

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 - - - - -

4 August Term, 2006

5 (Argued: December 7, 2006

Decided: April 12, 2007)

6  
7 Docket No. 06-1207-cr

8  
9 UNITED STATES OF AMERICA,

10 Appellee,

11 - v. -

12 WALTER CHIRINO,

13 Defendant-Appellant.  
14

15 Before: KEARSE, McLAUGHLIN, and STRAUB, Circuit Judges.

16 Appeal from a judgment of the United States District Court  
17 for the Eastern District of New York, Denis R. Hurley, Judge,  
18 convicting defendant, a previously convicted felon on probation, of  
19 possessing of a firearm in violation of 18 U.S.C. § 922(g)(1).

20 Affirmed.

21 Judge McLaughlin concurs, in a separate opinion.

22 SUSAN CORKERY, Assistant United States  
23 Attorney, Brooklyn, New York (Roslynn R.  
24 Mauskopf, United States Attorney for the  
25 Eastern District of New York, Peter A.  
26 Norling, Assistant United States Attorney,  
27 Brooklyn, New York, on the brief), for  
28 Appellee.

29 NORMAN TRABULUS, Garden City, New York, for  
30 Defendant-Appellant.

1 KEARSE, Circuit Judge:

2 Defendant Walter Chirino appeals from a judgment of  
3 conviction entered in the United States District Court for the  
4 Eastern District of New York, following his conditional plea of  
5 guilty before Denis R. Hurley, Judge, to one count of possession of  
6 a firearm by a previously convicted felon, in violation of 18 U.S.C.  
7 § 922(g)(1). Chirino was sentenced principally to 37 months'  
8 imprisonment, to be followed by three years' supervised release. On  
9 appeal, he contends that the district court should have granted his  
10 motion to suppress (1) the firearm, discovered in his dresser drawer  
11 during a warrantless search by probation officers and other law  
12 enforcement officers, and (2) a statement made in the course of his  
13 arrest following discovery of the gun, arguing principally that the  
14 search was not supported by reasonable suspicion, and hence was  
15 unlawful, and that his statement was a product of that search. For  
16 the reasons that follow, we affirm the judgment of conviction.

17 I. BACKGROUND

18 In 2001, Chirino was convicted in Suffolk County, New York  
19 ("Suffolk County" or "County"), of third-degree robbery, a Class D  
20 felony, see New York Penal Law § 160.05 (McKinney 1999), punishable  
21 by up to seven years' imprisonment, see id. § 70.00(2)(d). The  
22 Suffolk County Court sentenced him to six months' imprisonment, to  
23 be followed by a five-year period of probation.

24 Federal law makes it unlawful for any person to possess a  
25 firearm that has been shipped or transported in interstate commerce

1 if that person has previously "been convicted in any court of[] a  
2 crime punishable by imprisonment for a term exceeding one year," 18  
3 U.S.C. § 922(g)(1), regardless of the prison term actually imposed,  
4 see, e.g., Dickerson v. New Banner Institute, Inc., 460 U.S. 103,  
5 113 (1983) (the word "punishable" in § 922(g) makes it "plainly  
6 irrelevant . . . whether the individual in question actually  
7 receives a prison term" (emphasis in original)). The present  
8 prosecution was initiated after a warrantless search of Chirino's  
9 bedroom in 2004, by a County probation officer and a County police  
10 officer, turned up a firearm in Chirino's dresser drawer. The  
11 events leading to that discovery, as found by the district court,  
12 whose factual findings are largely unchallenged on appeal, and as  
13 described at a suppression hearing principally by Suffolk County  
14 Probation Officer José Martorell, whose testimony the district court  
15 credited, were as follows.

16 A. The Conditions of Chirino's Probation

17 Among the conditions of probation imposed on Chirino by  
18 the County Court in 2001 were the requirements that he notify his  
19 probation officer prior to any change of address, see Suffolk County  
20 Court Probation Order dated October 26, 2001 ("Probation Order"),  
21 ¶ 3, and that he "permit the probation officer to visit his . . .  
22 place of abode or elsewhere," id. ¶ 1. Chirino was also required to  
23 "[r]efrain from violating any federal, state or local law." Id.  
24 ¶ 4.

25 In addition, Chirino was expressly prohibited from, inter  
26 alia, using and/or possessing any illegal drugs. See, e.g., id.

1 ¶ 11(e). In connection with this prohibition, he was required to  
2 "[p]ermit search of [his] person" and "[p]ermit search of [his]  
3 vehicle and place of abode where such place of abode is legally  
4 under [his] control," with "such search[es] to be conducted by a  
5 probation officer or a probation officer and his agent." Id.  
6 ¶¶ 11(a) and (b). Chirino was also expressly "[p]rohibited from  
7 possessing any firearms, weapons or dangerous instruments," id.  
8 ¶ 15; and he was required to "submit to the search of home, vehicle  
9 and person by a probation officer to determine compliance with this  
10 prohibition," id.

11 In mid-2003, the Suffolk County Probation Office received  
12 information that Chirino was a member of a street gang known as  
13 MS-13. As a result, responsibility for the supervision of his  
14 probation was transferred from his original probation officers to  
15 County Probation Officer Matt Porter, assisted by Martorell.  
16 Martorell was in charge of the probation office's "gang unit," which  
17 was concerned with probationers who were members of gangs.

18 In late January 2004, Chirino informed Porter and  
19 Martorell that he was moving to a new address, on Long Shore Avenue  
20 in Bay Shore, New York ("Long Shore Avenue"). The probation  
21 officers planned to make their first visit to Chirino's new home on  
22 February 6. On February 4, however, they received information from  
23 Suffolk County Police Sergeant John Oliva that caused them to  
24 advance the date of that visit.

25 B. The Search for the Missing Girl

26 In late January, Oliva, who was a member of a police unit

1 that worked jointly with the Federal Bureau of Investigation ("FBI")  
2 to deal with street gangs, received information from a confidential  
3 informant that a girl who appeared to be 13 or 14 years of age was  
4 hanging out with members of the MS-13 gang. In communications on  
5 February 1st, 2nd, 3rd, and possibly the 4th, the informant  
6 indicated that the girl, whom the authorities ultimately identified  
7 (hereinafter called "Bonilla"), had been seen with members of MS-13  
8 on each of those days. On February 1, she had been seen with  
9 approximately eight members of MS-13, several of whom the informant  
10 identified by name. The informant reported that Bonilla was being  
11 sexually abused by numerous members of MS-13, passed around from  
12 member to member, and that she was perhaps being held against her  
13 will.

14 The informant had been a confidential informant for more  
15 than a year. During that period, members of MS-13 had been arrested  
16 on the basis of information he provided; Oliva had verified all of  
17 the informant's information and found none of it to be erroneous.

18 After speaking with his informant on February 4, 2004,  
19 Oliva telephoned Porter and asked whether there was an outstanding  
20 PINS warrant (i.e., a warrant for the arrest of a "person in need of  
21 supervision") for Bonilla, a 14-year-old girl who had been missing  
22 for two weeks. When Porter responded affirmatively, Oliva relayed  
23 the information he had received from the informant and asked whether  
24 any MS-13 members were probationers. Porter responded that Chirino  
25 and one other County probationer were members of MS-13. Oliva  
26 stated that one of the MS-13 members whom the confidential informant  
27 had identified as being with Bonilla on February 1 was Chirino.

1 Porter contacted Martorell, whose 9 a.m. to 5 p.m. shift  
2 by then had ended, and the probation officers decided not to wait  
3 until February 6 to visit Chirino's new home but to make their first  
4 visit immediately, on the evening of February 4. Porter and  
5 Martorell met at 8 p.m. with Oliva, FBI agents, and other police  
6 officers, all of whom would accompany the probation officers, to  
7 plan the visit to Chirino's home, as well as a visit to the home of  
8 the other probationer who was an MS-13 member. At about 10:30 or  
9 10:45 p.m. on February 4, Martorell went to Chirino's Long Shore  
10 Avenue address, accompanied by two FBI agents and a police officer.  
11 (Oliva and Porter initially went to the home of the other  
12 probationer; finding that he was not at home but being allowed to  
13 inspect his room and determine that Bonilla was not there, Oliva and  
14 Porter shortly joined the law enforcement agents at Chirino's  
15 residence.) The two purposes of the visit to Chirino's new address  
16 were to determine that it was indeed his home and to determine  
17 whether Bonilla was with, or had been in the company of, Chirino.

18 At Chirino's residence, the officers knocked on the front  
19 door, which was answered by the owner of the house and his son  
20 Edward Galdez. The officers identified themselves, asked if Chirino  
21 was present, and were informed that Chirino lived in the basement.  
22 Galdez escorted the officers to the basement. Knocks on an unmarked  
23 door, which led to an anteroom that the officers only later learned  
24 was Chirino's living room (Chirino's prior residence had consisted  
25 of a single rented bedroom), went unanswered. Galdez opened the  
26 door, which was not locked, and pointed to a second closed door,  
27 telling the officers that it led to Chirino's bedroom. The officers

1 passed through the anteroom, looking only from side to side for  
2 safety, and knocked on that second door. After a short delay, the  
3 door was opened by Chirino.

4 The bed in the small (8' x 10') bedroom was so positioned  
5 that Chirino could open the door without leaving the bed. When the  
6 door opened, the officers found Chirino in bed between two young  
7 girls who were under the covers, dressed in night clothes; Chirino  
8 wore only boxer shorts. When Chirino was asked who the girls were,  
9 he stated that one was his cousin and the other was her friend.  
10 However, he did not know his "cousin's" last name, or where she  
11 lived, or her parents' names. Eventually, the officers learned the  
12 identities of the girls, who turned out to be 13 and 14 years of age  
13 (Chirino was 23). Both girls were the subjects of outstanding PINS  
14 warrants, but neither of them was Bonilla.

15 In the meantime, Martorell informed Chirino that the  
16 officers were going to conduct both a search for Bonilla and a  
17 probation search. Martorell testified that

18 [i]f . . . there is reason to believe [a probationer  
19 is] involved in gang activity, or there is a source  
20 or information from . . . police that this person is  
21 actually involved or is active in gang activity,  
22 that would give us a reason to make sure that he is  
23 complying with the conditions of probation, that he  
24 has no firearms, no drugs and no alcohol.

25 After the other agents had taken Chirino to the living room and the  
26 girls to another part of the basement, Martorell began searching  
27 Chirino's bedroom closet, on the chance that he might find Bonilla  
28 or some of her clothing or some other indication that she had been  
29 there. When Oliva arrived, Martorell asked him to search the  
30 dressers.

1           As Oliva felt around in one of the dresser drawers, he  
2 found a loaded .380 pistol, whose serial number had been defaced.  
3 He discreetly signaled his discovery of the gun to Martorell. Oliva  
4 then went into the living room and placed handcuffs on Chirino; as  
5 he did so, Chirino said, "[y]ou got me." Oliva asked whether there  
6 were any other guns present; Chirino responded, "[t]hat's the only  
7 gun I have."

8       C. The Present Prosecution and Chirino's Suppression Motion

9           Chirino was indicted on one count of being, as a  
10 previously convicted felon, in possession of a firearm in violation  
11 of 18 U.S.C. § 922(g)(1), and on one count of possessing a firearm  
12 with a defaced serial number, in violation of 18 U.S.C. § 922(k).  
13 He moved to suppress both the gun found in the search and the  
14 statements he made following that discovery. He argued that the  
15 search violated his rights under the Fourth Amendment because he had  
16 not voluntarily consented, that the search exceeded the scope  
17 authorized by the Probation Order, and that his statements were the  
18 product of the unlawful search.

19           A suppression hearing was held, at which Martorell, Oliva,  
20 and others testified. In a decision announced from the bench on  
21 October 7, 2005, the court denied the motion to suppress the gun and  
22 the "[y]ou got me" statement. See Transcript, October 7, 2005  
23 ("Decision Tr."), at 27. In a subsequent order, the district court  
24 granted the motion to suppress Chirino's statement "[t]hat's the  
25 only gun I have," ruling that that statement was a response to a  
26 question posed after Chirino had been placed in custody and before



1 he had been given Miranda warnings. See Memorandum and Order dated  
2 November 4, 2005, at 1-2, 5-6. The government has not appealed the  
3 latter ruling.

4 With respect to the rulings at issue on this appeal,  
5 denying Chirino's motion to suppress the gun and the "[y]ou got me"  
6 statement, the court held that the officers' entry into the living  
7 room of Chirino's apartment was lawful, both because it was  
8 reasonable for the officers to believe that that room was not part  
9 of Chirino's apartment--given that they had not previously visited  
10 Chirino at that location, that the door was opened by Galdez, and  
11 that the door was unmarked and unlocked--and because the information  
12 with respect to Bonilla bespoke exigent circumstances. See Decision  
13 Tr. 8-9, 21-22. The entry to Chirino's bedroom was ruled lawful  
14 because the door to that room was opened by Chirino. See id. at 23.  
15 Without making a finding as to whether or not Chirino had consented  
16 to the ensuing search of his bedroom, the court found that the  
17 search was lawful because it had been initiated and controlled by a  
18 probation officer and was based on reasonable suspicion that Chirino  
19 was violating the conditions of his probation. See id. at 11,  
20 14-15, 24. The court stated:

21 The two girls were under the covers in the bed.  
22 The two girls were dressed in nightclothes. The  
23 defendant was dressed in boxer shorts.

24 Now, a juxtapositioning of what the officers  
25 saw after the defendant opened the second door, with  
26 one of the reasons, that being one of the two  
27 reasons that the officers had gone to that location,  
28 certainly gave rise to reasonable suspicion.  
29 Reasonable suspicion of what? Reasonable suspicion  
30 that the defendant was violating a condition of his  
31 probation.

1                   One of the conditions of his probation is that  
2 he's not to be involved in any type of criminal  
3 activity. He is seen in the presence of two  
4 children, female children, in a bed, under  
5 circumstances that would certainly suggest that  
6 inappropriate conduct was occurring.

7       Id. at 11. The court concluded that,

8                   given what the officers saw once the defendant  
9 opened the second door, it seems to me they  
10 definitely had reasonable suspicion to believe the  
11 defendant was violating conditions of his probation  
12 by being inappropriately involved with underaged  
13 girls, i.e., children apparently 14 years of age or  
14 younger.

15       Id. at 24.

16                   Further, the court reasoned that the reports, from an  
17 informant of proven reliability, that Bonilla was being subjected to  
18 sexual abuse by numerous members of MS-13 indicated

19                   exigent circumstances. The officers have the  
20 following information at the time when the search  
21 was commenced. A girl has been missing for two  
22 weeks. She's 14 years of age. Information from a  
23 confidential informant indicates that she is being  
24 abused sexually by members of the MS 13 gang.

25                   The confidential informant also confirmed that  
26 information on the first, the second, and the third,  
27 and possibly the fourth, but certainly on the first  
28 three days of February. We also have information  
29 from that same informant that the defendant, along  
30 with seven others, was with her on the preceding  
31 Sunday.

32                   Under those circumstances, it seems imperative  
33 that all reasonable efforts must be taken to locate  
34 the missing child.

35       Decision Tr. 24-25.

36                   As to "whether the search should have ceased once it was  
37 determined that neither of . . . the 14 year old girls who were in  
38 bed with" Chirino was Bonilla, id. at 25, the court answered that  
39 question in the negative.



1 Wyoming v. Houghton, 526 U.S. 295, 300 (1999)). In determining the  
2 reasonableness of the search of a person who is on probation, we are  
3 to follow the "general Fourth Amendment approach of 'examining the  
4 totality of the circumstances,' Ohio v. Robinette, 519 U.S. 33, 39  
5 (1996), with the probation search condition being a salient  
6 circumstance." Knights, 534 U.S. at 118.

7 A defendant's "status as a probationer subject to a search  
8 condition informs both sides of th[e] balance." Id. at 119.  
9 "Inherent in the very nature of probation," which is one point on a  
10 continuum of possible punishments imposed on a person who has been  
11 convicted of a crime, is that "probationers do not enjoy the  
12 absolute liberty to which every citizen is entitled." Id. (internal  
13 quotation marks omitted). Inherent in authorized supervision is a  
14 diminution of the probationer's right to privacy. See, e.g.,  
15 Griffin v. Wisconsin, 483 U.S. 868, 875 (1987).

16 On the other side of the scale, the government has a  
17 heightened interest in conducting supervision when a person is  
18 placed on probation. Part of that interest concerns the  
19 probationer's rehabilitation and his reintegration into the  
20 community; but another part of the government's concern is an  
21 "interest in apprehending violators of the criminal law, thereby  
22 protecting potential victims of criminal enterprise." Knights, 534  
23 U.S. at 121. The Knights Court noted that "'the very assumption of  
24 the institution of probation' is that the probationer 'is more  
25 likely than the ordinary citizen to violate the law.'" Id. at 120  
26 (quoting Griffin, 483 U.S. at 880, and citing statistics on  
27 recidivism). It also noted that "probationers have even more of an

1 incentive to conceal their criminal activities and quickly dispose  
2 of incriminating evidence than the ordinary criminal," knowing that  
3 they are subject to supervision and to punishment for probationary  
4 infractions "in proceedings in which the trial rights of a jury and  
5 proof beyond a reasonable doubt, among other things, do not apply."  
6 Knights, 534 U.S. at 120. Accordingly, the Knights Court concluded  
7 that

8 [w]hen an officer has reasonable suspicion that a  
9 probationer subject to a search condition is engaged  
10 in criminal activity, there is enough likelihood  
11 that criminal conduct is occurring that an intrusion  
12 on the probationer's significantly diminished  
13 privacy interests is reasonable.

14 Id. at 121 (emphasis added). In such circumstances, the  
15 reasonableness requirement of the Fourth Amendment is satisfied  
16 without a warrant. See id.

17 In the present case, the district court ruled that the  
18 officers' entries into the anteroom and Chirino's bedroom were  
19 lawful. See Decision Tr. at 21-22. Chirino does not challenge  
20 those rulings. (See Chirino brief on appeal at 4.) Nor does he  
21 dispute the court's finding that "[n]o search was conducted of the  
22 area behind the first door," Decision Tr. at 10, a finding that is  
23 supported by the uncontradicted evidence that the officers did not  
24 know this area was part of Chirino's apartment and that, in  
25 proceeding through that area to the door to Chirino's bedroom, the  
26 officers merely looked from side to side for safety. "[A] truly  
27 cursory inspection--one that involves merely looking at what is  
28 already exposed to view, without disturbing it--is not a 'search'  
29 for Fourth Amendment purposes." Arizona v. Hicks, 480 U.S. 321, 328

1 (1987).

2 Rather, Chirino contends that his Fourth Amendment rights  
3 were violated by the officers' search of his bedroom including, in  
4 particular, the search of his dresser drawers, arguing that the  
5 search was not supported by reasonable suspicion, was not authorized  
6 by the Probation Order, and was not justified by exigent  
7 circumstances. Reviewing the district court's factual findings for  
8 clear error and its legal conclusions de novo, and assessing the  
9 reasonableness of the search in light of the totality of the  
10 circumstances known to the officers at the time the search was  
11 begun, we disagree.

12 A. The Conditions of Chirino's Probation and the Circumstances  
13 Known or Suspected by the Officers

14 The conditions imposed on Chirino by the Probation Order  
15 plainly diminished his right of privacy. Prohibited from violating  
16 any federal, state, or local law, see Probation Order ¶ 4, Chirino  
17 was required to permit probation officers to visit his "place of  
18 abode or elsewhere," id. ¶ 1. In connection with the prohibition  
19 against his use or possession of illegal drugs, see id. ¶ 11(e), he  
20 was required to permit probation officers to search his person and  
21 his vehicle, as well as his home to the extent that it was legally  
22 under his control, see id. ¶¶ 11(a) and (b). He was also required  
23 to submit to the search of his person, vehicle, and home by  
24 probation officers to determine whether he was complying with the  
25 prohibition against his possession of firearms or other weapons.  
26 See id. ¶ 15. The district court correctly found that Chirino's

1 "status as a probationer diminishe[d] his reasonable expectation of  
2 privacy." Decision Tr. at 12.

3 The record also amply supports the district court's  
4 finding that the search of Chirino's bedroom did not violate his  
5 rights under the Fourth Amendment because it was, inter alia, based  
6 on reasonable suspicion that Chirino was engaged in criminal  
7 activity. Before the officers initiated the search, they knew that  
8 Chirino was a member of the MS-13 street gang. They had information  
9 originating from a reliable informant that Bonilla, a 14-year-old  
10 girl for whom a PINS warrant was outstanding, had been seen  
11 virtually every day for the past several days in the company of  
12 members of MS-13; that she had been sexually abused by numerous  
13 members of that gang; that a few days earlier, Bonilla had been seen  
14 with Chirino; and that Bonilla was perhaps being held against her  
15 will. In addition, upon Chirino's opening the door to his bedroom,  
16 the officers had found Chirino, clad only in boxer shorts, in bed  
17 with two young girls; the girls' ages appeared to be similar to  
18 Bonilla's age, i.e., well below the age of consent; and the officers  
19 learned that Chirino did not know the girls' surnames or their  
20 addresses. These facts known to the officers prior to their search  
21 plainly gave them grounds for at least a reasonable suspicion that  
22 Chirino was engaged in criminal activity.

23 The fact that the officers learned while the search was  
24 ongoing--and before the discovery of the gun--that neither of the  
25 girls found with Chirino was Bonilla, and that Bonilla was not in  
26 the bedroom closet, did not require the immediate cessation of the  
27 search. Martorell had announced that he was conducting not only a

1 search for Bonilla but also a probation search. The confirmed  
2 absence of Bonilla did not lessen the grounds for suspecting that  
3 Chirino had violated the terms of his probation by engaging in  
4 illegal activity with the two girls who were present. Nor did the  
5 absence of Bonilla diminish the authority of the probation officers  
6 to search for weapons or illegal narcotics as provided by the  
7 Probation Order. And the officers' knowledge that Chirino was a  
8 member of the MS-13 gang, that he had been seen with Bonilla, and  
9 that Bonilla was perhaps being held by MS-13 members against her  
10 will justified the continuation of the search of Chirino's bedroom  
11 for drugs or weapons that could be used to overcome a person's will.

12 Finally, the exigent circumstances that led the probation  
13 officers to expedite their visit to Chirino's home did not abate  
14 with the discovery that Bonilla was not then there. The urgency of  
15 the need to find Bonilla, who was reportedly being passed around  
16 from gang member to gang member for the purpose of sexual abuse,  
17 remained. And the fact that Chirino had been found nearly naked in  
18 bed with two other underage girls, about the same age as Bonilla,  
19 increased the likelihood that the informant's report that Chirino  
20 had recently been with Bonilla herself was accurate, and that  
21 enhanced the possibility that Chirino might have in his bedroom  
22 information relating to Bonilla's whereabouts.

23 In sum, the search of Chirino's bedroom, including the  
24 furniture in that room, was justified by Chirino's diminished  
25 expectation of privacy as a probationer and the officers' reasonable  
26 suspicion that Chirino had engaged in unlawful activity with Bonilla  
27 and the two young girls with whom he was found.



1 B. The Alleged Noncompliance With State-Law Procedures

2 Chirino also contends that the district court should have  
3 granted his motion to suppress because his "conditions of probation  
4 did not authorize probation searches generally, or for clothing or  
5 evidence in general, just searches for specific classes of  
6 contraband: narcotics, narcotics implements, firearms, weapons, or  
7 dangerous instruments" (Chirino brief on appeal at 12), and under  
8 New York law, a search beyond the conditions delineated in the  
9 probation agreement requires prior court authorization, see N.Y.  
10 Crim. Proc. Law § 410.50(3). Again, we disagree.

11 While state-law rules and practices may inform our  
12 evaluation of the totality of the circumstances, "the appropriate  
13 inquiry for a federal court considering a motion to suppress  
14 evidence seized by state police officers is whether the arrest,  
15 search, or seizure violated the Fourth Amendment . . . . because the  
16 exclusionary rule is only concerned with deterring Constitutional  
17 violations." United States v. Wright, 16 F.3d 1429, 1437 (6th Cir.  
18 1994); see id. at 1434 (the fact that state law "may . . . require  
19 greater protection against searches and seizures than the fourteenth  
20 amendment is of no avail to a defendant in federal court, under  
21 prosecution for a federal crime" (internal quotation marks  
22 omitted)); see also Griffin, 483 U.S. at 880 n.8 (where a search  
23 passes the Fourth Amendment reasonableness test, the fact that it  
24 may have violated state regulations is irrelevant to the  
25 constitutional analysis); United States v. Miller, 116 F.3d 641,  
26 662-63 (2d Cir. 1997) (even a state-law-based suppression order in  
27 a state proceeding would not be binding on the district court in

1 considering a motion to suppress in a federal-court proceeding),  
2 cert. denied, 524 U.S. 905 (1998).

3 Thus, even assuming arguendo that the search of Chirino's  
4 bedroom exceeded the scope authorized by the Probation Order and New  
5 York law, that would not require the district court to find the  
6 search unreasonable in light of all the circumstances discussed  
7 above.

8 CONCLUSION

9 We have considered all of Chirino's arguments on this  
10 appeal and have found them to be without merit. The judgment of  
11 conviction is affirmed.

1 McLAUGHLIN, Circuit Judge, concurring:

2 I agree with my colleagues that reasonable suspicion supported  
3 the search at issue here. I write separately only to note my  
4 continuing belief that something less than reasonable suspicion may  
5 support a search of the dwelling of a felon on probation.

6 The Supreme Court has remained expressly agnostic on this  
7 question. See United States v. Knights, 534 U.S. 112, 120 n.6  
8 (2001). Our court, too, has noted that probationary searches may be  
9 permissible if based upon reasonable suspicion, "or potentially a  
10 lesser standard." United States v. Lifshitz, 369 F.3d 173, 181 (2d  
11 Cir. 2004).

12 We recently refused, however, to interpret Knights as  
13 permitting suspicionless searches in the absence of a "special need"  
14 beyond law enforcement, or a similar exception. Nicholas v. Goord,  
15 430 F.3d 652, 666 (2d Cir. 2005). We promised to follow this "more  
16 prudent" course until the Supreme Court clarified its Fourth  
17 Amendment jurisprudence. Id.

18 That time has come. Last year's decision in Samson v.  
19 California, 126 S. Ct. 2193 (2006), has fatally undermined the  
20 "prudent" reading of Knights. In approving the use of a general  
21 balancing test for suspicionless parolee searches, the Court  
22 admonished that it has "never held that ['special needs' scenarios]  
23 are the only limited circumstances in which searches absent  
24 individualized suspicion could be 'reasonable' under the Fourth  
25 Amendment." Id. at 2201 n.4.

26 It is not a great leap from the conditioned parole of Sampson  
27 to a conditioned probation—though it may be an important one. Cf.

1     id. at 2198 (noting that “parolees have fewer expectations of  
2     privacy than probationers”). Distinctions could also be drawn upon  
3     the particular release conditions imposed upon a defendant. Compare  
4     id. at 2199, with Knights, 534 U.S. at 114.

5             Inevitably, however, a case will arise in which a suspicionless  
6     search of a probationer occurs absent a “special need” or similar  
7     exception. I believe that the propriety of that search would  
8     present an open question of constitutional law in this Circuit after  
9     Samson.