STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK, DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO,

Plaintiff,

vs.

CLARISSA MAE GOUGE,

Defendant.

Case No. **CRF 2017 4327**

MEMORANDUM DECISION AND ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

Defendant CLARISSA MAE GOUGE's Motion to Suppress is **DENIED**.
Rebecca Perez, Dep. Pros. Attorney, lawyer for the Plaintiff,
Jay Logsdon Coeur d'Alene, lawyer for Defendant Gouge.

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I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY.

On December 7, 2016, in Kootenai County Case No. CRF 2016 17065, this Court sentenced Clarissa Mae Gouge (Gouge), the defendant in this case, to the custody of the Idaho Department of Corrections for a fixed term of three years, followed by an indeterminate term of four years, for possession of a controlled substance (methamphetamine). That sentence was suspended, and the Court placed Gouge on supervised probation for a period of four years. The terms and conditions of Gouge's probation, which were imposed at sentencing, included the following condition, "That you shall submit to searches of your person, personal property, automobiles, and residence

without a search warrant at the request of your probation officer." Sentencing Disposition, CRF 2016 17065, Terms of Probation 2, Term and Condition 12. This Court's terms and conditions of probation were also attached to Gouge's Memorandum in Support of Motion to Suppress. At the May 2, 2017, hearing on her Motion to Suppress, counsel for Gouge asked the Court to take judicial notice of the Court's terms and conditions of probation imposed in CRF 2016 17065, which the Court granted. But according to Gouge, "Probation and Parole later provided her with their own conditions and indicated she must consent to searches of her person by all members of law enforcement." Mem. Supp. Mot. Suppress 1–2. However, there is no *evidence* as to that. At the May 2, 2017, hearing on the Motion to Suppress, neither party offered a copy of Probation and Parole's terms and conditions as an exhibit, and such document does not appear in the court file in Kootenai County Case CRF 2016 17065.

Approximately three months after her sentencing hearing, on March 17, 2017, Gouge was arrested for possession of a controlled substance (methamphetamine), the genesis for the instant case. The circumstances leading up to her arrest are reported in Officer Kelly Mongan's (Officer Mongan) police report, and, unless otherwise noted, the following facts are based on that report. Officer Mongan testified at the May 2, 2017, hearing on Gouge's Motion to Suppress, and testified consistent with his report.

On March 17, 2017, Officer Mongan, a police officer with the Coeur d'Alene Police Department, was on patrol when he observed a blue Dodge pickup parked at a gas station at 2301 E. Sherman Avenue, Coeur d'Alene, Idaho. Officer Mongan testified that the pickup had no rear window and he saw three individuals in the pickup all seated on a bench seat. This is shown in Plaintiff's Exhibit 1, the DVD recording of Officer Mongan's body camera, played at the hearing. As Officer Mongan drove past the pickup, the three

individuals appeared to become nervous, and the male occupant seemed to try and conceal his face. Officer Mongan pulled his patrol vehicle in behind the pickup, but left enough space for the pickup to leave. He approached the pickup on foot and made contact with the occupants. He learned that the three occupants were Michael Withey, Amanda Mackinnon, and Gouge. He ran those names through dispatch, and two minutes into the conversation, Officer Mongan asked Gouge and Michael Withey if they were on probation. Pl.'s Exhibit 1. They both answered that they were, that they all just met each other, and they seemed genuinely surprised that they both had the same probation officer, Jennifer Carter, whom they had met a few days earlier. *Id.* They both confirmed that they were on probation. While the police report provides no details related to Gouge's consent to search, the State's Exhibit 1 shows Officer Mongan questioning Michael Withey and Gouge about the terms and conditions of their probation and, as a result of that conversation, consenting to searches of their persons.

In his police report, Officer Mongan described the search of Gouge as follows:

> I had [Gouge] stand in front of my patrol vehicle. As I went to turn my dash camera on, I could see [Gouge] manipulating something in her front right pocket. It appeared as if she was attempting to push something down in the pocket. I searched Gouge and located a small plastic baggie, containing white crystalline substance, in her front right pocket.

Based on Officer Mongan's training and experience, he recognized the white crystalline substance to be consistent with methamphetamine. Officer Mongan subsequently arrested Gouge for possession of a controlled substance.

Gouge waived her right to a preliminary hearing. *Court Minutes (Mar. 31, 2017*). She filed a Motion to Suppress on April 3, 2017, and a Brief in Support of Motion to Suppress on April 4, 2017. The State filed its Brief in Opposition to Motion to Suppress on April 25, 2017. A hearing on Gouge's Motion to Suppress was held on May 2, 2017.

II. STANDARD OF REVIEW.

In an appeal from an order granting or denying a motion to suppress, the reviewing court will not disturb findings of fact supported by substantial evidence. *State v. Whiteley*, 124 Idaho 261, 264, 858 P.2d 800, 803 (Ct. App. 1993); *State v. Donato*, 135 Idaho 469, 470, 20 P.3d 5, 6 (2001). However, it freely reviews "the trial court's determination as to whether constitutional requirements [were] satisfied in light of the facts." *Whiteley*, 124 Idaho at 264, 858 P.2d at 803; *Donato*, 135 Idaho at 470, 20 P.3d at 6. "[T]he power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court." *State v. Dreier*, 139 Idaho 246, 250, 76 P.3d 990, 994 (Ct. App. 2003) (citing *State v. Valdez–Molina*, 127 Idaho 102, 106, 897 P.2d 993, 997 (1995); *State v. Schevers*, 132 Idaho 786, 789, 979 P.2d 659, 662 (Ct. App. 1999)).

When evaluating the trial court's determination of voluntariness of consent given, reviewing courts will not disturb such a decision on appeal if the trial court's finding is based on reasonable inferences to be drawn from the record. *State v. Post,* 98 Idaho 834, 837, 573 P.2d 153, 156 (1978), *overruled on other grounds by State v. Bottleson,* 102 Idaho 90, 94, 625 P.2d 1093, 1097 (1981). Whether consent to a search was voluntary is a question of fact and reviewing courts accept the factual findings of a trial court unless they are clearly erroneous. *State v. McCall,* 135 Idaho 885, 886, 26 P.3d 1222, 1223 (2001).

III. ANALYSIS.

This case presents several issues. The first issue is whether there is any proof that Gouge agreed to supplemental terms and conditions presented by her probation officer. The Court concludes there is not.

The second issue is whether Gouge gave Officer Mongan voluntary consent. The Court finds she did.

Gouge bases her Motion to Suppress on the claim that Officer Mongan's search of Gouge was a probation search. The Court does not find such to be the case. The Court does find that if the search of Gouge was a probation search, a secondary issue arises as to whether Gouge's consent to searches of her person by all members of law enforcement, which she gave when she agreed to comply with Probation and Parole's supplemental conditions, was coerced. Assuming this was a probation search (which the Court does not find) and assuming there is evidence somewhere that Gouge was presented with supplemental terms and conditions of probation (with which the Court was not presented), the Court finds such consent by Gouge given to her probation officer, was coerced. A tertiary issue then arises as to whether Gouge consented to the search at issue in this case when she agreed to the terms and conditions of probation ordered by this Court, which included a limited Fourth Amendment waiver. The Court finds Gouge did not consent to the Officer Mongan's search by law enforcement when she agreed to the terms and conditions of her probation. A fourth issue then arises as to whether Officer Mongan had reasonable grounds to believe Gouge had committed a probation violation. The Court finds that exception to the warrant requirement does not apply in this case. Each of these issues are discussed separately below.

1. There is No Evidence as to Supplemental Terms and Conditions of Probation.

As mentioned above, the claim is made by Gouge in her briefing that, "Probation and Parole later provided her with their own conditions and indicated she must consent to searches of her person by all members of law enforcement." Mem. Supp. Mot. Suppress 1–2. However, there is no evidence of such. Gouge testified at her hearing on her motion

to suppress that "I signed the paper saying that I have to consent to a search." However, Gouge did not testify as to the language of such document, or whether the language even included law enforcement. Gouge's Motion to Suppress based on a probation search must be denied for a lack of proof on the part of Gouge, the moving party. She has not put on any proof that she was required to consent to a request by law enforcement to search her person.

2. Gouge Gave Consent to a Police Search.

The Court finds this is a police search to which consent was given by Gouge, and not a probation search. In making this finding, the Court *assumes* that somewhere there exists a document with Gouge's signature on it, upon which she acknowledges she consents to searches of her person by her probation officer and law enforcement.

Given that assumption, the Court finds the police search by Officer Mongan was made in the context of a consensual encounter, and that Gouge voluntarily consented to the search of her person. The search was a consensual encounter because Gouge was not coerced to consent. Officer Mongan at no time raised his voice, he was extremely cordial throughout the six minute encounter that led to Gouge's detention. Officer Mongan complimented the occupants on their honesty. He did not draw his weapon. It was daylight. Officer Mongan parked so that the pickup could leave. Officer Mongan made it clear why he was talking to them, which was because he was looking for a person named Michael Withey who had a warrant, and the male seated in the middle initially identified himself only as Michael. The driver of the pickup, Amanda McKinnon, asked Officer Mongan "Can I have your card", to which he responded "Yeah" and he immediately handed one to her. This was less than two minutes into the encounter.

Then Officer Mongan asked all the occupants "Are you guys on probation?", and Withey responded first "Yes", then Gouge answered "I am." Officer Mongan asked "For what?" Withey answered first, "possession of methamphetamine" and Gouge answered, "same". Not in response to any question, Gouge then stated she did not know Withey was on probation and had just met him two days previous, and they'd both just met the driver, MacKinnon when she gave them a ride. Officer Mongan then asked MacKinnon if it gets cold in the cab when she drives, since the pickup lacked a back window. The following exchange then occurred:

Officer Mongan:	So, who's your guys P.O.'s?
Withey:	Mine is, uh…Jessica….
Gouge:	Mine is Jennifer Carter.
Withey:	Mine is Jennifer Carter.
Officer Mongan:	So you guys have the same P.O. too, huh?
Gouge:	I just got on probation, so…I even forgot that I was supposed to tell you. Sorry.
Officer Mongan:	That's alright, you guys are being honest now. So [as] part of your probation do you guys sign a search clause?
Gouge:	(nods head yes, then answers "Yes")
Officer Mongan:	Would you guys both be willing to consent to a search of your person?
Withey:	K.
Gouge:	(nods yes)
Officer Mongan:	Yes?
Gouge:	Yeah.
Officer Mongan:	So I'm going to wait until my partner gets here and then we'll do that. Alright? We just like to do probation checks, make sure you guys are, you know, following along and not doing things that are going to get you into trouble again. Make sense?
Withey:	Yup.
Officer Mongan:	Alright, Clarissa (Gouge) I'll have you go ahead and step out and go back over here. (Gouge steps out, goes to the back passenger side of the truck, Officer Mongan stays at the cab, then another patrol vehicle arrives)
Officer Mongan:	Alright, I'll have you step outside too. (Withey steps out) Clarissa, is that your purse there on the seat?
Gouge:	Mmm.
Officer Mongan:	OK. Is anything else in the vehicle yours?
Gouge:	Hmm umm. (shakes her head no) (She turns around, without being asked).
Officer Mongan:	I'll have you put your hands behind your back, I'm not

handcuffing you now, alright.

Officer Mongan then conducted a search of Gouge's person. Again, this Court finds this to be a consensual police encounter which resulted in a consensual search of Gouge. The Court finds Gouge responded in the affirmative to Officer Mongan's question "Would you guys both be willing to consent to a search of your person?" The Court finds Gouge's consent to be voluntary.

Whether consent to search was granted voluntarily, or was a product of coercion, is a question of fact to be determined by all the surrounding circumstances. *State v. Santana*, No. 43873, 2017 WL 875974, at *3 (Idaho Ct. App. Mar. 6, 2017) citing *State v. Hansen,* 138 Idaho 791, 796, 69 P.3d 1052, 1057 (2003)). The State must show that consent to search was not the result of duress or coercion, either direct or implied. *Id.* The voluntariness of an individual's consent to search is evaluated in light of all the circumstances. *Id.*

A "voluntary" decision, in the context of whether one has consented to a warrantless search, is one that is the product of an essentially free and unconstrained choice by its maker. *State v. Lutton,* 161 Idaho 556, __, 388 P.3d 71, 75 (Ct. App. 2017) citing *Schneckloth v. Bustamante,* 412 U.S. 218, 225, 93 S.Ct. 2041, 2046, 36 L.Ed.2d 854, 861 (1973)). The voluntariness of an individual's consent to a warrantless search is evaluated based upon the totality of the circumstances; this analysis requires consideration of subtle coercive police tactics and questions, as well as the subjective state of the party granting consent to search. *Id.* (citing *State v. Jaborra,* 143 Idaho 94, 97, 137 P.3d 481, 484 (Ct. App. 2006)).

The Court specifically finds that Officer Mongan asking if anyone was on probation, who their probation officer was, and if they signed a "search clause", is not coercion.

"Coercion" is defined as "compulsion by physical force or threat of physical force." *Coercion,* Black's Law Dictionary, (7th ed. 1999). So the fact that Gouge was on probation and may have signed a written consent for law enforcement, and was asked questions about such by Officer Mongan, is not coercion, even if the topic of probation and a written consent were directly linked to the request at the scene for ordinary consent. As set forth below, the Court finds the fact that Gouge was on probation and any written consent to a search was not directly linked to the request for ordinary consent.

It can certainly be argued that the question, "Would you guys both be willing to consent to a search of your person?", was asked in the overall context of a discussion about Gouge (and Withey) being on probation. Officer Mongan's two prior questions were about probation, and the statement made by Officer Mongan at the end of this sequence was about probation. The two questions posed at the beginning of this inquiry by Officer Mongan, "Who's your guys P.O.'s?", and "So [as] part of your probation do you guys sign a search clause?", are direct and non-deceptive questions. Gouge answered truthfully to those two questions. Next, Officer Mongan asks a direct question which is not linked to probation and which is asked of two people, "Would you guys both be willing to consent to a search of your person?"

It may be helpful for the Court to engage in four hypothetical situations. These four situations are in a continuum, from clearly a probation search, to, as the Court finds, closer to a consent search.

First hypothetical situation is as follows. Upon finding out that Gouge is on probation, Officer Mongan tells Gouge to get out of the truck, he's going to search her as part of her probation terms. This is clearly a probation search. Had Officer Mongan done that, he would have turned a consensual encounter into a probation search. And, given

the Court's probation terms compared to probation and parole's terms (if they were in as evidence), this is an illegal probation search under *Santana*, as discussed below.

The second situation is as follows. Officer Mongan instead asks, "Now, as part of your probation, your judge ordered you to submit to searches if requested by me, a peace officer, so do I have your consent to search you?" This is first of all an incorrect statement (the Court did not so order), and it is directly linked to her being on probation. This is an unfair request, due to that incorrect statement, which adds coercion. That unfair request is also directly linked to her being probation. Such a question would have turned this into a probation search, in this Court's opinion.

The third situation would be Officer Mongan instead asks, "Now as part of your probation, you signed a consent to allow searches of your person by me, a law enforcement officer, so do I have your consent to search you?" This is a correct statement (assuming there is such a document), but such statement ignores the change in the law under *Santana*, given the fact that the Court did not order her to consent to law enforcement searches, and, again, the request for her consent is clearly linked to her being on probation. This question is less coercive than the second hypothetical, since there is no false statement, but there is some coercion due to the change in the law and directly linking the question to her being on probation.

In the fourth scenario, Officer Mongan asks, "You remember you signed a search clause, so do I have your consent to search you?" That question contains no misrepresentation of fact. That statement makes no misrepresentation under *Santana*. But, that statement more clearly links the fact of her probation and the fact she's already given consent to the request for actual consent at the scene, as compared to the actual facts of the instant case. There is some, but very little coercion in this hypothetical. This

Court would find such to be a valid law enforcement or "traditional" consent, and not a probation consent.

But under the facts of this case, there is no incorrect statement made by Officer Mongan nor is any deceptive question asked by Officer Mongan. Officer Mongan asked if they'd signed a search clause, and they answered truthfully that they had. Officer Mongan's *next* question, a separate question, asked both of them whether they would consent to a search of their person, and nothing in that question was linked to the subject of probation nor was it linked to the subject of any search clause given or not given as a term of probation.

This Court finds Officer Mongan's statement at the end, "We just like to do probation checks, make sure you guys are, you know, following along and not doing things that are going to get you into trouble again. Make sense?", is of no bearing, as Officer Mongan had already obtained Gouge's consent.

Based on the entire conversation above, especially the statement at the end, it could certainly be argued that the only *reason* Officer Mongan searched Gouge was because she was on probation. The fact that only Gouge and Withey were searched also leads to that conclusion. However, what is in Officer Mongan's mind at the time as to his reason for the search, is not the question. The question is whether the actual *words* that came out of Officer Mongan's mouth caused duress or were coercive to Gouge. The Court finds the words used did not cause duress nor were they coercive. The statement made by Officer Mongan about them signing a search clause was not a false statement, and the question asked by Officer Mongan as to whether they would consent was direct and not related to probation. In addition to the actual *words* that Officer Mongan used, the Court also finds the totality of the *circumstances* (daylight, no threats, very cordial and calm

conversation back and forth between the occupants and Officer Mongan, one officer and three occupants, no weapon drawn, no overhead lights used, parked to where the pickup could leave, and an explanation given by Officer Mongan as to why he was talking to them) show this was at all times a consensual law enforcement encounter.

It can also be argued that Gouge's consent, given to Officer Mongan at the time of the search, was the result of implied coercion—Officer Mongan's questioning served to remind Gouge she was on probation and subject to search. By implication, her refusal to consent to his request to search her could result in a probation violation and imposition of her sentence and, thus, here consent was involuntary and coerced. The Court simply cannot go that far. When Officer Mongan asked, "So [as] part of your probation do you guys sign a search clause?", he didn't direct Gouge as to whom that clause was in favor, probation, or law enforcement, or both. He asked that question of two people. He simply asked as part of probation did you sign a search clause, which Gouge answered in the affirmative, presumably because doing so was speaking the truth. Officer Mongan did not ask a deceptive follow-up question such as, "You know that the search clause allows me to search you?" This Court finds that the exact language used by Officer Mongan, "Would you guys both be willing to consent to a search of your person?" did not even *imply* such a question.

Finally, the Court discusses Gouge's thoughts at the time, as they are relevant. As mentioned above, the recent decision of *Lutton*, which cites to *Jaborra*, states, "The voluntariness of an individual's consent to a warrantless search is evaluated based upon the totality of the circumstances, [t]his analysis requires consideration of subtle coercive police tactics and questions, as well as the subjective state of the party granting consent to search." *Lutton,* 161 Idzaho at __, 388 P.3d at 75 (citations omitted). When Officer

Mongan asked if he had the consent of *both* Withey and Gouge, Withey's response "K", was nearly instantaneous, and Gouge's head nod immediately after that. The short time span, and the fact that Gouge's response came second, are important to the Court in evaluating Gouge's "subjective state."

At the May 2, 2017, hearing, the following testimony by Gouge was elicited by her attorney:

> Q. [Logsdon] The only real question that I have for you, when he asked you whether or not you'd consent to the search, what…why did you do that?
> A. [Gouge] Because I was told, or I guess when I signed the paper saying that I have to consent to a search.
> Q. What piece of paper?
> A. Oh, the paper that my probation officer goes through and like this packet that they give me in the beginning of our probation.

Gouge was never asked to look at a copy or identify her probation terms and conditions, even though such were placed into evidence. Gouge was never asked what such document actually stated. Gouge was never asked whether that document required her to consent to request by her probation officer, by law enforcement officers, or both. The Court finds Gouge is credible that she *thought* she had to consent as a probationer. The Court is really giving Gouge the benefit of the doubt here. At the scene, she stated to Officer Mongan that she'd forgotten the requirement that she had to disclose to law enforcement that she is on probation. If she forgot that requirement at the scene, did she really remember what her probation terms said about requests to search made by law enforcement? Again, the Court gives Gouge the benefit of the doubt. However, the Court finds that Gouge's subjective belief that she had to consent, does not turn Officer Mongan's simple request for consent which he made to two people, into a probation search of Gouge. The Court finds that just because at the hearing Gouge testified that she recalled signing a paper requiring her to give consent, that knowledge of Gouge at the time

did not place any duress upon Gouge on March 17, 2017. The Court finds the fact that Gouge, who at the scene stated she had "just got on probation", gave consent as much because Withey gave consent, as compared to what she specifically recalled of her probation terms.

Accordingly, the Court finds Gouge gave un-coerced, voluntary consent to Officer Mongan. That ends the inquiry as to Gouge's Motion to Suppress. The remaining issues are discussed only in the alternative, as they were the sole issues which were raised by Gouge in her Motion to Suppress. As shown below, had Gouge not given voluntary consent, the Motion to Suppress would have been granted.

3. Probation Search.

While not directly stated by Gouge in her briefing, Gouge believes that the search of her person on March 17, 2017, was a probation search. Mem. Supp. Mot. Suppress 1–2. The State argues that Officer Mongan did not conduct the search of Gouge pursuant to her "probation agreement." Br. Opp'n Mot. Suppress 5. The State notes that "[p]robation and possible terms were discussed, but that was not the basis for the search. It was simply the consent given." *Id.* As mentioned above, the State's argument is persuasive and supported by the State's Exhibit 1.

If Officer Mongan's search of Gouge was conducted pursuant to the conditions of Gouge's probation, it would have been illegal. As mentioned above, during the stop, Officer Mongan asked Gouge and the pickup's other two occupants if they were on probation. Gouge and Michael Withey said yes. The exchange noted above then occurred. Officer Mongan then asked Gouge to step out of the pickup, and he eventually conducted a search of her person. If Officer Mongan made it clear he was going to search Gouge only because she was on probation (as shown above, the Court finds he obtained Gouge's

voluntary consent), and the only reason Gouge consented to that search was because she was on probation and mistakenly believed she had to consent to law enforcement requests to search, which she did testify to, again, giving her the benefit of the doubt, then no other conclusion could be reached other than the search of Gouge was a probation search. If there was a probation search, the following issues must be explored.

4. The Supplemental Probation Condition Imposed by Probation and Parole Requiring Gouge to Consent to Searches of Her Person at the Request of All Members of Law Enforcement, Was Coerced.

Gouge argues that her consent to the search of her person was coerced. Mem. Supp. Mot. Suppress 3. Specifically, she states that consenting to searches of her person upon the request of law enforcement was not a condition of her probation. *Id.* at 1. Despite that, according to Gouge, Probation and Parole later provided her with their own supplemental conditions and indicated she must consent to searches of her person by all members of law enforcement. *Id.* at 1–2. Again, there is no evidence of this, the Court makes the assumption such does exist, and the analysis in this section is consistent with that assumption.

Gouge cites to *State v. Santana*, No. 43873, 2017 WL 875974 (Idaho Ct. App. Mar. 6, 2017), in support of her argument and for the proposition that "Fourth Amendment waivers made a term of a defendant's probation by a probation officer are invalid and a product of coercion." Mem. Supp. Mot. Suppress 3. Because the State does not consider Officer Mongan's search to be a probation search, it does not respond to Gouge's argument. In light of the Idaho Court of Appeals' recent decision in *State v. Santana*, this Court agrees with Gouge and finds that, if this was a probation search (again, the Court does not find such), then her consent to searches of her person by all members of law

enforcement which she gave when she agreed to comply with Probation and Parole's supplemental condition, was coerced.

The Fourth Amendment to the U.S. Constitution and Article I, § 17 of the Idaho Constitution prohibit unreasonable searches and seizures by government officials. U.S. Const. amend. IV; Idaho Const. art. I, § 17; *State v. Spencer*, 139 Idaho 736, 738, 85 P.3d 1135, 1137 (Ct. App. 2004). A warrantless search is "considered unreasonable per se unless [it] come[s] within one of the few specifically established and well-delineated exceptions to the warrant requirement." *State v. Geissler*, 134 Idaho 902, 904, 11 P.3d 1120, 1122 (Ct. App. 2000) (citing *California v Acevedo*, 500 U.S. 565, 580, 111 S. Ct. 1982, 1991, 114 L. Ed. 2d 619, 634 (1991); *State v. Henderson*, 114 Idaho 293, 295, 756 P.2d 1057, 1059 (1988)). One exception to the warrant requirement is a search conducted pursuant to an individual's consent. *State v. Armstrong*, 158 Idaho 364, 370, 347 P.3d 1025, 1031 (Ct. App. 2015) (citations omitted). "This exception encompasses Fourth Amendment waivers, which operate as consents to search, given as a condition of probation or parole." *Id.* (citing *State v. Purdum*, 147 Idaho 206, 208, 207 P.3d 182, 184 (2009); *State v. Gawron*, 223 Idaho 841, 843, 736 P.2d 1295, 1297 (1987); *State v. Pecor*, 132 Idaho 359, 364, 972 P.2d 737, 742 (Ct. App. 1998)).

The State has the burden of proving consent by a preponderance of the evidence. *State v. Johnson*, 110 Idaho 516, 522, 716 P.2d 1288, 1294 (1986).

> The [S]tate must show that consent was not the result of duress or coercion, either direct or implied. *Schneckloth v. Bustamonte*, 412 U.S. 218, 248, 93 S. Ct. 2041, 2058, 36 L. Ed. 2d 854, 875 (1973); *State v. Whiteley*, 124 Idaho 261, 264, 858 P.2d 800, 803 (Ct. App. 1993). The voluntariness of an individual's consent is evaluated in light of all the circumstances. *Whiteley*, 124 Idaho at 264, 858 P.2d at 803. Consent to search may be in the form of words, gestures, or conduct. *State v. Knapp*, 120 Idaho 343, 348, 815 P.2d 1083, 1088 (Ct. App. 1991). Whether consent was granted voluntarily, or was a product of coercion, is a question of fact to be determined by all the surrounding circumstances.

Santana, 2017 WL 875974, at *3; *see also State v. Fleenor*, 133 Idaho 552, 554–55, 989 P.2d 784, 786–87 (Ct. App. 1999).

In *State v. Santana*, Bryan Santana (Santana) was placed on probation. *Santana*, 2017 WL 875974, at *1. At sentencing, the magistrate judge did not require Santana to waive his Fourth Amendment rights and consent to searches of his residence as a condition of probation. *Id.* However, Santana was ordered to comply with all rules and reporting requirements of the probation department. *Id.* Approximately six weeks after sentencing, "Santana's probation officer required Santana to sign a probation agreement. The probation agreement contained a Fourth Amendment waiver, authorizing any law enforcement officer, peace officer or probation officer to search Santana and his residence." *Id.* Santana signed the probation agreement. *Id.* Santana's probation officer and a police officer eventually searched Santana's house without a warrant but pursuant to the probation agreement's Fourth Amendment waiver. *Id.* Santana was not present for that search, and he did not consent to the search at the time of the search. *Id.* Drugs were discovered, and Santana subsequently filed a motion to suppress. *Id.* In support of his motion to suppress, he argued that the "search was conducted without his consent and that the State lacked the requisite reasonable grounds." *Id.*

The Idaho Court of Appeals, in part, agreed with Santana's argument. *Id.* at *5 (concluding that Santana did not consent to the search but finding that his probation officer had reasonable grounds to conduct the search). It held that "Santana[']s consent[] to the search of his residence by signing the probation agreement . . . was the product of coercion." *Id.* at *3. The consent was coerced because Santana's probation officer required him to sign the probation agreement, Santana's attorney was not present, and Santana was not told that he had a right to an attorney. *Id.* In other words, Santana did

not choose to waive his Fourth Amendments rights. Instead, he signed the probation agreement waiving his rights because he believed he had to as condition of his probation.

Gouge's case differs from *Santana* in two ways: (1) the terms and conditions of Gouge's probation, imposed at sentencing, included a Fourth Amendment waiver requiring Gouge to consent to searches at the request of her probation officer, and (2) Gouge was (obviously) present for the search and verbally consented to it at the time of the search. However, as noted by Gouge, there are important similarities between this case and *State v. Santana*. Like in *State v. Santana*, Probation and Parole presented Gouge with supplemental probation conditions and required her to comply with those conditions; one supplemental condition required Gouge to submit to searches of her person at the request of not only her probation officer (as ordered by this Court), but at the request of all members of law enforcement (not in this Court's order); and Gouge agreed to that condition presumably because Probation and Parole required her agreement. These facts suggest that while Gouge voluntarily agreed at sentencing to a limited Fourth Amendment waiver (searches at the request of a probation officer), she did not voluntarily agree to a Fourth Amendment waiver that required her to consent to searches at the request of *all law enforcement members*. Instead, as in *Santana*, Gouge agreed to comply with Probation and Parole's expanded waiver because she believed doing so was a condition of her probation. Thus, to the extent that Gouge consented to the search of her person by law enforcement when she agreed to comply with Probation and Parole's supplemental condition, her consent was coerced.

Although not discussed by Gouge, the Court finds that under *Santana*, the alleged condition imposed by Probation and Parole in Gouge's case impermissibly modified a substantive condition of Gouge's probation by expanding the scope of Gouge's Fourth

Amendment waiver to include all members of law enforcement. In *Santana*, the Idaho Court of Appeals noted I.C. § 19-2602(2) vests the sentencing court with the authority to set the substantive terms and conditions of probation, and that "the statute does not even mention the probation department." *Id.* at *2. "The Idaho Supreme Court has stated that the probation order, not the probation agreement, sets the conditions of probation. *Id.* (citing *Franklin v. State,* 87 Idaho 291, 296, 392 P.2d 552, 554 (1964)). The Idaho Court of Appeals held that "only the sentencing court may set the substantive conditions of probation" in its probation order, while the probation agreement may set forth "how the substantive conditions will be enforced." *Id.* at *3. That is because the defendant must have notice of the substantive conditions of probation before he or she decides to accept or decline probation. *Id.* The court provided the following example:

> the probation order may require a probationer to submit to drug tests as a condition of probation. The probation agreement could then set forth the time and place the drug tests would be conducted; however, it could not expand the condition to include a search of the probationer's vehicle at the time of the drug test.

Id. Likewise, in this case, the Court imposed a substantive condition when it required Gouge to consent to searches at the request of her probation officer. As the example illustrates, Probation and Parole cannot expand that condition to require Gouge to consent to searches at the request of all members of law enforcement. To allow Probation and Parole to do so would deprive Gouge of the requisite notice, preventing her from making an informed decision as to whether the terms and conditions of probation were, in her view, acceptable or too onerous.

5. The Scope of Gouge's Fourth Amendment Waiver in the Court-Ordered Terms and Conditions of Probation Was Exceeded.

Although not discussed by either Gouge or the State, the next issue is whether Gouge's Fourth Amendment waiver, as ordered by this Court, is sufficient to support

Officer Mongan's search of Gouge. In other words, the issue is the scope of Gouge's consent as provided in her court-ordered probation terms. "When the basis for a search is consent, the search must conform to the limitations placed upon the right granted by the consent." *Santana*, 2017 WL 875974, at *3. "The standard for measuring the scope of consent under the Fourth Amendment is that of objective reasonableness." *State v. Turek*, 150 Idaho 745, 749, 250 P.3d 796, 800 (Ct. App. 2011).

Idaho appellate courts have considered the scope of a probationer's or parolee's consent to search given as a condition of probation or parole in several cases. *See, e.g.*, *Garwon*, 112 Idaho 841, 736 P.2d 1295; *Turek*, 150 Idaho 745, 250 P.3d 796; *Armstrong*, 158 Idaho 364, 347 P.3d 1025. In *State v. Armstong*, 158 Idaho 364, 347 P.3d 1025 (Ct. App. 2015), the Idaho Court of Appeals considered whether a police officer's warrantless search of Armstrong, a parolee, exceeded the scope of consent contained in Armstrong's Fourth Amendment waiver. The waiver required Armstrong to "submit to a search of person or property, to include residence and vehicle, at any time and place by any agent of Field and Community Services[, now known as the Bureau of Probation and Parole,] and s/he does waive constitutional right to be free from such searches." *Id.* at 366, 347 P.3d at 1027. Armstrong argued that his Fourth Amendment waiver applied only to searches by Probation and Parole agents, not a search conducted by a local police officer. *Id.* The Idaho Court of Appeals disagreed and held that the police officer's search did not exceed the scope of Armstrong's consent because (1) the plain language of the waiver did not limit searches to searches performed only by a parole officer, but included searches performed by "any agent" of Probation and Parole, and (2) the police officer was acting as an agent of Probation and Parole when he searched Armstrong. *Id.* at 371, 347 P.3d at 1032. It explained that the search

> was performed by local police at the express request of Probation and Parole. The parole officer dictated the scope of the search within the parameters of [the parolee's] Fourth Amendment waiver by requesting that the officers use a drug dog to search [the parolee's] vehicle. Therefore, the local police performed the search at the request and under the supervision of the parole officer, acting as temporary, limited representatives of Probation and Parole.

Id.

In this case, Gouge, a probationer, agreed to a limited waiver of her Fourth Amendment rights when she accepted the terms and conditions of probation ordered by this Court. That waiver required Gouge to "submit to searches of [her] person, personal property, automobiles, and residence without a search warrant at the request of *[her] probation officer*." Mem. Supp. Mot. Supp. (as attached) (emphasis added). Unlike the consent to search condition at issue in *State v. Armstrong*, Gouge's Fourth Amendment waiver does not include the "any agent" language. Moreover, that condition did not expressly require Gouge to consent to searches of her person at the request of law enforcement. Rather, the plain language of Gouge's the probation terms and conditions only require her to consent to warrantless searches of her person at the request of her probation officer.

Further, there is no evidence that Gouge's probation officer directed Officer Mongan to conduct the search of Gouge. The Idaho Court of Appeals has explained that "if a parole or probation officer is justified in making a search, . . . he may enlist the aid of police officers in performing his duty." *State v. Pinson*, 104 Idaho 227, 233, 657 P.2d 1095, 1101 (Ct. App. 1983). However, "it is impermissible for the police to use parole [or probation] officers in lieu of a warrant to search, when conducting a criminal investigation . . . ." *State v. Vega*, 110 Idaho 685, 688, 718 P.2d 598, 602 (Ct. App. 1986). "Courts have perceived a distinction between searches of probationers conducted by a supervising probation

officer and those conducted by the police. The 'special and unique' interest which probation authorities have in invading the privacy of probationers 'does not extend to law enforcement officers.'" *Pinson*, 104 Idaho at 233, 657 P.2d at 1101 (quoting *United States v. Consuelo-Gonzalaz*, 521 F.2d 259, 266 (9th Cir. 1975)).

6. No Reasonable Grounds Exist as the Basis for the Warrantless Search of Gouge as a Probationer.

Even without consent, a probationer may be subject to a warrantless search by a probation officer under another exception to the warrant requirement. That exception permits a probation officer to conduct a warrantless search of a probationer when the search is conducted pursuant to the administration of probation or parole. *Pinson*, 104 Idaho at 233, 657 P.2d at 1101.

> The state must show that any such warrantless search conducted by the parole [or probation] officer is reasonable. A parole [or probation] officer may make a warrantless search of a parolee [or probationer] and his residence if the officer has reasonable grounds to believe that the parolee [or probationer] has violated some parole [or probation] condition and the search is reasonably related to disclosure or confirmation of that violation.

Vega, 110 Idaho at 687, 718 P.2d at 600 (citations omitted). However, a probation officer's authority to conduct a warrantless search of a probationer based upon reasonable grounds does not extend to police officers. Moreover, while a probation or parole officer may enlist the aid of police officers when conducting a probation search and "nothing precludes mutually beneficial cooperation between law enforcement officials and parole [or probation] officers, including law enforcement assistance with a parole [or probation] officer's request to perform a parole [or probation] search," there is no evidence in this case that Gouge's probation officer enlisted the aid of Officer Mongan in conducting a search of Gouge's person. *Id.*; *Vega*, 110 Idaho at 688, 718 P.2d at 601; *Armstrong*, 158 Idaho at 370, 347

P.3d at 1031. As a result, this exception to the warrant requirement is inapplicable in this case.

IV. CONCLUSION AND ORDER.

The search of Gouge's person was conducted without a warrant, but Gouge gave voluntary consent. The Motion to Suppress must be denied.

IT IS HEREBY ORDERED that CLARISSA MAE GOUGE's Motion to Suppress is **DENIED** due to a lack of proof.

IT IS HEREBY ORDERED that CLARISSA MAE GOUGE's Motion to Suppress is **DENIED** because the search of Gouge was conducted pursuant to Gouge's voluntary consent.

DATED this 3rd day of May, 2017

_____
JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of May, 2017 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney - Jay Logsdon
Prosecuting Attorney – Rebecca Perez

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY:_____
Deputy