Before the central themes are discussed, the basic components of an unconstitutional conditions problem should be identified. Many conditions are attached to government offers of benefits, and many aspects of government benefit offers are unconstitutional, but not every instance of either presents an unconstitutional conditions problem. Unconstitutional conditions problems arise when government *1422 offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from government interference. The 'exchange' thus has two components: the conditioned government benefit on the one hand and the affected constitutional right on the other. The imposition of the condition on the benefit poses a dilemma: allocation of the benefit would normally be subject to deferential review, while imposition of a burden on the constitutional right would normally be strictly scrutinized. Which sort of review should apply? The doctrine of unconstitutional conditions says the latter.22. *Unconstitutional Conditions*, 102 HVLR 1413 - Kathleen M. Sullivan - Harvard Law Review (1989)

Constitutional Violations as Part of Probation Conditions

U.S. v. **Antelope, United States Court of Appeals, Ninth Circuit (2005) 395 F.3d 1128**

After defendant was convicted of possessing child pornography, the District Court imposed sentence and subsequently revoked defendant's probation because defendant refuse to give a detailed history of his past sexual history on the basis that it violated his 5th Amendment right against self-incrimination. The appellate court held that the condition requiring Antelope to disclose potential, past criminal acts violated his 5th Amendment right. *U.S. v.* Antelope, United States Court of Appeals, Ninth Circuit 395 F.3d 1128 (2005).

U.S. v. Lara**, U.S. Court of Appeals, Ninth Circuit 815 F.3d 605 (2016)**

Appellant–Defendant Paulo Lara appeals his conviction for being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g)(1). At the time of his arrest, Lara was subject to a term of probation that required him to submit his "person and property, including any residence, premises, container or vehicle" to search and seizure "without a warrant, probable cause, or reasonable suspicion." Lara contends that his Fourth Amendment right to be free from unreasonable searches and seizures was violated when probation officers conducted two warrantless, suspicionless searches of his cell phone. He contends that the exclusionary rule requires the suppression of images, text messages, and GPS data found on his cell phone, as well as a gun and ammunition, as fruits of the illegal searches. We agree. *U.S. v. Lara*, U.S. Court of Appeals, Ninth Circuit 815 F.3d 605 (2016).

Commonwealth of Virginia v. Murry, Jr., Supreme Court of Virginia 288 Va. 117 (2014)

Background: Defendant was convicted in the Circuit Court, Hanover County, J. Overton Harris, J., of rape and five counts of aggravated sexual battery.

Holding: The Supreme Court, Cynthia D. Kinser, J., held that probation condition subjecting defendant to warrantless, suspicionless searches at any time by any probation or law enforcement officer was not reasonable. *Commonwealth of Virginia v. Murry*, Jr., Supreme Court of Virginia 288 Va. 117 (2014).

Grubbs v. State, Supreme Court of Florida, 373 So.2d 905 (1979)

In regard to the specific certified question before us, the search condition set forth unilaterally by the judge in the probation order which requires a probationer to consent at any time to a warrantless search by a law enforcement officer is a violation of article I, section 12, of the Florida Constitution, and the fourth amendment to the United States Constitution. This type of condition, in the manner in which it was imposed, cannot properly establish authority to conduct a warrantless search in the absence of one of the traditional exceptions to the warrant requirement. The question certified must therefore be answered in the affirmative. We emphasize that the authority of probation supervisors and law enforcement officers to conduct warrantless searches of probationers in accordance with the views set forth in this opinion is not dependent upon a search condition expressly set forth in the order of probation. *Grubbs v. State*, Supreme Court of Florida, 373 So.2d 905 (1979).

Com v. LaFrance, Supreme Judicial Court of Mass., Bristol, 402 Mass 789 (1988)

Defendant appealed from order entered in the Superior Court, Bristol County, Chris Byron, J., requiring as special condition of defendant's probation that she submit to search of herself, her possessions, and any place where she may be, with or without search warrant, on request of probation officer. The Supreme Judicial Court, Wilkins, J., held that: (1) order imposing special condition had to expressly require that probation officer have at least reasonable suspicion that search might produce evidence of wrongdoing, and (2) State Declaration of Rights required warrant for search, except for certain warrantless searches based on reasonable suspicion conducted in circumstances in which search warrant traditionally had not been required. *Com v. LaFrance*, Supreme Judicial Court of Mass., Bristol, 402 Mass 789 (1988).

People v. Peterson, Court of Appeals Michigan, Division 2 (1975)

Defendant was convicted upon plea of guilty before the Circuit Court, Monroe County, James J. Kelley, Jr., J., of larceny from an automobile and she appealed. The Court of Appeals, O'Hara, J., held that sentence was invalid absent credit being given for time served prior to sentencing; that defendant's plea of guilty waived all nonjurisdictional defects, including alleged defect in binding defendant over on original charge of unlawfully driving away motor vehicle without sufficient

evidence thereby resulting in defendant's plea of guilty to lesser charge being coerced; and that 'blanket search and seizure' provision in order of probation was improper and would be struck.

"We would not be understood by this holding to mean that one who accepts probation and consents to its terms cannot waive any constitutional rights. Many of these rights are waived daily in our criminal courts, the right to a trial by jury for example. They can be waived also as a condition of probation. But when the waiver is conditioned on the surrender of so hallowed a right, the so-called choice amounts to no choice at all. We hold the probationer's signed acceptance thereof was in legal effect coerced and thus rendered nugatory." *People v. Peterson*, Court of Appeals Michigan, Division 2 (1975).

State v. Ballard, Supreme Court of North Dakota, 874 N.W.2d 61 (2016)

The United States Supreme Court described a criminal defendant's Fourth Amendment privacy interests as a "continuum." Samson, 547 U.S. at 850, 126 S.Ct. 2193. ("[P]arolees are on the 'continuum' of state-imposed punishments. On this continuum, parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment.") (citation omitted). Based on that continuum, we do not equate Samson's extensive parole constraints with Ballard's modest conditions of unsupervised probation. We therefore cannot conclude the governmental interest outweighs Ballard's expectation of privacy so that Ballard's suspicionless search of his person and his home is reasonable under the Fourth Amendment. *State v. Ballard*, Supreme Court of North Dakota, 874 N.W.2d 61 (2016).

Fitzgerald v. State, Court of Appeals of Indiana, 805 N.E.2d 857 (2004)

As a result, we cannot conclude, as we did in Bonner, Carswell, and Purdy, that the provision is valid due to the inherent reasonableness requirement. Rather, this provision is invalid because it explicitly attempts to allow Probation Officers to perform unreasonable searches, even though it has repeatedly been stated that probationers enjoy a constitutionally protected *866 right against such. Consequently, the trial court is ordered to revise the probation condition to reflect that any such search must be reasonable in light of this discussion. *Fitzgerald v. State*, Court of Appeals of Indiana, 805 N.E.2d 857 (2004).

State v. Bennett, Supreme Court of Kansas, 288 Kan. 86 (2009)

Defendant sought review of decision of the District Court, Dickinson County, Benjamin J. Sexton, J., imposing probationary condition requiring him to submit to nonconsensual, suspicionless searches performed by community corrections or law enforcement officers. The Court of Appeals

reversed, 39 Kan.App.2d 890, 185 P.3d 320, finding that condition was unconstitutional and therefore unenforceable. State petitioned for review.

Holdings: The Supreme Court, Davis, J., held that:

1 otherwise moot question as to the constitutionality of suspicionless searches was an issue that was capable of repetition yet evading review, and

2 warrantless search condition was unconstitutional and thus unenforceable.

State v. Bennett, Supreme Court of Kansas, 288 Kan. 86 (2009).

People v. Mead, Supreme Court, Appellate Division, Fourth Department, NY 133 A.D.3d 1257 (2015)

Defendant was convicted, on Alford plea, of second-degree attempted assault in the County Court, Genesee County, Robert C. Noonan, J., and he appealed from condition of his probation.

Holding: The Supreme Court, Appellate Division, held that condition of probation of first-time offender who did not have history of drug or alcohol abuse, and who was not under the influence of drugs or alcohol at time of his attempted assault offense, that he consent to waive his Fourth Amendment rights to permit search of his home for alcohol or drugs, did not relate to probationary goal of rehabilitation and was unenforceable. *People v. Mead*, Supreme Court, Appellate Division, Fourth Department, NY 133 A.D.3d 1257 (2015).

People v. Saraceni, Supreme Court, Appellate Div, Fourth Dept., NY 153 A.D.3d 1559 (2017)

Defendant pleaded guilty in the County Court, Genesee County, Robert C. Noonan, J., to sexual abuse in the first degree. Defendant appealed.

4 defendant's written waiver of his Fourth Amendment right protecting him from unreasonable searches and seizures of his person, home, and personal property, and agreement to submit to chemical tests of his breath, blood, or urine was not enforceable. *People v. Saraceni,* Supreme Court, Appellate Div, Fourth Dept., NY 153 A.D.3d 1559 (2017).

Com v. Wilson, Supreme Court of Pennsylvania 620 Pa.251 (2013)

Following a bench trial, defendant was convicted in the Court of Common Pleas, Philadelphia County, Criminal Division, No. CP–51–CR–0010866–2007, Schulman, J., of three counts of violation of the Uniform Firearms Act (VUFA) and possession of a controlled substance. Defendant appealed.

Holding: The Supreme Court, No. 39 EAP 2011, Castille, C.J., held that sentencing courts are not empowered to direct that a probation officer may conduct warrantless, suspicionless searches of a

probationer as a condition of probation, statutorily speaking. *Com v. Wilson*, Supreme Court of Pennsylvania 620 Pa.251 (2013).

Jones v. State, Supreme Court of Wyoming 41 P.3d 1247 (2002)

Following denial of his appeal to the district court of his conviction for driving while under the influence (DWUI) causing serious bodily injury, defendant petitioned for writ of review and remand for resentencing. Holding: condition of probation requiring defendant to submit to search of his person, vehicle, or residence at request, at any time, of probation agent was unreasonable. *Jones v. State*, Supreme Court of Wyoming 41 P.3d 1247 (2002).

U.S. v. Perazza-Mercado, U.S. Court of Appeals, First Circ. 553 F.3d 65 (2009)

Defendant was convicted in the United States District Court for the District of Puerto Rico, Jose A. Fuste, J., of knowingly engaging in sexual contact with female under age of twelve, and he appealed.

Holdings: The Court of Appeals, Lipez, Circuit Judge, held, as matters of first impression, that:

1 prohibition on any access to internet at home as condition of supervised release was overly broad.

U.S. v. Perazza-Mercado, U.S. Court of Appeals, First Circ. 553 F.3d 65 (2009).

U.S. v. Eaglin, United States Court of Appeals, Second Circuit 913 F.3d 88 (2019)

Background: Defendant, having twice previously been convicted of having unlawful sexual relationships with thirteen-year-old girls, was convicted of failing to register as a sex offender. Thereafter, the United States District Court for the Northern District of New York, D'Agostino, J., after finding that defendant had violated certain conditions of his supervised release, imposed renewed conditions of supervised release. Defendant appealed.

Holdings: The Court of Appeals, Susan L. Carney, Circuit Judge, held that:

1 imposition of a total Internet ban was substantively unreasonable; and

2 imposition of an adult pornography ban was substantively unreasonable. *U.S. v. Eaglin*, United States Court of Appeals, Second Circuit 913 F.3d 88 (2019).

Probation Conditions Did Not Violate Constitutional Rights

State v. Gallo, Court of Appeals of Oregon 275 Or.App.868 (2015)

Defendant was convicted following guilty plea in the Circuit Court, Jackson County, Lorenzo A. Mejia, J., of sexual abuse in the second degree. His sentence included the imposition of a special condition of probation, which defendant appealed.

Holding: The Court of Appeals, Nakamoto, J., held that imposition of special condition of probation barring defendant's use of e-mail, social networking, and other aspects of the Internet was warranted.

State v. Gallo, Court of Appeals of Oregon 275 Or.App.868 (2015).

Alford v. State, District Court of Appeals of FL, Second District 279 So.3d 752 (2019)

Background: Defendant was convicted in the Circuit Court, 13th Judicial Circuit, Hillsborough County, Mark D. Kiser, J., of kidnapping and sexual battery, and sentenced to sex offender probation for both offenses. Defendant appealed.

Holding: The District Court of Appeal, Morris, J., held that probationary conditions restricting use of internet to work and shopping and expressly prohibiting use of social media were not overbroad in violation of First Amendment. *Alford v. State*, District Court of Appeals of FL, Second District 279 So.3d 752 (2019).

State v. McAuliffe, Supreme Court of Wyoming 125 P.3d 276 (2005)

On May 1, 2003, McAuliffe entered a guilty plea to misdemeanor possession of a controlled substance in the Laramie County Circuit Court and was sentenced to a suspended jail term and one year of unsupervised probation.

Probation conditions requiring drug defendant to submit to random searches and chemical testing for drugs were reasonable. *State v. McAuliffe*, Supreme Court of Wyoming 125 P.3d 276 (2005).

Com. v. Alexander, Superior Court of Pennsylvania 16A.3d 1152 (2011)

Defendant pled guilty in the Court of Common Pleas, Philadelphia County, Criminal Division, No. CP-51-CR-0001867-2008, Schulman, J., to possession of prohibited firearm and possession of firearm with altered manufacturer's number. Defendant appealed his sentence.

Our Commonwealth has recognized that individuals on probationary supervision have a diminished expectation of privacy, Commonwealth v. Williams, 547 Pa. 577, 692 A.2d 1031 (1997); however, that does not mean that the search of a probationer's residence can be conducted at any time and for any reason.

As the opinion in support of reversal concluded in Wilson, the instant probation condition imposed by the trial court on Alexander's sentence has no basis in statutory authority or other legal authority. *Com. v. Alexander*, Superior Court of Pennsylvania 16A.3d 1152 (2011).

Voluntariness of Parole Search Agreement

State v. Baldon, Supreme Court of Iowa, 829 N.W.2d 785 (2013)

The narrow question before us is whether the government can conduct the search based solely on consent required to be given by parolees as a condition of release from prison.4 Every search of a citizen by the government must be supported by some recognized ground or justification, and we must only decide if consent extracted from prisoners *801 as a condition of release on parole constitutes one such ground.

Considering our obligation to ensure that consent remains a doctrine of voluntariness that functions with integrity, we conclude a parole agreement containing a prospective search provision is insufficient evidence to establish consent. Such a contract reveals an absence of bargaining power on behalf of the parolee, rendering *803 contract principles inadequate to entitle the state to enforce compliance of a search provision. The purported consent extracted from a prisoner as a condition of release fails to constitute voluntary consent. As a mandatory term of parole, such consent would also have the effect of justifying the search on the basis of parole status. This is not permitted under Ochoa. More is needed, and a consent provision in a parole agreement does not supply this additional justification because it fails to pass the test of voluntariness required under article I, section 8 of the Iowa Constitution. *State v. Baldon*, Supreme Court of Iowa, 829 N.W.2d 785 (2013).

Pretrial Conditions Which Are Constitutional

Norris v. Premier Integrity Solutions, Inc., U.S. Court of Appeals, Sixth Circuit F.3d 695 (2011)

The primary issue in this case is whether the appellee Premier Integrity Solutions Inc. ("Premier") subjected the appellant Norman Norris to an unreasonable search in violation of the Fourth Amendment when it required him to provide a urine sample (for a drug testing) while directly facing a Premier employee. Premier used this "direct observation" method for monitoring the provision of the sample because of the ease with which persons giving a sample could otherwise evade the requirement of supplying a valid one. The district court held that Premier's method of obtaining the urine sample did not constitute an unreasonable search in violation of the Fourth Amendment. We affirm.

Dissent

Pretrial releasees lack comparable safeguards from Fourth Amendment violations. Faced with even more stringently regulated alternatives, such as jail pending trial, pretrial release is the preferable option, even if its conditions are objectively unreasonable. Cf. Samson, 547 U.S. at 863 n. 4, 126 S.Ct. 2193 (Stevens, J., dissenting) ("Whether or not a prisoner can choose to remain in prison rather than be released on parole, he has no 'choice' concerning the search condition; he may either remain in prison, where he will be subjected to suspicionless searches, or he may exit prison and still be subject to suspicionless searches. Accordingly, to speak of consent in this context is to resort to a

manifest fiction, for the [parolee] who purportedly waives his rights by accepting such a condition has little genuine option to refuse." (internal quotation and citation omitted)). By arguing that pretrial release is a highly regulated program that should have diminished Norris's expectation of privacy, the majority begs the question of what regulations are constitutionally permissible. I would not extend Samson to cover pretrial releasees whose guilt has not been adjudicated, and I would conclude that Norris retains a strong privacy interest. *Norris v. Premier Integrity Solutions*, Inc., U.S. Court of Appeals, Sixth Circuit F.3d 695 (2011).

State v. Ullring, Supreme Judicial Court of Maine, 741 A.2d 1065 (1999)

Defendant was convicted in a jury trial in the Superior Court, Franklin County, Warren, J., of trafficking in marijuana after the Court, Marden, J., denied motion to suppress. Defendant appealed. The Supreme Judicial Court, Calkins, J., held that: (1) bail condition allowing random searches of defendant's residence was permitted by bail code; (2) bail condition did not violate Fourth Amendment; and (3) evidence was sufficient to support conviction. *State v. Ullring*, Supreme Judicial Court of Maine, 741 A.2d 1065 (1999).

People v. Hellenthal, 186 Mich.App. 484 (1991)

Although we acknowledge that this Court's holding in People v. Peterson, 62 Mich.App. 258, 233 N.W.2d 250 (1975), lv. den. 397 Mich. 811 (1976), supports defendant's argument, we decline to follow that decision. Instead, we believe that a waiver of one's constitutional protections against unreasonable searches and seizures may properly be made a condition of a probation order where the waiver is reasonably tailored to a defendant's rehabilitation. *People v. Hellenthal*, 186 Mich.App. 484 (1991).

Owens v. Kelley, U.S. Court of Appeals, Eleventh Circuit, 681 F.2d 1362 (1982)

Probationer brought action against county, judge, and county officials challenging constitutionality of certain conditions of probation placed upon him and seeking declaratory and injunctive relief and monetary damages. The United States District Court for the Middle District of Georgia, Wibur D. Owens, Jr., Chief Judge, denied probationer's motion for summary judgment and, granted motion for summary judgment filed by defendants, and probationer appealed. The Court of Appeals, James C. Hill, Circuit Judge, held that: (1) issue of material fact as to content and nature of oral instruction component of "Emotional Maturity Instruction" program precluded summary judgment on First Amendment issues; (2) condition of probation allowing warrantless search of probationer's person and property did not violate probationer's Fourth Amendment rights; (3) condition of probation requiring probationer to submit to "Psychological Stress Evaluation" examinations did not violate his Fifth Amendment rights; (4) judge, in his individual capacity, was immune from liability; and (5) county, however, was not entitled to immunity. *Owens v. Kelley*, U.S. Court of Appeals, Eleventh Circuit, 681 F.2d 1362 (1982).

State v. Brusuelas, Court of Appeals of New Mexico 147 N.M. 233 (2009)

Defendant was convicted in the District Court, Otero County, Frank K. Wilson, D.J., of possession of methamphetamine. She appealed.

Holding: The Court of Appeals, Bustamante, J., held that searches of defendant's vehicle and purse pursuant to a condition of probation that required defendant to submit to searches at the direction of any law enforcement officer did not violate defendant's constitutional right against unreasonable searches. *State v. Brusuelas*, Court of Appeals of New Mexico 147 N.M. 233 (2009).

State v. Hamm, Supreme Court of Tennessee, At Jackson 589 S.W.3d 765 (2019)

Background: Probationer and defendant, who was her husband, filed motions to suppress. The Circuit Court, Obion County, Jeff Parham, J., granted motions, and the State appealed. The Court of Criminal Appeals affirmed, and the State appealed.

Holdings: The Supreme Court held that:

1 as matter of first impression, probation search conditions that permit search, without warrant, of probationer's person, vehicle, or place of residence do not require law enforcement to have reasonable suspicion. *State v. Hamm*, Supreme Court of Tennessee, At Jackson 589 S.W.3d 765 (2019).

State v. Bradley, Court of Appeals of Texas, Texarkana, 563 S.W.3d 374 (2018)

Defendant, who was on deferred adjudication community supervision for drug possession, pled guilty to and was convicted in the 6th District Court, Lamar County, No. 27507, of drug possession in a drug free zone, after the Court denied his motion to suppress evidence obtained from a search of his motel room. Defendant appealed.

Holdings: The Court of Appeals, Morriss, C.J., held that:

1 search of defendant's motel room was reasonable;

2 condition of community supervision allowing warrantless searches for illegal drugs or contraband was a valid condition that did not violate defendant's right to privacy. *State v. Bradley*, Court of Appeals of Texas, Texarkana, 563 S.W.3d 374 (2018).

Pretrial Conditions as Violations of Excessive Bail Clause and Due Process

1. Pretrial conditions did NOT violate D's constitutional rights.

In prosecution for conspiracy to engage in sex trafficking of minor and sex trafficking of a minor, US moved to amend defendant's pretrial release conditions, namely imposition of electronic monitoring. The court held that the electronic monitoring for pretrial release did not violate

Excessive Bail Clause. Nor did the condition violate the defendant's procedural due process rights. *U.S. v. Gardner*, 523 F.Supp.2d 1025 N.D. CA (2007).

2. Pretrial conditions DID violate D's constitutional rights.

Poluizzi, U.S. District Court, E.D. New York (2010)

Defendant was charged with possession of child pornography. Defendant moved to amend conditions of release which included curfew and electronic monitoring as mandated by Adam Walsh Amendments to Bail Reform Act.

The court held that the provision of the Adam Walsh Amendments mandating curfew with electronic monitoring for pretrial release of certain defendants violated procedural due process as applied to defendant and provision violated Excessive Bail Clause as applied to defendant. *U.S. v. Poluizzi*, U.S. District Court, E.D. New York (2010).

State v. Hayes, Supreme Court of North Dakota 809 N.W.2d 309 (2012)

After defendant was charged with driving while her license was suspended and with possession of a controlled substance while driving a motor vehicle, defendant was required, as a condition of bail, to consent to a warrantless search at any time of her person, vehicle, and residence. After a warrantless search of her alleged residence, defendant was additionally charged with unlawful possession of drug paraphernalia, methamphetamine, ingesting a controlled substance, marijuana, ingesting a controlled substance, methamphetamine, and unlawful possession of drug paraphernalia, marijuana. Defendant was convicted in the District Court, Divide County, Northwest Judicial District, Joshua B. Rustad, J., of all charges. Defendant appealed.

2 district court abused its discretion by imposing pretrial release conditions requiring defendant to consent to warrantless searches of her person, vehicle, and residence;

3 defendant did not provide voluntary consent to search of her alleged residence; and

4 good-faith exception to the warrant requirement did not apply to officer's enforcement of bond order. *State v. Hayes*, Supreme Court of North Dakota 809 N.W.2d 309 (2012)

State v. Wentz, Court of Appeals Washington 146 Wash.App. 439 (2008)

Three defendants, respectively charged with possession and manufacture of a controlled substance, unlawful possession of a firearm, and possession of a controlled substance, appealed decisions of Superior Court.

Holdings: After consolidating the appeals, the Court of Appeals, Bridgewater, J., held that:

1 trial court failed to make a determination related to the unlikeliness to appear of defendant charged with possession and manufacture of a controlled substance;

2 evidence did not support trial court's determination that defendant charged with unlawful possession of a firearm was unlikely to appear for future court dates;

3 testing was a warrantless search, and thus could not be imposed on defendant charged with possession of a controlled substance absent probable cause or a finding that state had a special need to conduct the testing beyond the normal need for law enforcement; and

4 trial court was required to exclude evidence, during hearing setting amount of bond, that defendant charged with possession of a controlled substance had tested positive for marijuana use during drug testing. *State v. Wentz*, Court of Appeals Washington 146 Wash.App. 439 (2008).

Butler v. Kato, Court of Appeals of Washington 137 Wash.App. 515 (2007)

Defendant petitioned for writ of habeas corpus challenging conditions trial court imposed after placing on his own recognizance for charge of driving under influence of alcohol (DUI).

1 conditions that defendant undergo alcohol evaluation and attend three self-help meetings per week were not least restrictive means to ensure defendant's presence in court;

2 conditions implicated privilege against self-incrimination; and

3 conditions violated defendant's right of confidentiality and autonomous decision-making.

Butler v. Kato, Court of Appeals of Washington 137 Wash.App. 515 (2007).

State v. Hayes, 809 N.W.2d 309 (2012)

In State v. Hayes, the North Dakota Supreme Court held a district court abuses its discretion when it imposes a pretrial release condition on a defendant requiring her to submit to warrantless searches and seizures of her person, vehicle, and home under North Dakota Rule of Criminal Procedure 46(a)(2)(M), without first finding those conditions were necessary. In addition, the court held when a person is left between the choice of violating his or her bail conditions or consenting to a search, the person is unable to consent without coercion. Finally, the court held the good faith exception to the warrant requirement did not apply to the officer's enforcement of the bond order signed by the district court. The decision in Hayes will significantly affect pretrial release in North Dakota, because district courts will no longer be able to impose any pretrial release conditions under Rule 46(a)(2)(M) without an explicit finding of their appropriateness in a neutral and detached manner. *State v. Hayes*, 809 N.W.2d 309 (2012).

State v. Rose, Court of Appeals WA, Div 2 (146 Wash.App 439)

Three defendants, respectively charged with possession and manufacture of a controlled substance, unlawful possession of a firearm, and possession of a controlled substance, appealed decisions of Superior Court, Mason County, Toni A. Sheldon and James Sawyer, JJ., imposing weekly drug testing as a condition of their pretrial releases. The court held:

1 trial court failed to make a determination related to the unlikeliness to appear of defendant charged with possession and manufacture of a controlled substance;

2 evidence did not support trial court's determination that defendant charged with unlawful possession of a firearm was unlikely to appear for future court dates;

3 testing was a warrantless search, and thus could not be imposed on defendant charged with possession of a controlled substance absent probable cause or a finding that state had a special need to conduct the testing beyond the normal need for law enforcement; and

4 trial court was required to exclude evidence, during hearing setting amount of bond, that defendant charged with possession of a controlled substance had tested positive for marijuana use during drug testing. *State v. Rose*, Court of Appeals WA, Div 2 (146 Wash.App 439).

Blomstrom v. Tripp, Supreme Ct of WA, 189 Wash.2d 379 (2017)

Arrestees charged with DUIs were released with random urinalysis condition. Court held that arrestees' expectation of privacy was disturbed by the condition in violation of WA Constitution because they suffered no diminution in their privacy interests sufficient to justify urinalysis testing. *Blomstrom v. Tripp*, Supreme Ct of WA, 189 Wash.2d 379 (2017).

Supreme Judicial Court of Mass, Middlesex, 484 Mass. 330 (2020)

Background: Defendant filed motion to suppress location data gleaned from GPS device imposed on defendant as condition of pretrial release at arraignment for possession of a class B substance with the intent to distribute, as a subsequent offense, and motor vehicle violations. The Superior Court Department, Middlesex County, Kenneth J. Fishman, J., granted motion. Commonwealth filed application for leave to pursue an interlocutory appeal. A single justice of the Supreme Judicial Court, Suffolk County, Budd, J., allowed appeal to proceed and case was reported to the Appeals Court. Commonwealth petitioned for direct appellate review in the Supreme Judicial Court, which was allowed.

Holdings: The Supreme Judicial Court, Gaziano, J., held that:

1 defendant did not freely and voluntarily consent to imposition of GPS device as condition of pretrial release, and

2 imposition of GPS device did not advance permissible goals of bail statute, and thus violated state constitutional prohibition against unreasonable searches and seizures. *Commonwealth v. Norman*, Supreme Judicial Court of Mass, Middlesex, 484 Mass. 330 (2020).

Simpson v. Miller, 241 Ariz. 341 (2017)

Under our reading of Salerno, the state may deny bail categorically for crimes that inherently demonstrate future dangerousness, when the proof is evident or presumption great that the defendant committed the crime. What it may not do, consistent with due process, is deny bail categorically for those accused of crimes that do not inherently predict future dangerousness. *Simpson v. Miller*, 241 Ariz. 341 (2017).

Steiner v. State, Court of Appeals of Indiana 763 N.E.2d 1024 (2002)

Defendant, who was charged with possession of marijuana, filed motion to terminate pretrial urine drug screens as condition of bail. The Superior Court, Lawrence County, William G. Sleva, J., denied motion. Defendant appealed. The Court of Appeals, Vaidik, J., held that: (1) defendant's failure to object to screening at initial hearing did not waive defendant's right to challenge screens as condition of bail, and (2) trial court's imposition of random drug screens without individualized determination that defendant would use drugs was not reasonable. *Steiner v. State*, Court of Appeals of Indiana 763 N.E.2d 1024 (2002).

Technology Conditions of Post-Trial Release

Packingham v. North Carolina, Sup Court of the United States 137 S.Ct.1730 (2017)

Defendant, who was a registered sex offender, was convicted in the Superior Court, Durham County, William Osmond Smith, J., of accessing a commercial social networking website. Defendant appealed.

Holding: The Supreme Court, Justice Kennedy, held that statute prohibiting sex offenders from accessing social networking websites violated First Amendment.

Packingham v. North Carolina, Sup Court of the United States 137 S.Ct.1730 (2017).

State v. Hotchkiss, Supreme Court of Montana 402 Mont. 1 (2020)

Defendant was convicted in the District Court of the Twenty-first Judicial District, County of Ravalli, Jennifer B. Lint, J., of the felony offenses of sexual assault and tampering with or fabricating physical evidence. Defendant appealed.

Holdings: The Supreme Court, Shea, J., held that:

1 technology use conditions that completely prohibited defendant from accessing the internet or possessing certain electronic devices were overbroad; but

2 defendant's usage of the internet and electronic devices warranted appropriate monitoring on conditional release; and

3 District Court was required to scrupulously and meticulously inquire as to defendant's ability to pay costs incurred by his assigned public defendant before requiring him to pay those costs as a

condition of his conditional release. *State v. Hotchkiss*, Supreme Court of Montana 402 Mont. 1 (2020).

State v. Johnson, Court of Appeals of Washington 12 Wash.App.2d 201 (2020)

Defendant was convicted, in the Superior Court, Kitsap County, Kevin D. Hull, J., of attempted second degree rape of child, attempted commercial sexual abuse of minor, and communication with minor for immoral purposes.

Holdings: The Court of Appeals, Worswick, J., held that:

3 restriction imposed on defendant's use of internet at sentencing was not overbroad in violation of his First Amendment rights

This community custody condition is sufficiently tailored to Johnson's crimes because Johnson is prohibited from using the medium through which he committed his crimes. Restricting his future internet use is reasonably necessary to prevent repeated offenses. The condition is also sensitively imposed. Unlike the statute in Packingham or condition in Holena, Johnson is not absolutely banned from internet-based activities. Johnson may use the internet with the permission of his CCO and through approved filters. Johnson is subject to a partial deprivation of his interest in having access to the internet after he committed crimes through that medium. We hold that this restriction *216 on Johnson's internet use is reasonably necessary to accomplish the essential needs of the State. *State v. Johnson*, Court of Appeals of Washington 12 Wash.App.2d 201 (2020).

Mutter v. Ross, Supreme Court of West Virginia 240 W.Va. 336 (2018)

Parolee, who was registered sex offender, filed petition for writ of habeas corpus, challenging revocation of parole.

Holdings: The Supreme Court of Appeals, Ketchum, J., held that:

1 special condition of parole prohibiting parolee from possession of or contact with "any computer, electronic device, communication device or any device which is enabled with internet access" was unconstitutionally overbroad restriction on First Amendment right of free speech. *Mutter v. Ross*, Supreme Court of West Virginia 240 W.Va. 336 (2018).

State v. Cornell, Supreme Court of Vermont 202 Vt. 19 (2016)

Defendant was convicted in the Superior Court, Bennington Unit, Criminal Division, David A. Howard, J., of lewd and lascivious conduct with a 12–year–old child. Defendant appealed, and the Supreme Court, 197 Vt. 294, 103 A.3d 469, 2014 VT 82, remanded. On remand, the Superior Court issued order imposing 21 probation conditions. Defendant appealed six probation conditions.

Holding(s):

condition which prohibited defendant from owning a computer in his home or accessing the Internet without approval of his probation officer was overbroad.
State v. Cornell, Supreme Court of Vermont 202 Vt. 19 (2016).

State v. King, Court of Appeals Wisconsin 394 Wis.2d 431 (2020)

After revocation of his probation, defendant, whose conviction for using computer to facilitate a child sex crime and child enticement had been affirmed on appeal.

Holding: The Court of Appeals, Fitzpatrick, J., held that conditions of defendant's extended supervision, which restricted his access to internet, did not impermissibly infringe upon defendant's constitutional right to freedom of speech.

Similarly, paragraph 2 of the internet conditions does not bar King from accessing the internet. That paragraph states that King may do so, but such access must be consistent with the permission of King's DOC agent. That paragraph restricts the authority of the DOC agent in that the agent must give King permission to access the internet for King to "obtain[ ] employment" and to "perform[ ] any legitimate government functions." *State v. King*, Court of Appeals Wisconsin 394 Wis.2d 431 (2020).

U.S. v. Miller, U.S. Court of Appeals, Fifth Circ, 665 F.3d 114 (2011)

Defendant was convicted following guilty plea in the United States District Court for the Western District of Texas, Lee Yeakel, J., of transportation of child pornography, and sentenced to 220 months' imprisonment and 25 years of supervised release. Defendant appealed.

Holdings: The Court of Appeals, Owen, Circuit Judge, held that:

1 sentence of 220 months of imprisonment for conviction of transportation of child pornography was not substantively unreasonable;

2 it was within district court's discretion to impose prohibitions on computer and Internet access as condition of defendant's supervised release; and

3 condition of supervised release that prohibited defendant from possessing sexually stimulating or sexually oriented materials was not plain error.

U.S. v. Miller, U.S. Court of Appeals, Fifth Circ, 665 F.3d 114 (2011).

State v. Bouchard, Supreme Court of Vermont 228 A.3d 349 (2019)

Defendant was convicted on guilty plea in the Superior Court, Chittenden County, Criminal Division, Kevin Griffin, J., of lewd and lascivious conduct and unlawful restraint, involving defendant's niece and nephew who were minors at time of offenses. Defendant appealed.

Holdings: The Supreme Court, Robinson, J., held that:

1 condition of probation that defendant "may not purchase, possess or use pornography or erotica [and] may not go to adult bookstores, sex shops, topless bars, etc.," was not reasonably related to defendant's rehabilitation or necessary to reduce risk to public safety;

2 condition of probation authorizing warrantless search and seizure of "drugs, pornography, erotica, digital media, computer, or any other item which may constitute a violation of [his] conditions" was not narrowly tailored to promote State interest that outweighed defendant's privacy interest;

3 probation condition allowing probation officer to "monitor [his] computer/internet usage, to include ... use of specific software for monitoring sex offenders," without warrant, was not narrowly tailored to promote State interest that outweighed defendant's privacy interest. *State v. Bouchard,* Supreme Court of Vermont 228 A.3d 349 (2019).