, the Court was convinced that the totality of the circumstances demonstrated that the search was reasonable.

time, there was no state regulation authorizing the search.[115] Knights had been sentenced to "summary probation" for a drug offense.[116] His probation order required him to "'[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.'"[117] Knights signed the probation order immediately below a line that said, "'I HAVE RECEIVED A COPY, READ AND UNDERSTAND THE ABOVE TERMS AND CONDITIONS OF PROBATION AND AGREE TO ABIDE BY SAME.'"[118]

While Knights was still on probation and subject to this condition, someone burned a telecommunications facility, and the local sheriff's department suspected that Knights was involved in the fire.[119] After conducting surveillance of Knights's apartment, a detective who was aware of Knights's probation order—and therefore believed that a warrant was unnecessary—searched Knights's apartment for evidence of Knights's involvement in the arson.[120] Knights moved to suppress evidence found during the apartment search that implicated him in the fire.[121]

The Supreme Court framed the pertinent issue as "whether a search pursuant to this probation condition, and supported by reasonable suspicion, satisfied the Fourth Amendment."[122] The Court ultimately concluded that the search was "reasonable within the meaning of the Fourth Amendment" because it was "supported by reasonable suspicion and authorized by a condition of probation."[123] The government had urged a different justification. It argued that Knights had consented to the search when he signed the probation order.[124] The Court noted that the government viewed "Knights' acceptance of the search condition []as voluntary because he had the option of rejecting probation and going to prison instead, which the Government argue[d wa]s analogous to the voluntary decision defendants often make to waive their right to a trial and accept a plea bargain."[125] Despite the government's argument, the Supreme Court did not decide the case on the basis of Knights's consent:

Id. at 119–21. Nevertheless, the Court in *Knights* expressly recognized Knights's signature on the probation form as "a salient circumstance" in the totality-of-the-circumstances Fourth Amendment evaluation. *Id.* at 118.

115. *See id.* at 117.

116. *Id.* at 114.

117. *Id.* (alterations in original) (quoting the probation order).

118. *Knights*, 534 U.S. at 114 (quoting the probation order).

119. *Id.* at 114–15.

120. *Id.* at 115.

121. *Id.* at 116.

122. *Id.* at 114.

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

124. *Id.* at 118.

125. *Id.*

> We need not decide whether Knights' acceptance of the search condition constituted consent in the *Schneckloth* [*v. Bustamonte*] sense of a complete waiver of his Fourth Amendment rights, however, because we conclude that the search of Knights was reasonable under our general Fourth Amendment approach of "examining the totality of the circumstances[]" . . . .[126]

In sum, *Knights*, like *Griffin*, left at least two important questions unresolved: (1) whether a convicted person (let alone an arrested person) can validly consent to a blanket waiver of his or her Fourth Amendment rights to gain release from incarceration on probation, and (2) whether any such waiver can, without more, justify a search of a person's home on less than probable cause.

Griffin teaches, on one hand, that probationers' homes are protected by the Fourth Amendment.[127] On the other, *Griffin* declares that probationers do not enjoy the absolute liberty to which every other citizen is entitled.[128] Although *Griffin* reiterates these clear rules at the boundaries, it fails to resolve several issues relevant to whether the government can lawfully subject arrested persons to Fourth Amendment searches on less than probable cause.[129] For example, is a pretrial-services program the equivalent of a probation program for purposes of the special-needs exception to the Fourth Amendment? In other words, if an arrested person is released under the supervision of a pretrial-services officer, is a search conducted pursuant to such a program exempted by the special-needs exception from the usual Fourth Amendment analysis? Furthermore, are persons released pretrial the equivalent of probationers for purposes of all Fourth Amendment issues?

There is at least one key difference between the pretrial setting and the post-conviction setting. Arrested persons have not been restricted "'after verdict, finding, or plea of guilty'" and cannot be punished.[130] They are not convicts. They are not guilty beyond a reasonable doubt as determined by a jury of their peers following an evidentiary trial, which is accompanied by guarantees of due process and Sixth Amendment rights to counsel, cross-examination, confrontation, and other constitutional protections. Nevertheless, in almost all cases in which a person is arrested on a federal charge, a neutral magistrate judge promptly determines that probable cause

126. *Id.* at 118 (quoting Ohio v. Robinette, 519 U.S. 33, 39 (1996)). The Court also did not decide "whether the probation condition so diminished, or completely eliminated, Knights' reasonable expectation of privacy." *Id.* at 120 n.6.

127. Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) ("A probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.'").

128. *Id.* at 874 (declaring that probationers enjoy only conditional liberty contingent on special probation restrictions).

129. *See id.* at 873–74 (addressing the rules that fall at the extremes without resolving other complexities).

130. *Id.* (quoting PROBATION AND PAROLE, *supra* note 110, at 14).

exists for the charge; thus, there is a reasonable probability that the arrestee did commit a crime. And, every person charged with a serious federal crime presents some risk of flight from prosecution. Some arrestees obviously present more than a flight risk. They may present a risk of harm to themselves, witnesses, and/or the community.

3. The Government Can Search a Parolee's Person Without Reasonable Suspicion and Absent a Warrant

Recently, in *Samson v. California*, the Supreme Court ruled that a law-enforcement officer acts reasonably and complies with the Fourth Amendment when he conducts a suspicionless search on a public street of a person who has been released from prison on parole pursuant to a state law that requires the person to "'agree in writing to be subject to search or seizure by a . . . peace officer at any time . . . with or without a search warrant and with or without cause.'"[131]

Samson was paroled from prison in accordance with a California law that made his parole dependent on his signing a form in which he "agreed" to random, warrantless searches with or without cause.[132] While on parole, subject to this condition, a police officer stopped Samson on the street, believing that Samson was wanted for a parole violation.[133] During the stop, the officer learned that he was mistaken; there was no outstanding warrant for Samson.[134] Notwithstanding this new information, the officer searched Samson anyway "based solely on [Samson]'s status as a parolee."[135] In Samson's breast pocket, the officer found a cigarette box containing methamphetamine.[136]

Based on the methamphetamine found in his pocket, Samson was charged in a California state court with unlawful possession of the drug.[137] Before trial, Samson moved to suppress the methamphetamine, but the trial judge denied the motion.[138] A jury convicted Samson, and he was sentenced to seven years of imprisonment.[139]

In upholding the search as reasonable under the Fourth Amendment, the Supreme Court applied the usual totality-of-the-circumstances test, weighing Samson's privacy interests against the government's interest in

131. Samson v. California, 126 S. Ct. 2193, 2196 (2006) (quoting CAL. PENAL CODE § 3067(a) (West 2000)).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Samson*, 126 S. Ct. at 2196.

137. *Id.*

138. *Id.*

139. *Id.*

reducing recidivism by parolees.[140] Significantly, the Court determined that on the "continuum" of persons with privacy interests, parolees "have fewer expectations of privacy than probationers."[141] According to the Court, "'The 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.'"[142] The Court noted the many conditions routinely imposed on parolees as further evidence that parolees "have severely diminished expectations of privacy by virtue of their status alone."[143] The Court also considered it relevant that the California law, under which Samson was paroled, required Samson to submit to suspicionless searches and that this requirement was "clearly expressed" to Samson in the order he signed to gain release.[144] The Court concluded: "Examining the totality of the circumstances pertaining to [Samson]'s status as a parolee, 'an established variation on imprisonment,' . . . including the plain terms of the parole search condition, we conclude that [Samson] did not have an expectation of privacy that society would recognize as legitimate."[145]

As in *Knights*, however, the Court did not decide whether Samson waived his Fourth Amendment rights and/or consented to the Fourth Amendment search of his person when he signed the order acknowledging that release on parole would be accompanied by the potential for such warrantless, suspicionless searches.[146] On this point, the Court explained: "Because we find that the search at issue here is reasonable under our Fourth Amendment approach, we need not reach the issue whether 'acceptance of the search condition constituted consent in the *Schneckloth* [*v. Bustamonte*] sense of a complete waiver of his Fourth Amendment rights.'"[147]

Thus, while the Supreme Court has twice considered a post-conviction person's "consent" to warrantless, suspicionless searches of person and home to be *one* factor of Fourth Amendment reasonableness,[148] the Court has never decided whether a convicted person, let alone a pretrial arrestee,

140. *Id.* at 2196–97; *see also supra* note 70 (discussing the totality-of-the-circumstances test).

141. *Samson*, 126 S. Ct. at 2194; *see id.* at 2198 ("[P]arole is more akin to imprisonment than probation is to imprisonment.").

142. *Id.* (quoting Morrissey v. Brewer, 408 U.S. 471, 477 (1972)).

143. *Id.* at 2199 (noting that typical parole conditions include: mandatory drug tests, restrictions on associating with felons, mandatory meetings with parole officers, restrictions on weapon possession and travel, and tailored conditions for some parolees that can include psychiatric treatment and/or abstinence from alcohol).

144. *Id.*

145. *Id.* (citation omitted).

146. *Samson*, 126 S. Ct. at 2199 n.3.

147. *Id.* (alteration in original) (quoting United States v. Knights, 534 U.S. 112, 118 (2001)). Likewise, the Court avoided a "special needs" *Griffin*-type analysis of the issue, finding such analysis unnecessary where the typical Fourth Amendment totality-of-the-circumstances evaluation revealed the search to be constitutionally reasonable. *Id.*

148. *See supra* Part I.C.2–3.

"consents" to waive her Fourth Amendment rights by signing a form saying that she does.

D. POST-CONVICTION BLANKET FOURTH AMENDMENT WAIVERS AND THE FEDERAL COURTS OF APPEAL

While the Ninth Circuit Court of Appeals is the only circuit to have faced the *pretrial* Fourth Amendment consent issue,[149] other circuits have considered *post-conviction* waivers with differing results. Last year, the Seventh Circuit upheld "a blanket waiver of Fourth Amendment rights as a condition of *probation*" in *United States v. Barnett*.[150] There, a criminal defendant pleaded guilty to a gun charge and then appealed, arguing that his earlier motion to suppress had been wrongly denied by the trial court.[151] Before facing the federal gun charge, Barnett had been convicted in a state court and sentenced to "intensive" probation, rather than incarceration.[152] Among other conditions of his intensive probation, Barnett was required to "'submit to searches of [his] person, residence, papers, automobile and/or effects at any time such requests are made by the Probation Officer, and consent to the use of anything seized as evidence in Court proceedings.'"[153]

Pursuant to the search condition of Barnett's intensive probation, the government searched Barnett's home without a warrant (and arguably without reasonable suspicion to suspect that he was violating his intensive probation).[154] The Seventh Circuit upheld the warrantless search as compatible with the Fourth Amendment and affirmed Barnett's conviction, noting that "[c]onstitutional rights like other rights can be waived, provided that the waiver is knowing and intelligent, as it was here."[155] Essentially, the Seventh Circuit relied on common, contract-type principles of bargained-for offer and acceptance to find that Barnett had waived his Fourth Amendment rights when he avoided incarceration by negotiating his release on intensive probation.[156] The court explained:

149. At least two states have decided the issue. *See In re* York, 892 P.2d 804, 814 (Cal. 1995) (rejecting the idea that an arrested person who seeks release has the same reasonable expectation of privacy as someone who has posted reasonable bail and holding that persons unable to post reasonable bail may be required to consent to warrantless searches and seizures to gain release); State v. Ullring, 741 A.2d 1065, 1068 (Me. 1999) (holding that the mere fact that an arrestee is incarcerated when he decides to consent to waive his Fourth Amendment rights as part of pretrial release does not invalidate the consent).

150. United States v. Barnett, 415 F.3d 690, 691 (7th Cir. 2005) (emphasis added).

151. *Id.* at 691.

152. *Id.*

153. *Id.* (alteration in original) (quoting terms of probation).

154. *Id.* at 693.

155. *Barnett*, 415 F.3d at 691.

156. *Id.* at 693. In fact, the *Barnett* court compared the probation agreement to a "contract" involved in plea bargains. *Id.* "Plea bargains are a form of contract . . . and like other contracts

> Barnett didn't want to go to prison. He preferred to sacrifice the limited privacy to which he would have been entitled had he been on ordinary as distinct from intensive probation . . . just as convicted defendants prefer home confinement to confinement in a jail or prison even if the home confinement involves monitoring the defendant's activities inside the home and thus invades his privacy. And since imprisonment is a greater invasion of personal privacy than being exposed to searches of one's home on demand, the bargain that Barnett struck was not only advantageous to him but actually more protective of Fourth Amendment values than the alternative of prison would have been.[157]

Applying an analysis akin to the analysis that the Seventh Circuit used in *Barnett*, the Sixth Circuit has also upheld a criminal defendant's consent to a blanket search in the context of post-conviction probation.[158] In *United States v. Downs*,[159] a defendant signed a probation agreement acknowledging:

> "'In consideration of having been granted supervision on 9-15-94, I agree . . . to the following conditions: . . . I agree to a search without warrant of my person, my motor vehicle, or my place of residence by a probation/parole officer at any time . . . . I have read or had read to me, the foregoing conditions of my probation. I fully understand these conditions. I agree to comply with them, and I understand that violation of any of these conditions may result in the revocation of my probation.'"[160]

Based on the defendant's execution of this probation agreement, the Sixth Circuit concluded that the defendant's probation officer was constitutionally authorized to search the defendant's home based on reasonable suspicion, as opposed to probable cause, that the defendant was violating his probation.[161] The court noted that "the waiver of a constitutional right such as this one must be voluntary, knowing, and intelligent."[162] In evaluating the knowing and intelligent nature of Downs's valid waiver of his Fourth Amendment rights, the Sixth Circuit found the terms of the condition "readily understandable" and stated that the writing put the defendant/probationer on notice that his home might be the

---

are presumed to make both parties better off and do no harm to third parties, and so they are enforceable and enforced." *Id.* at 692 (citations omitted).

157. *Id.* at 691–92.

158. *See generally* United States v. Downs, No. 96-3862, 1999 WL 130786 (6th Cir. Jan. 19, 1999) (unpublished opinion).

159. *Id.*

160. *Id.* at *2 (quoting Downs's conditions of supervision).

161. *Id.* at *4.

162. *Id.* (citing Brady v. United States, 397 U.S. 742, 748 (1970)).

subject of a warrantless search.[163] Thus, the Sixth Circuit panel concluded that "[the defendant's] waiver of his Fourth Amendment protection was knowing and intelligent."[164]

As for the voluntariness of relinquishing his rights, the court quickly concluded with only superficial analysis that Downs had signed his probation agreement voluntarily.[165] Although the court acknowledged that Downs "lacked an attractive option when making his choice to waive his Fourth Amendment protections,"[166] the court also found that "having to decide between probation with a waiver of some rights or incarceration does not negate the voluntariness of the choice."[167] The Sixth Circuit concluded: "In light of the policies and case law supporting diminished Fourth Amendment freedoms for probationers and Downs's consent to warrantless searches in his supervision agreement, we find no error in the district court's denial of Downs's motion to suppress."[168]

In addition to the offer and acceptance contract-type analysis applied by the Sixth and Seventh Circuits in validating a probationer's blanket waiver of Fourth Amendment rights, the Second Circuit has evaluated such probation waivers using a special-needs analysis. In *United States v. Lifshitz*,[169] the Second Circuit expressed a general willingness to uphold warrantless searches of probationers without probable cause, although it was equally concerned with restricting such searches to specific law-enforcement needs.[170] The court in *Lifshitz* reviewed a computer-monitoring condition imposed on a probationer who had been convicted of receiving child pornography over the Internet.[171] The sentencing court in *Lifshitz* had granted the defendant a ten-level downward departure[172] from the recommended sentencing-

163. *Downs*, 1999 WL 130786, at *4.

164. *Id.*

165. *Id.*

166. *Id.* at *4 n.2.

167. *Id.*

168. *Downs*, 1999 WL 130786, at *4.

169. United States v. Lifshitz, 369 F.3d 173 (2d Cir. 2004).

170. *Id.* at 185–86.

171. *Id.* at 175–76.

172. In imposing sentences in federal court, sentencing judges are guided by the United States Sentencing Guidelines. U.S. SENTENCING COMMISSION, GUIDELINES MANUAL (2005) [hereinafter GUIDELINES MANUAL], *available at* http://www.ussc.gov/2005guid/gl2005.pdf. The Sentencing Guidelines were created as part of the Sentencing Reform Act of 1984 ("SRA"). 18 U.S.C. § 3551 (2000); *see* Apprendi v. New Jersey, 530 U.S. 466, 550 (2000) (explaining that the SRA created the U.S. Sentencing Commission, "which in turn promulgated the [Federal] Sentencing Guidelines"). The SRA was passed in an effort to end the uncertainties and disparities that had accompanied the indeterminate-sentencing system that predated the Federal Sentencing Guidelines. Mistretta v. United States, 488 U.S. 361, 365–66 (1989). The sentencing guidelines now provide an advisory range of punishments that a court may impose on a particular defendant. *See generally* United States v. Booker, 543 U.S. 220, 246 (2005) (making the sentencing guidelines merely advisory); GUIDELINES MANUAL, *supra*. The range is

guideline range and had placed the defendant on probation with conditions.[173] One of the conditions, a rigid computer-monitoring restriction, prompted Lifshitz to appeal.[174] The contested condition provided:

> "'[T]he defendant shall consent to the installation of systems that will enable the Probation office or its designee to monitor and filter computer use on a regular or random basis and any computer owned or controlled by the defendant. The defendant shall consent to unannounced examinations of any computer equipment owned or controlled by the defendant which may result in the retrieval and copying of all data from the computer and any internal or external peripherals and may involve removal of such equipment for the purpose of conducting a more thorough investigation.'"[175]

In evaluating the search conditions imposed on Lifshitz, the Second Circuit articulated a general acceptance of some warrantless searches of probationers but voiced an even stronger desire to limit the scope of such searches.[176] As the court put it: "[T]he search program at issue must seek a minimum of intrusiveness coupled with maximal effectiveness so that the searches 'bear a close and substantial relationship' to the government's 'special needs.'"[177] Thus, the Second Circuit viewed the pertinent issue as "whether the computer monitoring condition imposed upon Lifshitz constitutes such a 'more focused restriction,' or does itself result in a deprivation of privacy 'greater . . . than reasonably necessary.'"[178]

Unlike the Seventh Circuit that insisted on holding a probationer to the bargain he struck with the government, the Second Circuit seemed unconcerned that Lifshitz had agreed to concede some of his Fourth

designed to reflect the severity of the crime committed, the defendant's criminal history, and other circumstances relevant to the particular offense and offender. *See Booker*, 543 U.S. at 246. The guidelines result in a mathematical-type calculation of suggested sentences, using a grid in which a defendant is assigned an offense level and a criminal-history category. *See generally* GUIDELINES MANUAL, *supra*, at app. G (providing the Sentencing Table). In *Lifshitz*, the sentencing judge deviated by ten levels and/or categories from the applicable guideline range, thereby significantly reducing the range of punishment that Lifshitz would have been expected to receive if the guidelines had been more strictly adhered to. *Liftshitz*, 369 F.3d at 177.

173. *Lifshitz*, 369 F.3d at 177.

174. *Id.* at 175.

175. *Id.* at 177 (alteration in original) (quoting the computer-monitoring restriction).

176. *Id.* at 185–86.

177. *Id.* at 186.

178. *Lifshitz*, 369 F.3d at 189 (alteration in original); *see also id.* at 190 (stating that a court "must assess the necessary scope of the monitoring condition in light of the 'special needs' articulated in this particular case, those of rehabilitating Lifshitz and ensuring that he does not inflict further harm on the community by receiving or disseminating child pornography during the probationary period").

Amendment protections as a means of avoiding incarceration. Implicitly, the Second Circuit, like the Ninth Circuit in *Scott*, focused on what the totality of the circumstances dictated was reasonable. The Second Circuit remanded the case to the district court with directions that the trial court further evaluate the "privacy implications" of the proposed computer-monitoring techniques it had previously imposed as a term of Lifshitz's probation.[179]

In sum, the handful of federal circuit courts that have confronted the "consent" issue have struggled in deciding whether *post-conviction* probationers can validly waive their Fourth Amendment rights as a condition of release from incarceration and, if so, how extensive such waivers can and/or should be. The variations in the courts' reasoning and conclusions regarding *convicted* criminals highlight the constitutional tension and difficult legal issues presented when someone awaiting trial is asked to waive his Fourth Amendment rights to gain pretrial liberty.

There are constitutional and pragmatic reasons why the law should treat convicted persons differently than it treats charged persons. The most important, of course, is that an arrested person may be innocent. An obvious basis for a criminal defendant's constitutional guarantees to legal counsel, confrontation, trial by jury, and a beyond-a-reasonable-doubt standard of proof at trial is society's desire to ensure that innocent persons are not convicted and punished. The basic rationales underlying the punishment of convicted criminals—utilitarianism[180] and retributivism[181]—are ineffective unless the defendant is guilty. Furthermore, it is unconstitutional for the government to punish someone who has not been convicted of a crime.[182] Because the federal courts have not uniformly decided that convicted criminals may unconditionally waive their Fourth Amendment rights to gain *post*-conviction liberty, there is even less reason to believe that there will be judicial agreement on waivers in the pretrial context.

179. *Id.* at 193.

180. Utilitarianism presumes that criminal laws will "maximize the net happiness of society" but also rests on the notion that happiness will be maximized only when inflicting punishment is necessary to reduce "the pain of crime that would occur otherwise." JOSHUA DRESSLER & GEORGE C. THOMAS, III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES 1215 (2d ed. 2003) [hereinafter DRESSLER & THOMAS]. Utilitarianism would never support punishment of the innocent. *See generally id.* For instance, deterrence, which is a utilitarian goal, remains unserved when the innocent are punished. *Id.*

181. "Retributivists believe that punishment is justified when it is deserved." *Id.* at 1216. Naturally, someone innocent of a charged crime does not deserve punishment. Furthermore, there is no rational reason to ask him to relinquish his rights and privileges.

182. Bell v. Wolfish, 441 U.S. 520, 535 n.16, 536–37 (1979); *see supra* Part I.C.1 (discussing *Bell*); *see also* Benjamin v. Fraser, 343 F.3d 35, 49–50 (2d Cir. 2003) (noting that a pretrial detainee has not been adjudged guilty of any crime and may not be punished, cruelly, unusually, or otherwise, but acknowledging that not every uncomfortable condition or restriction is punitive); O'Connor v. Huard, 117 F.3d 12, 16 (1st Cir. 1997) (indicating that punishment of pretrial detainee, except for violations of "order and security" administration regulations, is unconstitutional).

II. PRETRIAL RELEASE CONDITIONED ON A FOURTH AMENDMENT WAIVER SHOULD BE PERMITTED

A. THE DILEMMA

Can an arrested person who faces pretrial detention validly and freely waive his or her rights in exchange for release from jail?[183] The decision in *United States v. Scott* exposes the constitutional tension that results when an arrested person seeks to strike a bargain with the government to gain the freedoms associated with pretrial release from jail.[184] The stress of an arrest[185] and the pressures that necessarily accompany making a choice between two undesirables, jail and waiver of one's Fourth Amendment rights, can reach a coercive level.[186] The Ninth Circuit captured the essence of these pressures in its decision in the *Scott* case. As the court noted there, Scott "was given the choice to waive his Fourth Amendment rights or stay in jail."[187]

Some legal scholars would undoubtedly argue that such a choice is no choice at all.[188] As the Ninth Circuit recognized, "Many pretrial detainees willingly consent to such conditions, preferring to give up some rights in order to sleep in their own beds while awaiting trial."[189] On the other hand, without such an option to use some rights as a bargaining tool, Scott and others like him could remain in jail indefinitely.[190] Thus, a decision to waive

183. In *United States v. Scott*, 450 F.3d 863 (9th Cir. 2006), the majority drew a distinction between a criminal defendant's ability to waive his Fourth Amendment rights, which the court believed defendants could do, and the government's power to "induce" a pretrial defendant "to waive his Fourth Amendment rights by conditioning pretrial release on such a waiver." *Id.* at 865 n.4. I think the distinction is more semantic than substantive. When an arrestee waives his Fourth Amendment rights in exchange for release from incarceration pending trial, it makes no difference to him whether he offers his rights in exchange for release or whether the government seeks to induce him to forego these rights. *Id.* at 887 n.7 (Bybee, J., dissenting) ("In one sense, the government has no more 'induced' Scott to forgo his Fourth Amendment rights in exchange for his liberty, than Scott has 'induced' the government to forgo its right to require bail in exchange for the right to search him at his home.").

184. *Id.* at 865 (majority opinion).

185. "An arrest . . . is a serious personal intrusion regardless of whether the person seized is guilty or innocent." United States v. Watson, 423 U.S. 411, 428 (1976) (Powell, J., concurring).

186. *See* Miranda v. Arizona, 384 U.S. 436, 457 (1966) (noting the potential for compulsion when a person is arrested, "thrust into an unfamiliar atmosphere," and subjected to "menacing police interrogation procedures").

187. *Scott*, 450 F.3d at 866.

188. *See* Cathryn Jo Rosen, *The Fourth Amendment Implications of Urine Testing for Evidence of Drug Use in Probation*, 55 BROOK. L. REV. 1159, 1195 (1990) (asserting that "it is pure fiction" to conclude that a *probationer's* agreement to submit to a search and seizure condition is not coerced given that a defendant must choose between freedom and incarceration).

189. *Scott*, 450 F.3d at 865–66.

190. The Bail Reform Act contains no time limits on detention. Bail Reform Act of 1984 § 203, 18 U.S.C. § 3141 (2000). Of course, speedy-trial deadlines would provide some outside limits on the indefinite nature of the detention, given that the pretrial detainee is held only

Fourth Amendment rights arguably only increases the opportunities, options, rights, and liberties available to persons, like Scott, who are charged with a crime. "After all, Scott's options were only expanded when he was given the choice to waive his Fourth Amendment rights or stay in jail."[191]

Is an arrested person who faces the real likelihood of indefinite, pretrial detention pressed to waive his constitutional rights? Of course he is. It defies common sense to say that such a decision is, in fact, a "free and unconstrained choice"[192] in the sense that the arrested person feels no urgency to subordinate his Fourth Amendment rights. Certainly, if such a defendant lacks the property, money, or other means needed to secure his release from jail, there is little doubt that he will almost always "decide" to waive his Fourth Amendment rights (and any others necessary)[193] to gain freedom from detention. Detention, after all, is a place where an arrested person has even fewer rights and liberties. If an arrestee waives his Fourth Amendment rights, he immediately gains the opportunity, among other freedoms, to sleep in his own bed, choose his own meals, and move about beyond bars. Because the attraction of these comforts is so great, the only time a pretrial defendant is likely to choose to preserve his Fourth Amendment rights and accept detention is when he knows that his home or belongings currently contain incriminating evidence. In that instance, the pressure might be greatest to accept pretrial detention to protect the adverse evidence from the reach of the police.[194]

In addition to the perils to liberty and privacy that individuals face when asked to trade their Fourth Amendment rights for their freedom, there are obvious dangers to society that accompany an arrestee's blanket Fourth

until trial. *See* Speedy Trial Act, 18 U.S.C. § 3161. In addition, arrested persons with property and other assets might gain release by posting bail. *See* Bail Reform Act of 1984 § 203, 18 U.S.C. § 3142(c)(1)(xi) (including as a possible condition of pretrial release that the arrested person execute an agreement to forfeit property used as collateral upon failing to appear as required); *id.* § 3142(c)(1)(xii) (including as a possible condition of pretrial release that the arrested person "execute a bail bond with solvent sureties"); *see also Scott*, 450 F.3d at 889 (Bybee, J., dissenting) ("It is not hard to imagine that some jurisdictions will decide that releasing persons accused of crimes on OR without such conditions will not serve the public interest.").

191. *Scott*, 450 F.3d at 866.

192. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973); *see also infra* Part II.B–C (discussing *Schneckloth*).

193. Perhaps this is really the problem. Where will the waivers stop? Once the government knows that it can "urge" a defendant to waive Fourth Amendment rights in the pretrial context, there is little to stop the government from obtaining a waiver of many other constitutional and/or statutory rights, whether or not the waivers correlate directly with risk of flight or danger to the community. For instance, why wouldn't the government demand that the arrestee waive his right to file a motion to suppress illegally seized evidence, or any other right that, when waived, would benefit the government?

194. Because a convicted defendant receives credit for time he spends in pretrial detention, a defendant who expects a conviction may also prefer to remain in jail before trial rather than forego his Fourth Amendment rights, especially if serving time is, for whatever reason, more convenient before trial than it would be after a conviction.

Amendment waiver.[195] "Pervasively imposing an intrusive search regime as the price of pretrial release, just like imposing such a regime outright, can contribute to the downward ratchet of privacy expectations."[196] "When an individual waives her Fourth Amendment rights in exchange for a government benefit or relief from some penalty, the waiver may implicate substantial public values."[197] The Fourth Amendment protection against unreasonable government searches and seizures guards all people from "government repression by subjecting governmental searches to scrutiny and review."[198] In other words, the Fourth Amendment protects the individual, but it also requires that government searches be "consistent with societal expectations of privacy."[199] In this way, the public values of security and privacy are protected.[200]

Regardless of the risks to individuals and a "free" society, the real issue in the pretrial, bail-hearing context is whether the pressure that necessarily accompanies the "choice" between two negative situations invalidates the choice altogether. It may be that a criminal defendant, in fact, prefers to waive one constitutional right to keep the ability to exercise others. The tougher, related issue is whether a defendant should be put to such a choice. Is it appropriate to allow and/or require a person who faces criminal charges, but who has not yet been deemed guilty, to select between rights? On the other hand, does an accused person not have the right or ability to exercise his own volition to remove himself from the potentially abhorrent possibility of indefinite pretrial confinement?[201] Life is replete with difficult choices, but difficulty alone does not always render a choice legally invalid.[202]

195. *See* Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 867–69 (2003) (citing AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 67–68 (1998)).

196. *Scott*, 450 F.3d at 867; *see also* California v. Acevedo, 500 U.S. 565, 586 (1991) (Stevens, J., dissenting) (stating that the Fourth Amendment acts as "a bulwark against police practices that prevail in totalitarian regimes").

197. Mazzone, *supra* note 195, at 868.

198. *Id.* at 868 & n.321 (quoting Johnson v. United States, 333 U.S. 10, 14 (1948) (recognizing society's interest in a living environment in which persons are reasonably free from surveillance)).

199. *Id.* at 868 (citing Hudson v. Palmer, 468 U.S. 517, 525 (1984)).

200. *Id.*

201. The Supreme Court has previously acknowledged that under our system of government, the people retain certain basic rights, even when the rights are not specifically mentioned in the Bill of Rights. *See, e.g.*, Roe v. Wade, 410 U.S. 179, 210–11 (1973) (noting various privacy and liberty rights retained by the people, including freedom of choice in the basic decisions of one's life); *see also* Daniel R. Williams, *Mitigation and the Capital Defendant Who Wants to Die: A Study in the Rhetoric of Autonomy and the Hidden Disclosure of Collective Responsibility*, 57 HASTINGS L.J. 693, 695 n.11 (2006) (describing the right to self-representation as one of the best expressions of the law's respect for an individual's autonomy to control his own criminal case).

202. At least one legal writer has urged that a *probationer's* consent to a blanket search is voluntary. *See* Marc R. Lewis, *Lost in Probation: Contrasting the Treatment of Probationary Search Agreements in California and Federal Courts*, 51 UCLA L. REV. 1703, 1731 (2004) ("A probationer's

B. WAIVERS CAN BE CONSENSUAL

Suspects in criminal investigations commonly consent to forego their Fourth Amendment rights.[203] In fact, criminal cases are full of examples of "voluntary" Fourth Amendment consent searches. Usually, a suspect "agrees" to a search of her person, car, or home without legal counsel and without the benefit of an unbiased judge who might ensure that the suspect consented under conditions that were fair and that she was not tricked or pressured into giving permission to search. Such searches routinely uncover contraband. *Schneckloth v. Bustamonte* presents a typical situation.[204] There, a police officer stopped a car after he noticed a headlight and a license-plate light burned out.[205] The officer pulled the car over and asked one of the passengers in the front seat if the officer could search the car.[206] The passenger said, "Sure, go ahead."[207] The search uncovered evidence of a crime.[208] The search in *Schneckloth* was deemed valid, even though the consenting person was not told that he had the right to refuse consent, even though he had no lawyer to consult, and notwithstanding that there was no neutral magistrate judge present to ensure that the passenger understood his rights.[209] As a practical matter, suspects do not act voluntarily and in the

advance waiver of Fourth Amendment protection is more likely to be knowing and intelligent than a criminal suspect's consent to search . . . ."). Although a probationer is already convicted and a potential pretrial detainee only charged, much of Lewis's reasoning also applies to the pretrial-waiver context. As Lewis notes: "When a probationer waives her Fourth Amendment rights, defense counsel is present to provide advice, and the proceeding itself is conducted by a neutral judicial official." *Id.* The same is true when an arrested person agrees to a blanket Fourth Amendment search waiver. *But see* Rosen, *supra* note 188, at 1195 (advancing the idea that it is "pure fiction" that a probationer's consent to a search-and-seizure condition is voluntary).

203. United States v. Barnett, 415 F.3d 690, 692 (7th Cir. 2005) ("Nothing is more common than an individual's consenting to a search that would otherwise violate the Fourth Amendment, thinking that he will be better off than he would be standing on his rights."); *see also* Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 773 (2005) ("Over 90% of warrantless police searches are accomplished through the use of the consent exception to the Fourth Amendment."); Williams, *supra* note 201, at 702 (noting the common-place nature of the waiver of constitutional rights and asserting that the right to waive is "a right in itself, one among the positive constitutional rights associated with the Fourth, Fifth, and Sixth Amendments").

204. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); *see also* United States v. Drayton, 536 U.S. 194, 197–200 (2002) (holding that bus passengers' consent to search their persons was "voluntary" as required by the Fourth Amendment, even though three officers entered the bus without probable cause, one knelt on the bus driver's seat at the front of the bus, one stationed himself at the back of the bus, and a third worked his way methodically through the bus, asking questions of passengers and then, without telling the passengers that they had a right to refuse, asked Drayton and his companion for permission to search their luggage and person).

205. *Schneckloth*, 412 U.S. at 220.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

absence of coercion when they "consent" to such searches; yet, the searches are conducted by law-enforcement officers, and courts routinely approve them.[210]

Logically, it is difficult to say that someone with little understanding of the law and no legal advisor can voluntarily "consent" to a search of his car or home, but that a pretrial detainee, who has usually been Mirandized[211] and who has the advice of counsel and the benefit of a neutral arbiter, should be prohibited from entering into an agreement "waiving" her Fourth Amendment rights. A person facing pretrial detention should arguably have less constitutional protection than a person who is not facing such confinement because he has had "a 'judicial determination of probable cause as a prerequisite to [the] extended restraint of [his] liberty following arrest.'"[212] If the arrestee is truly in danger of detention, he is also entitled to a detention hearing.[213] If a pretrial detainee were simply treated like an ordinary citizen, uncounseled consent to conduct a search would be wholly adequate. Arrestees should not enjoy more constitutional protections than those citizens not reasonably suspected of committing crimes; therefore, arrestees should, at least under some circumstances, be permitted to "agree" to such Fourth Amendment searches.[214]

The legal sustainability of a pretrial detainee's rights waiver (at least under the right precautionary circumstances) is most readily supported by the analogous setting in which an accused person waives his constitutional rights and pleads guilty to criminal charges. After all, waiving Fourth Amendment rights to avoid the indignities of an extended stay in jail can hardly be more coercive than entering a plea of guilty and foregoing all of the constitutional rights that accompany a jury trial. In fact, the Supreme Court has found that even if a person's plea of guilty rests, at least in part, on his fear of the death penalty, such a plea is valid, provided the defendant is

210. *See* Simmons, *supra* note 203, at 779 (contending that in practice the courts "only look to the conduct of the police," not the characteristics or volition of the suspect when determining if consent is voluntary); *see also id.* at 797 (arguing that in the Fourth Amendment context, "the focus is on the reasonableness of the actions of the law enforcement official, not the subjective consent of the individual being searched").

211. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966) (requiring that persons subjected to in-custody interrogation be advised of certain rights, including the right to remain silent and the right to legal counsel).

212. Bell v. Wolfish, 441 U.S. 520, 536 (1979) (alteration in original) (quoting Gerstein v. Pugh, 420 U.S. 103, 114 (1975)).

213. *Id.* (citation omitted).

214. One obvious difference between an arrestee and an average citizen who consents to a search is that an arrested person is not consenting to a specific, one-time search. She is providing an open-ended consent to potentially numerous searches at the whim of the government searcher.

represented by counsel, the plea complies with the mandates of Rule 11,[215] and the record reflects that the plea was entered understandingly and voluntarily.[216] A fortiari, Fourth Amendment rights waivers, which are necessarily accompanied by less compulsion, are legally supportable.

Like plea bargains, which courts have treated as a form of contract,[217] any bargain reached between the government and an arrested person who faces a risk of detention is nothing more than a contract "presumed to make both parties better off and [to] do no harm to third parties"[218] Applying basic contract principles, such waiver agreements are enforceable.[219] Like other contracts, "[i]f a party's manifestation of assent is induced by an improper threat . . . the contract [would be] voidable by the victim."[220]

If the federal courts validate post-arrest, pretrial Fourth Amendment waivers, arrested persons will undoubtedly feel pressure to forego their rights in favor of pretrial liberty. Nevertheless, an arrested person is afforded numerous protections from unfair dealing that are unavailable to the average citizen who may also be asked to consent to a Fourth Amendment search during a criminal investigation.[221] Persons facing pretrial detention benefit from legal counsel and a neutral arbiter who can assist them in

215. FED. R. CRIM. P. 11 (requiring the trial court to address the defendant personally in open court and to inform the defendant of his rights so that it is clear that the defendant's plea is really voluntary and grounded on a factual basis).

216. *See* Brady v. United States, 397 U.S. 742, 746–47 & n.4 (1970). The Supreme Court announced in *dicta* that the government "may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant." *Id.* at 750. The Court also held open the possibility that a criminal defendant would be "so gripped by fear of the death penalty [(a possible consequence of not pleading guilty)] or hope of leniency that he did not or could not, with the help of counsel, rationally weigh the advantages of going to trial against the advantages of pleading guilty." *Id.*; *see also* North Carolina v. Alford, 400 U.S. 25, 31 (1970) (finding that a defendant who would not have pled guilty except for an opportunity to limit the possible penalty does not necessarily demonstrate that plea was not a product of free and rational choice).

217. *See* United States v. Barnett, 415 F.3d 690, 692 (7th Cir. 2005) (finding that plea bargains are like contracts and should be interpreted in accordance with the parties' intentions); United States v. Rubbo, 396 F.3d 1330, 1334 (11th Cir. 2005) (same); *see also* Santobello v. New York, 404 U.S. 257, 262 (1971) ("[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.").

218. *Barnett*, 415 F.3d at 692.

219. *Id.*

220. 28 WILLISTON ON CONTRACTS § 71:8 (4th ed. 2003) (citing RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (1979)).

221. *Contrast* the "voluntary" consent to search given in *Schneckloth v. Bustamonte*, 412 U.S. 218, 232–33 (1973), which was valid, although the defendant was not accompanied by counsel, was unaware of his right to refuse consent, and was never told of a right against self-incrimination, *with* the numerous protections afforded an arrested person under the Bail Reform Act of 1984 § 203, 18 U.S.C. § 3142 (2000), including the right to counsel and to a hearing before a judge.

evaluating the pros and cons of such a waiver.[222] The law deems such procedural safeguards sufficient to ensure the voluntary nature of guilty pleas, all of which result in the loss of fundamental rights.[223] Therefore, the law should also respect a waiver of Fourth Amendment rights in the post-arrest, pretrial context. The procedural protections that attach to pretrial-detention hearings[224] will tend to confirm that an arrestee's decision to waive his or her Fourth Amendment rights in exchange for pretrial release is knowing, understanding, and voluntary (both as a legal matter and in the way that a normal person would expect someone to make a difficult choice). The arrestee's own lawyer will be present to protect the arrestee's interests and ensure her understanding of the process and any Fourth Amendment waiver. The magistrate judge will be present to determine from a more neutral position whether such a waiver is part of the least-restrictive means necessary to ensure that the arrestee will appear at trial and avoid criminal conduct in the meantime.

C. BLANKET WAIVERS SHOULD BE VOLUNTARY AND KNOWING

Assuming for the moment that a pretrial arrestee can consent to "waive" his Fourth Amendment rights, by what standard should such a "consent" or "waiver" be judged? The Supreme Court has stated that "one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent."[225] Thus, a warrantless search, even of someone's home (where privacy is at its zenith), is permissible when the homeowner consents.[226] Of course, the government always bears the burden of proving that consent is "in fact, freely and voluntarily given."[227] And whether consent is really voluntary is a "question of fact to be determined from the totality of all the circumstances."[228]

In the context of a noncustodial consent search of a car, the Supreme Court has defined a voluntary consent as "an essentially free and

222. 18 U.S.C. § 3142.

223. *See* Brady v. United States, 397 U.S. 742 (1970) (upholding a guilty plea in face of plaintiff's claim that it was not sufficiently voluntary because it was entered to avoid a potential death sentence).

224. These protections include: (1) a proceeding during which the judge hears evidence and arguments from the government and the defendant regarding the appropriate pretrial restraints to impose on the arrestee, 18 U.S.C. § 3142(f); (2) representation by counsel (appointed or retained) to personally advise the arrestee, *id.*; (3) an opportunity to testify, present witnesses, and/or proffer information, *id.*; (4) the right to have the terms of her release explained in writing by the judicial officer, *id.* § 3142(h)(1); (5) the right to be advised of the consequences of violating the conditions of release, *id.* § 3142(h)(2)(B); and (6) the protection of a clear-and-convincing-evidence standard for detention, *id.* § 3142(f).

225. *Schneckloth*, 412 U.S. at 219.

226. *Id.* at 222.

227. *Id.* (citing Bumper v. North Carolina, 391 U.S. 543, 548 (1968)).

228. *Id.* at 227.

unconstrained choice by its maker" as compared to a choice made when a person's "will has been overborne and his capacity for self-determination critically impaired."[229] According to the Court, consent must not be "coerced, by explicit or implicit means, by implied threat or covert force."[230]

The Supreme Court requires an even stronger showing of voluntariness when a criminal defendant agrees to relinquish constitutional rights designed to preserve a fair trial.[231] To ensure a criminal defendant's fair-trial process, the Court mandates that a waiver of constitutional rights be knowing in addition to voluntary. Such waivers must be undertaken with "sufficient awareness of the relevant circumstances and likely consequences."[232] The Court has explained that "whether a person has acted 'voluntarily' is quite distinct from the question whether he has 'waived' a trial right."[233] While the former question asks if the person has been coerced, the latter question turns on the extent of the person's knowledge.[234] "The determination of whether there has been an intelligent waiver of [a constitutional trial right] must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."[235] Thus, the government is held to a higher standard of voluntariness in the trial context than in the investigatory phase of a case.[236] For example, guilty pleas are "carefully scrutinized to determine whether the accused knew and understood all the rights to which he would be entitled at trial, and that he had intentionally chosen to forego them."[237] In contrast, a person may consent to a search of his home or car, provided his consent is voluntary.

Although no published decision directly assesses the standard applicable to a *pretrial* Fourth Amendment blanket waiver, in the *post-conviction* phase, the circuit courts have applied the tougher trial-waiver standard.[238] In reviewing a criminal defendant's post-conviction "consent" to

229. *Id.* at 225 (citing Culombe v. Connecticut, 367 U.S. 568, 602 (1961)).

230. *Schneckloth*, 412 U.S. at 228. Nevertheless, the consenting person need not be told that she has the right to refuse consent. United States v. Drayton, 536 U.S. 194, 206–07 (2002).

231. *Schneckloth*, 412 U.S. at 237.

232. Brady v. United States, 397 U.S. 742, 748 (1970); *see also* Johnson v. Zerbst, 304 U.S. 458, 464 (1938). *Zerbst* dealt with the potential waiver of the Sixth Amendment right to counsel. *Id.* at 458.

233. *Schneckloth*, 412 U.S. at 238.

234. *Id.*

235. *Zerbst*, 304 U.S. at 464.

236. *Schneckloth*, 412 U.S. at 236–37.

237. *Id.* at 238; *see also* FED. R. CRIM. P. 11 (providing that a defendant must demonstrate to the court that he understands his rights before a guilty plea will be accepted); Brady v. United States, 397 U.S. 742, 747 (1970) (citing Boykin v. Alabama, 395 U.S. 238, 242 (1969) (noting that guilty pleas are valid, as long as they are both voluntary and intelligent)).

238. United States v. Barnett, 415 F.3d 690, 691 (7th Cir. 2005); United States v. Downs, No. 96-3862, 1999 WL 130786, at *4 (6th Cir. Jan 19, 1999) (unpublished opinion) (applying a "knowing and intelligent" standard to a probationer's blanket Fourth Amendment waiver).

a waiver as part of probation, the Seventh Circuit has noted that "[c]onstitutional rights like other rights can be waived, provided that the waiver is knowing and intelligent."[239] The Sixth Circuit has also applied the stricter standard.[240]

From a due-process and fairness standpoint, it is best to afford arrested persons all of the constitutional protections that accompany trial rights, including the more stringent "waiver" procedural safeguards. After all, "The guarantees afforded a criminal defendant at trial also protect him at certain stages before the actual trial, and any alleged waiver must meet the strict standard of an intentional relinquishment of a 'known' right."[241] The Supreme Court has acknowledged that "[t]he trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused . . . and the accused unprotected against the overreaching, intentional or unintentional . . . ."[242] Although in some instances a bond determination may not directly affect a criminal defendant's trial, the fact that a defendant may sit in jail while awaiting that day in court can alter the pace with which a defendant's lawyer moves toward trial and the strategies she employs to reach trial sooner rather than later. Furthermore, someone detained has a limited ability to prepare his defense. When detained, a defendant has restricted contact with his lawyer and even less access to potential trial witnesses.[243] These limits on a criminal defendant's ability to investigate and prepare her defense properly can have a meaningful and detrimental effect on her ability to present fully her side of the story to a jury. Because the judge's decision to detain an arrested person has the capacity to alter her ability to prepare her case for trial and, thereby, impair a defendant's fair-trial process, pretrial waivers used to gain pretrial freedom are important.[244] Arrestees, therefore, deserve the same procedural protections afforded to trial waivers of similar rights.[245]

239. *Barnett*, 415 F.3d at 691.

240. *Downs*, 1999 WL 130786, at *4.

241. *Schneckloth*, 412 U.S. at 239.

242. *Id.* at 239–40.

243. *See* DRESSLER & THOMAS, *supra* note 180, at 747; *see also* Stack v. Boyle, 342 U.S. 1, 4 (1951) (acknowledging that detention may limit a defendant's preparation for trial by limiting her access to her attorney and potential witnesses); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 124 (2005) (explaining how detention limits a defendant's ability to prepare for trial and often results in conviction).

244. In fact, criminal defendants who remain in detention before trial are anxious for resolution; therefore, they plead guilty more often than those who are released while awaiting adjudication of their case. *See* Wright, *supra* note 243, at 124.

245. Scholars contend that defendants who are unable to make bail are "'for that reason alone, more likely to be convicted'" regardless of the seriousness of the offense. *See* DRESSLER & THOMAS, *supra* note 180, at 747 (quoting Hans Zeisel, *Bail Revisited*, 1979 AM. B. FOUND. RES. J. 769, 769).

Moreover, as discussed in Part II.A, someone confronted with pretrial detention is under strong pressure to waive any rights that can be exchanged for pretrial release. An arrestee may face a real possibility of the loss of liberty and privacy without the protection of a guilt-beyond-a-reasonable-doubt standard. While such pressure can fall short of the stress produced during a custodial interrogation without counsel,[246] the situation is much more akin to a trial setting than to the typical, investigative search environment. The arrested person is in custody, on unfamiliar turf, with potentially few options to secure his discharge. Additionally, the arrestee is faced with a genuine likelihood of jail, which will expose him to numerous indignities, potentially including strip searches, group housing, common bathroom facilities, restrictions on phone privileges and reading materials, and a host of other infringements on his privacy. Understandably, one might feel intense pressure to forego Fourth Amendment rights to gain the additional freedoms associated with home. In short, the more accused-friendly standard, which would require a knowing, intelligent, and voluntary waiver of one's Fourth Amendment rights, is the appropriate standard for a judge to use in cases where an accused must choose between incarceration and waiving such rights.

D. THE DEFENDANT'S RIGHT TO CONSENT

Who should determine whether someone facing detention should go to jail and relinquish almost all privacy and liberty rights or forego a portion of her Fourth Amendment protections to avoid those indignities? The person who risks the deprivation of liberty and privacy should be allowed to make his own decision. After all, "[o]ften a big part of the value of a right is what one can get in exchange for giving it up."[247] Who better to value this exchange than those facing the loss of rights? Arguably, those presumed innocent of the charges they face have an innate, if not a constitutional, right to give up some freedoms to avoid the intrusive nature of incarceration.[248] A person should not be "'imprison[ed] . . . in his privileges.'"[249] Incarceration, even before trial, routinely means common

246. *See* Miranda v. Arizona, 384 U.S. 436, 476 (1966); *see also* Michigan v. Mosley, 423 U.S. 96, 115–16 (1975) (Brennan, J., dissenting) ("'[T]he compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.'" (quoting *Miranda*, 384 U.S. at 461)).

247. United States v. Barnett, 415 F.3d 690, 692 (7th Cir. 2005).

248. *See supra* note 201 and accompanying text; *see also* Marc M. Harrold, *Computer Searches of Probationers—Diminished Privacies, "Special Needs" & "Whilst' Quiet Pedophiles"—Plugging the Fourth Amendment into the "Virtual Home Visit,"* 75 MISS. L.J. 273, 293 (2005) (asserting that "implicit and intrinsic in the grant of any 'right'" is an individual's power to waive it).

249. *Mosley*, 423 U.S. at 109 (White, J., concurring) (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 280 (1942)) (addressing issues surrounding the use of a defendant's

bathrooms and sleeping quarters, limited choices in food and reading materials, restricted phone privileges, potentially recorded conversations, limited exercise, restrictions on visitors, and, of course, physical confinement.[250] If someone merely charged with a crime must face such privacy and liberty infringements, he alone should decide whether he would be better off subjecting himself to unannounced searches, with or without probable cause, to avoid incarceration.

The ability of arrested persons to bargain away some or all of their Fourth Amendment rights to gain release from pretrial detention will prove especially important to indigent defendants who have little or no money or property to offer as collateral. With the ability to relinquish some of their Fourth Amendment rights, indigent defendants would gain an additional bargaining tool to obtain their release from jail. Nevertheless, the ability to sign away Fourth Amendment rights, unless strictly limited, opens the door for the government to abuse its power to exact such waivers. This is especially true in the case of indigent defendants, who might always be required to forego their constitutional rights in exchange for pretrial release.

Even from a paternalistic perspective, it seems better to protect the indigent defendants—the ones who will be most susceptible to jail because they have no money or means to use as collateral to ensure their appearance. That is, it makes sense to guard indigents from losing so many of their privacy rights while, at the same time, protecting society from ongoing criminal activity, by allowing a magistrate judge to weigh all of the pertinent factors and decide when the reasons for waiver outweigh the interests in holding the arrested person in jail.[251] At the same time, a cynic should be willing to allow a defendant to waive some Fourth Amendment rights as a temporary stop-gap measure, because a cynic would say that the criminal facing trial will inevitably return to his criminal activity. Under a cynic's view, a continuing criminal enterprise will be revealed during the "compliance inspections" that accompany a criminal's conditional release from detention.[252] Thus, like consent searches that are encouraged by society because "the resulting search may yield necessary evidence for the solution and prosecution of crime, [or] evidence that may insure that a

post-*Miranda*, inculpatory statement that followed the defendant's invocation of his right to remain silent).

250. *See, e.g.*, Hamilton v. Lyons, 74 F.3d 99, 102, 104 (5th Cir. 1996) (noting that detainees are not unlawfully punished when subjected to telephone restrictions, denial of visitations, and limited use of showers and sheets for three days).

251. *See* Harrold, *supra* note 248, at 294–98 n.52 (2005) (criticizing commentators' condemnation of Supreme Court decisions in which the Court upholds a person's autonomy to consent to a Fourth Amendment search conducted "on the street").

252. On the negative side, a defendant released from detention may engage in some criminal activity before additional investigation and relevant searches reveal such crimes.

wholly innocent person is not wrongly charged with a criminal offense,"[253] waivers of a detainee's Fourth Amendment rights should be allowed, if not encouraged. Such waivers give defendants more freedom, while providing law enforcement additional tools to investigate.[254]

III. IF FOURTH AMENDMENT WAIVERS ARE PERMITTED, THE CRIMINAL-JUSTICE SYSTEM IS EQUIPPED WITH ESTABLISHED LEGAL PRINCIPLES TO LIMIT THEM EFFECTIVELY

It is tempting, at first, to focus solely on the coercive versus free-choice aspect of the issue of whether an arrested person can freely and voluntarily waive her Fourth Amendment rights and/or be induced by the government to do so. On closer review, it seems more likely that the answer to the free-choice question turns on a related and more complicated matter of debate—the limits, if any, that restrict such waivers. The fact that a person charged with a crime can be detained indefinitely with few, if any, Fourth Amendment (let alone other constitutional) rights and the fact that persons released under the federal-bail-reform laws are already subject to numerous restrictions on their liberty and privacy,[255] suggest that the Supreme Court will ultimately uphold a pretrial agreement in which an arrested person relinquishes some of her Fourth Amendment rights. The likelihood is especially great given that waivers of constitutional rights have routinely been approved in the equally coercive context of plea agreements. In other words, the Ninth Circuit's decision in *United States v. Scott* was wrongly decided.[256]

The tougher question, and the real crux of the pretrial-waiver issue, is not whether, but under what conditions and/or circumstances persons arrested but not convicted, can "voluntarily" relinquish their Fourth Amendment rights. What parameters do, or should, limit or constrain such waivers? At a minimum, there must be a direct correlation between

253. Schneckloth v. Bustamonte, 412 U.S. 218, 243 (1973).

254. The Supreme Court has already held that the government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. *See* United States v. Salerno, 481 U.S. 739, 750–51 (1987).

255. *See* Bell v. Wolfish, 441 U.S. 520, 536–37 (1979); *supra* Part I.C.1 (discussing *Bell*); *see also* Bail Reform Act of 1984 § 203, 18 U.S.C. § 3142(c)(1)(B) (2000) (outlining the various restrictions a magistrate judge can impose as a condition of pretrial release).

256. *See also* Recent Case, United States v. Scott, 119 HARV. L. REV. 1630, 1634–37 (2006) [hereinafter Recent Case]. This *Harvard Law Review* Note commented on the original *Scott* decision, 424 F.3d 888 (9th Cir. 2005), and opined that the majority's reasoning in the *Scott* case suffers from two limitations. Recent Case, *supra*, at 1634–37. First, the court took "consent into account" in evaluating the reasonableness of a search, thereby allowing invalid consent to lessen one's expectation of privacy for Fourth Amendment purposes. *Id.* at 1634. Second, by using consent as a factor, the court undermined "its bold assertion" that induced blanket "consent" searches cannot make an unreasonable search reasonable. *Id.* at 1636. Both of these factors undermine the effectiveness of the *Scott* court's efforts to protect privacy and liberty rights. *Id.* at 1636–37.

government searches and the defendant's alleged crime. Whole-sale, blanket waivers of Fourth Amendment rights certainly encourage greater opportunities for abuse (intentional or not) by the government. "[F]or what if the [pretrial-services] officer decided to camp in [the arrestee's] home and search him every five minutes?"[257] Could an officer search every inch of a defendant's home and car, or just portions? A blanket waiver needs to address specifically whether it covers searches of the defendant's cellular phones and computers. It also needs to address whether it reaches shared computers and the rooms, drawers, and personal belongings of others who live with the defendant/releasee. Not every blanket waiver should allow strip searches and body-cavity inspections of an arrestee. Not every arrestee should be subject to daily searches of the body and/or the home. At a minimum, the crime charged must impose some Fourth Amendment limits.

In addition to limits on a waiver that the type and severity of the crime may dictate, established principles in the Constitution and the Bail Reform Act, as well as the unconstitutional conditions doctrine and basic notions of contract law, can effectively limit pretrial Fourth Amendment waivers. These limits will allow defendants the benefits of such waivers without exposing arrestees to unconscionable intrusions on their liberty and privacy rights.

A. LIMITS IMPOSED BY THE CONSTITUTION[258]

1. The Eighth Amendment Forbids Excessive Bail

The Eighth Amendment protects arrested persons against potential government abuse in the bail setting. The amendment declares that "[e]xcessive bail shall not be required."[259] Bail set at a figure higher than an amount reasonably calculated to assure the presence of an accused at trial or to protect the public is excessive under the Eighth Amendment.[260] While the meaning of "excessive bail" (in this context) has not been determined, it is reasonable to expect that the Eighth Amendment would prohibit a search conducted pursuant to a pretrial release waiver, if the search were so intrusive that it could be fairly described as out of proportion to the crime

257. United States v. Barnett, 415 F.3d 690, 692 (7th Cir. 2005).

258. The Equal Protection Clause of the Fourteenth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments would no doubt impose some limits on the rights the government may ask an arrested person to forego. With regard to equal protection, the Fourteenth Amendment says that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. Similarly, the Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law." *Id.* amend. V. The corresponding due-process provision in the Fourteenth Amendment, likewise, provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." *Id.* amend. XIV. A full discussion of the limits these constitutional provisions may provide is outside the scope of this Article.

259. *Id.* amend. VIII.

260. *See* Stack v. Boyle, 342 U.S. 1, 5 (1951).

charged, or if the search bore little or no relationship to the legitimate law-enforcement needs for undertaking the search. For example, if an arrested person with no criminal history were charged with conspiring to commit fraud and she "agreed" to subject herself to random, daily strip searches and body-cavity inspections to gain release from pretrial detention, in light of the charges and the characteristics of the arrestee, the Eighth Amendment should effectively strike that condition as excessive bail.[261] When the conditions of pretrial release, including a Fourth Amendment waiver, are unreasonably oppressive in light of the crime charged, the conditions constitute excessive bail in violation of the Eighth Amendment. As the Ninth Circuit said in *United States v. Scott*, "There may . . . be cases where the risk of flight is so slight that any amount of bail is excessive; release on one's own recognizance would then be constitutionally required, which could further limit the government's discretion to fashion conditions of release."[262] The court further stated:

> The right to keep someone in jail does not in any way imply the right to release that person subject to unconstitutional conditions—such as chopping off a finger or giving up one's first-born. Once [the government] decides to release a criminal defendant pending trial, the [government] may impose only such conditions as are constitutional, including compliance with the prohibition against excessive bail.[263]

The *Scott* court was right about these limits. While the lines are far from bright on what pretrial conditions would be so disproportionate as to violate the Eighth Amendment, if the excessive-bail provision of the Eighth Amendment means anything, it would invalidate some pretrial waivers as excessive bail. Thus, the Eighth Amendment would limit Fourth Amendment waivers that were unduly broad.

2. The Fourth Amendment Requires Reasonableness

Although the Supreme Court has not settled whether a pretrial arrestee can consent to a Fourth Amendment waiver as a condition of his or her release, the Court has interpreted the Fourth Amendment to mean that all Fourth Amendment searches are confined and governed by reasonableness.[264] Reasonableness is a flexible, fluid standard that is dependent on the context:

---

261. Excessive, non-proportional searches are essentially what the Second Circuit was worried about in *Lifshitz*. *See supra* Part I.D. Although the court's decision in *Lifshitz* did not rest on the Eighth Amendment, the Second Circuit expressly addressed proportionality. *See id.*

262. United States v. Scott, 450 F.3d 863, 866 n.5 (9th Cir. 2006).

263. *Id.*

264. *See* United States v. Knights, 534 U.S. 112, 118 (2001). In fact, reasonableness is demanded by the text of the Fourth Amendment itself. U.S. CONST. amend. IV ("The right of

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.[265]

In other words, reasonableness is judged in light of the "totality of the circumstances."[266] Although it is unclear what "reasonableness" requires in the context of a pretrial releasee who signs a blanket waiver of her Fourth Amendment rights, reasonableness viewed from a totality-of-the-circumstances perspective will continue to serve as an outer parameter on every search of an arrested person and her home, whether or not she executes a pretrial-release waiver.

In *United States v. Henry*, the Sixth Circuit showed that the reasonableness standard can have teeth.[267] The court applied the standard to invalidate an officer's search of a probationer's home because the officer "did not have the requisite reasonable suspicion to conduct the search."[268] The Sixth Circuit noted that a probationer's consent to a blanket-search condition is "'a salient circumstance' in determining whether the reasonable-suspicion-based investigatory search of a probationer's residence [is] reasonable,"[269] but found that the particular search exceeded those bounds of reasonableness.[270]

The Second Circuit has also used the well-established reasonableness standard to restrict the search conditions a sentencing court may place on a probationer as part of his probation.[271] In deciding that a probation condition requiring computer monitoring for a defendant convicted of a child-pornography charge was unduly broad, the Second Circuit showed sensitivity to conditions resulting in a "deprivation of liberty 'greater . . . than is reasonably necessary.'"[272] The court explained the standard as follows:

---

the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated . . . .").

265. Bell v. Wolfish, 441 U.S. 520, 559 (1979).

266. *Knights*, 534 U.S. at 118; *see also supra* note 70 (discussing the totality-of-the-circumstances test).

267. United States v. Henry, 429 F.3d 603 (6th Cir. 2005).

268. *Id.* at 614.

269. *Id.* at 614 n.11 (quoting *Knights*, 534 U.S. at 118).

270. *Id.* at 614. Perhaps the *Scott* majority also simply intended to ensure that the Fourth Amendment reasonableness standard has teeth. But in discounting the importance of Scott's written Fourth Amendment waiver in the reasonableness equation, the court erred.

271. *See generally* United States v. Lifshitz, 369 F.3d 173 (2d Cir. 2004).

272. *Id.* at 189 (quoting United States v. Sofsky, 287 F.3d 122, 126 (2d Cir. 2002)).

> We must assess the necessary scope of the monitoring condition in light of the 'special needs' articulated in this particular case, those of rehabilitating Lifshitz and ensuring that he does not inflict further harm on the community by receiving or disseminating child pornography during the probationary period. In order to comply with the requirements of the Fourth Amendment, the monitoring condition must be narrowly tailored, and not sweep so broadly as to draw a wide swath of extraneous material into its net.[273]

The Second Circuit reiterated Supreme Court precedent noting "that the reasonableness inquiry under the Fourth Amendment does not require employing the least intrusive means, [but that] the means employed must bear a close and substantial relation to the government's interest in pursuing the search."[274] Applying this reasonableness standard, the Second Circuit concluded that the scope of the Fourth Amendment computer-monitoring condition imposed on Lifshitz "may, therefore, be overbroad."[275] In short, the reasonableness requirement in the Fourth Amendment text and existing precedent interpreting that reasonableness requirement will effectively limit pretrial waivers of the rights the Fourth Amendment protects.

B. OTHER LIMITS TO A PRETRIAL WAIVER OF FOURTH AMENDMENT RIGHTS

1. The Unconstitutional Conditions Doctrine

The unconstitutional conditions doctrine is another potential restriction on pretrial release conditioned on the waiver of an arrested person's Fourth Amendment rights. Generally, this doctrine "precludes the government from coercing the waiver of a constitutional right either by conditioning the exercise of one constitutional right on the waiver of another . . . or by attaching conditions that penalize the exercise of a constitutional right . . . ."[276] Although the Supreme Court has applied the

273. *Id.* at 190.

274. *Id.* at 192 (internal quotations omitted).

275. *Id.* at 193.

276. United States v. Ryan, 810 F.2d 650, 665 (7th Cir. 1987) (citing Simmons v. United States, 390 U.S. 377, 394 (1968); United States v. Jackson, 390 U.S. 570, 583 (1968)); *see also* Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) (explaining that the unconstitutional conditions doctrine prohibits the government from forcing a person to waive the right to receive just compensation for property taken for public use in exchange for a benefit that is unrelated to that property); United States v. Scott, 450 F.3d 863, 866–67 (9th Cir. 2006); Mazzone, *supra* note 195, at 806–30 (discussing the history of the development of the unconstitutional conditions doctrine); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415–76 (1989) (discussing the unconstitutional conditions doctrine thoroughly). The District Court for the Western District of Virginia noted:

unconstitutional conditions doctrine in the First Amendment context and to Fifth Amendment Takings Clause cases,[277] the doctrine has rarely been used to limit the government's power in the criminal context.[278]

The Court has, albeit sparingly,[279] applied the unconstitutional conditions doctrine in criminal cases to invalidate government-imposed choices that "needlessly chill the exercise of basic constitutional rights."[280] Although the Supreme Court did not say that it was applying the unconstitutional conditions doctrine, it did so in *United States v. Jackson* and concluded that "the death penalty provision of the Federal Kidnaping Act impose[d] an impermissible burden upon the exercise of a [criminal defendant's] constitutional right."[281]

In *Jackson*, the defendant challenged the federal criminal kidnaping statute because it did not provide a procedure for imposing the death penalty on defendants who waived their Sixth Amendment right to a *jury* trial.[282] Under the statute, only a jury could recommend a sentence of

---

> An important basis for the constitutional conditions doctrine, however, is that in some instances the condition itself is unconstitutional because of its power to coerce a citizen into unwillingly surrendering a constitutional right in exchange for a governmental benefit, rendering of little import the fact that the citizen formally "agreed" to the exchange.

Stephens v. County of Albemarle, No. Civ.A.3:04CV00081, 2005 WL 3533428, at *7 (W.D. Va. Dec. 22, 2005) (citation omitted).

277. *See* Mazzone, *supra* note 195, at 810, 822 (presenting a fuller discussion of the unconstitutional conditions doctrine in these contexts).

278. Even when the Supreme Court has applied this doctrine in the criminal context, it has not called it by name. *See, e.g.*, *Simmons*, 390 U.S. at 394 (holding that it was legally impermissible to require a criminal defendant to give up a potentially valid Fourth Amendment challenge to protect a Fifth Amendment right against self-incrimination). Mazzone contends that the "waiver doctrine" is applied in the criminal setting and that the "unconstitutional conditions doctrine" is used in civil cases. Mazzone, *supra* note 195, at 844. Mazzone states that these are two "independent doctrines" developed by the Supreme Court "for what is a single problem." *Id.* Mazzone asserts that "[w]hereas the [Supreme Court] routinely invalidates deals involving First Amendment rights, it takes exactly the opposite approach" in evaluating criminal bargains. *Id.* at 832. According to Mazzone, in criminal cases, the Supreme Court "assumes deals between the government and criminal defendants are voluntary contracts conferring mutual benefits." *Id.* He asserts, "In the world of criminal waiver, coercion is replaced by choice; freedom means the power to bargain, and the public's interest lies in foregoing rights, not keeping them intact. In sum, criminal waiver turns the doctrine of unconstitutional conditions on its head." *Id.* Mazzone also claims that "[i]n the criminal context, conditional benefits are understood to represent more, not less, choice." *Id.* at 833.

279. The Court should apply the doctrine sparingly in the criminal context. An accused facing the potential loss of liberty should retain latitude to bargain. It is appropriate that he hold an expanded array of constitutional and statutory rights with which to deal because so much is at risk.

280. United States v. Jackson, 390 U.S. 570, 581–82 (1968).

281. *Id.* at 572.

282. *Id.* at 571, 581.

death.[283] Thus, a defendant's assertion of her right to a jury trial could realistically cost the defendant her life.[284] In contrast, a plea of guilty or a bench trial would necessarily save the defendant from a possible death sentence.[285] In evaluating the case, the Supreme Court framed the issue as "whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury."[286] The Court remarked, "The inevitable effect of any such provision, is of course, to discourage assertion of the Fifth Amendment right not to plead guilty[] and to deter exercise of the Sixth Amendment right to demand a jury trial."[287] The Court held that because of these effects, the statute unduly chilled a criminal defendant's exercise of his constitutional rights. "Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights."[288] The Court deemed such an intrusion on a criminal defendant's rights "unnecessary and therefore excessive."[289]

The same year, in *Simmons v. United States*, the Supreme Court applied an unconstitutional-conditions-type analysis to save a criminal defendant from choosing between the loss of his Fourth Amendment rights and the preservation of his "Fifth Amendment privilege against self incrimination."[290] In *Simmons*, the Court held that when a criminal defendant "testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony [cannot later be used] against him at trial on the issue of [his] guilt."[291] In reaching this decision, the Court explained that when a criminal defendant is confronted with a "choice" between foregoing the right to challenge adverse evidence and testifying with the possibility that the testimony may be used against him on the issue of guilt in a later trial, "an undeniable tension" is created because the defendant is placed in a situation where "the 'benefit' to be gained is that afforded by another provision of the Bill of Rights."[292] In such circumstances, the Court "f[ou]nd it intolerable that one constitutional right should have to be surrendered in order to assert another."[293] The Court has maintained its adherence to this concept and has subsequently reiterated:

283. *Id.* at 571.
284. *Id.* at 572.
285. *Jackson*, 390 U.S. at 581.
286. *Id.*
287. *Id.* (citation omitted).
288. *Id.* at 582.
289. *Id.*
290. Simmons v. United States, 390 U.S. 377, 394 (1968).
291. *Id.*
292. *Id.*
293. *Id.*

> To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the [government] to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is "patently unconstitutional."[294]

While the Supreme Court has not recently applied an unconstitutional-conditions-type analysis in a criminal case, it has never repudiated its decisions in *Jackson* or *Simmons*. Moreover, the federal government seems to accept the doctrine's application in appropriate criminal cases.[295] Consequently, the unconstitutional conditions doctrine will limit the reach of a pretrial Fourth Amendment rights waiver.

Although the unconstitutional conditions doctrine will provide some bounds on an arrestee's blanket Fourth Amendment waiver, the Supreme Court's decisions since *Jackson* and *Simmons* clarify that the doctrine does not "forbid[] every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights."[296] Even if circumstances discourage a defendant from asserting his trial rights, the mere fact that the defendant's decision is a "difficult" one does not place an impermissible burden on a right,[297] especially if the pressure to forego that right is marked by speculation or remoteness.[298] "[S]peculative prospects" regarding the impact of exercising one's constitutional rights do not "interfere with the right to make a free choice."[299]

---

294. Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (citation omitted) (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 33 n.20 (1973)).

295. *See* United States v. Knights, 534 U.S. 112, 118 n.4 (2001) (acknowledging the government's argument that the unconstitutional conditions doctrine acts as a "limitation on what a probationer may validly consent to in a probation order" and the government's contention that the search condition at issue did not exceed that limit "because waiver of Fourth Amendment rights 'directly furthers the State's interest in the effective administration of its probation system'" (quoting Brief for the Petitioner at 22, *Knights*, 534 U.S. 112 (No. 00-1260))). The government's position in *Knights* coincides with the Supreme Court's reasoning in *Jackson* and *Simmons*. *See supra* notes 13–14. Although in *Knights* the Supreme Court acknowledged the government's unconstitutional conditions argument, the Court did not rule on it. *Knights*, 534 U.S. at 118 n.4.

296. *Chaffin*, 412 U.S. at 30.

297. *Id.* at 35.

298. *Id.* at 33.

299. *Id.* at 35. In *Chaffin*, the Court emphasized the remote nature of the possibility that a defendant would receive a harsher jury sentence upon retrial if he exercised his right to appeal and was successful. *Id.* at 33. The Court indicated that "the likelihood of actually receiving a harsher sentence is quite remote at the time a convicted defendant begins to weigh the question whether he will appeal." *Id.* The Court further enumerated the speculative prospects:

> First, his appeal must succeed. Second, it must result in an order remanding the case for retrial rather than dismissing outright. Third, the prosecutor must again make the decision to prosecute and the accused must again select trial by jury rather than securing a bench trial or negotiating a plea.

In *Bordenkircher v. Hayes*,[300] the Supreme Court distinguished certain cases in which it had previously found the violation of a criminal defendant's due-process rights when one constitutional right was conditioned on the forbearance of another.[301] The Supreme Court explained that due-process violations "lay not in the possibility that a defendant might be deterred from the exercise of a legal right but rather in the danger that the [government] might be retaliating against the accused for lawfully attacking his conviction."[302] The Court also declared that "[d]efendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation."[303]

Even more recently, in *Ohio Adult Parole Authority v. Woodard*, a unanimous Court[304] rejected an inmate's argument that a state clemency process forced him to make an unlawful "Hobson's choice" between asserting his Fifth Amendment right against self-incrimination and his right to participate in a clemency-review process.[305] Woodard claimed that the choice violated the unconstitutional conditions doctrine.[306] The Supreme Court dodged a discussion of the doctrine noting, "[W]e find it unnecessary to address [the unconstitutional conditions doctrine] in deciding this case. In our opinion, the procedures of the [clemency] Authority do not under any view violate the Fifth Amendment privilege."[307] The Court reasoned further:

> It is difficult to see how a voluntary interview could "compel" respondent to speak. He merely faces a choice quite similar to the sorts of choices that a criminal defendant must make in the course

Id.

300. Bordenkircher v. Hayes, 434 U.S. 357, 362–63 (1978). In *Bordenkircher*, a state prisoner sought habeas relief, claiming that his due-process rights were violated when a state prosecutor carried through on a threat to reindict him on more serious charges if he did not plead guilty to the offense originally charged. *Id.* at 358–59. The defendant in *Bordenkircher* refused to plead, and the prosecutor reindicted him under a habitual-criminal statute. *Id.* at 359.

301. The Court distinguished cases like *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969), which held that the Due Process Clause of the Fourteenth Amendment prohibits vindictiveness against a defendant for successfully attacking his first conviction, and *Blackledge v. Perry*, 417 U.S. 21, 28–29 (1974), which held that due process is infringed when a prosecutor reindicts a defendant on a felony charge after the defendant successfully invokes an appellate remedy for a misdemeanor conviction.

302. *Bordenkircher*, 434 U.S. at 363 (citations omitted).

303. *Id.* (citing Brady v. United States, 397 U.S. 742, 758 (1970)).

304. Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 272 (1998). The *Woodard* decision spawned several splits in the Court, but not on the unconstitutional conditions issue.

305. *Id.* at 286.

306. *Id.* at 272, 279, 285–86.

307. *Id.* at 286.

> of criminal proceedings, none of which has ever been held to violate the Fifth Amendment.[308]

The Supreme Court concluded that Woodard had freely exercised a "choice."[309]

Unlike the Supreme Court, which has only implicitly recognized the unconstitutional conditions doctrine in the criminal context, and then only in a limited manner, the Third Circuit Court of Appeals has applied the doctrine to criminal cases. For instance, in *Wilcox v. Johnson*, the court held that a criminal defendant was deprived of his constitutional rights when he was asked to choose between his statutory right to testify and his Sixth Amendment right to counsel.[310] Wilcox had been convicted of rape in 1967.[311] During that trial, his defense hinged on an alibi.[312] Wilcox was convicted in that trial, but his conviction was later reversed and he was retried.[313] At the retrial, his lawyer abandoned the alibi defense in favor of a consent defense without consulting Wilcox.[314] Wilcox objected to this change in trial strategy.[315] Mid-trial, Wilcox told his lawyer that he wanted to testify and to call witnesses to corroborate his alibi.[316] Wilcox's lawyer disagreed.[317] The disagreement between Wilcox and his lawyer "grew more pronounced" and at a side-bar conference, the lawyer informed the trial judge that she planned to move to withdraw as counsel based on her belief that Wilcox intended to perjure himself.[318] The lawyer then told Wilcox that if Wilcox demanded to testify, the judge would allow her to withdraw, and Wilcox would have to proceed pro se.[319] The Third Circuit described the difficult choice Wilcox faced as a "completely untenable position."[320] According to the court, Wilcox had been:

> put to a Hobson's choice[]: decline to testify and lose the opportunity of conveying his version of the facts to the jury, or take the stand and forego his fundamental right to be assisted by counsel. The Trial Judge thus conditioned the exercise of Mr. Wilcox's statutory right to testify upon the waiver of rights guaranteed by the Constitution. . . . A defendant in a criminal

308. *Id.*
309. *Woodard*, 523 U.S. at 286.
310. Wilcox v. Johnson, 555 F.2d 115, 120 (3d Cir. 1977).
311. *Id.* at 116.
312. *Id.*
313. *Id.*
314. *Id.*
315. *Wilcox*, 555 F.2d at 116–17.
316. *Id.* at 117.
317. *Id.*
318. *Id.*
319. *Id.*
320. *Wilcox*, 555 F.2d at 120.

> proceeding is entitled to certain rights and protections which derive from a variety of sources. He is entitled to all of them; he cannot be forced to barter one for another. When the exercise of one right is made contingent upon the forbearance of another, both rights are corrupted.[321]

The First Circuit has also recognized that the unconstitutional conditions doctrine may apply in a criminal case to invalidate some "choices" that require the relinquishment of one right in favor of another. In the context of ruling that a criminal defendant does not have to accept responsibility for dismissed charges to gain an acceptance reduction under the Federal Sentencing Guidelines, the First Circuit declared:

> Clearly, a defendant does not have a "free choice to admit, to deny, or to refuse to answer" if he knows he will be incarcerated for a longer period of time if he does not make the incriminating statements. The touchstone of the fifth amendment is compulsion, and the Supreme Court has recognized that imprisonment is one of a wide variety of penalties which can serve to trigger a constitutional violation.[322]

Accordingly, while the unconstitutional conditions doctrine has been sparingly applied to invalidate a criminal defendant's "choice" between two competing constitutional rights, the Supreme Court appears to have accepted the doctrine and certainly has never expressly rejected its application. The federal government has, in argument before the Supreme Court, conceded the doctrine's applicability to criminal cases,[323] and some circuit courts have expressly applied the doctrine to save defendants from facing a choice of one important constitutional right at the expense of another.[324] Thus, defendants should continue to press the issue, particularly if an arrested person is asked to consent to an overly broad waiver of her Fourth Amendment rights and/or is asked to sign such a waiver because the prosecutor or case agent demonstrates a desire to retaliate against the defendant for her lack of cooperation or out of a spirit of vindictiveness. For

321. *Id.*; *see also* United States v. Oliveras, 905 F.2d 623, 626 (2d Cir. 1990) ("[T]he effect of requiring a defendant to accept responsibility for crimes other than those to which he pled guilty [for the purpose of reducing his offense level as provided by the Sentencing Guidelines] . . . is to penalize him for refusing to incriminate himself. This runs afoul of the fifth amendment."). *But see* Ebbole v. United States, 8 F.3d 530, 535 (7th Cir. 1993) (noting a split among the circuits as to "whether a defendant's Fifth Amendment rights are violated when he is denied an offense level reduction for not accepting responsibility for crimes related to his offense of conviction").

322. United States v. Perez-Franco, 873 F.2d 455, 463 (1st Cir. 1989) (citing Lefkowitz v. Cunningham, 431 U.S. 801, 806 (1977)).

323. *See* United States v. Knights, 234 U.S. 112, 118 n.4 (2001); *see also supra* Part I.C.2 (discussing *Knights*).

324. *See, e.g.*, *Perez-Franco*, 873 F.2d at 463; *Wilcox*, 555 F.2d at 120.

when a pretrial arrestee is induced by the government to relinquish Fourth Amendment rights for minor charges, out of retaliation for failing to cooperate in the government's investigation of others, or for refusing to plead guilty at an initial appearance, the unconstitutional conditions doctrine, which protects defendants from being forced to preserve one fundamental right at the expense of another, should invalidate such waivers.

2. Limits in the Bail Reform Act

The Bail Reform Act contains built-in limits on the rights an arrested person may be asked or required to relinquish to gain pretrial release. That Act mandates that the judicial officer deciding bail impose the "least restrictive" conditions necessary to ensure that the arrestee appears at trial and that the public is adequately protected.[325] If no legitimate grounds support the government's imposition of a Fourth Amendment waiver condition to protect the public or ensure the defendant's appearance in court, the judicial officer must reject such a provision as beyond the least restrictive condition(s) required to fulfill the goals of the Act. Moreover, while the Bail Reform Act does not specifically demand such an inquiry, to ensure that an arrestee's Fourth Amendment waiver is knowing and voluntary, the presiding judicial officer should ask all the questions that judges routinely ask during change-of-plea hearings and/or when a defendant seeks to waive his Sixth Amendment rights.[326] In addressing a defendant's waiver of Sixth Amendment rights, the Supreme Court has indicated that "a judge must investigate as long and as thoroughly as the circumstances of the case before him demand."[327] According to the Court, "[a] judge can make certain that an accused's professed waiver of [rights] is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such [a waiver] is tendered."[328] Requiring a magistrate judge to make a similar inquiry of arrestees will help document the voluntary and knowing nature of

325. Bail Reform Act of 1984 § 203, 18 U.S.C. § 3142(c)(1)(B) (2000).

326. In the plea context, voluntariness means:

> "'[E]ntered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, . . . [not] induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).'"

Brady v. United States, 397 U.S. 742, 755 (1970) (quoting Shelton v. United States, 242 F.2d 101, 115 (5th Cir. 1957) (Tuttle, J., dissenting)).

327. Schneckloth v. Bustamonte, 412 U.S. 218, 244 n.32 (1973) (citing Von Moltke v. Gillies, 332 U.S. 708, 723–24 (1948)).

328. *Id.*

the waiver.[329] This additional inquiry will not be burdensome, given the magistrate judge's duty "to advise the [arrested] person of the penalties for violating [any] condition[s] of release,"[330] but will serve as another safeguard for arrestees asked to forego important Fourth Amendment rights.

3. Contractual Limits

The express, written terms of the waiver will also define its reach. Generally, "'when law enforcement officers rely on consent as the basis for a warrantless search, the scope of the consent given determines the permissible scope of the search.'"[331] As the Sixth Circuit noted in rejecting the government's argument that a probationer consented to a contraband search as a condition of his probation, "even if [the probationer] could consent to searches by agreeing to this search condition, the complained-of search was not encompassed by the condition and therefore would not have been included in the consent."[332] The court respected the limits of the consent given by the probationer.[333] "[I]t is clear that consent to a home visit does not encompass consent to a full search."[334] Similarly, an arrestee's consent to a warrantless search of her computer would not imply the government's right to search her person or her purse, unless the government complied with the usual Fourth Amendment mandates.

Like the Sixth Circuit, the Seventh Circuit has recognized that a probationer's blanket waiver of Fourth Amendment rights is limited by the "contract" reached between the government and the probationer. In *United States v. Barnett*, the court focused on the plea-bargain "contract" that contained the blanket-search terms, noting that such agreements include implicit and explicit terms.[335] "'[A] contract will not be interpreted literally if doing so would produce absurd results, in the sense of results that the parties, presumed to be rational persons pursuing rational ends, are very unlikely to have agreed to seek.'"[336] The Seventh Circuit stated that a waiver

329. *See* Carnley v. Cochran, 369 U.S. 506, 516 (1962) (stating that in the context of waiver of counsel, "[t]he record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer," and that "[a]nything less is not waiver").

330. 18 U.S.C. § 3142(h).

331. United States v. Henry, 429 F.3d 603, 616 (6th Cir. 2005) (quoting United States v. Garrido-Santana, 360 F.3d 565, 575 (6th Cir. 2004)); *see also* Zap v. United States, 328 U.S. 624, 630 (1946) (recognizing implicitly that an agreement in which a Navy contractor acquiesces in inspections of his accounts to obtain the government's business was limited in scope and that the agreement did not "include consent to the taking of [a] check").

332. *Henry*, 429 F.3d at 614–15.

333. *Id.*

334. *Id.*

335. United States v. Barnett, 415 F.3d 690, 692 (7th Cir. 2005).

336. *Id.* (alteration in original) (quoting Beanstalk Group, Inc. v. AM Gen. Corp., 283 F.3d 856, 860 (7th Cir. 2002)).

of Fourth Amendment rights would not cover "searches that have no possible law-enforcement objective, or that so far exceed any legitimate enforcement needs as to compel an inference that the purpose and only effect were harassment."[337] In short, the court explained that it would interpret contractual language "'in light of common sense.'"[338]

Because an agreement between the government and an arrested person is a contract, any unconscionable terms or ambiguity would be governed by common rules of contract law, which seek, where possible, to glean the intentions of the parties.[339] Therefore, the magistrate judge, defense counsel, and government counsel should make every effort to ensure that the terms of any agreement in which an arrestee waives Fourth Amendment rights are clear and simple to understand. This clarity will make the parties' intentions apparent and avoid conflicts regarding what the waiver covers. With a clear, written agreement of the scope of the arrestee's rights waiver, the arrested person can evaluate whether release is worth the Fourth Amendment infringement; the government agencies will know what they can and cannot search; and the federal courts can properly enforce such waivers against the government and the arrested person in subsequent disputes.

CONCLUSION

The Fourth Amendment serves an important constitutional function. It protects the privacy of Americans from intrusions on their personal security. Few rights are held more sacred. When a person is arrested and faces the real likelihood of pretrial detention in jail, the person risks not only a reduction in his privacy rights, but also a loss of his liberty. In such circumstances, the arrested person should be able to bargain away some of his Fourth Amendment rights in exchange for the additional freedoms associated with release to home.

Undoubtedly, defendants forced to choose between incarceration and Fourth Amendment rights will almost always choose to forego their Fourth Amendment protections. But these rights are theirs to value and to bargain away. The Eighth Amendment, the Fourth Amendment, the Bail Reform Act, the unconstitutional conditions doctrine, and basic offer-and-acceptance principles of contract law will limit the scope of such waivers

337. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 203 (1981)).

338. *Id.* at 693 (quoting McElroy v. B.F. Goodrich Co., 73 F.3d 722, 726–27 (7th Cir. 1996)).

339. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 66 (1995) (Thomas, J., dissenting); *see also* EEOC v. Waffle House, Inc., 534 U.S. 279, 294 (2002) (noting that the clear intent of contracting parties as expressed in the plain text of an agreement governs the terms of the agreement); Kuhn v. Fairmont Coal Co., 215 U.S. 349, 356 (1910) (noting that the Court construes contracts to give full force to their written terms unless the language of the contract is ambiguous or uncertain).

and, hence, prevent the government from abusing a pretrial defendant's vulnerability to waive his rights. Accordingly, when, as part of a bail hearing, a neutral magistrate judge finds that a federal criminal defendant voluntarily and knowingly chooses to waive (at least some of) her Fourth Amendment rights in favor of pretrial release, and also determines that such a waiver constitutes the least-intrusive means of ensuring that the defendant will appear at trial and in the meantime not endanger witnesses or the public, such a waiver is legally valid and should be permitted, if not encouraged.