

## **Fourth Amendment Applies to Individuals Facing Trial**

**By: Wayne C. Fricke; Oct 2005**

Recently, the Ninth Circuit decided the case of U.S. vs. Scott, 04-10090, (September 9, 2005), holding that police must have probable cause to search an individual released pending trial pursuant to conditions of release.

In Scott, the defendant had been arrested for a drug possession charge and was released on his personal recognizance. One condition of his release was that he consent to random drug testing “at any time of the day or night by any peace officer without a warrant” and that he agree to have his home searched for drugs by any peace officer at any time without a warrant.

After an informant’s tip, the police went to the defendant’s house and administered a urine test which tested positive for methamphetamine. This resulted in his arrest and a search of the house which turned up a shot gun. He was indicted for possession of an unregistered shotgun. The District Court suppressed and the Ninth Circuit, in an issue of first impression in any federal appeals court, affirmed the dismissal in a 2-1 decision.

Citing to United States Supreme Court cases and other federal cases, the court noted that the consent to search contained within the condition to release would only be valid if the search in question was reasonable. The government attempted to justify the search under the “special needs” doctrine, and the protection of the community from criminal defendants released pending trial and to ensure that defendants appear at trial. The court noted, in rejecting the first reason, that the government had an interest in preventing crime by anyone. As such, it was a “quintessential” general law enforcement purpose and, thus, could not qualify as a special need.

Secondly, the court noted that the search was not necessary to ensure the defendant’s appearance at trial and given the fact that he was at home, it made his privacy interest at its zenith. Consequently, the court found that the government needed to show probable cause as the special needs exceptions would not apply.

The court then found that the search was not reasonable and that the defendant’s privacy and liberty interests were greater than the typical probationer as he was out of jail pre-conviction and on his own recognizance. As such, his supposed likelihood to commit crimes,

more so than the other members of the public, was contradicted by the presumption of innocence. The drug test was, therefore, not reasonable and not supported by probable cause. The gun that was found as a fruit of the poisonous tree as a result of the search, was also ordered suppressed.

We probably haven't heard the last of this case. Because of the closeness and the implications of this decision, it is most likely destined to be reviewed by the Supreme Court after an en banc review by the Ninth Circuit.

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