Sex Offender Law Report™

Vol 7 No. 6 | ISSN 1529-0697 | Pages 81 - 96 | October/November 2006

Child Pornography and the Fourth Amendment

Monitoring Probationer Internet Habits

by Marc M. Harrold

Editor's Note: *The Fourth Amendment to the Constitution forbids the government from engaging in unreasonable searches or seizures. (U.S. Const. Amend. IV.) The fluid language in the Amendment allows for a balancing of interests tied to relevant facts in determining whether a particular search condition is valid on its face or whether a completed search was reasonable as conducted.*

In fall 2005, the author published a comprehensive article on this topic in the Mississippi Law Journal entitled "Computer Searches of Probationers—Diminished Privacies, 'Special Needs,' and 'Whilst' Quiet Pedophiles—Plugging the Fourth Amendment Into the 'Virtual Home Visit.'" (75 Miss. L.J. 273 (Fall 2005); available at www.ncjrl.org.*) In this brief article, he provides a practical overview of the legal and constitutional subject matter, with particular emphasis on the recent U.S. Supreme Court ruling* ***Samson v. California*** *(547 U.S. ___, 126 S.Ct. 2193 (2006)), a case handed down after publication of his earlier article. This article also includes overview information related to the technology that comprises "computer-monitoring" in the field.*

The touchstone of the Fourth Amendment is "reasonableness." Under the Fourth Amendment, the "ultimate measure of the constitutionality of a governmental search is 'reasonableness.'" (**Vernonia Sch. Dist. v. Acton,** 515 U.S. 646, 652 (1995).) Thus, to analyze the

See MONITORING, page 90

Octopus in the Bathtub: The Slippery Nature of Female Sex Offending

by Abby Stein, Ph.D.

Available data on the gender of offenders in sexual abuse convictions indicate that women comprise between 2% and 5% of the offender population (U.S. Dept of Justice, *Women Offenders*, NCJ 175688 (Bur. of Justice Statistics 1999)), only an infinitesimal climb from figures in previous decades. Low report and conviction rates may be due to widely held cultural beliefs regarding female caretaker roles, narrow legal definitions of sexual violation, and the reluctance—or downright inability—of victims to report molestations. If my own encounters with adult male sex offenders are any indication, their early experiences of victimization at the hands of women have often been psychologically reconceptualized as consensual encounters: "I *did* her," such a man might say, "when I was six," making both the quantification and qualification of data quite difficult. (Abby Stein, *Prologue to Violence: Child Abuse, Dissociation, and Crime* (2006).)

Researchers who rely on official criminal justice statistics to tabulate the prevalence, incidence, and nature of female perpetrated sexual abuse have likely excluded the more subtle forms of female offending. Those who use information from child protection proceedings instituted in civil or family courts may, conversely, over-represent women by including in their data females who were bystanders to assaults by their husbands or boyfriends rather than active participants in sexual offending.

Insidious Perpetration

The nature of women's perpetration may be quite insidious. Intimate touching is part of the fabric of female nurturing, and the social construct of women as dependent and nonthreatening makes it difficult to imagine them in predatory roles. Speaking to adults who were sexually abused in childhood, for example, reveals that many female perpetrated abuses revolve around hygienic or protective themes, such as administering enemas or checking to see that a young daughter's hymen is intact, actions which are rarely labeled as criminal even by the victims who endure them. As a 23-year-old inmate once shared with me: "My mom to this day washes me. I cover here (subject cups his genitals) but she does it. She wants me that much, as her baby." (Stein, supra, at 100.) Given the ambiguous nature of these kinds of violations, even when retrospective self-reports of adult victims are considered (and more liberal definitions of sexual violation are used), the prevalence of sex abuse committed by women may still be artificially low as compared to that of male offenders.

While, given the vagaries of memory and the usual lack of corroborating evidence, these data are often considered of questionable reliability and validity, autobiographical narratives may offer the richest portrait of female sex crimes. Some clinicians in private practice estimate that 10% to 39% of their clients report having been molested by women, and retrospective reports of incarcerated male rapists receiving treatment suggest that many were assaulted sexually by women during childhood. Denov points out

See OCTOPUS, next page

ALSO IN THIS ISSUE

MONITORING, from page 81

Fourth Amendment as related to a "search or seizure" involving a probationer with a prior conviction for Internet-related child pornography, the balancing that leads to whether or not governmental action can be deemed "reasonable" under the Constitution must include the nature of an offense related to child pornography and the high recidivism rate linked to this type of offender. (See, e.g., **United States v. Hayes,** 445 F.3d 536 (2d Cir. 2006).)

Child Pornography

Reasonable Supervision Condition. A recent case in the Second Circuit Court of Appeals provides an example of how a supervision condition that may not be generally acceptable might be "reasonable" where the underlying offense is one related to child pornography.

In holding that the trial court did not err in ordering a lifetime term of supervised release for a probationer previously convicted of "knowingly transporting child pornography in interstate commerce," the Second Circuit held:

> In [this] case, the district court weighed, on the record, the statistical evidence [offender] proffered against congressional findings presented by the government linking sex offenders to recidivism and specifically rebutting the notion that this link weakens with age. (See H.R. Rep. No. 107-527, at 2 (2002) (noting that "studies have shown that sex offenders are four times more likely than other violent criminals to recommit their crimes" and that "recidivism rates do not appreciably decline as offenders age.")) (**United States v. Hayes**, supra, at 537.)

Given that the heinous crimes involving child pornography are linked to the sexual preferences of the offender, high rates of recidivism are intuitive realities. Regardless, this in no way excuses any individual, regardless of the compulsion (unless it renders them legally insane), from being criminally liable for this type of crime. There are certain instances where the sex crime offender is solely profit-motivated, but these cases are in the stark minority.

Curing These Individuals. During his presentations, Dr. Jim Tanner, president of KBSolutions and a foremost expert in this area, has engaged in this type of Q&A to drive home the point about society's ability to "cure" individuals who are sexually aroused by the viewing or production of child pornography:

> Think about your favorite sexual activity, the one you enjoy doing the most. Got it? OK, now imagine I was going to ask you to share it in detail with a group of total strangers. Then imagine I was going to ask you to never do that behavior again. What would you do? You would do exactly what I would do. You would hide your favorite sexual behavior and tell the group something you were willing to give up.

Given that the heinous crimes involving child pornography are linked to the sexual preferences of the offender, high rates of recidivism are intuitive realities.

What I just described is exactly what we require from sex offenders. We tell them to share their favorite sexual behavior with a group of total strangers called a treatment group and then tell them to never do that behavior again. What do you think they do? They do exactly what you or I would do. They hide their favorite behavior and tell the group about anything but their favorite behavior. This makes treatment very difficult.

How many years would you have to be in treatment with me before I could convince you to have sex with a five-year-old child? Forever, I hope. But understand that the leap you must make to see sex with a five-year-old as good is the same leap a person whose preferred sexual partner is a five-year-old has to make to see it as bad; the leap is just in the opposite direction. It will take me just as long to convince them it's bad as it would to convince you it's good. The only advantage I have with sex offenders is that it is illegal to pursue their interests. But making them understand that does not change their interest or desire.

Government Not Forced to Ignore Recidivism Risk. It is crucial to remember the heinous nature of child pornography crimes and the well-documented recidivism rates for this type of offender when undertaking any Fourth Amendment analysis in the probation context. To this end, the U.S. Supreme Court has recently stated that the Fourth Amendment does not force the government to ignore recidivism, future victims, or the fact that probationers are simply "more likely than the average citizen to violate the law," and have great incentive to avoid detection.

Referring to its earlier ruling in **United States v. Knights,** 534 U.S. 112 (2001), the Court stated:

> We explained that the State did not have to ignore the reality of recidivism or suppress its interest in "protecting potential victims of criminal enterprise" for fear of running afoul of the Fourth Amendment. (**Samson**, supra, at 2193, 2202.) (additional citation omitted).)

Supreme Court Cases

Although both of the following U.S. Supreme Court decisions are extremely important to any analysis involving warrantless probationary searches, the value to our specific inquiry is limited, as both cases involved the constitutionality of particular searches and not the more general question as to the constitutionality of the particular search condition of computer monitoring more generally.

U.S. v. Knights. In **U.S. v. Knights,** the Court declined to apply any aspect of the "special needs" doctrine and, instead, used an ad hoc general reasonableness standard to analyze a particular search under the Fourth Amendment. The Court held that the search at issue, performed pursuant to "reasonable suspicion," was reasonable.

Griffin v. Wisconsin. In **Griffin v. Wisconsin,** 483 U.S. 868 (1987), the Court did invoke the "special needs" doctrine and held that the search was reasonable for purposes of the Fourth Amendment because "it was conducted pursuant to a valid regulation governing probationers." (**Griffin,** supra, at 880.) In other words, because the law that authorizes a search passes muster under the Fourth Amendment, the search-at-issue is also reasonable.

See MONITORING, next page

MONITORING, from page 90

Samson v. California. **Samson v. California,** is a very recent case that addresses a warrantless parolee search that is not based on any indicia of individualized suspicion. This case is examined in depth later in this article.

Virtual Home Visit: Putting "Special" Back in "Special Needs"

Although the most recent Supreme Court decisions dealing with warrantless searches of a probationer (**Knights,** supra) and, by analogy, the even more recent Court ruling with regards to parolees (**Samson,** supra) both declined to invoke the "special needs" doctrine, it is still worthwhile to review why supervision of probationers was originally included in the "special needs" exception to the Fourth Amendment. (See **Griffin v. Wisconsin,** supra, at 873-74) ("[a] State's operation of a probation system, like its operation of a school, government office, or prison," presents special needs).)

Unique Circumstances of Supervision. One of the reasons that probation/supervision is special in the first place is that supervision brings with it a set of unique circumstances and challenges distinct from searches performed by law enforcement officers for evidence to be used in future criminal prosecutions. Although intrusive, a home visit is not the same as a search and, as we will see, monitoring is not necessarily the same as testing. A search is looking for particular evidence or contraband. A home visit is much more supervisory than a search. The probation official is not seeking to find particular evidence, but instead is attempting to determine whether the individual is complying with the express terms of their supervised release or period of probation. Further, the goals of a test differ from those of monitoring. For example, the Second Circuit in **Lifshitz,** analogized computer monitoring to drug testing; a poor analogy both legally and factually. (**United States v. Lifshitz,** 369 F.3d 173 (2d Cir. 2004).) If blood or urine is tested to determine whether there is a certain drug present, it is a test. It is either there or it is not. The tester knows exactly what they are attempting to determine. This is not the case in monitoring. Monitoring will reveal a level of compliance and the presence or absence of technical violations in a much more broad way than a drug test or polygraph exam. Further, one of the reasons that suspicionless drug tests have been found constitutionally permissible in certain circumstances is that the test was specific and would not reveal too much extraneous information. This should not be a concern in the context of monitoring as broad, general, even extraneous, information is the whole point. What could be "extraneous" to a probation officer attempting to determine whether a child sex offender, especially given the high rates of recidivism, is a threat to the community and in compliance with the terms of probation set forth as part of their sentence?

Remedy for Violations. Also relevant is that the remedy for violations of the Fourth Amendment in the criminal search context is suppression of evidence, while the Supreme Court has clearly held that this type of suppression is not applicable in administrative probation revocation hearings. (**Pennsylvania Bd. of Probation and Parole v. Scott,** 524 U.S. 357 (1998).)

Monitoring is not necessarily the same as testing.

Although the outcome (detection of evidence or contraband) might be the same, the mindset of probation officials in performing a home visit (or in the case of computer monitoring what I have tagged a "Virtual Home Visit" (VHV)) for the purpose of supervision to determine the level of an offender/probationer's compliance with the terms of probation is distinct from a law enforcement officer searching for evidence or contraband. As such, the law should treat probation as a distinct area of jurisprudence, and not attempt, by analogy or comparison, to fit square pegs in the round holes created for other areas of criminal procedure.

U.S. v. Lifshitz, the oft-cited, and frequently misunderstood, Second Circuit Court of Appeals ruling, is indicative of the manner in which certain courts have attempted to determine the reasonableness of "searches" performed in the larger context of supervision. Put simply, the Second Circuit acknowledged that probation presents the government with a "special need," but, in its analysis, *totally abandoned the logic related to what makes probation* special *in the first place.*

Samson v. California

A "kissing your sister" case for the ages? For those with an interest in the Fourth Amendment boundaries as they relate within the context of probation, the Court's 5-4 ruling, authored by Justice Thomas, was unsatisfying, even anticlimactic. The Court's decision was highly anticipated because of its opportunity to answer a number of questions left open in **Knights** (**U.S. v. Knights,** supra, at 120 n.6)) related to the proper doctrine for warrantless searches and the necessary level of individualized suspicion required to search a probationer. As in numerous other contexts, it was expected that the precedent set forth in **Samson,** would also be relevant and generally applicable in the context of probation.

Specifically, the Court was faced with deciding the proper analytical framework for gauging this type of search:

- Consent;
- "Special needs"; or
- General reasonableness judged by the "totality of the circumstances."

The Court chose to analyze the search under a general standard of reasonableness and expressly rejected the other two doctrines. (**Samson,** supra, at n.3.) As such, the case has limited value as precedent because it is tied both to the facts at issue ("totality of circumstances balancing") and the underlying California statute the search was conducted under. (See Cal. Penal Code Ann. § 3067(a)(West 2000).)

The unsatisfying nature of the majority's written opinion stems from both style and substance and falls into three general categories.

Conflicted Breadth of Holding. In the opening paragraph Justice Thomas states:

> We granted certiorari to decide whether a suspicionless search, conducted *under the authority of this statute*, violates the Constitution. We hold that it does not. (**Samson**) (emphasis added).)

Thus, initially a reader is led to believe that the holding that such a search passes Constitutional muster under the Fourth Amendment would be closely tied to the underlying statute. However, 11 pages later, the majority opinion is much broader, concluding with:

> Thus, we conclude that *the Fourth Amendment does not prohibit* a police officer from conducting a suspicion-

See MONITORING, next page

MONITORING, from page 91

> less search of a parolee. Accordingly, we affirm the judgment of the California Court of Appeal. (Id. at *) (emphasis added).)

Justice Thomas' Expectation of Privacy Conundrum. The second dissatisfying aspect of the opinion is related to the somewhat contradictory manner with which the Court handles its determination of reasonable expectation of privacy.

Justice Thomas expressly acknowledges that the Court's grant of certiorari was:

> to answer a variation of the question this Court left open in **United States v. Knights**, 534 U.S. 112, 120 n. 6 (2001)—whether a condition of release can so diminish or eliminate a released prisoner's reasonable expectation of privacy that a suspicionless search by a law enforcement officer would not offend the Fourth Amendment. (**Samson**, supra, at 2193, 2196) (internal footnote omitted).)

However, after clearly identifying the question, Justice Thomas' opinion offers a muddled answer, or no answer at all. First, the Court reviewed the facts in the **Knights** case and identified the primary question before it: Whether a search not based on any level of individualized suspicion should be deemed reasonable solely because of status. This is unlike the search in **Knights,** that was found reasonable as Mr. Knights had a diminished expectation of privacy and the search was "predicated on both the probation search condition and reasonable suspicion." (**Samson v. California,** supra, at 2193, 2195.) Although the Court's holding in **Knights,** was in the probation context, the Court clearly stated that it turns to the question above "albeit in the context of a parole search." (Id. at 2193, 2195.)

Next, the Court held that, similar to the facts in **Knights,** Mr. Samson was clearly aware of the search condition when he accepted parole. This analogy would seem to indicate that Mr. Samson's expectation of privacy, given the similar "clear and unambiguous search condition" would also be diminished to the point that a warrantless search based on nothing but the subject's status would likely be deemed reasonable. But the Court takes a drastic leap beyond its analogy and precedent in stating:

> [W]e conclude that petitioner did not have an expectation of privacy that society would recognize as legitimate. (**Samson**, supra, at 2195.)

Thus, in deeming that society would not regard the expectation of privacy as "legitimate" (the objective prong of the test for determining reasonable expectation of privacy), the Court holds not that Mr. Samson's expectation of privacy was severely diminished, but that it does not exist at all.

It appears possible that the same search could be either reasonable or unreasonable depending on whether the subject was on probation or parole.

Even more curious is the next paragraph. After finding that no reasonable expectation of privacy existed, and thus no actual governmental intrusion into any protected interest, Justice Thomas turns to the other side of the balance: the interest of the state in conducting the search. (Id. at 2193, 2200.) What is not clear is why.

The "totality of the circumstances" balancing test is relevant only when there is a search or seizure of some protected interest the individual has a legitimate expectation of privacy in. In short, if there is no reasonable expectation of privacy, the Fourth Amendment is not "at play" and such balancing is irrelevant and unnecessary. Thus, the Court's exhaustive inquiry into the "substantial" interest of the State of California due to the extremely high rate of recidivism in parolees is irrelevant as there is no need to balance State's interest with the intrusion that is not even present according to the majority opinion. (Id. at 2195.)

Probation vs. Parole. The next somewhat confusing aspect of the case is the Court's comparison of probation versus parole. The Court stated:

> On this continuum, parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment. (See **Samson**, supra, at 2193, 2198.)

This distinction is highly relevant to our analysis and provides a glimpse of how the Court might treat these historically linked statuses for future Fourth Amendment jurisprudence. Given that the Court relied on an overall reasonableness approach to determine whether a particular search violated the Fourth Amendment, where on the "continuum" of possible punishments the target of the "search" is ("ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service" (**Knights,** supra, at 119) might be highly relevant as to whether a search is ultimately deemed reasonable. In other words, it appears possible that the same search could be either reasonable or unreasonable depending on whether the subject was on probation or parole.

Technological "Footsteps" of VHV

One reason that I am drawn to academic research in this area is that it gives me the opportunity to learn about the actual technology being used in the field by probation professionals who utilize computer monitoring as part of their overall supervision of sex offenders.

Much of this information is gleaned from my earlier article and has been updated and consolidated, as needed.

Similar to my thesis about the differences, both practical and conceptual, between criminal searches for evidence and VHVs earlier in this article, there is also a marked difference between probationary computer monitoring and traditional computer forensics:

> Probationary computer monitoring is part of an overall goal of containment. As such, it is distinguishable from traditional computer forensics. The primary distinction is that computer forensics looks backwards in time to collect evidence to convict an individual for a particular offense, while computer management, including computer monitoring, looks forward to determine the manner in which an individual is living while on probation and whether this manner is consistent with the terms of probation. (Harrold, supra, at 341.)

Monitoring Software. Obviously, computer monitoring may include looking backwards for the purposes of revealing recent infractions, technical or otherwise, of pro-

See MONITORING, next page

MONITORING, from page 92

bation conditions, but, overall, it is forward-looking to meet the needs of continuous supervision and compliance.

There are four basic approaches to existing management (monitoring) software, namely:

1. Filtering software;
2. Type I "system resident";
3. Type II "system resident"; and
4. "Forced gateway" software. (For a full review of the software approaches, see Harrold, supra, at 340-45.)

For our purposes, I have included a chart to detail the basic differences and distinctions between the approaches. (See Table 1: Four Basic Approaches to Management Software.)

Table 1: Four Basic Approaches to Management Software

TYPE	MAJOR BRAND	ADVANTAGES	DISADVANTAGES
Filtering Software	Cyber Sentinel®	Blocks access to certain sites and logs offender's usage.	[Note: Outside scope of this article as the Fourth Amendment is not implicated and the question will be more one of "rational relation" between condition and offense or goals of supervision.]
System Resident Type I	Spector Pro® True Active®	Spector Pro® is a screen-recording program. It is installed on a hard drive and configured to capture screen images; it can easily store six months of use in less than a GB. Spector Pro® works on Windows and Mac.	Must be physically present at offender's computer to review usage, etc. Cannot be reviewed remotely.
System Resident Type II	E-Blaster®	The software emails usage reports to official. Physical presence at computer is not necessary.	The information is actually stored on the offender's drive and therefore can be susceptible to alteration/deletion. Unlike Spector Pro®, which works on Windows and Mac, E-Blaster® only works on Windows applications. Requires target machine to have Internet connection to submit reports.
Forced Gateway	Impulse Control®	Can be reviewed remotely, sends weekly reports via email.	Requires target machine to have Internet connection to submit reports and be monitored.

Implementing Management Software. Next, there are three very general primary "models" probation officials utilize in implementing management software.

The first, internal management forensics (IMF), involves forensic "searches" or examinations performed directly by government actors or agents. This is a part of the offender's probation/supervised release and any data gathered through IMF is immediately in the hands of the probation department.

Next is external management forensics (EMF). EMF is conducted by a private forensic examiner who is not directly employed by the government. EMF is also part of the offender's treatment program. In some cases, the data collected is not relayed directly to the probation department but is, instead, conveyed to the authorities of the treatment program the offender is enrolled in. An excellent example of the implementation of EMF is the work of Dr. Jim Tanner (EMF's inventor) and the work of his company KBSolutions. (See *www.kbsolutions.com.*)

The third "model" is basically a hybrid of the two models, above. In hybrid management forensics (HMF) the monitoring is conducted directly by probation (government) officials, but a private company provides monitoring "control" which includes report generation, server maintenance, and data management. An example of this third model is Internet Probation and Parole, Inc. (IPPC), through their service/software Impulse Control™. (See *www.impulsecontrol.net.*)

Tip of the Iceberg

Admittedly, the legal analysis is somewhat frustrating as the two most recent Supreme Court cases have declined to apply either a consent analysis or a "special needs" analysis and have instead applied an ad hoc general reasonableness analysis. As each determination of whether a search is reasonable apparently will be made on a de facto basis, the value of these cases in predicting future judicial determinations of reasonableness in the probation context is unclear.

Also admittedly, the practical information included in this article is merely the tip of the iceberg with regards to the ever-improving technology for use in the field of probation. Recently, I was invited to speak at the 7th Annual Innovative Technologies for Community Corrections Conference in Atlanta, GA, hosted by the National Law Enforcement and Corrections Technology Center (NLECTC). The conference was excellent, and I was both impressed and amazed at the level of technology that is, and will be, available to probation professionals throughout the U.S. in performing their crucial and challenging duties. As this technology advances, it will inevitably, in certain cases, implicate the boundaries of protection governed under the Fourth Amendment. I hope to continue to have the opportunity to communicate information about this intersection between constitutional law and technology and invite feedback and information from the field to facilitate this scholarship.

Marc M. Harrold serves as counsel for National Programs at the National Center for Justice and the Rule of Law and is a visiting professor at the University of Mississippi School of Law. He may be contacted at mharrold@olemiss.edu.

The author thanks Dr. Jim Tanner of KBSolutions, Inc., and Joe Russo, NLECTC, for their continuous guidance in this area and their willingness to involve me in the practical side of computer monitoring and probation training. ■

PRIVACY, from page 87

> Effective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment. (**Jaffee,** supra, at 1, 10.)
>
> As the Judicial Conference Advisory Committee observed in 1972 when it recommended that Congress recognize a psychotherapist privilege as part of the Proposed Federal Rules of Evidence, a psychiatrist's ability to help her patients.
>
> The same reasoning applies in any case in which the crime is a violation both physical and spiritual, or a violation of both body and mind, such as sex crimes, domestic violence, hate crimes, and the like. Without the assurance of legally protected disclosures, victims cannot receive effective counseling. ■