Contract Law and its Potential Impact on Parole and Probation Searches

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I. PAROLE AND PROBATION SEARCHES AND THE FOURTH AMENDMENT

Under the Fourth Amendment, people are "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."¹ For a search and seizure to be reasonable under the Fourth Amendment, a warrant supported by probable cause is generally required.² However, there are exceptions to this general requirement.³ In People v. Lampitok⁴ and

¹. U.S. CONST. amend. IV. Under the Illinois Constitution an individual receives the same protection from unreasonable search and seizure as they do under the Fourth Amendment of the U.S. Constitution. See ILL. CONST. art. I, § 6.


³. New York v. Belton, 453 U.S. 454 (1981) (allowing a search of the vehicle following a custodial arrest); Gustafson v. Florida, 414 U.S. 260 (1973) (allowing a search of the person following a full custodial arrest); Cady v. Dombrowski, 413 U.S. 433 (1973) (defining the community caretaking exception); Shneckloth v. Bustamonte, 412 U.S. 218 (1973) (defining consent as an exception to the warrant requirement); Terry v. Ohio, 392 U.S. 1 (1968) (permitting an investigatory stop when an officer believes a person has or is about to commit a crime); Warden v. Hayden, 387 U.S. 294 (1967) (defining the exigent circumstances exception); Cooper v. California, 386 U.S. 58 (1966) (defining the exception for forfeited automobiles); McDonald v. United States, 335 U.S. 451 (1948) (defining the emergency exception); Carroll v. United States, 267 U.S. 132 (1925) (defining the automobile exception); People v. Gipson, 786 N.E.2d 540 (Ill. 2003) (defining the inventory search exception); People v. Mitchell, 650 N.E.2d 1014 (Ill. 1995) (discussing the plain view and plain touch exceptions to the warrant requirement).
People v. Wilson, the Illinois Supreme Court considered two possible exceptions to the warrant requirement: parole and probation searches.

A. PROBATION SEARCHES - PEOPLE V. LAMPITOK

In Lampitok, police arrested the defendant and charged him with numerous drug and weapon violations following a search of his residence based on the conditions of his fiancée’s probation. A condition of his fiancée’s probation stated that she “shall submit to a search of her person, residence, or automobile at any time as directed by her Probation Officer to verify compliance with the conditions of [her] Probation Order.” The circuit court granted defendant’s motion to quash and suppress, finding that the probation officers conducting the search lacked reasonable suspicion that the probationer or defendant had weapons or drugs in the residence.

A divided appellate court affirmed the decision in an unpublished opinion. The Illinois Supreme Court granted the State’s leave to appeal. On appeal, the court considered the reasonableness of the search under the totality-of-the-circumstances test. Under the totality-of-the-circumstances test, the court balances the intrusion on one’s privacy interest against the legitimate governmental interest promoted by the search. Based on the test, the court held that a probation officer could rely on the search term of a

4. 798 N.E.2d 91 (Ill. 2003).
6. Illinois v. Lampitok, 798 N.E.2d 91 (Ill. 2003). The defendant was charged with unlawful possession of a weapon by a felon, unlawful possession of firearm ammunition by a felon, unlawful possession of a hypodermic syringe, unlawful possession of a controlled substance, and armed violence. Id. at 96.
7. Conditions of adult probation are set out in 730 ILL. COMP. STAT. 5/5-6-3 (2007). “Probation is one point...on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service.” United States v. Knight, 534 U.S. 112, 119 (2001) (internal quotation marks omitted).
8. Lampitok, 798 N.E.2d at 96. Current conditions of probation require an individual to “admit any person or agent designated by the court into offender’s place of confinement at any time for purposes of verifying the offender’s compliance with conditions of his confinement.” 730 ILL. COMP. STAT. 5/5-6-3(b)(10)(ii) (2007).
9. The trial court also found that the probation condition was unauthorized under 5/5-6-3 and that the search condition lacked any “regulations, guidelines, standards or procedures.” Lampitok, 798 N.E.2d at 97.
11. Lampitok, 798 N.E.2d at 95.
12. Id. at 103-06 (relying on United States v. Knights, 534 U.S. 112 (2001); Griffin v. Wisconsin, 483 U.S. 868 (1987)).
probation order when searching a probationer's residence only if the officer had reasonable suspicion of a probation violation. In effect, the court eliminated the search condition of the probation order.

Considering the government interest at issue in the search, the court identified the administration of the probation system as a "special need" that would "justify a greater intrusion on privacy than would be acceptable in the case of ordinary citizens." In addition, the court found the purpose of the probation system as one of rehabilitation, punishment, and protection. Therefore, the court concluded a warrant and a requirement of probable cause would delay the effective administration of the probation system.

However, although the court found that an individual on probation has a diminished expectation of privacy, the court concluded that a probation officer needed reasonable suspicion to search a probationer's residence regardless of the probation order's search condition. The Lampitok court relied heavily on the fact that the officers were searching a residence, and what the court identified as a clear majority of federal courts requiring reasonable suspicion to support probation searches. Applying tools of "statu-

14. Lampitok, 798 N.E.2d at 105.
15. See id.
16. Id. at 104. Based on status alone, an individual on probation does not enjoy the liberties that every citizen is entitled to. Knights, 534 U.S. at 119. See also cases cited infra note 36.
17. Lampitok, 798 N.E.2d at 104 (citing Griffin, 483 U.S. at 875; People v. Meyer, 680 N.E.2d 315, 318 (Ill. 1997)). An individual on probation is "more likely than the ordinary citizen to violate law." Knights, 534 U.S. at 120 (quoting Griffin, 483 U.S. at 880). Probationers have "even more of an incentive to conceal their criminal activities because probationers are aware that they may be subject to supervision and face revocation of probation, and possible incarceration, in proceedings in which the trial rights of a jury and proof beyond a reasonable doubt, among other things, do not apply." Samson v. California, 126 S. Ct. 2193, 2197-98 (2006) (quoting Knights, 534 U.S. at 120). In 2004, there were 144,454 adults on probation in Illinois. BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2004 (Nov. 2005), available at http://www.ojp.usdoj.gov/bjs/abstract/ppus04.htm. In 1991, looking at the most serious offenses, 23.4% of the state prison population was comprised of probation violators. BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE VIOLATORS IN STATE PRISON, 1991 (Aug. 1995), available at http://www.ojp.usdoj.gov/bjs/abstract/ppvsp91.htm.
18. Lampitok, 798 N.E.2d at 104.
19. Id. (citing People v. Adams, 597 N.E.2d 574, 583 (Ill. 1992)).
20. See id. at 105.
21. Id. at 104-05 (relying on Payton v. New York, 445 U.S. 573 (1980)).
22. Id. at 105 (citing United States v. Crawford, 323 F.3d 700, 714 (9th Cir. 2003)); United States v. Vincent, 167 F.3d 428, 431 (8th Cir. 1999); United States v. Payne, 181 F.3d 781, 787 (6th Cir. 1999); United States v. Giannetta, 909 F.2d 571, 576 (1st Cir. 1990); United States v. Scott, 678 F.2d 32, 35 (5th Cir. 1982); United States v. Bradley, 571 F.2d 787, 790 n.4 (4th Cir. 1978). But see Samson, 126 S. Ct. at 2193 (holding that the Fourth Amendment does not preclude a suspicionless search of a parolee when the search condition
tory interpretation,” the court rejected the State’s argument that the probation order’s search term constituted a waiver of the fiancée’s Fourth Amendment rights.24

B. PAROLE SEARCHES - PEOPLE V. WILSON

In Wilson, the Illinois appellate court extended the reasonable suspicion requirement of Lampitok to parole searches.25 In Wilson, the defendant was on Mandatory Supervised Release (MSR) from an armed violence conviction.26 Following a search of the defendant’s second floor apartment by a parole officer and Chicago Police, the defendant was convicted and sentenced to eight years for possession of a controlled substance.28 Officers gained access to the second floor apartment through a relative, but did not ask the defendant’s permission to search his room.29 Although officers did not have a search warrant, the defendant’s MSR agreement read “you shall consent to a search of your person, property or residence under your control.”


23. Interpretation of a statute or legislation is distinct from the interpretation of a contract because “[t]hough a piece of legislation may result from compromise among a number of conflicting interests, the statute is ultimately enacted as embodying the statement of one unit, the legislature, rather than as the words of two units, the parties to a contract.” See ARTHUR CORBIN & CAROLINE BROWN, 5-24 CORBIN ON CONTRACTS § 24.2 (Joseph M. Perillo ed., 2005). In addition, there is a distinction between “interpretation” and “construction.” Id. at § 24.3. When interpreting a contract, the court determines the meanings of the terms of the contract as given by the parties when contracting. Id. Through “construction” of a contract, the court determines the legal effect of the terms on the contracting parties. Id.

24. Lampitok, 798 N.E.2d at 110.


28. Id. at 755. Officers recovered cocaine and heroin from Wilson’s room. Id.

29. Id.

30. Id. at 754-55. “The conditions of every parole and [MSR] are that the subject: . . . (10) consent to a search of his or her person, property, or residence under his or her control.” 730 ILL. COMP. STAT. 5/3-3-7(a)(10) (2007).
Prior to his trial, the defendant filed a motion to quash and suppress the drugs and guns found in his apartment.\(^{31}\) The trial court denied the defendant’s motion based on the search condition of his MSR.\(^{32}\) On appeal, the defendant argued that the search based on the MSR agreement violated the Fourth Amendment.\(^{33}\) The appellate court agreed with the defendant and remanded his case for a new hearing on his motion to quash and suppress.\(^{34}\) On remand, the trial court was to determine whether officers had “reasonable suspicion” to support the search of the defendant’s apartment.\(^{35}\)

In its analysis, the appellate court found individuals on MSR, like those on probation, have a reduced expectation of privacy\(^{36}\) “because they are criminal offenders and because they are subject to certain restrictions as a condition of their release.”\(^{37}\) However, after comparing the search condi-

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31. Wilson, 847 N.E.2d at 754.
32. Id. at 755; 730 Ill. Comp. Stat. 5/3-3-7(a)(10) (2007).
33. Specifically, Wilson argued that “(1) despite the condition of his MSR agreement requiring that he ‘shall consent to a search of [his] person, property, or residence under [his] control,’ he retained some expectation of privacy; (2) the search was conducted without a warrant; and (3) the search was unsupported by reasonable suspicion that he possessed guns and narcotics.” Wilson, 847 N.E.2d at 755.
34. Id. at 760-61.
35. Id.
36. The U.S. Supreme Court has identified other individuals or groups as having a reduced or diminished expectation of privacy. For example, in New Jersey v. T.L.O., the Court recognized that students while “within the school environment” have a lower expectation of privacy. 469 U.S. 325, 348 (1985) (Powell, J., concurring). In Vernonia School District 47J v. Acton, the Court identified student athletes as having an even further diminished expectation of privacy than those of a typical student. 515 U.S. 646, 657 (1995). In Skinner v. Railway Labor Executives’ Association, the Court stated that certain employees of an industry regulated to ensure safety have a diminished expectation of privacy. 489 U.S. 602, 627 (1989). See also Nat’l Treasury Employees Union v. Von Raab, 489 U.S. 656, 672 (1989) (stating that armed employees in the drug war have a reduced expectation of privacy); Florida v. Royer, 460 U.S. 491, 515 (1983) (Blackmun, J., dissenting) (stating that the reasonable expectation of privacy is reduced while at an airport based on security concerns). See generally New York v. Burger, 482 U.S. 691 (1987) (discussing diminished expectations of privacy in closely regulated industries); Fink v. Ryan, 673 N.E.2d 281 (Ill. 1996) (finding a driver involved in a personal injury accident has a reduced expectation of privacy under the implied consent law).
37. People v. Wilson, 847 N.E.2d 753, 759 (Ill. App. Ct. 2006) (citing People v. Moss, 842 N.E.2d 699, 712 (Ill. 2005)). Parolees have even a lower expectation of privacy than probationers do because parole is “more akin to imprisonment.” Samson v. California, 126 S. Ct. 2193, 2198 (2006). See also Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (defining the test for a Fourth Amendment violation as first, whether a person has an “actual” or subjective expectation of privacy and second, that the subjective expectation of privacy is “reasonable” as recognized by society). A subjective expectation of privacy that is unreasonable is not protected by the Fourth Amendment. T.L.O., 469 U.S. at 338.
tion of Wilson's MSR with search conditions in other cases, the court
found that the defendant's expectation of privacy was reduced but not
eliminated. Therefore, after balancing the State's interest in the admin-
istration of the Illinois MSR system against the diminished privacy interest
of an individual on MSR, the court concluded that a search of a person's
home pursuant to an MSR agreement is only reasonable if based on "rea-
sonable suspicion." Therefore, like the court's decision in Lampitok, the
court in Wilson eliminated the search term of the MSR agreement.

An application of contract law principals as utilized to review plea ne-
gotiations would not only uphold probation or parole searches without a
requirement of reasonable suspicion, but it would support the court's policy
of encouraging plea bargaining and support the public interests of rehabi-
lation and community safety. In addition, by failing to enforce the
search term of a negotiated plea, Illinois courts created a conflict on how
different terms of a negotiated plea are enforced.

38. The Wilson court compared the search condition in this case to the search condi-
tions considered in People v. Lampitok, 798 N.E.2d 91, 105 (Ill. 2003), and United States v.
39. See Wilson, 847 N.E.2d at 759 (finding a person on MSR has an even lower
expectation of privacy than a person on probation).
40. The court recognized the objectives of probation, those being rehabilitation and
community safety, are even more apparent in the administration of Illinois' MSR program.
Id. at 758 (citing Moss, 842 N.E.2d at 712). On January 1, 2004, there were 35,008 indi-
viduals on parole in Illinois. BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE
UNITED STATES, 2004 (Nov. 2005), available at http://www.ojp.usdoj.gov/bjs/abstract/ppus04.htm. As of June 30, 2005, the number of
parolees in Illinois had decreased to 33,255. ILLINOIS DEPARTMENT OF CORRECTIONS, 2005
DEPARTMENT DATA, available at http://www.idoc.state.il.us/subsections/reports/. In 1991,
looking at the most serious offenses, 22.5% of the state prison population was comprised of
parole violators. BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE VIOLATORS IN
41. Wilson, 847 N.E.2d at 760 (applying the “totality of the circumstances” test as
in Lampitok).
42. See id.
43. People v. Diaz, 735 N.E.2d 605 (Ill. 2000); People v. Lumzy, 730 N.E.2d 20, 22
(Ill. 2000); People v. Evans, 673 N.E.2d 244 (Ill. 1996); People v. Stacey, 369 N.E.2d 1254
(Ill. 1977), overruled by People v. Wilk, 529 N.E.2d 218 (Ill. 1988) (case is still good law
for limited purposes offered here).
44. Lumzy, 730 N.E.2d at 25 (Bilandic, J., dissenting).
45. See People v. Lampitok, 798 N.E.2d 91, 101 (Ill. 2003) (stating that probation
restrictions promote the purposes of probation, which are to protect the public and rehabili-
tate the probationer); Wilson, 847 N.E.2d at 758-59 (Ill. App. Ct.) (equating the interests in
administering probation with those of MSR).
II. CONTRACT LAW AND NEGOTIATED PLEAS

There are at least four types of pleas a defendant can enter when entering a plea of guilty. A defendant can enter an "open" or "blind" plea, a fully negotiated plea of guilty, a charging plea, or a sentencing plea. Under an "open" or "blind" plea, the defendant enters a plea of guilty without receiving any promises from the State in return for the plea. Under a fully negotiated plea of guilty, the defendant enters a plea of guilty in exchange for the State dismissing charges and recommending a specific sentence. Under a charging plea, the defendant enters a plea of guilty in exchange for the State dismissing charges or reducing the charge to which the defendant is pleading. However, under a charging plea, there is no agreement between the parties as to the sentence or a sentencing range. Finally, under a sentencing plea, the defendant enters a plea of guilty in exchange for the State dismissing charges or reducing a charge in conjunction with the State recommending a sentencing range.

In a number of cases, the Illinois Supreme Court has considered the impact of a negotiated plea on a post-trial motion to reconsider or reduce a sentence. According to Supreme Court Rules 604(d) and 605(b) and (c), a "negotiated plea" consists solely of plea where the State recommends a sentence, sentencing range, or


47. People v. Diaz, 735 N.E.2d 605, 608-09 (Ill. 2000) (citing People v. Lumzy, 730 N.E.2d 20, 21 (Ill. 2000)).

48. Diaz, 735 N.E.2d at 609 (citing Evans, 673 N.E.2d at 250).

49. Id.

50. See id. at 610 (citing Lumzy, 730 N.E.2d at 22).

51. See id. (citing Lumzy, 730 N.E.2d at 21).

52. People v. Evans, 673 N.E.2d 244, 245 (Ill. 1996).

53. Diaz, 735 N.E.2d at 610 (citing Lumzy, 730 N.E.2d at 22). See also Evans, 673 N.E.2d at 246.

54. Diaz, 735 N.E.2d at 610 (citing Lumzy, 730 N.E.2d at 22).

55. Id. at 609.

56. Id. at 610 (citing Lumzy, 730 N.E.2d at 22). See also People v. Linder, 708 N.E.2d 1169, 1171 (Ill. 1999) (recognizing a negotiated plea agreement between a defendant and the State where the State recommends a sentencing range).

57. According to Supreme Court Rules 604(d) and 605(b) and (c), a "negotiated plea" consists solely of plea where the State recommends a sentence, sentencing range, or
sentence as it applies to Supreme Court Rule 604(d).\textsuperscript{58} In those cases, the court has applied principals of contract law while assessing whether a defendant should be allowed to seek a modification of his sentence after entering into a negotiated plea agreement.\textsuperscript{59} As a result, courts have found that a defendant’s attempt to reduce a sentence through Rule 604(d) amounts to a unilateral attempt to modify a contract, which would “fly [y] in the face of contract law principles.”\textsuperscript{60} Instead of allowing the unilateral modification of the sentence the defendant bargained for, the court requires that both parties be placed back to the status quo through the defendant withdrawing his plea of guilty.\textsuperscript{61} However, upholding the principal of the freedom to contract,\textsuperscript{62} the negotiated agreement will stand unless the defendant is able

makes other sentencing considerations “and not merely to the charge or charges then pending.” ILL. SUP. CT. R. 604(d), 605(b)-(c). Therefore, a charging plea would not be considered a “negotiated plea” under Rule 604 or 605. See Lumzy, 730 N.E.2d at 23 (holding that there is no agreement to be breached where there is no agreement between a defendant and the State as to the sentence); but see Lumzy, 730 N.E.2d at 25 (Bilandic, J., dissenting) (applying contract law to “charging” plea based on the ability of the defendant to control his sentence through a plea to a reduced charge).

\textsuperscript{58} Supreme Court Rule 604(d) reads in pertinent part: “No appeal from a judgment entered upon a plea of guilty shall be taken unless the defendant, within 30 days of the date on which sentence is imposed, files in the trial court a motion to reconsider the sentence, if only the sentence is being challenged, or, if the plea is being challenged, a motion to withdraw the plea of guilty and vacate the judgment.” ILL. SUP. CT. R. 604(d).

\textsuperscript{59} See Diaz, 735 N.E.2d at 612 (applying contract principals to a plea negotiation where the State limited its ability to argue for extended and consecutive sentencing in exchange for a plea of guilty); Lumzy, 730 N.E.2d at 25 (Bilandic, J., dissenting) (applying contract law to “charging” plea based on the ability of the defendant to control his sentence through a plea to a reduced charge); Linder, 708 N.E.2d at 1172 (applying contract law principals to the defendant’s motion to reconsider his sentence where the defendant entered a plea of guilty in exchange for the State dismissing charges and recommending a limit on defendant’s sentence); People v. Evans, 673 N.E.2d 244, 246 (Ill. 1996) (applying contract principals to a plea negotiation where the defendant pled guilty to armed violence and aggravated unlawful restraint in exchange for the State dismissing the residential burglary charge and recommending a sentence of eleven and five years concurrently). See also People v. Clark, 700 N.E.2d 1039, 1042 (1998).

\textsuperscript{60} Evans, 673 N.E.2d at 248. The modification of an existing contact creates a new contract, which must be supported by consideration and must be mutually agreed upon to be enforceable. See Doyle v. Holy Cross Hosp., 708 N.E.2d 1140, 1144 (Ill. 1999); Mundelein v. Evanger, 269 N.E.2d 325, 327 (Ill. App. Ct. 1971).

\textsuperscript{61} Evans, 673 N.E.2d at 246. See also ARTHUR CORBIN & HELEN HADJIYANNAKIS BENDER, CORBIN ON CONTRACTS § 55.3 (Joseph M. Perillo ed., 2005) (stating that generally, contract remedies intend to put the injured party in the position they would have been in if there had been no breach of the contract and the aggrieved party must not be put into a better position than they would have been in if the contract had been fully performed).

\textsuperscript{62} After the contract has been entered into the freedom to contract becomes subject to the provisions of the contract. See Bd. of Educ. v. Chi. Teachers Union, 430 N.E.2d 1111, 1118 (Ill. 1981) (Simon, J., dissenting). Other limitations on the freedom to contract included the inability to contract the commission of a crime, the payment for the commission
to show that the motion to withdraw his plea is necessary to correct a "manifest injustice." 63

Courts are able to utilize contract law in the above situations because a plea negotiation results in the formation of a contract between the defendant and State. 64 To create a contract, there must be an offer, 65 acceptance, and consideration. 66 In order for a contract to be enforceable, the parties must manifest an intention to be bound by the agreement, 67 the terms of the agreement must be sufficiently definite to be enforced, 68 and consideration must be exchanged between the parties. 69

In a plea negotiation, the offer originates with the State, either on its own accord, or at the request of the defendant. 70 The defendant can accept the offer, resulting in a sentencing plea, charging plea, or fully negotiated plea, or can make a counter-offer. 71 If the offer is accepted, the negotiated agreement is presented to the court for ratification. Even though the agreement is subject to a judge's approval, a contract is formed if the defendant unconditionally accepts the State's offer, because the State and the

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63. See Evans, 673 N.E.2d at 250.


65. The offer "must be so definite as to its material terms or require such definite terms of the acceptance that the promises or performances to be rendered by each party are reasonably certain." Acad. Chi. Publishers v. Cheever, 578 N.E.2d 981, 983 (Ill. 1991) (relying on 1 WILLISTON ON CONTRACTS §§ 38-48 (3d ed., 1957); 1 CORBIN ON CONTRACTS §§ 95-100 (1963)).

66. Steinberg v. Chi. Med. Sch., 371 N.E.2d 634, 639 (Ill. 1977) (finding consideration is any act or promise which is a benefit to the other party or a disadvantage or burden to the promisor). See also RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981).


68. See Acad. Chi. Publishers, 578 N.E.2d at 983. Some terms of the contract may be missing or left to be agreed upon, but if the essential terms are so ambiguous as to provide no basis for deciding whether the agreement has been broken, then there is no contract created. Id. at 984.


70. Under common law, the offeror is the master of the offer. See ARTHUR CORBIN & JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 3.8 (Joseph M. Perillo ed., 2005).

71. A counter-offer is a rejection of the offer. People v. Henderson, 809 N.E.2d 1224, 1232 (Ill. 2004). The "mirror-image rule" requires that the acceptance strictly comply with the terms of the offer. Hubble v. O'Connor, 684 N.E.2d 816, 821 (Ill. App. Ct. 1997) (citing Loeb v. Gray, 475 N.E.2d 1342, 1346 (Ill. App. Ct. 1985)). A conditioned acceptance constitutes a rejection of the initial offer and constitutes a counter-offer which can be accepted or rejected. Id.
defendant intend that the negotiations are final and neither one can withdraw from the agreement before it is presented to a judge.\textsuperscript{72}

As in a majority of contracts, the most important part of the plea negotiation is the exchange of consideration between the State and the defendant. In a negotiated plea, the State and the defendant are both knowingly bargaining for the terms of the sentence and the plea. This bargaining includes not only the length of the sentence, but also the built-in provisions for the protection of the public and the rehabilitation of the defendant, those interests upon which the terms of MSR and probation were designed. With this in mind, both the defendant and the State bargain for what they want and what they each believe is a benefit in terms of a sentence and charge.

Overall, the State bargains to eliminate all the risk and expense it bears when it takes a case to trial. By obtaining a guilty plea, the State eliminates the burden to prove a defendant’s guilt beyond a reasonable doubt;\textsuperscript{73} and therefore, the need to have the victim testify. Therefore, in certain cases, especially sex offenses involving a young victim, the State is able to prevent the need for a child to testify. In addition, the State is able to eliminate expenses associated with having certain expert witnesses testify. The State is also bargaining to have the defendant supervised by the State of Illinois through incarceration, MSR, or probation. As part of that bargaining and need to secure a defendant’s rehabilitation and the community’s safety, the State bargains for the terms of probation or MSR. To that end, the State secures a waiver of a defendant’s Fourth Amendment rights.\textsuperscript{74}

On the other side, a defendant bargains for a sentence recommendation, a reduced charge, or to have certain charges dismissed. Through this type of negotiating, a defendant has reduced his time in a penitentiary and in the case of a recidivist, reduced the availability of aggravation in future plea negotiations.\textsuperscript{75} The court will also consider the defendant’s plea of guilty as mitigation in the defendant’s current case.\textsuperscript{76} In addition, although MSR is required following every sentence of penitentiary time, a defendant can negotiate the ultimate duration of MSR based on the ability to enter a plea on a reduced charge.\textsuperscript{77}

\begin{itemize}
\item \textsuperscript{72}See \textsc{Corbin & Perillo}, \textit{supra} note 70, § 3.7.
\item \textsuperscript{73}See \textsc{ILL. Sup. Ct. R. 402(c)} (stating that a factual basis must still be presented before the plea of guilty can be accepted).
\item \textsuperscript{74}See \textsc{730 ILL. Comp. Stat. 5/5-6-3(a)(5), (b)10(ii)} (2007); \textsc{730 ILL. Comp. Stat. 5/3-3-7(10)} (2007).
\item \textsuperscript{75}See \textsc{People v. Lampitok, 798 N.E.2d 91, 103 (Ill. 2003)} (recognizing that the recidivism rates are higher than the general crime rate for individuals on probation). \textsc{See also supra} notes 17 and 40.
\item \textsuperscript{76}People v. Diaz, 735 N.E.2d 605, 608 (Ill. 2000) (recognizing the defendant’s plea of guilty as mitigation because it prevented minors from having to testify).
\item \textsuperscript{77}See \textsc{People v. Lumzy, 730 N.E.2d 20, 25 (Ill. 2000)} (Bilandic, J., dissenting) (recognizing that under a charging plea, the defendant is able to control his own sentencing
\end{itemize}
of his probation by his ability to negotiate a plea on a reduced charge.\textsuperscript{78} Part of a defendant's consideration is what he is willing to surrender to the State in exchange for a specific sentence or reduced charge. This includes a defendant waiving his Fourth Amendment rights (to be free from unreasonable search or seizure of his person or home) to secure a sentence he values.\textsuperscript{79}

The terms of the plea are made sufficiently definite, in part, by Illinois Supreme Court Rule 402, which must be satisfied before a court can accept a plea of guilty.\textsuperscript{80} This rule assures that both the State and the defendant are informed as to the material terms of the plea. The plea may only be accepted if it is made knowingly and voluntarily, if the court confirms the terms of the agreement with the defendant in open court, and if the agreement is reached without force, threats, or other promises outside the agreement.\textsuperscript{81} Specifically, the judge must admonish a defendant as to the minimum and maximum sentences available based on the felony classification.\textsuperscript{82} This includes the MSR associated with a plea of guilty. The court's failure to notify the defendant of the length of MSR or probation constitutes a plain error and may be reversible error.\textsuperscript{83} By following the standards laid out under Rule 402, contract defenses such as fraud, coercion, mistake, and duress are not an issue.

Courts have borrowed from contract law when answering a defendant's 604(d) motion because the motion is in fact a collateral attack on the negotiation process itself, and courts have recognized the importance of plea negotiation in the modern criminal environment. For those same reasons, courts should extend the use of contract law to answer other collateral attacks on the terms of the plea negotiation. This means an extension of contract law beyond the base terms of the plea negotiation. Contract law principals should be utilized when considering a defendant's motion to quash in challenging a parole or probation search, especially when the parole or probation resulted from a negotiated plea because the search condition being challenged constitutes consideration and is a material term of the agreement.

by eliminating charges that would result in an extended sentence); 730 ILL. COMP. STAT. 5/5-8-1 (2005).

\textsuperscript{78.} See 730 ILL. COMP. STAT. 5/5-6-2 (2005).

\textsuperscript{79.} See 730 ILL. COMP. STAT. 5/5-6-3(a)(5), (b)(10)(ii); 5/3-3-7(a)(10) (2007).

\textsuperscript{80.} ILL. SUP. CT. R. 402.

\textsuperscript{81.} ILL. SUP. CT. R. 402(b).

\textsuperscript{82.} ILL. SUP. CT. R. 402(a)(2).

III. CONTRACT LAW AND WAIVER AS CONSIDERATION

The court’s analysis of a search based on conditions of probation or MSR should begin with a determination of whether the probation or MSR resulted from a negotiated plea agreement. If the MSR or probation was the result of a negotiated plea, a court should apply the contract law principals as utilized when it considers a motion under Supreme Court Rule 604(d).

In a plea negotiation, the sentence and the plea are material terms of the agreement. Excluding a case where the sentence is death or natural life, any sentence of penitentiary time must include a term of MSR. The term of MSR will depend on the classification of the crime on which the defendant enters his plea. As an alternative to a term of prison with MSR, a plea negotiation may result in a term of straight probation. Like the term of MSR, the term of probation will depend on the class of crime on which the defendant enters his plea. As a result, MSR and probation are inseparable from any other part of the sentence. Therefore, the terms of probation or the terms of MSR are terms of the sentence. Consequently, the terms of the probation and terms of MSR are material terms of the agreement. If those terms result in the defendant waiving his Fourth Amendment rights as part of his consideration in a fully negotiated sentencing or charging plea, then that term should be upheld as any other material term of a contract.

84. Even if the sentence of probation or MSR resulted from a finding of guilty instead of a negotiated plea, the application of contract law principals to a probation or MSR search still works because the defendant has a choice between agreeing to the MSR or probation conditions and spending the duration of the sentence in custody. See 730 ILL. COMP. STAT. 5/3-3-2.1(c); 5/5-3-3; 5/3-3-10(a); 5/5-6-4(e); 5/5-5-3 (1997).
85. People v. Diaz, 735 N.E.2d. 605, 611 (Ill. 2000).
86. 730 ILL. COMP. STAT. 5/3-3-8 (1999); 5/5-8-1(d) (2005).
87. For first degree murder or a Class X felony, the term of MSR shall be three years. 730 ILL. COMP. STAT 5/5-8-1(d)(1) (2005). For a Class 1 or Class 2 felony, the term of MSR shall be two years. Id. at 5-8-1(d)(2). For a Class 3 or 4 felony, the term of MSR shall be one year. Id. at 5-8-1(d)(3). However, under 5/3-3-8 (b), the term of MSR can be terminated if the Prisoner Review Board determines that an individual “is likely to remain at liberty without committing another offense.”
88. See 730 ILL. COMP. STAT. 5/5-6-2 (2005).
89. For a Class 1 or 2 felony, the term of probation shall not exceed four years. Id. at 5-6-2(b)(1). For a Class 3 or 4 felony, the term of probation shall not exceed 30 months. Id. at 5-6-2(b)(2). Probation is not allowed on a Class X felony. 730 ILL. COMP. STAT 5/5-5-3(c)(2)(c) (2005).
90. See Diaz, 735 N.E.2d at 611.
It is well settled that parties may contract away constitutional and statutory rights. In the case of a plea negotiation, a defendant waives his Fourth Amendment rights as a form of consideration. The waiver constitutes consideration because it is a specified act of forbearance and it creates a new legal relationship between the State and the defendant. It is a waiver bargained for by the State intending to create a certain legal result. The legal result obtained is the freedom to search a probationer or parolee outside the requirements of the Fourth Amendment.

After finding a waiver of the Fourth Amendment constitutes consideration, the court should determine whether a defense to the contract exists. Aside from defenses of fraud, mistake, misrepresentation, duress, coercion, or unconscionability, the waiver, and therefore the contract and the search should be upheld as valid and enforceable. As a result, if no defenses to the contract exist, the court should deny a defen-

93. There are countless situations in which the courts have recognized an individual’s ability to waive Fourth, Fifth, and Sixth Amendment rights. See United States v. Ruiz, 536 U.S. 622, 628-29 (2002) (stating a defendant’s waiver of his Sixth Amendment rights to counsel, jury trial, and confront witnesses must be done knowingly and intelligently); People v. McCauley, 645 N.E.2d 923, 928 (Ill. 1994) (finding that a defendant may waive his Fifth Amendment rights if he does so knowingly and intelligently); People v. Harris, 697 N.E.2d 850, 858 (Ill. App. Ct. 1998) (finding that a defendant may waive his Fourth Amendment rights through voluntary consent obtained free from duress or coercion).
94. See RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. d (1981). See also ARTHUR CORBIN & JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 5.21 (Joseph M. Perillo ed., 2005) (discussing forbearance to exercise a legal privilege and forbearance to exercise a legal power).
95. See supra note 66 and accompanying text.
96. In United States v. Carter, 136 F. App’x. 40 (9th Cir. 2005), the court reviewed whether the warrantless search of a probationer’s home violated the Fourth Amendment. The court stated that the relevant inquiry was whether the probationer voluntarily signed the probation intake form stating that probationer would “permit [a] probation officer to visit or search your place of residence at reasonable times.” Id. The court noted the absence from the record of any allegation of “fraud, coercion – expressed or implied – or duress which may have caused [probationer’s] signature.” Id.
99. Id. at §§ 174, 175.
100. Id. at § 177.
101. Although it can be argued that a probation or MSR search condition is a “take-it-or-leave-it” provision, that alone does not make the contract unconscionable. See Kinkel v. Cingular Wireless, L.L.C., 828 N.E.2d 812, 818 (Ill. App. Ct. 2005) (adopting the Ninth Circuit’s sliding scale from Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003), to determine whether a provision is unconscionable).
102. United States v. Carter, 136 F. App’x. 40 (9th Cir. 2005).
dant’s motion to quash and suppress evidence and enforce the terms of the agreement.

By granting a defendant’s motion to quash and suppress as in Lampitok and Wilson, a court allows a defendant to unilaterally modify contract terms while holding the State to its side of the agreement. Consequently, the State will be discouraged from entering into plea agreements.\(^{103}\) Moreover, a unilateral modification in favor of either party will weaken the policy of encouraging plea negotiations.\(^{104}\) Therefore, the principal of freedom to contract utilized to uphold sentence length in a 604(d) motion should be extended beyond the base terms of the negotiated plea and applied to the other material terms of the agreement.\(^{105}\)

IV. CONCLUSION

The purpose of this article was to present an alternative process to the traditional analysis of a motion to quash.\(^{106}\) By extending contract law to other material terms of the plea negotiation, which include the search terms of a probation or parole order, courts will continue to encourage the plea negotiation process which has become a crucial part of the criminal court system at both the federal and state level.\(^{107}\) At the same time, courts will honor an obvious agreement between the defendant and the State for a very specific benefit to both parties.

The decision not to enforce the terms of a negotiated sentence under contract law may reduce the number of individuals who are able to negotiate for probation. The inability to conduct searches based on the conditions of probation diminishes the ability of the State to enforce the interests of rehabilitation and protection of the public. The failure to protect the public and rehabilitate the defendant through probation will result in an increase in trials, an increase in penitentiary time, and an increased cost on the State and the defendant.\(^{108}\)

Likewise, the inability to conduct searches based on the conditions of MSR diminishes the ability of the State to enforce the interests of rehabilitation and protection of the public. As a result, the State may increase peni-

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103. See People v. Lumzy, 730 N.E.2d 20, 25 (Ill. 2000) (Bilandic, J., dissenting); People v. Evans, 673 N.E.2d 244 (Ill. 1996).
104. See People v. Lumzy, 730 N.E.2d 20, 25 (Ill. 2000) (Bilandic, J., dissenting); People v. Evans, 673 N.E.2d 244 (Ill. 1996).
105. See Evans, 673 N.E.2d at 248.
106. See supra note 96 and accompanying text.
107. See supra note 46 and accompanying text.
108. According to the Illinois Department of Corrections, in the fiscal year 2003, the average annual cost of incarcerating an individual in a department facility was $22,627. ILLINOIS DEPARTMENT OF CORRECTIONS, FINANCIAL IMPACT STATEMENT FY03, available at http://www.idoc.state.il.us/subsections/reports/default.shtml.
tentative time offered on felony cases in order to compensate for the diminished ability of the State to protect the public during a defendant's term of MSR. According, in economic terms, the increased penitentiary time will increase the costs on the State and the defendant.

109. According to the Illinois Department of Corrections, at the end of 2004, the adult prison population was 35.1% over capacity. ILLINOIS DEPARTMENT OF CORRECTIONS, 2004 STATISTICAL PRESENTATION, available at http://www.idoc.state.il.us/subsections/reports/default.shtml. In the fiscal year 2003, the construction cost per bed averaged $55,826. ILLINOIS DEPARTMENT OF CORRECTIONS, FINANCIAL IMPACT STATEMENT FY03, available at http://www.idoc.state.il.us/subsections/reports/default.shtml.