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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 00-1260

MARK JAMES KNIGHTS. :

-----X

Washington, D.C.

Tuesday, November 6, 2001

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:02 a.m.

APPEARANCES:

MALCOM L. STEWART, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of the Petitioner.

HILARY A. FOX, ESQ., Assistant Federal Public Defender,
Oakland, California; on behalf of the Respondent.

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P R O C E E D I N G S

(11:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 00-1260, the United States v. Mark James Knights.

Mr. Stewart.

ORAL ARGUMENT OF MALCOM L. STEWART

ON BEHALF OF THE PETITIONER

MR. STEWART: Mr. Chief Justice, and may it please the Court:

In May 1998, respondent was convicted of a misdemeanor drug offense in a California court and was placed on 3 years' probation. One term of his probation required respondent to submit to searches of his person or property, quote, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer. The acknowledgement signed by respondent stated: I have received a copy, read, and understand the above terms and conditions of probation and agree to abide by same.

The Supreme Court of California has long held that such an acknowledgement is a voluntary and enforceable consent to future searches because, under California law, a defendant may not be compelled to accept probation, but may insist instead on serving the term of

1 confinement that is authorized by law.

2 Less than a week after respondent was placed on
3 probation, State police came to suspect that he was
4 involved in an act of vandalism against electric and
5 telecommunications facilities that caused approximately
6 \$1.5 million in damage. Relying on the search condition,
7 police searched respondent's residence and found evidence
8 implicating him in the crime.

9 Respondent was subsequently indicted in Federal
10 court on charges of conspiracy to commit arson and being a
11 felon in possession of ammunition.

12 QUESTION: Now, Mr. -- may I ask this question?
13 The actual search was conducted by State officers, as I
14 understand it.

15 MR. STEWART: That's correct.

16 QUESTION: Do you think the consent would have
17 applied equally to Federal officers?

18 MR. STEWART: It would have. By its terms, it
19 said any probation officer or law enforcement officer.
20 I'm not aware of any cases in the California system in
21 which the search condition has actually been invoked by a
22 Federal officer, but I think it would apply by its terms
23 to such searches.

24 QUESTION: What about a law enforcement officer
25 from Nevada?

1 MR. STEWART: I -- I think that's correct. It's
2 unlikely that such a search would occur because presumably
3 one of the terms of probation would be that the -- the
4 respondent would be required to remain within the State of
5 California, and it's -- it's unlikely that he would be
6 searched in California by Nevada officers. But I think if
7 -- if such an unlikely scenario unfolded --

8 QUESTION: Well, it could be on the basis of a
9 preexisting criminal situation. I mean, he might have
10 committed a crime in Nevada 2 years ago.

11 MR. STEWART: That's correct. It could have
12 happened.

13 QUESTION: But what do you think? Would it
14 apply to a Nevada officer as well, do you think?

15 MR. STEWART: I think it would. The consent
16 would apply by its terms because it refers, without
17 qualification, to any law enforcement officer.

18 QUESTION: Well, I assume that -- doesn't that
19 reasonably mean a law enforcement officer who has
20 authority?

21 MR. STEWART: I mean, there might be some
22 independent basis for objecting to the presence of the --
23 the officer from outside the State, but I -- I don't think
24 that the consent would fail to extend to --

25 QUESTION: Well, not -- I mean, if you have

1 consent, I assume it could be, you know, a law enforcement
2 officer from Afghanistan.

3 (Laughter.)

4 MR. STEWART: Well, the -- the Supreme Court --

5 QUESTION: Don't you think the consent is
6 reasonably understood to be limited to a law enforcement
7 officer who has authority under the applicable law of the
8 jurisdiction?

9 MR. STEWART: I think the -- I think that may be
10 right --

11 QUESTION: Which would include a Federal
12 officer --

13 MR. STEWART: And it might include --

14 QUESTION: -- but not -- not an Afghan officer.

15 MR. STEWART: Well, it might -- it might include
16 a Nevada officer, and if -- if under the circumstances
17 Justice Stevens posits, there were actually authority for
18 a Nevada officer to -- to be on the premises.

19 In any event --

20 QUESTION: Well, but isn't -- doesn't your
21 argument have an even narrower consequence? Because part
22 of your argument, which I -- I want to go into, rests upon
23 the fact that if he didn't consent, the State could --
24 could commit him, could put him -- put him in the house of
25 correction. And you're saying, well, a person, in effect,

1 can consent to bargain his way out of that more -- more
2 serious imposition, but that suggests that the only thing
3 that he's freely consenting to is the avoidance of
4 something that the State could do to him. The Federal
5 Government couldn't do it to him. Nevada couldn't to him,
6 and Afghanistan couldn't do it to him. So, doesn't --
7 doesn't that suggest that the only thing that he's
8 consenting to is what he has to consent to, and that is to
9 let California people search him so he doesn't have to go
10 behind bars now?

11 MR. STEWART: Well, the Supreme Court of
12 California has construed the consent to -- not to apply to
13 searches that are conducted for purposes of harassment or
14 in an unreasonable manner.

15 QUESTION: Well, but what about my -- what about
16 my question? If -- if there is significance in the -- in
17 your argument, and I take it there is. If there is
18 significance in the fact that California can put him
19 behind bars if he doesn't agree, doesn't it follow that
20 his consent is likewise limited, i.e., limited to agreeing
21 to let officers of the State that could put him behind
22 bars search him?

23 MR. STEWART: No. I don't -- I don't think that
24 follows. That is, the reason that California insists in
25 many cases upon a waiver of Fourth Amendment rights as a

1 condition of release on probation is that it wants to
2 ensure that there will be no unnecessary barriers to
3 monitoring the individual's compliance with the terms of
4 his probation.

5 QUESTION: That is to say monitoring by
6 California.

7 MR. STEWART: Well, it wouldn't -- it would
8 extend beyond monitoring by California, because one of the
9 terms of probation is that the individual avoid violations
10 of any criminal law. That is, the individual would be in
11 violation of his probation if he violated --

12 QUESTION: Well, sure, I -- I understand that,
13 but it's California that monitors California probationers,
14 isn't it? It's not -- it's not Federal probation officers
15 and it's not Nevada probation officers.

16 MR. STEWART: Certainly California has the
17 primary interest in ensuring that California probationers
18 comply with the terms of their probation, but -- but it
19 would be a violation of the California probation for
20 respondent or another probationer to violate Federal law.

21 QUESTION: Oh, I -- I realize that, but I'm just
22 saying -- well, let me -- let me put the question to you
23 blankly. What is the significance for your argument in
24 the fact that California could commit him? Is -- is --
25 are you implicitly making the argument that because

1 California could commit him, California could do something
2 lesser than committing him; i.e., it could let him out
3 subject to a limitation on Fourth Amendment rights? Is --
4 is that your argument?

5 MR. STEWART: We're not making that argument all
6 the way because there would be some possible --

7 QUESTION: Because if you made that argument all
8 the way there would be no significance in the -- in the
9 agreement, would there?

10 MR. STEWART: To take an example of --

11 QUESTION: Would -- would there? If that were
12 your argument, we would need an agreement.

13 MR. STEWART: I think that's right.

14 QUESTION: Okay, so that's not your argument.

15 MR. STEWART: And to take an --

16 QUESTION: What then is the significance of the
17 power of California to commit him?

18 MR. STEWART: I think the significance is that
19 this is -- that the defining characteristic of
20 probationers is that they have recently been convicted of
21 criminal offenses, and the premise of the institution of
22 probation, as the Court said in Griffin, is that a
23 probationer is more likely than the average citizen to
24 violate the law. And one possible way of dealing,
25 obviously, with people who've recently been convicted of

1 crimes is to incarcerate them to minimize the -- the
2 likelihood that they will commit future criminal offenses.

3 QUESTION: All right. Doesn't it boil down then
4 to saying that the significance of the conviction is
5 simply that it presents the occasion for this agreement
6 and that it's the agreement that is really what is
7 significant here?

8 MR. STEWART: I mean, it --

9 QUESTION: Everything stands or falls on the
10 fact that there's an agreement. Isn't that what your
11 position boils down to?

12 MR. STEWART: Well, everything stands or falls
13 on the fact that there is a conviction. That is, it -- we
14 think it would be the case that even if --

15 QUESTION: Well, if there were no conviction,
16 there would be no occasion for the agreement. They
17 wouldn't be there. They wouldn't be standing in court.

18 But once there is a conviction and the occasion
19 has presented itself, I don't see what in your argument
20 goes beyond the significance of the agreement itself.

21 MR. STEWART: We would say that even if there
22 had been no agreement -- that is, even if it were the case
23 under California law, as it is under Federal law, that an
24 individual who has no legal right to -- that an individual
25 has no legal right to refuse probation, even if probation

1 were a sentence that were imposed upon the defendant
2 without his consent -- we -- we would still argue that the
3 search condition is a reasonable term of probation.

4 QUESTION: Okay. But in that case, you would be
5 saying that because California had power to deal with him
6 at that point, it had power, in effect, to limit his
7 Fourth Amendment rights.

8 MR. STEWART: Let me give an example of --

9 QUESTION: No, but isn't -- isn't that what
10 you're saying?

11 MR. STEWART: That is almost what I'm saying,
12 but let -- let me give an --

13 QUESTION: But there's no -- I mean, there's no
14 general rule across the board that I know of that because
15 someone has been convicted, the State, in effect, can --
16 can limit bill of rights entitlements as a general rule.

17 MR. STEWART: Let me give an example of why
18 it's --

19 QUESTION: Is -- am I right on that?

20 MR. STEWART: I think that's right, and let me
21 give an example of why we're not going quite all the way
22 and why we think you're correct.

23 For instance, this Court held in *Bell v.*
24 *Wolfish*, which is not cited in our brief, but it's in 441
25 U.S., that prison officials may preclude inmates from

1 receiving hard cover books from persons other than
2 booksellers or bookstores. And the rationale for that
3 restriction was that hard cover books could be used to
4 smuggle contraband into the institution. We think it's
5 very unlikely that the State could impose a similar
6 restriction on probationers because once an individual is
7 allowed to circulate in the community, the likelihood that
8 his receipt of hard cover books will add a meaningful
9 increment of danger that he will possess contraband would
10 be pretty insignificant.

11 QUESTION: Right. It's the specific
12 relationship between the State and the prisoner at that
13 time that governs, in effect, what the State can do to --
14 to limit rights.

15 MR. STEWART: That's correct.

16 QUESTION: So, the same rule would apply in the
17 State as -- as probationary supervisor vis-a-vis
18 probationer. Right?

19 MR. STEWART: That -- that is correct. Our --

20 QUESTION: And doesn't it follow from that then
21 that the State's right to limit is itself limited by the
22 State's interest in supervising probation, as distinct
23 from the State's interest as a general enforcer of the
24 criminal law?

25 MR. STEWART: I think it's correct that the

1 State has an interest. I wouldn't quite put it as the
2 State has an interest in supervising probation. The State
3 has an interest in seeing to it that adequate measures are
4 taken to ensure that a probationer doesn't violate the
5 terms of his conditional release.

6 And if -- if one of the dangers that the State
7 fears, when a probationer is released into the community,
8 is that he may commit Federal crimes as -- in addition to
9 State crimes, it may reasonably choose to subject him, in
10 effect, to increased monitoring by Federal officials by
11 saying that he will have no right to demand the judicial
12 warrant even as to searches by -- by those officials. So,
13 we think that the -- a term of release like that is
14 reasonably related to the purposes and conditions --

15 QUESTION: Okay. Does that -- does that mean
16 then, at this point in the argument, that you're relying
17 on the State's power as -- as the -- as the State vis-a-
18 vis a convict for your position rather than the convict's
19 agreement for your position?

20 MR. STEWART: We -- we are relying on both. We
21 are saying --

22 QUESTION: But what does it -- I mean, if -- if
23 your last argument is sound, what does the agreement add?

24 MR. STEWART: I mean, the agreement provides an
25 additional check, an additional means of assurance that

1 the conditions of probation are not unduly onerous. The
2 fact --

3 QUESTION: Isn't the -- isn't the agreement, if
4 you're going to talk about it in realistic terms, simply
5 notice? This is not something that the prisoner can
6 negotiate. This is a package deal. This is what
7 probation is. If you're on probation, these are the
8 conditions. So, doesn't that -- that agreement -- the
9 word agreement seems to me not quite right to describe a
10 situation where the defendant really has no choice. This
11 is probation. This is the package that comes with
12 probation and that's it.

13 MR. STEWART: We would --

14 QUESTION: Well, doesn't the prisoner have the
15 power to say, no, I don't want probation? Usually that
16 extends much longer than a jail term. I'd rather go to
17 jail. I know when I used to sentence criminal defendants,
18 many times they'd make that choice. They'd say I'd rather
19 take a short jail sentence and get the government out of
20 my business than to accept a longer probation term on
21 these conditions. Don't they make a choice sometimes?

22 MR. STEWART: It happens rarely but it does
23 happen. And it is an agreement. That is, the individual
24 admittedly is faced with two options --

25 QUESTION: All right. What about the person for

1 whom there is no jail term? And I think you conceded
2 there is a category where probation is the only
3 punishment.

4 MR. STEWART: No. Probation may be the only
5 punishment that is actually imposed in a particular case,
6 but we -- we certainly don't concede in this case that the
7 individual had no choice. The individual could have
8 insisted upon --

9 QUESTION: But you're -- you're asking for a
10 rule across the board. And so, I'm asking you, what about
11 the category of case for which the prescribed punishment
12 is probation? Period.

13 MR. STEWART: It's -- you're -- you're correct.
14 In the Federal system, for instance, where an individual
15 doesn't have the choice to refuse probation, it may be
16 that a condition of this sort would still be upheld. We
17 would argue that it would, but it could not be on a
18 consent theory. We would agree with you on that.

19 And to return to Justice O'Connor's point --

20 QUESTION: Was this a case where the defendant
21 had to be placed on probation? Was there not a jail term
22 that could have been imposed here?

23 MR. STEWART: There -- there was a jail term.
24 The statute provided for up to a year in prison or up to 3
25 years' probation, and the individual was placed on

1 probation for a period of 3 years.

2 And this Court has often recognized, in the
3 context of plea bargaining --

4 QUESTION: Can I just -- excuse me. Just one --
5 is it not true, though, that the Wisconsin -- the -- the
6 -- California could have insisted on the 3-year probation?

7 MR. STEWART: Yes.

8 QUESTION: Okay.

9 MR. STEWART: I'm sorry. No, it couldn't have
10 insisted on the 3-year probation. That is, if the -- if
11 the --

12 QUESTION: Is -- is that possible in California
13 that --

14 MR. STEWART: No.

15 QUESTION: -- a person could be placed on
16 probation without a willingness to be placed on probation?
17 Is there no choice given to the person convicted?

18 MR. STEWART: No. No. In California, the
19 individual could insist on imprisonment. He couldn't
20 insist on probation. That is, if the judge had wanted to
21 sentence him to prison, he couldn't have said, no, I'll
22 take the 3-year probationary term instead. But he could
23 insist on imprisonment and could refuse to be placed on
24 probation.

25 And as the Court has often recognized in the

1 plea bargaining context, often defendants will plead
2 guilty because they're faced with unattractive options.

3 QUESTION: The relevance of this is -- escapes
4 me slightly because I -- I wonder what -- I mean, you may
5 have plenty of power to impose the condition you want.
6 That's a different issue. But as far as consenting is
7 concerned, don't people get searched in prison?

8 MR. STEWART: Yes.

9 QUESTION: Okay. And don't they get searched
10 out of prison under this?

11 MR. STEWART: Yes.

12 QUESTION: Then what's his choice in respect to
13 search?

14 MR. STEWART: Well, his choice -- I mean, he --
15 the likelihood is that as a practical matter, he will have
16 more privacy when on probation than -- than when he is in
17 -- than if he were in prison. But you're right. As a
18 legal matter, he is subject to searches without any
19 requirement of individualized --

20 QUESTION: To say he consents to search without
21 his consent is like saying I consent to being a human
22 being.

23 MR. STEWART: No. I mean, to take -- to take
24 the example of -- of plea bargaining, if an individual
25 pleads guilty to a criminal offense --

1 QUESTION: Yes, I grant you he concedes -- he
2 can choose whether to be in prison or out of prison.

3 MR. STEWART: But in the --

4 QUESTION: He can't choose whether to be
5 searched or not be searched.

6 MR. STEWART: That's correct. But in the plea
7 bargaining context, if an individual pleads guilty to an
8 offense because his understanding is he'll be sentenced to
9 10 years in prison and he does it because he thinks that
10 if he goes to trial, he'll be sentenced to 20 years in
11 prison, I mean, you could say in a sense that either way
12 he's going to be placed in prison, so what's the choice?
13 But the Court has recognized that to be a meaningful
14 choice. The fact that the options are unattractive
15 doesn't negate the volitional element.

16 QUESTION: If he's in prison, can the police
17 then go to his premises? Suppose he had been put in jail
18 and not let out because they suspected that he had done
19 something much more serious. And then the law enforcement
20 officer goes into his house, no warrant, finds all the
21 same damning material. Could -- could that be done
22 without a warrant when the man is not there?

23 MR. STEWART: No. No, unless some other
24 exception to the warrant requirement applied.

25 QUESTION: So, if he were in jail, that's the

1 way he would have of protecting his house against entry
2 without a warrant.

3 MR. STEWART: I mean -- and, you know, to look
4 at it that way, you could say that probation is
5 disadvantageous because, as Justice O'Connor pointed out,
6 it may extend for a longer period of time. The point here
7 is not that the individual, in choosing probation, doesn't
8 give up anything that he might have had had he chosen
9 prison. The point is that each of the options has both
10 attractive and unattractive features and the individual
11 has the choice --

12 QUESTION: Mr. Stewart, can I ask you this
13 question? I really want to understand the Government's
14 position. It seems to me -- maybe they don't do it. I
15 thought they did, but a State could have a -- a law that
16 says if you violate this statute, your punishment shall be
17 60 days in jail and a year of probation. They could do
18 that, and that's the only -- only alternative so that
19 there is no element of consent whatsoever on the part of
20 the defendant, but the statute provides you have to
21 subject to it. And would your argument apply equally to
22 that case and to this case?

23 MR. STEWART: No, it would not. That is, we --
24 we would still take the position that such a term was
25 reasonable, but it would be a pure special needs case. We

1 would not -- if the individual had no choice but to be
2 placed on probation, there would not be a consent theory
3 available to us.

4 QUESTION: If we follow your suggested line of
5 decision and say that this was a consented-to search, can
6 we write the opinion without citing Griffin?

7 MR. STEWART: I -- I assume that you would cite
8 Griffin, but I don't think that there is anything in our
9 position that is inconsistent with Griffin. That is --

10 QUESTION: We don't need Griffin under your
11 view.

12 MR. STEWART: That's correct. We -- I think the
13 part of Griffin that is particularly helpful to us is the
14 first part of Griffin that explained why supervision and
15 monitoring of probationers is a State interest distinct
16 from enforcement of the criminal law.

17 QUESTION: But Griffin was not a consent case.

18 MR. STEWART: That's correct. There was no
19 allegation in Griffin that the individual had a right to
20 refuse probation. And I think even in the circumstances
21 presented in Griffin where the individual was placed on
22 probation without his choice, the Court was careful not to
23 suggest that the features of the constitutional -- the
24 features of the Wisconsin scheme were necessarily
25 constitutional prerequisites to a valid process. In

1 particular, in footnote 2 of the Griffin opinion, the
2 Court noted that the test for restrictions within the
3 prison is whether they are reasonably related to a
4 legitimate penological objective.

5 QUESTION: Do we say that the consent has to be
6 for a search that is substantially related to the purposes
7 of the probation; i.e., the hypothetical probation for 3
8 years but you give up your Fourth Amendment rights for
9 life?

10 MR. STEWART: I mean, I think -- yes, I think we
11 would say that for the -- for the consent to be valid, the
12 individual's waiver of rights needs to bear some
13 reasonable relationship to the fact that he's on
14 probation. For instance, we've said in our brief that the
15 State presumably could not condition release on probation
16 on an individual's agreement to refrain from criticizing
17 the Government or to refrain from engaging in religious
18 worship.

19 QUESTION: Once you --

20 QUESTION: Is that an unconstitutional
21 conditions analysis?

22 MR. STEWART: I think that's correct, that the
23 -- the Court has said that ordinarily even when the
24 Government has discretion to grant or withhold a benefit
25 entirely, it may not grant it on a relinquishment of

1 constitutional rights that bears no reasonable
2 relationship to the program at issue. So, because a
3 probationer's criticism of the Government would impair no
4 legitimate Government interests, would cause no damage
5 distinct from any other individual's criticism of the
6 Government, the strong inference would be that a State
7 that imposed that condition was simply trying to stifle
8 dissent and was attempting to use the probation condition
9 as a hook.

10 QUESTION: Once you say that, I don't see what
11 is to be gained by drawing the -- the big distinction that
12 you attempt to draw between consent and nonconsent. Once
13 you've -- once you've made that -- that line that it has
14 to be related to the Government's not just penological
15 interest, because it's certainly a punishment not to be
16 able to criticize the Government -- I guess one of the
17 punishments of being in prison, for example, is -- is the
18 inability to have sexual relationships with -- with your
19 spouse. But I -- I assume you would say that the
20 Government could not sentence you to 5 years in prison
21 plus another 5 years for no sexual relationships with your
22 spouse. Right?

23 MR. STEWART: Right.

24 QUESTION: So, somehow the -- the -- it can't be
25 a punishment. What is attached after the prison term has

1 to be related to assuring the safety of the society from
2 the individual, which this search condition would. But
3 once you say that it has to be connected that way, what do
4 you gain by saying there has to be consent?

5 MR. STEWART: Well, I think the consent --

6 QUESTION: I mean, consent or no consent, if
7 it's -- if it's connected up in that way, why isn't it
8 valid?

9 MR. STEWART: I mean, we have -- we have said --
10 I mean, I've said today that we would be here defending
11 the condition even if it were imposed on a defendant who
12 had no option to refuse probation. So, we would agree
13 that the -- the existence of consent is not in our view
14 outcome determinative. However, the -- the fact that the
15 individual has the choice whether to accept probation or
16 to insist on incarceration does provide an additional
17 check, an additional assurance that the condition is not
18 unduly onerous.

19 QUESTION: The constitutional rights he can give
20 up are related to the purpose of the enforcement. So,
21 could you require him to give up his Miranda rights?

22 And my next question would be, could you require
23 him to give up his right to be free from coerced
24 confession by brutal torture?

25 MR. STEWART: No. I mean, there would be --

1 there would be no interest --

2 QUESTION: Well, you get -- you get information
3 out of people sometimes by applying the screw. I mean,
4 there's a Government interest there and I don't -- what
5 is --

6 MR. STEWART: I don't -- I don't think the --
7 the legitimacy of using those particular methods to
8 attempt to solve as yet unanticipated crimes would vary
9 depending on whether the individual is a probationer or
10 not.

11 QUESTION: Can you consent to torture? Can you
12 consent to the elimination of your Miranda rights?
13 Wouldn't it -- wouldn't it suffice for your case to say
14 that the State can take away any of the constitutional
15 rights related to the -- the probationary nature of the --
16 of -- of the punishment? Any of those rights that a
17 person can waive?

18 MR. STEWART: I think that's probably at least,
19 if not exactly, the --

20 QUESTION: I don't think you can waive your
21 rights to torture.

22 QUESTION: But you can certainly waive your
23 right to Miranda, and you could waive your right to save
24 questioning for 3 days in a -- in a cell. Everything
25 isn't torture.

1 MR. STEWART: Well, you can -- you can waive the
2 rights that are explained to you in the -- in the Miranda
3 colloquy. That's a different thing from saying you can
4 waive your right to be informed of -- of those rights.

5 And to further elucidate what to us is the
6 significance of consent, if the terms of probation under
7 California law were much more severe -- for instance, if
8 the probationary period were 15 years rather than 3 or if
9 one of the conditions of probation was that an individual
10 had video cameras mounted in his residence so he could be
11 observed at all times -- at a certain point, you'd get to
12 a situation where lots of probationers would decide that
13 incarceration is better than this.

14 QUESTION: May I ask another question? To what
15 extent is the waiver of Fourth Amendment rights total in
16 your view? Could he, for example -- could you say he's
17 waived his right to every 6-hour body cavity searches, for
18 example, something very extreme and intrusive searches?

19 MR. STEWART: I mean, he -- he doesn't under
20 California law. That is, the California Supreme Court has
21 interpreted the consent condition as not applying to
22 searches conducted in an arbitrary or unreasonable manner
23 or for purposes of harassment. And there is a statute in
24 the California penal code governing the situations under
25 which strip searches may be conducted.

1 QUESTION: Do you think that statute is
2 constitutionally compelled?

3 MR. STEWART: I mean, there -- there may be rare
4 situations in which an individual's consent -- blanket
5 consent to searches could be enforced with --

6 QUESTION: In other words, he can waive his
7 right to be free from unreasonable searches, but not from
8 very unreasonable searches.

9 MR. STEWART: I mean, certainly the -- the type
10 of -- there -- there would have to be some justification
11 for performing the search based on the fact that he was a
12 probationer, but again --

13 QUESTION: I'll look at the laws. I had thought
14 that under California law, for a second drug offense or a
15 third drug offense, you can get lifetime probation. So,
16 would you say -- let's say for a second offense, assuming
17 you could have probation for 20 years or a lifetime, the
18 Fourth Amendment right could be surrendered for that long?

19 MR. STEWART: I mean, I think if it were for a
20 third offense, I think yes. I think the State could
21 legitimately make the judgment that a person who has three
22 times been convicted of drug offenses was, for the rest of
23 his life, meaningfully more likely to violate the criminal
24 law than the average citizen.

25 If you talked about another type of extreme

1 example -- for instance, upon conviction for a traffic
2 violation, you'll be placed on lifetime probation under
3 which you can be searched at any time -- I think it would
4 be probably be irrational for the State to say simply
5 because you were convicted of a traffic violation, we will
6 regard you 20 years down the road as being more likely
7 than the average citizen to violate the law.

8 But the -- the point I was making about the --
9 the potential terms of probation becoming more onerous, if
10 we got to a situation where because the conditions of
11 probation were especially harsh, large numbers of
12 probationers decided that incarceration is better than
13 this, then the -- an individual defendant's right to
14 choose between the two alternatives would have obvious
15 significance. It would provide an obvious degree of -- of
16 comfort that the -- that what was being placed upon him,
17 if he chose probation, was not unconstitutionally onerous.

18 QUESTION: How long back does the consent or the
19 notice apply? Suppose the law enforcement officer is
20 investigating a crime that occurred before the defendant
21 was apprehended on the charge for which the sentence is
22 probation. So, here the last act of vandalism occurred
23 after the probation sentence. Suppose all the vandalism
24 acts had occurred before he was picked up for drug
25 possession.

1 MR. STEWART: I think the consent would apply,
2 by its terms, to that situation, and it would be
3 constitutional.

4 QUESTION: And then you couldn't have the
5 purpose, well, we want to see that from the day he's put
6 on probation, he's not living a life of crime. This would
7 have been before. So, it would be hard to connect it with
8 a probation purpose.

9 MR. STEWART: I agree that the link between the
10 search that you describe and the -- the monitoring of
11 compliance with the conditions of probation would be more
12 tenuous. In this case, as you point out, the -- the
13 search was intended to and did produce evidence of a crime
14 that was committed after the individual was placed on
15 probation.

16 If I may, I'd like to reserve the remainder of
17 my time.

18 QUESTION: Very well, Mr. Stewart.

19 Ms. Fox, we'll hear from you.

20 ORAL ARGUMENT OF HILARY A. FOX

21 ON BEHALF OF THE RESPONDENT

22 MS. FOX: Mr. Chief Justice, and may it please
23 the Court:

24 Respondent's argument has two major points.

25 First, on the facts of this case, the Government has

1 failed to establish that there was an effective consent to
2 search. But second, even if the Government could
3 establish consent, California's blanket search condition,
4 which purports to permit searches at any time of the day
5 or night, by any law enforcement officer, for any reason
6 or no reason, is unenforceable.

7 With regard to the first issue, the basis for
8 the consent argument here is a one-page probation order.
9 Mr. Knights' signature appears on the order beneath a two-
10 line advisement of rights. The -- the first line advises
11 him that, should he satisfactorily complete probation, he
12 may ask to have his conviction set aside, and the second
13 sentence confirms that he has received, read, and
14 understood the terms and conditions of probation and
15 agrees to abide by same. Beneath that is a line for
16 defendant's signature, acknowledgement of receipt.

17 As Justice Ginsburg suggested earlier, this is a
18 notice provision. This is not an effective consent.
19 Moreover --

20 QUESTION: Well, does it -- does it say? Does
21 it use the term consent?

22 MS. FOX: No, Your Honor, I don't believe it
23 does.

24 QUESTION: Is it somewhere in the record?

25 MS. FOX: Yes. It's at page 50 of the joint

1 appendix, Your Honor.

2 QUESTION: Thank you.

3 QUESTION: I don't even think he agrees to them.

4 He agrees to abide by them. He agrees to abide by the
5 conditions.

6 MS. FOX: Exactly, agrees to abide by same,
7 meaning the conditions.

8 QUESTION: Well, that's certainly an agreement.
9 Whether you'd call it consent or not, it's an agreement.

10 MS. FOX: It does say agree, Your Honor.

11 QUESTION: Well, I'm not saying it just says
12 that. If he signs it, it is an agreement, is it not?

13 MS. FOX: Well, Your Honor, I'm -- I'm not sure
14 that's an accurate way to characterize it, in that with
15 this probation order, we don't know when or where Mr.
16 Knights signed it. There's no evidence.

17 QUESTION: Well, does it make a difference?

18 MS. FOX: Well, I think, Your Honor, it does in
19 terms of was this an order of the court -- it's called a
20 probation order -- that was imposed on him.

21 QUESTION: But -- but he -- he has signed his
22 name saying he agrees to abide by it. Isn't that the
23 case?

24 MS. FOX: That's correct, Your Honor. That's
25 why I was going to refer then to the Bumper case, which I

1 think is very instructive as to whether this type of
2 agreement is an enforceable consent. In *Bumper v. North*
3 *Carolina*, of course, Mrs. Bumper did agree to -- consent
4 to a search of her house, but that's because she thought
5 that the searching officers had lawful authority to search
6 her house. So, the Court concluded that her consent under
7 those circumstances was nothing more than acquiescence to
8 a show of lawful authority.

9 In this case --

10 QUESTION: When, in fact, the lawful -- the
11 authority was not lawful.

12 MS. FOX: Exactly. And our argument here, Your
13 Honor, is that the probation order with form conditions,
14 one box checked being a search condition, sets forth a
15 blanket search condition that is not constitutional and
16 not enforceable, but that Mr. Knights, in agreeing to it,
17 would have had no way of knowing --

18 QUESTION: Well, in *Bumpers*, the premise for
19 lawful authority was established without reference to the
20 argument at hand. Here you're assuming -- you're assuming
21 the premise.

22 MS. FOX: That's correct, Your Honor. In fact,
23 it's my second point.

24 QUESTION: So that *Bumpers* doesn't work.

25 MS. FOX: Well, I -- I think it does if you --

1 of course, you then accept the second point which is was
2 this blanket search authority constitutional. My position
3 is that under Griffin, clearly it's not. An easy way to
4 understand that is that this condition is not limited by
5 its terms to probationary searches in that it --

6 QUESTION: Well, but Griffin is a special needs
7 case and you might argue that this is -- has -- that if we
8 have a special needs dichotomy, we have to expand somewhat
9 the holding of -- of Griffin. But Griffin, I don't think,
10 discussed consent. As I understand it, it as not a
11 consent case. Here it's a consent case.

12 MS. FOX: Yes, Your Honor. What -- what the
13 Government, I believe, conceded is that even if they don't
14 rely on Griffin, they do have to -- have to acknowledge
15 some or find some rational relationship between the
16 condition and the needs of the probation. And here,
17 California in the Supreme Court has construed this
18 condition in the Woods case, which I cited in my brief, to
19 authorize searches targeted at third parties who are not
20 on probation.

21 QUESTION: We wouldn't have to -- we wouldn't
22 have to accept that, would we?

23 MS. FOX: Well, I believe, Your Honor, under
24 Griffin the Court would look to --

25 QUESTION: I mean, can't we say that's totally

1 wrong or say that this has nothing to do with this case?

2 What about -- what about leaving that out?

3 MS. FOX: You could, Your Honor. I was only
4 going to say that -- that we usually look to California
5 law to fix the meaning of the --

6 QUESTION: No, no. That's the meaning. Fine,
7 okay. Does this involve such a search?

8 MS. FOX: No, it doesn't.

9 QUESTION: Okay. So, we could say, applied to
10 such a search, it's unconstitutional. What about this
11 case?

12 MS. FOX: In this case --

13 QUESTION: And suppose I say you're right about
14 consent. Consent has nothing to do with it, that this is
15 a punishment. One of the objectives of punishment is what
16 used to be called incapacitation, what's now called
17 specific deterrence. Many think that's the main purpose
18 of punishment, to incapacitate this person. We
19 incapacitate him in prison and we do it, in part, by
20 searching him randomly. What about a halfway house? What
21 about home confinement? What about probation where he is
22 at home? Why would we not have the same kind of
23 incapacitation there that we have in prison, indeed, a
24 less severe form?

25 MS. FOX: Well, Your Honor, the -- Your Honor's

1 argument suggests somewhat the greater versus the
2 lesser --

3 QUESTION: No, it doesn't.

4 MS. FOX: -- argument that was raised earlier.

5 QUESTION: Nothing to do with greater versus
6 lesser. I'll take greater/greater.

7 When people are in prison, they are
8 incapacitated from committing further crime. That's the
9 purpose of punishment, a major purpose. So, why can't a
10 State say, I am going to punish you for, in part, the same
11 purpose, to incapacitate you while you are being punished,
12 and I will do the same thing we do in prison in respect to
13 that? What we do in respect to that in prison is we
14 search you randomly. When you are in the halfway house,
15 you will be searched randomly. When you are confined to
16 your house, you will be searched randomly. When you are
17 on probation, you will be searched randomly.

18 Now, my question is, why in each of those
19 instances can the State not do the same thing?

20 MS. FOX: Because, Your Honor, the rationale for
21 the limitation of prisoners' Fourth Amendment rights --
22 and they would apply also to individuals at halfway houses
23 -- is not that we take away rights as a punishment.
24 Rather, what the Court has held is that recognition of a
25 privacy right in a cell is incompatible with the unique

1 needs --

2 QUESTION: I -- I thought -- then you're saying
3 we should -- if I were to tell you in my experience, which
4 is somewhat in this area -- I've had experience -- that
5 one of the purposes of punishment is incapacitation, and
6 you're saying that we couldn't have a punishment that
7 would be designed to do that by searching -- by searching
8 people's cells randomly to be sure that they're not
9 committing crimes in -- in a prison in order to make sure
10 -- I mean, I -- I had thought -- I'm not positive, but I
11 had thought that that was an important purpose.

12 MS. FOX: Yes, it is a purpose of punishment,
13 Your Honor.

14 What I'm, I think, relying on in part is that in
15 Griffin this Court has previously held that probationers
16 do have Fourth Amendment rights, and that a probationer's
17 home, like anyone else's, is protected by the Fourth
18 Amendment.

19 QUESTION: I'm not sure the Government has even
20 argued what Justice Breyer is suggesting, namely that I --
21 it follows from what he's suggesting that you could have
22 -- you could sentence somebody to nothing but the
23 incapacitation of forfeiting their Fourth Amendment
24 rights. That is, I sentence to you 10 years of, you know,
25 warrantless searches and seizures.

1 QUESTION: That actually isn't my question.

2 QUESTION: Well --

3 (Laughter.)

4 QUESTION: My question is designed to show you
5 -- to suggest that there is a purpose in searches that is
6 related to a basic aim of punishment.

7 MS. FOX: Certainly, Your Honor.

8 QUESTION: And so my -- my point is to suggest
9 to you to ask -- answer me as to why that same purpose
10 doesn't apply when, in fact, the person is on probation.
11 I may have overstated the case. I obviously misled
12 Justice Scalia.

13 (Laughter.)

14 QUESTION: And so, I will confine, not overstate
15 so that you can answer.

16 MS. FOX: Your Honor, my answer would be that
17 any sentence imposed must be imposed within constitutional
18 limitations, and in this case, I think Griffin is an
19 essential case because Griffin helps us see what are the
20 constitutional limitations on probationers' Fourth
21 Amendment rights. Obviously, the Fourth Amendment would
22 dictate that police searches have -- be based upon a
23 warrant, issued upon probable cause, and Griffin, like TLO
24 against New Jersey, and the other special needs cases
25 issued since, recognized that there is a limited class of

1 cases in which special needs, beyond the normal needs of
2 general law enforcement, make the warrant and probable
3 cause requirements impractical. And what I would say is
4 that for a general law enforcement search, the Fourth
5 Amendment tells us that a warrant and probable cause are
6 not impractical by definition.

7 So, what we have in the probation context is a
8 special need of probation supervision, a dual need that --
9 that includes both the monitoring and protection of the
10 community, which is the Government's main focus, but in
11 addition, rehabilitation. And I submit to you that if it
12 were only that single focus of protecting the community,
13 it would not be a special need beyond the general needs of
14 law enforcement.

15 QUESTION: Are you saying, in effect, yes,
16 Justice Breyer, you -- the Government could have a -- a
17 regime of probation in which they subject you to random
18 searches, but what the Government cannot do is have a
19 regime of probation in which you are subjected to
20 nonrandom searches, searches conducted not in supervision
21 of probationers, but searches conducted in the
22 investigation of specific crimes, and in the later case,
23 the -- the Government ought to follow normal Fourth
24 Amendment standards? Is that, in effect, your answer?

25 MS. FOX: Well, no, not quite, Your Honor,

1 because I don't believe that the Court should or would
2 dispense with the reasonable suspicion requirement in this
3 situation. There are, of course, very cases --

4 QUESTION: Okay, add that to his hypo: random
5 searches with reasonable suspicion. You would then say,
6 sure, you can have a regime like that. But this is not a
7 case that involves the -- the exercise of that kind of
8 power because in this case, you weren't having random
9 searches for probation supervision based on -- on
10 reasonable suspicion. You were having a full-blown law
11 enforcement kind of search, and you should have gotten a
12 Fourth Amendment warrant. Is that --

13 MS. FOX: I believe that's -- that is correct.

14 QUESTION: Good because that's exactly where I
15 am. That's better -- that's exactly where I am. But then
16 if that's so, how do you distinguish this particular case?

17 QUESTION: Yes. Why wasn't there reasonable
18 suspicion?

19 MS. FOX: You may have gotten ahead of me.

20 (Laughter.)

21 MS. FOX: The -- first, the district court found
22 reasonable suspicion and we disputed that, but that's the
23 district court's factual finding. That alone, at least
24 under Griffin, is not enough to make it a valid special
25 needs search. This was a police investigatory search as

1 part of a 2-year investigation conducted without a
2 warrant, without probable cause.

3 So, for -- for it to be a proper probationary
4 search under Griffin, we believe it would have to satisfy
5 other requirements. First, it would have to be, Griffin
6 suggests, done at the direction of or with the advice of a
7 probation officer to show that the search was, in fact,
8 somehow related to the programmatic purpose of probation
9 supervision. And --

10 QUESTION: Well, that -- that's part of my
11 problem with your argument. Why isn't it part of the
12 programmatic purpose of probation to ensure that, A, he
13 doesn't use drugs, and B, he doesn't violate other laws?

14 MS. FOX: For this reason, Your Honor. In
15 Griffin, when it talked about the importance of deterrence
16 and -- and searches to ensure that the probationer is
17 compliant, the Court undertook a balancing of the degree
18 of intrusion and the importance of the need. And central
19 to the first factor, the degree of intrusion, was that the
20 search was only being performed by a probation officer.
21 The balancing turned out to be constitutional because it
22 was not a police officer conducting a police search.

23 QUESTION: Well, Griffin upheld a search by a
24 probation officer. I really don't think it answered all
25 these questions. I don't think it answered this question.

1 And it is a concern to me that the whole thrust
2 of releasing someone on probation after a conviction of a
3 serious crime is to try to prevent that person from
4 committing other crimes, to try to encourage the person to
5 lead a law-abiding life for a sufficient period of time
6 that he can be totally released at the end of the day with
7 safety to the public. And so, this is terribly important
8 that you provide a deterrent to people not to commit
9 further crimes, and that is exactly what this probation
10 term is all about. Why isn't that eminently reasonable?

11 MS. FOX: Your Honor, three reasons. The first
12 is --

13 QUESTION: And this very case, this person was
14 found to have all kinds of indications of having been
15 planning and perhaps having committed a number of very
16 serious offenses while on probation.

17 MS. FOX: Your Honor, now I remember two of the
18 reasons. The first is that this probation was imposed on
19 -- on my client after a conviction for a misdemeanor, and
20 the Government's arguments, and the amici arguments in
21 particular, rely tremendously on the recidivism rates for
22 felony offenders and felony probationers and fail to point
23 out that in fact the recidivism rate for misdemeanant
24 probationers is substantially lower. So, I think the --
25 the magnitude of the threat that's been suggested to the

1 Court has not been borne out by the facts.

2 QUESTION: Are you suggesting then we draw a
3 line depending upon how serious the offense is? If you
4 don't commit a serious offense, but if you -- however, at
5 some probation you could attach this condition and other
6 probation you couldn't?

7 MS. FOX: Your Honor, this condition -- I -- no.
8 And I'll get to that in a minute. I don't believe it
9 would ever be -- I can't imagine when it would be an
10 appropriate condition in light of the underpinnings of the
11 Fourth Amendment and our Constitution abhorrence for a
12 regime of unfettered search discretion. And I think
13 that's what I'd like to get with Justice O'Connor.

14 But I do think that the magnitude of the threat,
15 the Court said in Edmonds, is never determinative --

16 QUESTION: Well, then -- then one would never
17 know. A police officer would never know how a court was
18 going to react to a search on reasonable suspicion like
19 this. He -- he would have to evaluate for himself how
20 serious the offense was versus all the other balancing?

21 MS. FOX: No, absolutely not, Your Honor. The
22 -- the decision making would come at the time that the
23 court imposed sentence. Now, because what I was going to
24 get to with Justice O'Connor is that, you know,
25 fundamentally the Fourth Amendment was, as the Court is

1 well aware, adopted for many reasons, but primarily in
2 reaction to a system of general warrants, writs of
3 assistance, in which petty officials could invade
4 citizens' homes at will. That unfettered search --

5 QUESTION: Citizens who had not been convicted
6 of crimes and who had not been placed on probation.

7 MS. FOX: Yes.

8 QUESTION: This person is in a different status.

9 MS. FOX: Yes, and it's only because he's a
10 probationer that he can be searched without a warrant at
11 all. Were he not a probationer, of course, he couldn't be
12 searched by anyone, let alone a probation officer.

13 But to get back to the Justice's question, oh,
14 it's not for the officer in the field to determine. The
15 point is that the court, in imposing sentence -- and the
16 First Circuit has gone into this in the Gianetta case,
17 which we cite -- has -- Gianetta suggested that where you
18 have a State that has failed to establish any kind of
19 regulatory scheme, such as the Wisconsin scheme, that
20 would limit the search discretion and indicate when
21 searches were appropriate, then in that case, a judge
22 could still impose a search condition, but it would be
23 appropriate for the judge to make some kind of factual
24 findings --

25 QUESTION: But -- but I take it then a judge's

1 finding wouldn't be conclusive necessarily. It could be
2 attacked collaterally as not having been part of a system
3 or having been an erroneous application of the system?

4 MS. FOX: No, I -- I think what the judge would
5 -- would do, in addition to making findings, is to impose
6 a --

7 QUESTION: Well, but I'm talking --

8 MS. FOX: -- narrowly tailored search condition.

9 QUESTION: Yes, but I'm talking to you about a
10 situation where the judge says, you know, perhaps not
11 consistently with the system, but he says, in this
12 particular case, this person is subject to search on
13 reasonable suspicion. And the -- the judge says that,
14 recognizing that he has to balance perhaps the seriousness
15 of the offense, and he says, I balance it this way.

16 Now, when the person is searched and that
17 evidence is sought to be admitted at his trial, can the
18 order of the judge be collaterally attacked by saying that
19 this judge just didn't reach the right balance in this
20 case?

21 MS. FOX: Well, yes, Your Honor, though I don't
22 mean to suggest, in fact, that a condition that simply
23 required reasonable suspicion and did not ensure that it
24 was going to be probationary searches, would be
25 constitutional because the exception that we're talking

1 with here, to the Fourth Amendment, is a special needs
2 exception. And that -- that's what Griffin relied on.
3 And you only get to a special needs exception if the
4 searches that are being conducted are special need
5 searches.

6 QUESTION: Well, Griffin relied on that but did
7 not say that there's -- that's the only condition. It --
8 it said the Wisconsin Supreme Court had -- had adopted a
9 -- a different principle, and we said -- we begin the
10 opinion, we think the Wisconsin Supreme Court correctly
11 concluded that this warrantless search could not violate
12 the Fourth Amendment. To reach that result, however, we
13 find it unnecessary to embrace a new principle of law, as
14 the Wisconsin court evidently did, that any search of a
15 probationer's home by a -- satisfy the Fourth Amendment.
16 We just didn't -- didn't consider whether we needed that
17 new principle of law and maybe that new principle of law
18 is at issue in this case.

19 MS. FOX: Well, two answers to that, Your Honor.

20 QUESTION: So, I mean, don't -- don't -- I don't
21 think Griffin precludes us from --

22 MS. FOX: No, it doesn't. However, I would
23 point out first that Griffin, even the -- the Wisconsin
24 Supreme Court was only talking about searches by probation
25 officers. So, the issue --

1 QUESTION: Why -- why does that -- I mean,
2 what's bothering me from a policy perspective is there are
3 a whole range of punishments called intermediate
4 punishments, which perhaps should be encouraged, and they
5 include things like boot camp -- not boot camps, but
6 halfway houses, home confinement, night and weekend
7 confinement, and probation. That's one of them. And so,
8 why is it unreasonable for the State to say we want to
9 encourage this kind of thing, but part of it has to be
10 checkups on people to make certain that they're not
11 committing crimes? And the condition that you have
12 checked here in the -- in the form is simply one of those
13 conditions that would help encourage, and indeed make more
14 sensible, this kind of range of intermediate punishments.

15 MS. FOX: Well, Your Honor, as we point out in
16 our brief, the -- the intermediate sanction programs,
17 which have been implemented, I hope effectively, across
18 this country by different States that are cited by amicus
19 -- several of the amici -- not a single program relies on
20 random searches by police. It is simply not a component
21 of an effective intensive supervision program, let alone a
22 regular probation system, in any State.

23 QUESTION: I thought there were some other
24 States, in addition to California, that had as a condition
25 of probation that you -- your premises can be searched to

1 determine whether you are continuing -- whether you are
2 engaged in crime. I did not think California was alone in
3 that respect.

4 MS. FOX: Your Honor, apart from California, I'm
5 aware only of Virginia as having approved a blanket search
6 condition such as this with no limitations for
7 individualized suspicion and no limitation to the
8 probation officer. Many States permit probation officers,
9 as part of their duties, to conduct home searches.

10 QUESTION: Well, if we put individual suspicion
11 -- there was reasonable suspicion in this case. If you
12 admit that one of the purposes of probation is to monitor
13 the person to make sure that they are now off their
14 bottle, they're no longer committing crimes, if that's a
15 purpose of probation, then why isn't this an entirely
16 reasonable condition to say we have to check up on you to
17 see that you're not engaging in crime anymore?

18 MS. FOX: Because it's disproportionate.
19 Because what this condition purports to do, even if we --
20 if we put back a reasonable suspicion requirement, it
21 still gives police unfettered discretion, randomly,
22 arbitrarily, as often as they want, for no reason or any
23 reason to go into, as they did in this case, Mr. Knights'
24 home --

25 QUESTION: Well, but counsel for the Government

1 represents to us that the State of California says that
2 this cannot be used for harassment.

3 MS. FOX: They do say that, Your Honor, although
4 there's not a single --

5 QUESTION: That's their argument. So, it's not
6 -- so, it is not completely arbitrary.

7 MS. FOX: Yes. I -- I'm not sure whether
8 arbitrary and harassing are the same, in that if there's
9 no requirement of individualized suspicion, then it would
10 seem to me that there's certainly a broad range of --

11 QUESTION: And there was -- there was reasonable
12 suspicion here.

13 MS. FOX: Yes, yes. I understand that in our
14 case.

15 QUESTION: I mean, we just don't have the
16 extreme here. And -- and with the help of hindsight, it
17 looked like an eminently reasonable search, for goodness
18 sakes.

19 MS. FOX: Well, Your Honor, looking again at the
20 facts of our particular case, that officer, Detective
21 Hancock, had over 12 hours during which he prepared to do
22 this search. So, it's clearly not a search that had
23 exigent circumstances attached to it. It's also not a
24 search for which he couldn't have gotten a warrant. In
25 his own view, Detective Hancock believed he could have

1 gotten a warrant, and in fact, he --

2 QUESTION: Well, that's a perfectly good
3 argument against searching someone who's not on probation,
4 but it doesn't deal with your case to say they could have
5 gotten a warrant and it wasn't exigent circumstances.

6 MS. FOX: Right. I guess what I was thinking is
7 it shows that -- that expanding the Griffin probation
8 search condition, special needs doctrine, is not necessary
9 to enable Detective Hancock to search because he could
10 have searched a different way. If the Court is
11 considering going beyond Griffin and endowing police
12 with --

13 QUESTION: Well, you say -- you say going beyond
14 Griffin, I mean, Griffin described the Wisconsin system at
15 some length, but I don't think, as Justice Scalia
16 suggested, that we implied that every single facet of the
17 Wisconsin system was necessary to its constitutionality.

18 MS. FOX: Certainly not, Your Honor, and I --
19 and I have not sought to represent that. But what Griffin
20 -- if Griffin means anything, what it does mean is that
21 there is some line between a probationary search and a
22 nonprobationary, general search. Otherwise --

23 QUESTION: Griffin means Wisconsin can do what
24 Wisconsin was doing. That's what it means.

25 MS. FOX: Yes. But it's not a one-line opinion

1 that says --

2 QUESTION: And it's very hard to take a case
3 that the defendant loses -- where there's a Fourth
4 Amendment claim that he loses and say, aha, but in the
5 next case, he'll win because the court confined itself to
6 the situation before it.

7 MS. FOX: That's -- that's correct, Your Honor.
8 But I -- I believe the Griffin analysis, in going through
9 first considering who conducts the search, second,
10 considering the presence or absence of reasonable
11 suspicion, and then third, concluding that it's conducted
12 in conformance with the regulatory scheme that itself
13 limits discretion and is therefore constitutional --

14 QUESTION: That's because we were not interested
15 in -- in contemplating the creation of any new
16 constitutional law. We said this can all be fit into
17 prior constitutional law on -- on the basis of the special
18 needs doctrine. But we didn't intimate that if the
19 special needs doctrine did not apply, the thing was
20 necessarily unconstitutional. We didn't intimate that at
21 all. We just were not interested in going any further
22 than we had to.

23 QUESTION: May I ask you one question that I've
24 been pondering about during the argument and don't know
25 what the answer is? Do you think it would be

1 unconstitutional for a State legislature to decide that we
2 don't want to put drug offenders in prison anymore, but we
3 do want to impose on them, in haec verba, condition 9 of
4 the probation order here and that -- and pass a statute
5 and say all drug offenders who are convicted of possession
6 of illegal drugs shall have to submit to that provision?

7 MS. FOX: Your Honor, I think it's a close
8 question. The -- the Court might well uphold it, although
9 I might argue against it, for this reason. The condition
10 permits random drug searches.

11 QUESTION: Correct.

12 MS. FOX: Now, that's clearly, I think,
13 constitutional if they were conducted by the probation
14 department. There's no reasonable suspicion requirement,
15 but in various cases, this Court has repeatedly held that
16 detection of drug abuse may be a situation in which we
17 dispense with individualized suspicion because it's
18 difficult to detect always signs of inebriation. This
19 condition does appear to require an individual to submit
20 to police searches. So --

21 QUESTION: Right, but it seems to me that's less
22 intrusive than going to jail.

23 MS. FOX: It's -- well, again, I would never use
24 less intrusive than jail as a standard of assessing the
25 constitutionality of a probation condition because

1 certainly a condition that the defendant pay money to the
2 opposing party or the district attorney would be less
3 onerous than jail, but doesn't answer whether it's
4 constitutional. So, the Fourth Amendment analysis that
5 this Court --

6 QUESTION: Well, it does in a way because what
7 the -- the net result of a criminal conviction is a loss
8 of liberty, and the question is which liberties can you be
9 deprived of and so forth. So, there's a definite
10 relationship.

11 MS. FOX: All right.

12 (Laughter.)

13 QUESTION: And you're saying that you can lose
14 your liberty by going to jail, but you can't lose this
15 lesser liberty. I know every lesser included argument
16 doesn't prevail, but I don't -- I'm not at all sure why
17 this one doesn't.

18 MS. FOX: It might. It would be, again, a
19 different case. It would be an interesting case. But it
20 may be again that the intrusion on privacy required of
21 urine testing or that you'd lose as a result of urine
22 testing is minimal compared to the kind of invasion of
23 privacy we're talking about here.

24 QUESTION: I don't see why it's magic that --
25 that a probation officer has to do it. I mean, there are

1 certain objectives that -- that the probation officer has
2 in common with the law enforcement officer, and -- and one
3 of them is to prevent individuals from committing
4 additional crimes. And what difference does it make
5 whether it's a probation officer or a law enforcement
6 officer that is pursuing that purpose?

7 MS. FOX: Your Honor --

8 QUESTION: What about a State that doesn't have
9 probation officers? You mean States have to have
10 probation officers? Suppose -- suppose they just say we
11 don't feel any need for special probation officers.

12 MS. FOX: Well, this I think is the important
13 distinction between probation and police, and it's a two-
14 part answer.

15 First, under Scott, this Court has recognized
16 that police have different objectives than probation
17 officers. And so to the extent that we're talking about a
18 -- to an extent, we are talking about a special needs
19 programmatic exception. Certainly when the search is
20 conducted by a probation officer, under Scott, the Court
21 will presume that the probation officer has a probationary
22 objective; whereas, again under Scott, a police search
23 does not have as its goal ascertaining compliance with
24 probation or parole conditions. And the Court has
25 recognized that in determining that the exclusionary rule

1 wouldn't apply to parole revocation proceedings.

2 But second, in Edmonds, the Court indicated that
3 the fact that a general law enforcement search, as a
4 secondary matter, furthers special needs -- in that case
5 highway safety -- does not bring the search scheme within
6 the special needs exception because a secondary,
7 incidental furtherance of a special need doesn't change
8 the fundamental character at the programmatic level of the
9 search.

10 That's why police searches that are conducted
11 pursuant to this condition are so problematic because, of
12 course, as a secondary matter, they ensure compliance with
13 probation conditions, but the primary objective of a
14 police search, as -- as it was the objective this search
15 in this case, is to investigate crime. And under the
16 Fourth Amendment, we've already decided as a society that
17 the hurdles of requiring a warrant and requiring probable
18 cause are acceptable costs to impose on the police when
19 they're engaged in general law enforcement. That's why
20 this condition is unconstitutional.

21 The Government's consent argument that we
22 started with doesn't save it for the reasons that I
23 suggested earlier.

24 QUESTION: You said something in your brief
25 about the unconstitutional conditions doctrine rarely

1 applies in Fourth Amendment cases. Now, you did say that,
2 didn't you?

3 MS. FOX: That's my understanding, yes, Your
4 Honor.

5 QUESTION: And why do you think that's so?

6 MS. FOX: I think the special needs balancing is
7 the unconstitutional doctrines -- unconstitutional
8 conditions doctrine in the Fourth Amendment situation.
9 It's -- it's virtually an identical balancing, and I think
10 this Court, in assessing Fourth Amendment issues, again
11 and again has returned to the special needs balancing,
12 which is particular to the privacy interests and the State
13 needs that the Court faces when resolving a Fourth
14 Amendment case. So, when you look at unconstitutional
15 conditions, I think it's achieving the same end by
16 requiring a central nexus and then, most importantly,
17 looking at proportionality. I think that's what -- I'm
18 sorry, Your Honor.

19 QUESTION: Thank you, Ms. Fox.

20 Mr. Stewart, you have 2 minutes remaining.

21 REBUTTAL ARGUMENT OF MALCOM L. STEWART

22 ON BEHALF OF THE PETITIONER

23 MR. STEWART: The State of California has
24 represented in its amicus brief that the State has a
25 little over 67,000 police officers and a little over 7,000

1 probation officers within the State. And in light of that
2 fact, California has, by conditioning probation on consent
3 to search by any probation officer or law enforcement
4 officer -- the State has, in effect, attempted to enlist
5 its police officers in the administration of the probation
6 program.

7 The core message that this -- excuse me -- that
8 this consent term sends to police officers within the
9 State is, if you suspect that a known probationer is in
10 violation of the most fundamental term of his release --
11 namely, he's committing future crimes -- you may conduct a
12 search that is designed to confirm or dispel that
13 suspicion --

14 QUESTION: Or even you don't suspect.

15 MR. STEWART: Or -- or even you don't suspect.
16 But -- but --

17 QUESTION: But, I mean, that -- that's the
18 problem.

19 MR. STEWART: I think it's probably more likely
20 that a probation officer would conduct a truly
21 suspicionless search, a search with no individualized
22 suspicion whatever, than that a police officer would do
23 so. A probation officer might decide to conduct spot
24 checks of his charges even if there were no reason to
25 believe that a particular individual was violating the

1 law. A police officer would be less likely to regard that
2 as an effective use of his resources and -- and the
3 department's resources.

4 But -- but the point here is that when a State
5 police officer conducts a search intended to confirm or
6 dispel the suspicion that a probationer is engaged in new
7 criminal activity, he is contributing directly and
8 precisely to the realization of a core probation purpose.

9 I have nothing further.

10 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
11 Stewart.

12 The case is submitted.

13 (Whereupon, at 12:01 p.m., the case in the
14 above-entitled matter was submitted.)

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