

2011 DRAFTING REQUEST

Bill

Received: 02/01/2012

Received By: phurley

Wanted: As time permits

Companion to LRB: -4171

For: Joseph Leibham (608) 266-2056

By/Representing: Jeff

May Contact:

Drafter: phurley

Subject: Criminal Law - sentencing
Criminal Law - law enforcement

Addl. Drafters:

Extra Copies:

Submit via email: YES

Requester's email: Sen.Leibham@legis.wisconsin.gov

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Searches of persons on probation, parole, or extended supervision

Instructions:

Starting 1506 from scratch, with the emphasis not on "condition of probation, parole or extended supervision" and more on simply including the possibility of search in the statutes pertaining to those releases. Also new approach to require reasonable suspicion. Do a prelim for now.

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/P1	phurley 02/02/2012	mduchek 02/09/2012	rschlue 02/09/2012	_____	sbasford 02/09/2012		S&L
	phurley 02/23/2012	mduchek 02/23/2012		_____			
/1			rschlue 02/23/2012	_____	sbasford 02/23/2012	sbasford 02/27/2012	S&L

FE Sent For:

atkins
3/5

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Handwritten notes:
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2/23/12
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2/23/12

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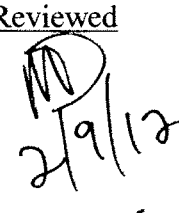

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FE Sent For:							

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2011 BILL

1 AN ACT *to amend* 302.113 (7), 302.114 (8) and 973.09 (1) (a); and *to create*
 2 302.113 (7g), 302.114 (8g), 304.06 (1r) and 973.09 (1d) of the statutes; **relating**
 3 **to:** searches of persons on parole or extended supervision.

probation

the parole commission or the

Analysis by the Legislative Reference Bureau

Under current law, with certain exceptions, if a person is convicted of a crime a court may withhold sentencing the person or may impose a sentence but stay its execution and, in either case, place the person on probation. The court may impose conditions of probation. If a person violates a condition of probation, the person's probation may be revoked.

Under current law, a person who is released from confinement in a prison to parole or to extended supervision is subject to conditions set by the Department of Corrections (DOC) or the Earned Release Review Commission (ERRC). If a person violates one of these conditions, his or her extended supervision may be revoked and the person may be returned to prison.

The bill requires the court, in the case of a person who is placed on probation, and DOC and ERRC, in the case of a person released on parole or to extended supervision, to require as a condition of probation, parole, or extended supervision, that the person may be searched and have his or her residence or property searched, by a law enforcement officer at any time, with or without probable cause or a search warrant, within or without the scope of a right of lawful inspection, and whether or not pursuant to a search during an authorized temporary questioning. Under the

the parole commission and

BILL

bill, no law enforcement officer may conduct a search that is wholly arbitrary, capricious, or conducted for the sole purpose of harassing the person.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 302.113 (7) of the statutes, as affected by 2011 Wisconsin Act 38, is
2 amended to read:

3 302.113 (7) Any inmate released to extended supervision under this section is
4 subject to all conditions and rules of extended supervision until the expiration of the
5 term of extended supervision portion of the bifurcated sentence. The department
6 may set conditions of extended supervision in addition to any conditions of extended
7 supervision required under sub. (7g) or s. 302.116, if applicable, or set by the court
8 under sub. (7m) or s. 973.01 (5) if the conditions set by the department do not conflict
9 with the court's conditions.

10 **SECTION 2.** 302.113 (7g) of the statutes is created to read:

11 302.113 (7g) The department shall require, as a condition of extended
12 supervision that the inmate, his or her residence, and any property under his or her
13 control, may be searched under s. 968.10 (6) by a law enforcement officer at any time,
14 with or without probable cause or a search warrant, within or without the scope of
15 a right of lawful inspection, and whether or not pursuant to a search during an
16 authorized temporary questioning as provided in s. 968.25. This subsection does not
17 authorize a law enforcement officer to conduct a search that is wholly capricious or
18 arbitrary or that is undertaken solely for the purpose of harassing the inmate.

19 **SECTION 3.** 302.114 (8) of the statutes is amended to read:

20 302.114 (8) Any inmate released to extended supervision under this section is
21 subject to all conditions and rules of extended supervision. The department may set

BILL

1 conditions of extended supervision in addition to any conditions of extended
2 supervision required under sub. (8g) or s. 302.116, if applicable, or set by the court
3 under sub. (5) (d) if the conditions set by the department do not conflict with the
4 court's conditions.

5 **SECTION 4.** 302.114 (8g) of the statutes is created to read:

6 302.114 (8g) The department shall require, as a condition of probation, that the
7 person, his or her residence, and any property under his or her control, may be
8 searched under s. 968.10 (6) by a law enforcement officer at any time, with or without
9 probable cause or a search warrant, within or without the scope of a right of lawful
10 inspection, and whether or not pursuant to a search during an authorized temporary
11 questioning as provided in s. 968.25. This subsection does not authorize a law
12 enforcement officer to conduct a search that is wholly capricious or arbitrary or that
13 is undertaken solely for the purpose of harassing the person.

14 **SECTION 5.** 304.06 (1r) of the statutes is created to read:

15 (15) 304.06 (1r) The earned release review ^{g parole} commission shall require, as a condition
16 of parole or extended supervision, that the inmate, his or her residence, and any
17 property under his or her control, may be searched under s. 968.10 (6) by a law
18 enforcement officer at any time, with or without probable cause or a search warrant,
19 within or without the scope of a right of lawful inspection, and whether or not
20 pursuant to a search during an authorized temporary questioning as provided in s.
21 968.25. This subsection does not authorize a law enforcement officer to conduct a
22 search that is wholly capricious or arbitrary or that is undertaken solely for the
23 purpose of harassing the inmate.

24 **SECTION 6.** 973.09 (1) (a) of the statutes is amended to read:

BILL

1 conditions of extended supervision in addition to any conditions of extended
2 supervision required under sub. (8g) or s. 302.116, if applicable, or set by the court
3 under sub. (5) (d) if the conditions set by the department do not conflict with the
4 court's conditions.

5 SECTION 4. 302.114 (8g) of the statutes is created to read:

6 302.114 (8g) The department shall require, as a condition of probation, that the
7 person, his or her residence, and any property under his or her control, may be
8 searched under s. 968.10 (6) by a law enforcement officer at any time, with ~~or without~~
9 probable cause or a search warrant, within ~~or without~~ the scope of a right of lawful
10 inspection, and whether or not pursuant to a search during an authorized temporary
11 questioning as provided in s. 968.25. This subsection does not authorize a law
12 enforcement officer to conduct a search that is wholly capricious or arbitrary or that
13 is undertaken ~~solely~~ for the purpose of harassing the person.

14 SECTION 5. 304.06 (1r) of the statutes is created to read:

15 304.06 (1r) The earned release review commission shall require, as a condition
16 of parole or extended supervision, that the inmate, his or her residence, and any
17 property under his or her control, may be searched under s. 968.10 (6) by a law
18 enforcement officer at any time, with or without probable cause or a search warrant,
19 within or without the scope of a right of lawful inspection, and whether or not
20 pursuant to a search during an authorized temporary questioning as provided in s.
21 968.25. This subsection does not authorize a law enforcement officer to conduct a
22 search that is wholly capricious or arbitrary or that is undertaken solely for the
23 purpose of harassing the inmate.

24 SECTION 6. 973.09 (1) (a) of the statutes is amended to read:

*so rework that
release include searches
of reasonable suspicion
w/o warrant p.c. or
any more*

so this for all three prob, parole, ext superv.

*based upon reasonable suspicion or what
with reasonable suspicion*

*standards
968.25*

Scott Walker
Governor

Gary H. Hamblin
Secretary



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State of Wisconsin Department of Corrections

DATE: October 11, 2011

TO: Dennis Schuh, Executive Assistant
Kathryn Anderson, Chief Legal Counsel

FROM: Jonathan Nitti, Assistant Legal Counsel *JN*

RE: Request for Legal Opinion—Constitutionality and Effects of Proposed Wisconsin Law that Makes Mandatory a Condition of Extended Supervision, Parole, and Probation Allowing a Law Enforcement Officer to Search the Supervisee's Person, Property, and Residence without Probable Cause, Search Warrant, or Suspicion

I have been asked for a legal opinion as to the constitutionality and effects of a proposed Wisconsin law that makes mandatory a condition of extended supervision, parole, and probation allowing a law enforcement officer to search the supervisee's person, property, and residence without probable cause, search warrant, or suspicion. **Based on current and prospective law, I have doubts that portions of the proposed Wisconsin law will pass constitutional muster.**

CONSTITUTIONALITY

The proposed Wisconsin law has been reputed to be inspired by comparable laws in California. Lending credence to this assertion, the California Court of Appeals held decades ago that it was not unconstitutional to condition a defendant's *probation* on his submission to searches and seizures by probation or peace officers during the day or night with or without a search warrant. See People v. Fitzpatrick, 3 Cal. App. 3d 824, 827 (Cal. Ct. App. 1970). The State of California Legislature subsequently codified California Penal Code §3067, which mandates that inmates eligible to be released on *parole* shall, as a prerequisite to release, agree in writing to be subject to search or seizure by a parole or other peace officers at any time of the day or night with or without cause or a search warrant:

“§ 3067. Search or seizure; written agreement; application; intent. (a) Any inmate who is eligible for release on parole pursuant to this chapter shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause. **(b)** Any inmate who does not comply with the provision of subdivision (a) shall lose worktime credit earned pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 on a day-for-day basis and shall not be released until he or she either complies with the provision of subdivision (a) or has no remaining worktime credit, whichever occurs earlier. **(c)** This section shall only apply to an inmate who is eligible for release on parole for an offense committed on or after January 1, 1997. **(d)** It is not the intent of the

Legislature to authorize law enforcement officers to conduct searches for the sole purpose of harassment. (e) This section does not affect the power of the Director of Corrections to prescribe and amend rules and regulations pursuant to Section 5058." Cal. Penal Code §3067.

Under California law, parole officers are also considered to be peace officers and may carry a firearm while off duty:

"§ 830.5. Parole and probation officers; correctional or medical facility employees; firearms. The following persons are peace officers whose authority extends to any place in the state while engaged in the performance of the duties of their respective employment and for the purpose of carrying out the primary function of their employment or as required under Sections 8597, 8598, and 8617 of the Government Code, as amended by Section 44 of Chapter 1124 of the Statutes of 2002. Except as specified in this section, these peace officers may carry firearms only if authorized and under those terms and conditions specified by their employing agency:

(a) A parole officer of the Department of Corrections or the Department of the Youth Authority, probation officer, deputy probation officer, or a board coordinating parole agent employed by the Youthful Offender Parole Board. Except as otherwise provided in this subdivision, the authority of these parole or probation officers shall extend only as follows: (1) To conditions of parole or of probation by any person in this state on parole or probation. (2) To the escape of any inmate or ward from a state or local institution. (3) To the transportation of persons on parole or probation. (4) To violations of any penal provisions of law which are discovered while performing the usual or authorized duties of his or her employment. (5) To the rendering of mutual aid to any other law enforcement agency. For the purposes of this subdivision, "parole agent" shall have the same meaning as parole officer of the Department of Corrections or of the Department of the Youth Authority. Any parole officer of the Department of Corrections, the Department of the Youth Authority, or the Youthful Offender Parole Board is authorized to carry firearms, but only as determined by the director on a case-by-case or unit-by-unit basis and only under those terms and conditions specified by the director or chairperson. [...]

(b) A correctional officer employed by the Department of Corrections or any employee of the Department of the Youth Authority having custody of wards or any employee of the Department of Corrections designated by the Director of Corrections or any correctional counselor series employee of the Department of Corrections or any medical technical assistant series employee designated by the Director of Corrections or designated by the Director of Corrections and employed by the State Department of Mental Health or employee of the Board of Prison Terms designated by the Secretary of the Youth and Adult Correctional Agency or employee of the Department of the Youth Authority designated by the Director of the Youth Authority or any superintendent, supervisor, or employee having custodial responsibilities in an institution operated by a probation department, or any transportation officer of a probation department.

(c) The following persons may carry a firearm while not on duty: a parole officer of the Department of Corrections or the Department of the Youth Authority, a correctional officer or correctional counselor employed by the Department of Corrections or any employee of the Department of the Youth Authority having custody of wards or any employee of the Department of Corrections designated by the Director of Corrections. A parole officer of the Youthful Offender Parole Board may carry a firearm while not on duty only when so authorized by the chairperson of the board and only under the terms and conditions specified by the chairperson. Nothing in this section shall be interpreted to require licensure pursuant to Section 12025. The director or chairperson may deny, suspend, or revoke for good cause a person's right to carry a firearm under this subdivision. That person shall, upon request, receive a hearing, as provided for in the negotiated grievance procedure between the exclusive employee representative and the Department of Corrections, the Department of the Youth Authority, or the Youthful Offender Parole Board, to review the director's or the chairperson's decision." Cal. Penal Code §830.5.

The constitutionality of this and related provisions have been tested before the United States Supreme Court. See Griffin v. Wisconsin, 483 U.S. 868 (1987); U.S. v. Knights, 534 U.S. 112 (2001); and Samson v. California, 547 U.S. 843 (2006). Specifically in Griffin, the United States Supreme Court held that a warrantless search of a probationer's residence by probation officers pursuant to an administrative regulation that required only "reasonable grounds" to search, did not violate the Fourth Amendment because it was a reasonable response to the "special needs" of the probation system. See Griffin, 483 U.S. at 873-74.

In Knights, the Court held that a warrantless search of a probationer's apartment by probation or law enforcement officer supported by "reasonable suspicion" and authorized by a condition of his probation was reasonable under the Fourth Amendment. See Knights, 534 U.S. at 121-22.

In Samson, the Court further held that California Penal Code §3067 referenced above, which allows police officers to conduct suspicionless searches of parolees pursuant to an obligatory condition of parole, was Constitutional. See Samson, 547 U.S. at 857. In doing so, the Court noted that on the "continuum" of state-imposed punishments, parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than is probation. See id at 846-47. I must point out that Samson involved a police officer seizing and searching parolee Donald Curtis Samson's person without a warrant after the officer encountered him on the street. See id at 850.

Wisconsin Courts have also provided some guidance, but have not as of yet decided the precise issues created by the instant proposed Wisconsin law. See State v. Griffin, 131 Wis. 2d 41, 45-46, 388 N.W.2d 535, 536 (1986); State v. Pittman, 159 Wis. 2d 764, 774, 465 N.W.2d 245, 248 (Wis. Ct. App. 1990); State v. Jones, 314 Wis. 2d 408, 418-19, 762 N.W.2d 106, 111 (2008); and State v. Bauer, 327 Wis. 2d 765, 774-75 (2010). For example, the Supreme Court of Wisconsin has held that a probation agent who has "reasonable grounds" to believe that a probationer is violating the terms of probation may conduct a warrantless search of probationer's residence, and evidence obtained in search may be used at a trial seeking new conviction of the probationer if the search is otherwise reasonable. See Griffin, 131 Wis. 2d at 45-46, 388 N.W.2d at 536. It should be noted that "reasonable grounds" is considered to be a lesser standard than

that of "probable cause", the latter of which is the standard necessary to obtain a search warrant. See Griffin, 483 U.S. at 873-74; and Griffin, 131 Wis. 2d at 60-1, 388 N.W.2d at 542. As cited above, this decision was later upheld by the United States Supreme Court. See Griffin, 483 U.S. at 873-74.

Furthermore, the Wisconsin Court of Appeals has held that a judicially issued arrest warrant was not constitutionally required for a police officer to seize a parole violator in his home and that an apprehension request from the DOC sufficed. See Pittman, 159 Wis. 2d at 774, 465 N.W.2d at 248. The Wisconsin Court of Appeals has also held that a "reasonable grounds" search of a probationer's room by his probation officer did not transform into a police search even though the probation officer was accompanied by police officers, the information leading to the search was provided by law enforcement, and a concurrent police investigation existed. See Jones, 314 Wis. 2d at 418-19, 762 N.W.2d at 111. However, the Court of Appeals more recently opined that a probation apprehension request issued by the DOC did not in and of itself allow a warrantless evidence search of a probationer's vehicle. See Bauer, 327 Wis. 2d at 774-75.

In contrast to California, Wisconsin's legal definitions of "law enforcement officer" and "peace officer" (a.k.a. police officer) appear to exclude probation, extended supervision, and parole agents (officers):

"Peace officer" means any person vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes." Wis. Stats. §938.22.

"Law enforcement officer" means a person who is employed by a law enforcement agency for the purpose of engaging in, or supervising others engaging in, the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law and who has statutory powers of arrest." Wis. Stats. §175.49 (1)(g).

"Probation, extended supervision and parole agent" means any person authorized by the department of corrections to exercise control over a probationer, parolee or person on extended supervision." Wis. Stats. §940.20 (2m)(a)2.

In light of the foregoing, it is clear that *police officers* (a.k.a. law enforcement or peace officers) may search a *parolee's person* without any suspicion when a condition of their parole specifically allows it, at least under the U.S. Constitution. See Samson, 547 U.S. at 857. Consequently, this aspect of the proposed Wisconsin Act is on fairly solid legal ground as regards those on *parole and extended supervision*. See *id.*

However, serious questions remain with respect to the rest of the proposed Wisconsin law. To expound, the proposed law evinces that neither "probable cause" nor a search warrant is necessary in order for a law enforcement officer to search of the supervisee's person, property, or residence. Moreover, I interpret the language "within the scope of a right of lawful inspection, and whether or not pursuant to a search during an authorized temporary questioning as provided in s. 968.25" to also eliminate the need for any suspicion prior to a law enforcement officer conducting a search of a supervisee's person, property, or residence. This directly contravenes current law, which demands minimally that probation and parole officers and/or law enforcement officers (police officers) have "reasonable suspicion" or "reasonable grounds" prior to searching

any supervisee's property or residence. See Griffin, 483 U.S. at 873-74; Knights, 534 U.S. at 121-22; Samson, 547 U.S. at 857; and Griffin, 131 Wis. 2d at 45-46, 388 N.W.2d at 536. Moreover, the proposed law treats probationers equally to parolees and extended supervisees, which may also prove to be a mistake. See Samson, 547 U.S. at 846-47.

Notwithstanding, the Wisconsin Court of Appeals has very recently certified to the Wisconsin Supreme Court an appeal that, once decided, should answer most of the legal questions raised by the proposed Wisconsin law. See State v. Rowan, No. 2010AP1398-CR (Wis. Ct. App. 2011). Indeed, the precise issue in Rowan is whether a sentencing court violated the Fourth Amendment or the Wisconsin Constitution by setting a condition of extended supervision that allows any law enforcement officer to search a defendant's person, vehicle, or residence for firearms, at any time and without probable cause or reasonable suspicion. See id. I suspect that the Supreme Court will find that such a condition goes too far. Consequently, portions of the proposed Wisconsin law discussed herein might likewise fail to survive constitutional scrutiny.

PECUNIARY CONSEQUENCES

Should the proposed Wisconsin law be promulgated, I envision pertinent financial ramifications for the DOC. Indeed, these provisions would likely cause a substantial increase in revocations of community supervision (probation, parole, and extended supervision) thereby increasing costs for DCC. In fact, some offenders may prefer to reject probation or seek revocation at the beginning of or at some point during their community supervision (probation, parole, and extended supervision) rather than be subject to heightened scrutiny by law enforcement. See State ex rel. Riesch v. Schwarz, 278 Wis.2d 24, 37-8, 692 N.W.2d 219, 225-26 (2005); State v. McCready, 234 Wis.2d 110, 114-15, 608 N.W.2d 762, 764 (Wis. Ct. App. 2000); State ex rel. Macemon v. McReynolds, 208 Wis.2d 594, 597, 561 N.W.2d 779, 780 (Wis. Ct. App. 1997). In turn, this will mean greater numbers of offenders being sent and returned to prison and hence, a significant increase in the costs of incarceration.

POTENTIAL CONSEQUENCES FOR COMMUNITY SUPERVISION

Aside from potential increased costs, the proposed law may diminish the continuity and effectiveness of community supervision. Particularly, the resulting increase in searches of offenders by law enforcement (sometimes unbeknownst to DCC) could engender a greater distrust of community supervision generally. Such distrust may manifest as an attenuation of offender cooperation with their probation and parole agents and consequently, a less effective system.

Moreover, as currently written, there does not appear to be any requirement in the proposed law that law enforcement consult with DCC prior to conducting a suspicionless search of an offender on community supervision. Should unilateral searches of supervisees by police officers become frequent, an inordinate increase in revocation cases is presumed. Such a consequence could strain DCC resources and evoke a perception that law enforcement is encroaching on the authority of the DOC.



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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Dave Pearlman

MEMORANDUM

TO: State Senator Joe Leibham
FR: Mark Rinehart, Legislative Liaison
DT: August 18, 2011
RE: LRB-1506/P1

Mark Rinehart

At the conclusion of our conference call last week Wednesday with you, the Sheboygan Police Department, the Sheboygan County District Attorney, and the Department of Corrections regarding LRB-1506/P1 you asked that the Department summarize its comments from the call. We greatly appreciate the opportunity to provide input on legislation, particularly prior to its introduction.

LRB-1506/P1 creates statutes which would require as a condition of probation, parole, or extended supervision that a convicted person agree, in writing, to a search by a law enforcement officer at any time, with or without probable cause or a search warrant, within or without the scope of a right of lawful inspection, and whether or not pursuant to a search during an authorized temporary questioning. It further provides that no law enforcement officer may conduct a search pursuant to the agreement for the sole purpose of harassment.

The constitutional implications of the provision regarding probation, and the provisions regarding parole and extended supervision must be considered separately because of their separate treatment in the law as of this time.

In *United States v. Knights*, which involved a California provision much like the one described in LRB-1506/P1, the Supreme Court decided that the California regulation which required a probationer to agree to this condition to keep from going to jail and 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," was not unconstitutional. While the government argued that the search of Knights' property under this provision was valid because he voluntarily chose to consent to the search condition instead of going to jail, **the Court declined to rule on that contention, and decided the case on substantive Fourth Amendment principles instead.**

In reaching its conclusion that the search authorized by the California regulation was valid, the Court balanced two factors:

Senator Leibham
August 18, 2011

- probation is a form of criminal sanction which necessarily diminishes a probationer's liberty interest. Moreover, the search condition significantly diminished his reasonable expectation of privacy even further.
- the search condition furthers the two primary goals of probation; rehabilitating the probationer and protecting the public.

The Court held that a search by law enforcement without a warrant or probable cause of a person with a diminished liberty interest which furthers the interests of probation is reasonable under the Fourth Amendment, at least when the police have reason to support that they might find evidence of a crime in the probationer's possession. *Knights* did not answer the question of whether a search under such a condition of probation is valid if it is not supported by reasonable suspicion.

Reasonable suspicion of crime

The California regulation came before the Supreme Court again in *Samson v. California*. The Court answered a "variation" of the question left open in *Knights*, to wit whether a search of a released prisoner can be conducted without reasonable suspicion. The "variation" is that the search in *Samson* involved a parolee instead of a probationer.

As in *Knights*, the Court refused to decide *Samson* on the theory that acceptance of the search condition constituted consent to a complete waiver of a parolee's Fourth Amendment rights. Again, the Court decided the case by applying substantive Fourth Amendment law. After discussing its reasoning in *Knights*, the Court said that **a parolee has even less of a liberty interest than a probationer. The Court found that a parolee has no expectation of privacy that society would recognize as legitimate.** Furthermore, a state has even more interest in rehabilitating, and protecting the public from, a parolee. So the search condition carries even more weight in the case of a parolee.

While The Court concluded that "the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee," it did go on to say that the search condition did not bestow a blanket grant of discretion unrestrained by any procedural safeguards because the regulation prohibited "arbitrary, capricious or harassing' searches."

In the context of search and seizure, the Wisconsin Supreme Court has almost always conformed the law under the Wisconsin Constitution to the law enunciated by the United States Supreme Court.

Upon initial investigation, DOJ has been unable to find any case in either of the two relevant treatises that extends *Samson* to probation searches. There are a couple post *Samson* cases that uphold probation searches without reasonable suspicion, e.g. *Commonwealth v. Wilson*, 11 A.3d 519 (Pa. 2010) (relying on pre *Samson* cases), but they are not very persuasive because their reasoning is suspect at best. None of them appropriately deals with the rationale of the *Samson* case.

Some cite cases that appear to bolster the view that an agreement to the conditions of probation or parole constitutes a valid waiver of Fourth Amendment rights. The Supreme Court

Senator Leibham
August 18, 2011

signaled its disapproval in both *Knights* and *Samson* by refusing to even consider deciding those cases on a theory that the probationer or parolee voluntarily consented to "a complete waiver of his Fourth Amendment rights."

Finally, we brought to the group's attention the Wisconsin Supreme Court's holding regarding voluntary choice. The Court holds that for a choice to be voluntary, it must be between two reasonable alternatives, each with some compelling power of acceptance.

In the call we also identified one potential drafting problem in the pro forma disclaimer crafted in LRB-1506/P1 which forbids parole searches conducted "for the sole purpose of harassment." One might construe this to mean that the police can conduct parole searches for the primary purpose of harassment as long as they can suggest any other purpose for the search. A consideration may be to use the language approved by the Supreme Court which prohibits all "arbitrary, capricious or harassing" searches," adding another requirement of the California regulation, i.e. that searches must be done in a reasonable manner.

302.043 = risk reduction

302.045 = challenge incall.
(3m) release to es. (rel to parole okay, because it's "under 304.06")

302.05 = sub abuse
(3)(c) release to es. (rel to parole ok because it's "under 304.06")

302.11 = mandatory release to parole

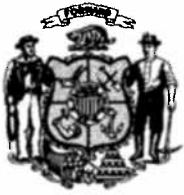
302.113 = es (not lifes)

302.114 = es (lifes)

304.08 = parole special action (crowding)

304.06 = parole

973.09 = probation



med

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

*2-2-12
D. note
soon*

Gen

1 AN ACT, relating to: searches by a law enforcement officer of a person on
2 probation, parole, or extended supervision.

of
Analysis by the Legislative Reference Bureau

Under current law, with certain exceptions, if a person is convicted of a crime a court may withhold sentencing the person or may impose a sentence but stay its execution and, in either case, place the person on probation. The court may impose conditions of probation. If a person violates a condition of probation, the person's probation may be revoked.

Under current law, a person who is released from confinement in a prison to parole or to extended supervision is subject to conditions set by the parole commission or by the Department of Corrections. If a person violates one of these conditions, his or her parole or extended supervision may be revoked and the person may be returned to prison.

This bill specifies that a person who is placed on probation or a person who is released from incarceration to parole or extended supervision is subject to having his or her person, residence, and any property under his control searched by a law enforcement officer at any time if the officer reasonably suspects that the person is committing, is about to commit, or has committed a crime or a violation of a condition of probation or release.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 302.043[✓] (4) of the statutes is created to read:

2 302.043 (4) A person released under this section, his or her residence, and any
3 property under his or her control may be searched by a law enforcement officer at any
4 time during his or her period of supervision if the officer reasonably suspects that the
5 person is committing, is about to commit, or has committed a crime or a violation of
6 a condition of release to extended supervision.

7 **SECTION 2.** 302.045 (3m) (e) of the statutes is created to read:

8 302.045 (3m) (e) A person released under this subsection, his or her residence,
9 and any property under his or her control may be searched by a law enforcement
10 officer at any time during his or her period of supervision if the officer reasonably
11 suspects that the person is committing, is about to commit, or has committed a crime
12 or a violation of a condition of release to extended supervision.

13 **SECTION 3.** 302.05 (3) (c) 4. of the statutes is created to read:

14 302.05 (3) (c) 4. A person released under this paragraph, his or her residence,
15 and any property under his or her control may be searched by a law enforcement
16 officer at any time during his or her period of supervision if the officer reasonably
17 suspects that the person is committing, is about to commit, or has committed a crime
18 or a violation of a condition of release to extended supervision.

19 **SECTION 4.** 302.11 (6m) of the statutes is created to read:

20 302.11 (6m) A person released under this section, his or her residence, and any
21 property under his or her control may be searched by a law enforcement officer at any

1 time during his or her period of supervision if the officer reasonably suspects that the
2 person is committing, is about to commit, or has committed a crime or a violation of
3 a condition of parole.

4 **SECTION 5.** 302.113 (7r) of the statutes is created to read:

5 302.113 (7r) A person released under this section, his or her residence, and any
6 property under his or her control may be searched by a law enforcement officer at any
7 time during his or her period of supervision if the officer reasonably suspects that the
8 person is committing, is about to commit, or has committed a crime or a violation of
9 a condition of release to extended supervision.

10 **SECTION 6.** 302.114 (8g) of the statutes is created to read:

11 302.114 (8g) A person released under this section, his or her residence, and any
12 property under his or her control may be searched by a law enforcement officer at any
13 time during his or her period of supervision if the officer reasonably suspects that the
14 person is committing, is about to commit, or has committed a crime or a violation of
15 a condition of release to extended supervision.

16 **SECTION 7.** 304.02 (2m) of the statutes is created to read:

17 304.02 (2m) A person released under this section, his or her residence, and any
18 property under his or her control may be searched by a law enforcement officer at any
19 time during his or her period of supervision if the officer reasonably suspects that the
20 person is committing, is about to commit, or has committed a crime or a violation of
21 a condition of parole.

22 **SECTION 8.** 304.06 (1r) of the statutes is created to read:

23 304.06 (1r) A person released under this section, his or her residence, and any
24 property under his or her control may be searched by a law enforcement officer at any
25 time during his or her period of supervision if the officer reasonably suspects that the

1 person is committing, is about to commit, or has committed a crime or a violation of
2 a condition of parole.

3 **SECTION 9.** 973.09 (1d) of the statutes is created to read:

4 973.09 (1d) A person who is placed on probation, his or her residence, and any
5 property under his or her control may be searched by a law enforcement officer at any
6 time during his or her period of supervision if the officer reasonably suspects that the
7 person is committing, is about to commit, or has committed a crime or a violation of
8 a condition of probation.

9 **SECTION 10. Initial applicability.**

10 (1) This act first applies to a person who is placed on probation, released on
11 parole, or released to extended supervision on the effective date of this subsection.

12

(END)

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-4005/P1dn

Dade

.....
PJH:med

Jeff,

Please review this draft to ensure that it is consistent with your intent. As we discussed, this draft does not refer to the possibility of searches as a "condition" of probation, parole, or release to extended supervision; instead, the draft simply includes the possibility of searches as part of the release. I am not sure whether, when determining whether these provisions pass constitutional muster, a court would prefer that an offender affirmatively choose to accept this possibility as a condition of his or her freedom from incarceration. As we discussed, it might be sufficient for an offender to receive and acknowledge "notice" of this possibility when he or she is released.

This draft does require reasonable suspicion of a crime or violation of a condition in order for a search to be justified, however. For that reason, this draft does not include the prohibition against searches that are arbitrary, capricious, or harassing.

This draft contains the same language for people who are placed on probation as for people who are released from incarceration to parole or extended supervision. Please also note that this draft includes the same provisions regarding the possibility of a search for persons released to parole or to extended supervision under various circumstances, including as part of a risk reduction or challenge incarceration sentence, as part of a substance abuse program, when the person reaches his or her mandatory release date, or is released to parole on a special action. If you do not want to include any of these provisions, please let me know.

This draft has an initial applicability provision, but not a delayed effective date. Please let me know if you want to delay the effective date of this bill and, as we discussed, if you would like to authorize or require the department of corrections to promulgate rules under the newly created statutes.

Please let me know if you have any questions or would like changes to the draft. When it meets your approval, I will redraft it into introducible form.

Peggy Hurley
Legislative Attorney
Phone: (608) 266-8906
E-mail: peggy.hurley@legis.wisconsin.gov

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-4005/P1dn

PJH:med:rs

February 9, 2012

Jeff,

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Please let me know if you have any questions or would like changes to the draft. When it meets your approval, I will redraft it into introducible form.

Peggy Hurley
Legislative Attorney
Phone: (608) 266-8906
E-mail: peggy.hurley@legis.wisconsin.gov



Step 1
MVR

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

SA~

to desc. pls
no charges
set for 1/1
10/1

Reyer

1 AN ACT to create 302.043 (4), 302.045 (3m) (e), 302.05 (3) (c) 4., 302.11 (6m),
2 302.113 (7r), 302.114 (8g), 304.02 (2m), 304.06 (1r) and 973.09 (1d) of the
3 statutes; relating to: searches by a law enforcement officer of a person on
4 probation, parole, or extended supervision.

Analysis by the Legislative Reference Bureau

Under current law, with certain exceptions, if a person is convicted of a crime a court may withhold sentencing of the person or may impose a sentence but stay its execution and, in either case, place the person on probation. The court may impose conditions of probation. If a person violates a condition of probation, the person's probation may be revoked.

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8 a condition of probation.

9 **SECTION 10. Initial applicability.**

10 (1) This act first applies to a person who is placed on probation, released on
11 parole, or released to extended supervision on the effective date of this subsection.

12 (END)

Parisi, Lori

From: Sen.Leibham
Sent: Friday, February 24, 2012 12:25 PM
To: LRB.Legal
Subject: Draft Review: LRB 11-4005/1 Topic: Searches of persons on probation, parole, or extended supervision

Please Jacket LRB 11-4005/1 for the SENATE.