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IN THE SUPREME COURT OF THE UNITED STATES

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DONALD CURTIS SAMSON, :
Petitioner, :
v. : No. 04-9728
CALIFORNIA. :
- - - - - x

Washington, D.C.
Wednesday, February 22, 2006

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:16 a.m.

APPEARANCES:

ROBERT A. LONG, JR., ESQ., Washington, D.C.; on behalf
of the Petitioner.

RONALD E. NIVER, ESQ., San Francisco, California; on
behalf of the Respondent.

JONATHAN L. MARCUS, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; for
the United States, as amicus curiae, supporting the
Respondent.

1 P R O C E E D I N G S

2 [10:16 a.m.]

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Samson versus California.

5 Mr. Long.

6 ORAL ARGUMENT OF ROBERT A. LONG, JR.,

7 ON BEHALF OF PETITIONER

8 MR. LONG: Mr. Chief Justice, and may it
9 please the Court:

10 The search in this case was not based on
11 individualized suspicion, and no other adequate
12 safeguards limited the police officer's discretion to
13 search Petitioner. For this reason, the search, which
14 would not be permitted by virtually any other State or
15 by the Federal Government, was unreasonable.

16 The Court has reaffirmed many times that the
17 Fourth Amendment does not permit the individual officer
18 in the field to exercise unconstrained discretion to
19 search. The Court has said that the Fourth Amendment
20 is primarily directed at the evil -- it was primarily
21 directed at the evil of general warrants and writs of
22 assistance, and the evil of general warrants and writs
23 of assistance was that they gave individual officers
24 blanket authority to search where they pleased and
25 placed the liberty of every man in the hands of every

1 petty officer.

2 JUSTICE GINSBURG: Mr. Long --

3 CHIEF JUSTICE ROBERTS: Mr. Long --

4 JUSTICE GINSBURG: -- with respect to
5 liberty, as it -- it's not disputed, is it, that your
6 client could have had his parole revoked even though
7 the search was suspicionless? So, what we're talking about
8 the difference between revocation of parole, on the one
9 hand, and a separate criminal offense. Is that right?

10 MR. LONG: Well, a parolee has conditional
11 liberty. But, at the time of this search, Mr. Samson
12 was on parole, there was no suspicion of any wrongdoing
13 --

14 JUSTICE GINSBURG: But I thought that
15 evidence seized could be introduced, could be a basis
16 to revoke parole.

17 MR. LONG: Oh, well, the Court held, in the
18 Scott case, that the exclusionary rule does not apply
19 at parole revocation hearings. So, if there is an
20 unreasonable search of a parolee that violates the
21 Fourth Amendment, the evidence could not be admitted at
22 a criminal trial, but it could be admitted at a parole
23 revocation --

24 JUSTICE GINSBURG: So, the -- what the -- the
25 consequence here is whether --

1 MR. LONG: I --

2 JUSTICE GINSBURG: -- he will have his parole
3 revoked --

4 MR. LONG: I --

5 JUSTICE GINSBURG: -- or he will have a
6 separate criminal offense.

7 MR. LONG: I understand your question. In
8 California, Justice Ginsburg, a nonviolent drug
9 offense, the possession of a small amount of an illegal
10 substance, is not a basis for revocation of parole. It
11 is not possible to revoke parole in California for this
12 offense. So, parole revocation would not have been a
13 possibility here.

14 JUSTICE KENNEDY: Well, Justice Ginsburg, I
15 suppose, can pursue her own line of questioning, but
16 let me ask you this, because I -- her question suggests
17 this, to me at least. Suppose the parole officer said,
18 "Now, look, I'm going to search you. If you don't
19 consent, then I'm going to revoke your parole."

20 MR. LONG: Well, this, of course, was a
21 police officer, not a parole officer.

22 JUSTICE KENNEDY: I --

23 MR. LONG: But if --

24 JUSTICE KENNEDY: I -- my question was
25 a parole officer, and I'll get to police officer next.

1 MR. LONG: All right. I think if a parole
2 officer said, "You must consent to this search" --

3 JUSTICE KENNEDY: When you see the --

4 MR. LONG: -- "this particular search" --

5 JUSTICE KENNEDY: -- person on the street, et
6 cetera, et cetera.

7 MR. LONG: "And, if you don't, I'll revoke
8 your" -- I mean, the consent is not, in this case,
9 first. I mean, California has said, the Supreme Court
10 has said, parole, in the parole search condition, is
11 imposed as a matter of law. Your hypothetical poses a
12 question of, could there be knowing and voluntary
13 consent to a search if the consequence of refusing is
14 revocation of parole? I would argue, in that
15 situation, that the consequences of refusal are so dire
16 that, effectively, the parolee would have no real
17 choice but to consent. So, it would be, in a sense, a
18 coerced consent.

19 JUSTICE SCALIA: Why are they dire? I mean,
20 he's just back in the situation he would have been in,
21 did he not comply with the conditions of his parole. I
22 don't see that that's dire. He has a choice. He can
23 stay in prison and --

24 MR. LONG: Well --

25 JUSTICE SCALIA: -- and suffer the reduction

1 of privacy there, which is much, much greater than
2 being subjected to -- I mean, he -- he cannot even go
3 to the toilet in privacy. Or he can go out on parole,
4 subject to the condition that --

5 MR. LONG: Well --

6 JUSTICE SCALIA: -- that he --

7 MR. LONG: I mean --

8 JUSTICE SCALIA: -- he can --

9 MR. LONG: I --

10 JUSTICE SCALIA: -- be searched.

11 MR. LONG: I have two answers to that,
12 Justice Scalia. I mean, first, in California, you
13 finish your prison sentence, and then parole is a
14 separate period that happens. The California Supreme
15 Court said, in *People v. Guzman* and other cases, parole
16 is not a part of the sentence --

17 JUSTICE SCALIA: No, but it's --

18 MR. LONG: -- in California.

19 JUSTICE SCALIA: -- but it's also clear from
20 the California statute that it is not a right, that
21 it's a privilege, that you get the privilege of parole
22 in exchange -- in exchange for agreeing to the
23 conditions, one of which is that you can be searched.

24 MR. LONG: Well, it's -- in California, every
25 inmate gets parole. It's a matter of law. It's not a

1 privilege -- in Morrissey against Brewer. The Court --
2 in other cases, the Court rejected the rights privilege
3 distinction anyway.

4 JUSTICE SCALIA: California statute says it's
5 a privilege, doesn't it?

6 MR. LONG: Yes, in section 3067.

7 JUSTICE SCALIA: It does.

8 MR. LONG: But it is -- it is also a --
9 section 3000 of the California penal code says every
10 prisoner gets parole. It is imposed on the prisoner as
11 --

12 JUSTICE SCALIA: Even if the --

13 MR. LONG: -- a matter of law.

14 JUSTICE SCALIA: -- prisoner -- oh, I thought
15 that he can turn it down, and that some prisoners do,
16 if --

17 MR. LONG: Well --

18 JUSTICE SCALIA: -- if they decide that they
19 don't want to be subjected to searches.

20 MR. LONG: The California Supreme Court has
21 held, in People v. Reyes, and in other cases cited in
22 our brief, that, in California, parole is not a matter
23 of choice, it is imposed as a matter of law.

24 JUSTICE SCALIA: Is -- and you mean people
25 are put out on the street when -- kicking and screaming

1 when they say, "No, I want to stay in jail. I don't
2 want to be" --

3 MR. LONG: Well, it's --

4 JUSTICE SCALIA: -- "searched. I would
5 rather stay in jail"? And --

6 MR. LONG: Well --

7 JUSTICE SCALIA: -- they are dragged out --

8 MR. LONG: That --

9 JUSTICE SCALIA: -- into the street. Is that
10 what happens?

11 MR. LONG: That is what the California
12 Supreme Court has said.

13 JUSTICE SCALIA: Oh, I --

14 MR. LONG: And what the statutes say is --

15 JUSTICE SCALIA: -- I don't think so.

16 MR. LONG: That -- the statutes say that
17 parole is a -- is a transitional period, and that every
18 inmate should undergo a period of parole.

19 But coming back to your earlier question, the
20 Court has said that the condition of a parolee is very
21 different from the condition of a prisoner. The Court
22 said that in *Morrissey against Brewer*. And the Court
23 said, in *Griffin*, as to probationers, that while the
24 Fourth Amendment rights of probationers -- and so,
25 parolees, too, we concede -- are reduced, there are --

1 the State can go too far. And if the State exceeds --

2 CHIEF JUSTICE ROBERTS: Well, but --

3 MR. LONG: -- the permissible limits, it's a
4 violation.

5 CHIEF JUSTICE ROBERTS: -- their condition is
6 very different, in a broad range of areas. They -- you
7 give up First Amendment rights. For example, it's
8 typical to have a condition of parole that you don't
9 consort with known criminals or gang members. You --
10 often it says you must refrain from alcohol. Sometimes
11 they say you can't go near particular places, if they
12 think that's going to tempt you to return to a life of
13 crime. Those are all First Amendment rights that are
14 sacrificed while you're on parole. Why is this any
15 different?

16 MR. LONG: Well, there are many rights that
17 are sacrificed. What the Court has said about the
18 Fourth Amendment rights is, because parolees have
19 conditional liberty, they will have a reduced, but not
20 eliminated, Fourth Amendment protection --

21 CHIEF JUSTICE ROBERTS: What about a drug --
22 what if you're convicted of a drug offense, you're on
23 parole, and one of the conditions is, every week you
24 have to go in for a drug test?

25 MR. LONG: Well, that --

1 CHIEF JUSTICE ROBERTS: Do you --

2 MR. LONG: -- that would be --

3 CHIEF JUSTICE ROBERTS: -- do you -- is that
4 acceptable?

5 MR. LONG: That would be different in several
6 respects, Mr. Chief Justice. First of all, there would
7 not be discretion. You wouldn't have the individual
8 officer deciding --

9 CHIEF JUSTICE ROBERTS: But it would be a
10 Fourth Amendment right that you would be giving up --

11 MR. LONG: Yes. And --

12 CHIEF JUSTICE ROBERTS: -- that you would
13 otherwise have if you weren't on parole.

14 MR. LONG: And I want to be clear, we are not
15 -- we're arguing there is a broad spectrum of searches
16 that States can undertake of parolees, and I'm, by no
17 means, arguing today that all of them, or even most of
18 them, are unconstitutional. This is a --

19 JUSTICE STEVENS: What would you say about a
20 condition that you must -- not a regular drug test --
21 you just have to submit yourself to a drug test
22 whenever a police officer asks you to?

23 MR. LONG: Well, you know, that would be much
24 narrower, because it would simply be a drug test. I
25 think it would have the problems of -- the officer

1 would have complete discretion. If it were like the
2 California --

3 CHIEF JUSTICE ROBERTS: Well, but it's -- I
4 mean, the point --

5 JUSTICE STEVENS: Do you think it would
6 valid? That's what I was asking you.

7 MR. LONG: I think, because that's a much
8 narrower test, that that could pass muster if -- but I
9 would think there really ought to be some guidance to
10 the officer. I think our ultimate submission today is
11 --

12 JUSTICE KENNEDY: Well, so that a --

13 MR. LONG: -- this is so --

14 JUSTICE KENNEDY: -- so that a burglar could
15 be searched for burglar tools --

16 MR. LONG: Well --

17 JUSTICE KENNEDY: -- but not for drugs? And
18 the drug addict can be searched for drugs, and not
19 burglar tools?

20 MR. LONG: If it were -- if it were tied to
21 the crime that the parolee has committed, you know,
22 that would give it some limitation. This is a
23 completely unlimited search, for anything, any crime.

24 CHIEF JUSTICE ROBERTS: But Justice Stevens's
25 question highlights the point that you criticize about:

1 the randomness of it is often a critical element. I
2 suppose it makes much more sense to say you're subject
3 to a random drug test than that you have to come in at
4 a scheduled time, when you -- presumably, you could
5 refrain from using drugs prior to the test. And, to
6 some extent, it's the same, even if you're not talking
7 about a drug test.

8 MR. LONG: Well, in all --

9 CHIEF JUSTICE ROBERTS: The search is only
10 going to be effective if it's not announced or --

11 MR. LONG: Well, in --

12 CHIEF JUSTICE ROBERTS: -- scheduled.

13 MR. LONG: -- and in this Court's
14 suspicionless search cases, you can have a random test
15 where you draw names at random. There's some other
16 process that doesn't leave it up to each individual
17 officer to decide who gets the drug test or which car
18 to stop to check the driver's license and registration.
19 What the Court has consistently held is really at the
20 core of the Fourth Amendment is this notion of: the
21 individual officer in the field has complete discretion
22 to decide, "Do I search this person? Do I not? What's
23 the scope of the search? What do" --

24 JUSTICE GINSBURG: Are you relying --

25 MR. LONG: -- "I search for?"

1 JUSTICE GINSBURG: -- on the difference
2 between -- you said "officer in the field." Would this
3 be okay if it had been his parole officer?

4 MR. LONG: Well, I think --

5 JUSTICE GINSBURG: The parole officer was
6 walking along the street, saw this guy, and said, "I'm
7 going to search you."

8 MR. LONG: I think it's a very different set
9 of circumstances if we have a parole officer. This
10 Court has said, at least twice, in Griffin and in
11 Scott, that a parole officer has a different function.
12 They are not in an adversarial, or a purely
13 adversarial, relationship. They often think of the
14 parolee or the probationer as a client. They're trying
15 to see that the person succeeds. In some sense, the
16 parole officer fails when the parolee goes back to
17 prison. The parole -- the parole officer can act on
18 their entire knowledge and experience with the client,
19 or the parolee. So, all of that makes a difference.
20 And the Court has noted that several times.

21 JUSTICE SCALIA: When he's in prison, is
22 there any problem about the prison guards intruding
23 upon his privacy, willy-nilly, whenever they choose?

24 MR. LONG: The -- as I understand the Court's
25 --

1 JUSTICE SCALIA: I mean, walking --

2 MR. LONG: -- holding --

3 JUSTICE SCALIA: -- by his cell, which is
4 always opened, and checking in on him to see what's --
5 what he's doing.

6 MR. LONG: As I understand the Court's
7 holding in Hudson against Palmer, the Fourth Amendment
8 does not apply in a prison cell. And --

9 JUSTICE SCALIA: So, he's better off on
10 parole than -- well, at least no worse off on parole
11 than he would be when he was in prison.

12 MR. LONG: But, Your Honor, that's not the
13 way this Court has analyzed the Fourth Amendment
14 issues. It's a different situation. It is conditional
15 liberty. It's the -- that sort of active grace theory,
16 or right, privilege, distinction, or greater power
17 includes the lesser, all those arguments have been
18 rejected, in --

19 JUSTICE SCALIA: Are --

20 MR. LONG: -- Morrissey against Brewer, and
21 Gagnon --

22 JUSTICE SOUTER: What --

23 MR. LONG: -- against Scarpelli.

24 JUSTICE SCALIA: Not --

25 JUSTICE SOUTER: -- what do you make of --

1 JUSTICE SCALIA: -- by me. No, please.

2 MR. LONG: It's --

3 JUSTICE SOUTER: What do you make of the
4 pragmatic argument that seems to cut through all of your
5 objections? The pragmatic argument is both in favor
6 of complete discretion and of suspicionless search,
7 that the in terrorem effect of knowing that these
8 searches can occur at any moment, in fact, discourages
9 recidivism.

10 MR. LONG: Well --

11 JUSTICE SOUTER: What's your response to
12 that?

13 MR. LONG: -- I have a pragmatic argument,
14 and then I have an argument just based on the Fourth
15 Amendment. Pragmatically, no other State, as far as we
16 can tell, and not the Federal Government, authorizes
17 this kind of search; that is, blanket suspicionless
18 discretionary searches by police officers.

19 JUSTICE SOUTER: Apart from --

20 MR. LONG: So --

21 JUSTICE SOUTER: Apart from the lack of
22 popularity of the State's view --

23 MR. LONG: Well --

24 JUSTICE SOUTER: -- do we have -- do we have
25 any empirical evidence that bears on the in terrorem

1 argument?

2 MR. LONG: The -- well, the empirical
3 evidence is that all the other States don't seem to be
4 having a harder time --

5 JUSTICE SOUTER: No, I --

6 MR. LONG: -- with recidivism.

7 JUSTICE SOUTER: -- I realize that. But,
8 beyond that, do we have any empirical evidence, one way
9 or the other?

10 MR. LONG: Well, the California -- I think
11 that's a pretty powerful demonstration, but we do have,
12 beyond that, empirically, California was with all the
13 other States until the People against Reyes decision.
14 Now they've moved to suspicionless searches. They seem
15 to have about the same rate of recidivism --

16 JUSTICE SOUTER: I take it --

17 MR. LONG: -- as they --

18 JUSTICE SOUTER: -- the answer is --

19 MR. LONG: -- did before.

20 JUSTICE SOUTER: -- we don't have any
21 empirical evidence, one way or the other, apart from
22 the fact that California stands out in its system. Is
23 that correct?

24 MR. LONG: Well, I -- I'm -- think I'm
25 offering you evidence that counts as empirical in my

1 mind, but --

2 JUSTICE SOUTER: No, I --

3 MR. LONG: -- apparently it's not --

4 JUSTICE SOUTER: -- I know it, but I've said,
5 about three times, that I want to get beyond the
6 peculiar position of California to any other empirical
7 evidence that cuts for you or against you. And I take
8 it there really isn't --

9 MR. LONG: Well, there -- we have a footnote.
10 There is a brief submitted by a Stanford law
11 professor, and we have at least a footnote in our
12 brief. There is some social science research that
13 suggests that this more intensive supervision is really
14 not effective, if you look at broad numbers. I mean, I
15 think you will catch some additional people. I mean,
16 it happened in this case. But if you step back and
17 look at the overall effects, it's not -- it's not
18 particularly helpful --

19 JUSTICE BREYER: Why --

20 CHIEF JUSTICE ROBERTS: Well --

21 JUSTICE BREYER: Why, if we're going to catch
22 some additional people, is that not sufficient? That
23 is, why is it unreasonable, say, not for law
24 professors, but business school professors, management
25 consultants, to say, "You have a lot of prisoners in

1 California, hundreds of thousands -- I don't know,
2 maybe more than 100,000 -- and we'll tell the
3 Legislature that they can cut the terms, save money,
4 release them early, but we want to have management
5 checks. And the management checks are, you might be
6 searched at any time. And we catch a few. And that's
7 helpful." Now, if the --

8 MR. LONG: Well --

9 JUSTICE BREYER: -- State decides that,
10 what's unreasonable about it? "They're" --

11 MR. LONG: Well --

12 JUSTICE BREYER: -- "letting the people out
13 earlier than they otherwise would" --

14 MR. LONG: Because --

15 JUSTICE BREYER: -- says the Legislature.

16 MR. LONG: Because, Justice Breyer, it has to
17 be a balancing analysis, and --

18 JUSTICE BREYER: And what's on the other
19 side? The other side --

20 MR. LONG: Well --

21 JUSTICE BREYER: -- is, you'd rather not have
22 policemen search you, but your alternative is going to
23 be in jail.

24 MR. LONG: Well, I mean, the other side is a
25 search condition that says you have -- you could be

1 searched at any time, any place, by any police officer
2 for evidence of any crime, is a breathtakingly broad
3 invasion of privacy.

4 JUSTICE BREYER: But, of course, that's how
5 it happens when he's in prison.

6 MR. LONG: Well, but he has come out of
7 prison. The State has seen fit to release him on
8 parole into society. He has conditional liberty. And
9 the Court --

10 JUSTICE SCALIA: But there is a
11 breathtakingly high probability that he is committing a
12 crime. The statistics cited in the Government's brief
13 say that in an April 2001 report prepared by the
14 California Criminal Justice Statistics Center, 68
15 percent of adult parolees are returned to prison -- 68
16 percent; 55 percent, for a parole violation; and 13
17 percent for the commission of a new felony offense. I
18 mean, it seems to me a breathtaking statistic like that
19 may call for breathtaking --

20 MR. LONG: Yes.

21 JUSTICE SCALIA: -- measures to try to police
22 the matter closely.

23 MR. LONG: It is a very serious problem. We
24 don't want to minimize it. I mean, it is a fact that
25 many -- many parolees -- and this is true especially in

1 California -- end up being returned for technical
2 violations, like not showing up to meetings with parole
3 officers. Some of the offenses are not as serious as
4 others. But it is a very serious problem. We
5 recognize that. But what the Court has said is that
6 the gravity of the problem cannot justify any means.
7 There has to be a balancing of the invasion of privacy
8 against the State's need to undertake this.

9 And coming back to my second answer to the
10 question you asked several minutes ago, Justice Scalia,
11 I mean, ultimately this search is a -- it's a general
12 warrant. It's a writ of assistance. It's limited to
13 parolees, but if the Court is going to stand by what it
14 has said in Griffin and other cases, that their
15 parolees and probationers have some modicum of Fourth
16 Amendment rights -- reduced, we recognize that -- this
17 is -- this is the core of what the --

18 CHIEF JUSTICE ROBERTS: Well, the --

19 MR. LONG: -- framers of --

20 CHIEF JUSTICE ROBERTS: -- California --

21 MR. LONG: -- the Fourth Amendment
22 prohibited.

23 CHIEF JUSTICE ROBERTS: The California
24 Supreme Court said that the Fourth Amendment applied to
25 these searches, but it only protected in a limited way,

1 along the same lines as we said in Griffin. And the
2 standard they applied was, it protected against
3 arbitrary or harassing or capricious searches --

4 MR. LONG: Yes, but --

5 CHIEF JUSTICE ROBERTS: -- which seems to go
6 to your argument, which is centered around the
7 unbridled discretion of the officer. And the
8 California Supreme Court is saying it's not unbridled.

9 MR. LONG: That is their answer to my
10 argument, and I want to be very clear about "arbitrary,
11 capricious, and harassing." That's the California
12 Supreme Court's standard. So, of course, they get to
13 define it. And they have not defined it the way this
14 Court perhaps would define "arbitrary." It's not
15 arbitrary, capricious, or harassing if it has a
16 permissible law enforcement purpose. So, as long as
17 the officer says, "Well, I don't have any reason to
18 think there's evidence of any crime here, but that's
19 what I'm looking for. Perhaps there's evidence of
20 crime" --

21 CHIEF JUSTICE ROBERTS: Well, that's --

22 MR. LONG: -- that's enough.

23 CHIEF JUSTICE ROBERTS: -- fine. But it
24 turns out he stops the guy every hour of the day, then
25 he has a pretty strong case that this is for

1 harassment, and it's not --

2 MR. LONG: Well --

3 CHIEF JUSTICE ROBERTS: -- for the special
4 law enforcement --

5 MR. LONG: Well, and --

6 CHIEF JUSTICE ROBERTS: -- need that
7 accompanies releasing parolees.

8 MR. LONG: And I take it the Fourth Amendment
9 itself would prohibit that sort of thing. But it --
10 you couldn't -- you couldn't justify a general warrant
11 by saying, "Well, yes, the officer can search anybody,
12 without any suspicion, and he can choose." But it --
13 you know, the search can't happen too often, or it
14 can't last too long. That would not be -- and you --
15 and you -- similarly, it would not be an answer to say,
16 "Well, as long as he's looking for evidence of crime."

17 CHIEF JUSTICE ROBERTS: No, but your point
18 was that this is the core of the Fourth Amendment, and
19 they're taking away all of the protection and leaving
20 it to the unbridled discretion. And that turns out to
21 be not the case. Under the law that authorizes the
22 procedure, the California Supreme Court interpretation
23 is that the Fourth Amendment provides protection
24 against harassment or arbitrary and --

25 MR. LONG: Well --

1 CHIEF JUSTICE ROBERTS: -- capricious
2 searches.

3 MR. LONG: -- I mean, my argument is that
4 what is left of the Fourth Amendment under the
5 California approach is not the core. It's the far
6 periphery. There has never been a case -- and we were
7 able to find over a hundred, and perhaps over 200; it
8 depends on how you count -- of cases where parolees or
9 probationers have said, "You know, this search was
10 arbitrary or capricious or harassing." It is always
11 rejected, for the same reason it was in this case. The
12 Court says, "Well" --

13 CHIEF JUSTICE ROBERTS: Then which way do you
14 think that cuts? There's --

15 MR. LONG: It --

16 CHIEF JUSTICE ROBERTS: -- never been a case
17 of a harassing search of a parolee.

18 MR. LONG: I --

19 CHIEF JUSTICE ROBERTS: I mean, that's what -
20 - or 200 cases in the --

21 MR. LONG: I --

22 CHIEF JUSTICE ROBERTS: -- in --

23 MR. LONG: -- I think it cuts in the
24 direction that it is an empty, vacuous standard. It's
25 a standard --

1 JUSTICE GINSBURG: Why?

2 MR. LONG: -- that's always --

3 JUSTICE GINSBURG: Why? If it -- if it -- if
4 it -- it doesn't go to the suspicionless character of
5 the search, but it does say it has to be reasonable in
6 time, place, or manner.

7 MR. LONG: Yes.

8 JUSTICE GINSBURG: And maybe the --

9 MR. LONG: Yes.

10 JUSTICE GINSBURG: -- officers are reasonable
11 in time, place --

12 MR. LONG: Yes.

13 JUSTICE GINSBURG: -- or manner.

14 MR. LONG: And -- but it's -- it had -- there
15 has never been a case in which a court has rejected a
16 parolee search as unreasonable in time, place, or
17 manner. And you could --

18 JUSTICE GINSBURG: How many times has it been
19 challenged --

20 MR. LONG: As --

21 JUSTICE GINSBURG: -- on the --

22 MR. LONG: -- we said -- we found over a hundred
23 cases in which it's been challenged in the California
24 courts. And it --

25 JUSTICE ALITO: Well --

1 MR. LONG: I mean, if you think about it, if
2 the search is, say, at night, the argument is going to
3 be -- well, if we said we'd not -- "never going to
4 search you at night," then you would commit crimes at
5 night. We had a very extreme case in our brief about
6 body-cavity searches. And they said, "Well, that -- of
7 course, that" -- you know, the suggestion was, "Of
8 course, that would be too extreme." But you could see
9 an argument if parolees and probationers knew that that
10 was off limits, that -- you know, that would become a -
11 -

12 JUSTICE SCALIA: You say there was a case in
13 which, without any special reason, they did --

14 MR. LONG: No. Let --

15 JUSTICE SCALIA: -- a cavity search --

16 MR. LONG: No, let me be -- I am not aware of
17 any actual case. We posited that. We said -- you know,
18 because you don't need to know anything about the parolee,
19 except he's on parole, and you can search for evidence
20 of any crime. You don't need any suspicion that -- so, you
21 could have somebody, a sort of white-collar criminal,
22 or you'd check someone who's written a bad check. And
23 if you say, "Well, I think perhaps you're involved in
24 drugs. Maybe you're one of these balloon-swallowers" -
25 - you don't need any actual reason to think that's

1 happening, you can simply say, "I want to investigate
2 that." And the way -- you have to investigate that by x
3 rays or something else quite intrusive.

4 JUSTICE SCALIA: The California Supreme Court
5 may -- might well hold that it's arbitrary to conduct
6 such an extreme search as a body-cavity search, or to -
7 - I don't know --

8 MR. LONG: Well --

9 JUSTICE SCALIA: -- to decide to search the
10 person when he's in the men's room or something. I
11 mean, there are --

12 MR. LONG: But --

13 JUSTICE SCALIA: -- there are a lot of
14 limitations that the California court --

15 MR. LONG: They might, and --

16 JUSTICE SCALIA: -- could put on it, within
17 the context of harassment or --

18 MR. LONG: But our principal submission,
19 Justice Scalia -- I mean, if California said, "We have
20 a terrible problem with crime in California; and,
21 therefore, we're authorizing every police officer to
22 search every person anytime, anywhere, for any crime,"
23 that would be, I would submit, the clearest sort of
24 Fourth Amendment violation you could imagine. It would
25 be a general warrant or a writ of assistance. It

1 couldn't possibly be justified by saying, "Well, if it
2 gets too extreme, if it gets into body-cavity searches,
3 we won't allow it." We are talking about parolees,
4 yes. Their Fourth Amendment rights are reduced, yes.
5 We recognize that. But saying that this sort of
6 absolutely unguided discretion --

7 JUSTICE BREYER: But the reason ---

8 MR. LONG: -- there's no sort of --

9 JUSTICE BREYER: -- the reason that people, I
10 think, are saying that is because they have a lot of
11 prisoners, they're trying to create a category of
12 people who don't have to stay in prison, where they
13 have no rights. And the real question is, can
14 California, in trying to create this interim category,
15 reduce the Fourth Amendment right in the way you
16 describe?

17 MR. LONG: They --

18 JUSTICE BREYER: Of course they can't do it,
19 but the justification is not that there is something
20 bad about this particular individual or he's in some
21 kind of limbo. The reason is that there's a policy
22 tending towards release, which California has decided
23 they want to introduce this as a condition. Now --

24 MR. LONG: Yes.

25 JUSTICE BREYER: -- and so, what -- and the

1 question is, what's unreasonable about that?

2 MR. LONG: Well, what's unreasonable about it
3 is that it goes so far in the direction of eliminating
4 the Fourth Amendment rights of people who are not
5 prisoners -- they are -- they have conditional liberty
6 -- that it is simply not consistent with the Fourth
7 Amendment. And on the empirical side, California is an
8 outlier. All the other States --

9 JUSTICE STEVENS: May I -- may I ask you --

10 MR. LONG: -- and the Federal Government --

11 JUSTICE STEVENS: -- this question? Part of
12 your appeal of your case is, you talk about the
13 corporate offender or tax dodger, something like that.

14 It seems quite unreasonable, I agree with you. But
15 what if you defined the class much more narrowly and
16 limit it to people who have been convicted of violent
17 crimes of a very serious nature and so forth, and said,
18 as to those, they can have a totally suspicionless
19 search? Would that --

20 MR. LONG: Well --

21 JUSTICE STEVENS: -- be permissible?

22 MR. LONG: -- I -- one of the things we
23 wanted to make -- I think there are many things that
24 States can do. They could certainly --

25 JUSTICE STEVENS: But I wonder whether --

1 MR. LONG: -- there's the possibility of --

2 JUSTICE STEVENS: -- whether you think they
3 could do that.

4 MR. LONG: There's the possibility of
5 individual determinations, based on the individual
6 circumstances. If you went --

7 JUSTICE STEVENS: Well, what I'm --

8 MR. LONG: -- category by --

9 JUSTICE STEVENS: I wanted to see if there is a
10 way that the class could be defined narrowly, because I
11 want to ask the other side if they would allow the
12 search for any ex-felon, for example. You could divide
13 it in a way that seemed obviously too broad. But is --

14 MR. LONG: Right.

15 JUSTICE STEVENS: -- there a narrower class -
16 -

17 MR. LONG: Well --

18 JUSTICE STEVENS: -- that you think would be
19 acceptable?

20 MR. LONG: I think this could be much
21 narrower. And, in my view, it would become a much
22 closer constitutional question if it were limited to
23 certain crimes where the legislature or the State made
24 a finding that there's a particular need to have --

25 JUSTICE STEVENS: Say you were a --

1 MR. LONG: -- suspicionless --

2 JUSTICE STEVENS: -- terrorist, for example.

3 MR. LONG: And --

4 JUSTICE STEVENS: It's just limited to
5 terrorists, convicted terrorists.

6 MR. LONG: Yes, perhaps convicted terrorists.
7 You know, that -- and it -- that's very different from
8 what we have here, because --

9 JUSTICE GINSBURG: What about drug offenders,
10 given the high rate of recidivism?

11 MR. LONG: Well, I -- you know, we -- I think
12 you would have to see the facts of that case, but if
13 they made a finding that, "Because of the nature of
14 drug offenses, we need suspicionless searches rather
15 than simply reasonable suspicion, and we need police
16 officers, not parole officers" -- and there could be
17 other regulations. The Federal regulations, we think,
18 are a model, really. They have lots of limitations on
19 --

20 JUSTICE SCALIA: Mr. Long, is it -- is it
21 fair to compare California to other States? The
22 assumption would have to be that other States grant
23 parole as liberally as California does. Maybe
24 California has made the decision, "We have too many
25 people in prison. We're going to let a lot of them

1 out, but we're going to keep them on a very tight
2 leash." Why shouldn't it be able to do that? To
3 have tighter controls, but let out many more people on
4 parole, which is -- which is exactly what I think
5 they're doing.

6 MR. LONG: Well, and I -- I think they can
7 have tighter controls, Your Honor. They can -- they
8 can have -- they could have -- they could make this a
9 special condition of parole --

10 JUSTICE SCALIA: But my only --

11 MR. LONG: -- rather than a general condition
12 --

13 JUSTICE SCALIA: -- point is --

14 MR. LONG: -- of parole.

15 JUSTICE SCALIA: -- the fact that other
16 States aren't as tight doesn't prove anything, because
17 other States --

18 MR. LONG: Well --

19 JUSTICE SCALIA: -- may not be --

20 MR. LONG: Well --

21 JUSTICE SCALIA: -- be trying to do the same
22 thing --

23 MR. LONG: I mean --

24 JUSTICE SCALIA: -- to empty their prisons --

25 MR. LONG: This Court has said, generally,

1 that what the Court has found to be reasonable for one
2 State is reasonable for all. And when a practice is
3 not well established -- and here, it's far from well
4 established; California's virtually unique -- the Court
5 has taken that into account for --

6 JUSTICE GINSBURG: Suppose you were in a
7 halfway house, and the State says, "We're creating a
8 status. One is, you're a prisoner. Another is, you're
9 a halfway house. Another is, on your -- parole. But
10 we want to subject you to suspicionless searches at --
11 in all three stages -- prison, halfway house, parole."
12 Could they do it for the halfway house?

13 MR. LONG: Well, they might -- halfway
14 houses, as I understand it, Justice Ginsburg, are
15 largely now a thing of the past. But if the idea is
16 you would actually be in a custody situation at night,
17 perhaps in lockdown, then perhaps Hudson against Palmer
18 would come into play --

19 JUSTICE GINSBURG: This person goes --

20 MR. LONG: -- which --

21 JUSTICE GINSBURG: -- out to work, comes back
22 at the end of the day, and is checked in.

23 MR. LONG: And so, your hypothetical is,
24 could there be suspicionless searches by --

25 JUSTICE GINSBURG: Yes, while the --

1 MR. LONG: -- police officers --

2 JUSTICE GINSBURG: -- while the --

3 MR. LONG: -- at work?

4 JUSTICE GINSBURG: The person who is in this
5 semi-custody state, he's going to work, and, while he's
6 at his workplace, the police officer shows up and says,
7 "I'm going to pat you down, and then I'm going to" --

8 MR. LONG: It's --

9 JUSTICE GINSBURG: -- "see if you have
10 drugs."

11 MR. LONG: It's a -- it's a harder case.
12 Again, our bottom line is, there would need to be some
13 limitations on that individual officer's discretion.
14 That's the core of the Fourth Amendment.

15 If there are no further questions, I'd like
16 to reserve the balance of my time.

17 CHIEF JUSTICE ROBERTS: Thank you, Mr. Long.
18 Mr. Niver, we'll hear now from you.

19 ORAL ARGUMENT OF RONALD E. NIVER
20 ON BEHALF OF RESPONDENT

21 MR. NIVER: Mr. Chief Justice, and may it --
22 may it please the Court:

23 Alarmed by the State rate of recidivism and
24 revocation of the more than 100,000 parolees,
25 California enacted a statute which authorized the

1 search of a parolee based solely on his status as a
2 parolee. We submit that such a search is reasonable
3 under the Fourth Amendment.

4 As this Court held recently in *United States*
5 *versus Knights*, to determine the validity of the search
6 we balance the State's need to search against the
7 privacy interest affected. Here, the need is
8 overwhelming, and the privacy interest is dramatically
9 reduced.

10 Turning first to Petitioner's expectation of
11 privacy, it is greatly diminished. Even if it exists,
12 it is far less than that enjoyed by the average law-
13 abiding citizen. No one outside the confines of a
14 prison has a lesser expectation of privacy than a
15 parolee.

16 CHIEF JUSTICE ROBERTS: Why is that? Doesn't
17 that kind of beg the question? I mean, if we say he's
18 got the normal Fourth Amendment rights, his -- I mean,
19 the expectation-of-privacy analysis seems to me to be
20 totally circular.

21 MR. NIVER: That's what the --

22 CHIEF JUSTICE ROBERTS: You say he doesn't
23 have an expectation of privacy, so it's not protected.

24 Well, if we say he does have a -- if we say it is
25 protected, then he does have an expectation of privacy.

1 MR. NIVER: Well, this Court spoke to that in
2 Knights and said, unanimously that the -- in Knights,
3 it was a probation condition, but I think that it --
4 obviously, the same analysis applies here -- that the
5 imposition or acceptance of a -- of a search condition
6 by a parolee or a probationer results in the severely
7 diminished expectation of privacy enjoyed by the
8 parolee or probationer. And this Court said that
9 unanimously in Knights.

10 CHIEF JUSTICE ROBERTS: Well, Knights
11 involved a situation where reasonable suspicion was
12 required, so it addressed the problem that Mr. Long has
13 of unbridled discretion. You still had to have an
14 articulable reasonable suspicion with respect to the
15 individual.

16 MR. NIVER: That is true, Your Honor, but the
17 threshold question was whether he had an expectation of
18 privacy at all, or to the -- the extent of that
19 expectation of privacy. And the Court, in Knights,
20 before it discussed the balance, had to identify the
21 factors in the balance. In terms of the probationer's
22 interest in that case, by virtue of the search
23 condition, this Court said that his interest in -- his
24 expectation of privacy was severely diminished, and
25 left open specific --

1 CHIEF JUSTICE ROBERTS: Why -- and why was
2 his expectation of privacy severely diminished?

3 MR. NIVER: Because of the parole's -- excuse
4 me -- the probation search that was imposed upon him by
5 virtue of the --

6 CHIEF JUSTICE ROBERTS: Because of the very
7 practice that's being challenged here today, right?

8 MR. NIVER: Well, yes.

9 CHIEF JUSTICE ROBERTS: Because he saw
10 something -- you -- he signed something that said,
11 "You're subject to searches." Well, that's what is at
12 issue. It seems to me that it's -- I guess I've said
13 it before, he's -- it's begging the question to say,
14 "You can do this, because he has a diminished
15 expectation of privacy." How far do you push this?
16 Can you have parolees come in and take a lie-detector
17 test every week? Do they have -- do they have
18 diminished expectation with respect to their Fifth
19 Amendment rights?

20 MR. NIVER: With regard to the Fifth
21 Amendment rights, if they are not in custody, then --
22 or even if they are -- I don't think that that would
23 necessarily -- the -- any expectation of privacy would
24 preclude the imposition of a lie-detector test, no.

25 CHIEF JUSTICE ROBERTS: Was that a yes, you

1 can have them --

2 MR. NIVER: Yes, Your Honor.

3 CHIEF JUSTICE ROBERTS: You can.

4 MR. NIVER: Yes. But in this case, the --

5 JUSTICE SCALIA: Is --

6 CHIEF JUSTICE ROBERTS: What about --

7 JUSTICE SCALIA: Is --

8 CHIEF JUSTICE ROBERTS: What about --

9 JUSTICE SCALIA: Is that right? I mean, even
10 in prison, I -- what -- I'm not sure you could even do
11 that if they were still in prison. Can you subject
12 people in prison --

13 MR. NIVER: Well, of course, that would not
14 be a Fourth Amendment claim.

15 JUSTICE SCALIA: No. No, I --

16 MR. NIVER: It would be a different --

17 JUSTICE SCALIA: The Chief Justice was trying
18 to get out of the Fourth Amendment into the Fifth.

19 MR. NIVER: That failing -- well, in terms of
20 the lack of a precedent from this Court, you know, at
21 this point we can only speculate, but it seems to me
22 that if a person can be required to submit to a drug
23 test by virtue of the status as a parolee or
24 probationer, I don't think that it is an extravagant
25 step to say that they could be required to submit to an

1 interview.

2 JUSTICE STEVENS: Would you say the same
3 thing if the offense he had committed was tax evasion
4 or price-fixing or speeding? Would the -- would a
5 person on parole for any one of those offenses have --
6 be subject to the same risk of a suspicionless search?
7 And would it be justified?

8 MR. NIVER: Suspicionless search?

9 JUSTICE STEVENS: Well --

10 MR. NIVER: Where we're back to --

11 JUSTICE STEVENS: -- applying this statute to
12 --

13 MR. NIVER: Yes.

14 JUSTICE STEVENS: -- a price-fixer, tax-
15 evader, speeder. Do you think it's justified?

16 MR. NIVER: If he's on parole, Your Honor, if
17 he's -- look, this applies to parolees in California
18 who have been convicted of felonies, served time in
19 prison, and have been --

20 JUSTICE STEVENS: And if it's to be --

21 MR. NIVER: -- released on parole.

22 JUSTICE STEVENS: -- applied to the tax
23 offender and so forth, how about just applying it to
24 all ex-felons? Would that be permissible?

25 MR. NIVER: On parole, or not on --

1 JUSTICE STEVENS: No, just the very fact that
2 there's -- they're an ex-felon. And let the person
3 know, at the time of his discharge from prison, that
4 this is one of the things that the State is going to
5 exact from you as a punishment for your crime.

6 MR. NIVER: If the person is on parole, the
7 answer --

8 JUSTICE STEVENS: No, I'm saying --

9 MR. NIVER: Oh --

10 JUSTICE STEVENS: -- he's not on parole.

11 MR. NIVER: -- he's no longer on parole?
12 Than the entire balance changes. The reduction of the
13 expectation of privacy --

14 JUSTICE STEVENS: But I'm hypothesizing a
15 case in which the law will destroy the expectation of
16 privacy, because it will provide that all ex-felons are
17 subject to search. So, they would know, the same as a
18 parolee now knows, he's subject to search. Would that
19 be valid?

20 MR. NIVER: My answer to that is, it would
21 not be valid, Your Honor, because a person, having
22 served his time on parole, the State's overwhelming
23 interest in supervision has ended. The State has
24 determined that that person, having successfully
25 completed his period of parole --

1 JUSTICE STEVENS: But -- so you don't --

2 JUSTICE SCALIA: Most --

3 JUSTICE STEVENS: -- rely on --

4 JUSTICE SCALIA: Most States --

5 JUSTICE STEVENS: -- the fact that --

6 JUSTICE SCALIA: -- don't let felons vote. I
7 mean, that's a punishment that they impose after
8 they're out of prison.

9 MR. NIVER: Yes, but this is not -- yes, Your
10 Honor, but this is really not about punishment, this is
11 about supervision. And if a parolee has successfully
12 completed this parole, has been discharged from parole,
13 then the balance --

14 JUSTICE STEVENS: But then we're not relying
15 on the elimination of the expectation of privacy,
16 because, under my hypothetical statute, the ex-felon
17 would know he's subject to it. So, it has to be
18 something other than the absence of an expectation of
19 privacy. Is that correct?

20 MR. NIVER: Not -- a person who is no longer
21 on parole, there is no longer the overwhelming State
22 interest in supervision. The balance changes. Our
23 position would be that that would not be a permissible
24 search.

25 JUSTICE SCALIA: It seems to me that the

1 principal difference, Mr. Niver, is that when he's on
2 parole, it's in lieu of being in jail. If that's not
3 the difference, you don't persuade me. He has
4 voluntarily accepted the parole in exchange for his
5 getting out of jail. And he'd be in worse condition if
6 he were in jail. That's what, seems to me, makes the
7 difference.

8 MR. NIVER: Well, that's -- I think that's
9 exactly right, Your Honor. The ex-parolee, no longer
10 on parole, is no longer in custody of the -- of the
11 California Department of Corrections. There is no
12 longer an overwhelming need to supervise the person,
13 who, having successfully completed parole, is
14 presumptively not the threat to society that he was
15 that he -- when he was a parolee. The balance changes,
16 and such a condition -- that is to say a suspicionless
17 search of an ex-parolee, I think would offend the
18 Fourth Amendment.

19 JUSTICE GINSBURG: Mr. Niver --

20 JUSTICE BREYER: But what do you achieve by
21 this system that you have that you couldn't achieve by
22 a system that more carefully worked out the rules and
23 conditions of a random search? I mean, rules, so that
24 you avoid the totally discretionary element. And if
25 you want to have management consultants, as I was

1 imagining, have 'em. They're not just going to tell
2 you, "Go and ask anybody to search anytime he wants."
3 They'll have a system worked out. So, why not at least
4 require you to think it through that much? And,
5 otherwise, it is unreasonable.

6 MR. NIVER: Well, we have disputed
7 Petitioner's position that this is a search, although
8 suspicionless, that it is -- that discretion is not
9 circumscribed is our position. And it is, because --

10 JUSTICE GINSBURG: Well, are there manuals --
11 are there any -- here is the cop on the beat.

12 MR. NIVER: Yes.

13 JUSTICE GINSBURG: He sees someone that he
14 knows is a parolee. Is there any instruction that he's
15 been given so that his discretion can be guided instead
16 of rudderless? In practice in California, are all --

17 MR. NIVER: In -- I'm sorry, Your Honor.

18 JUSTICE GINSBURG: Yes. What is the
19 practice?

20 MR. NIVER: In practice, the -- a search -- a
21 parole search may not be arbitrary, capricious, or
22 conducted solely for the purpose of harassing --

23 JUSTICE GINSBURG: I'm asking you about what
24 instruction, what training, if you know, are officers
25 given? Or are they given no training, just the law

1 that says, "You can search any parolee"?

2 MR. NIVER: No, they are not told that they
3 may search any parolee, Your Honor. Rather, they are
4 told that the search must be to rehabilitate, reform,
5 or have some other law enforcement purpose. And they -
6 -

7 JUSTICE SOUTER: Okay. The officer says,
8 "I'm searching to see whether the person has any
9 evidence of crime on him." For example, whether he has
10 any drugs on him. Law enforcement purpose:
11 supervisory, I suppose. They want to know whether
12 their -- whether their parolees are committing
13 offenses. And yet, that reason would apply to everyone
14 virtually all the time. So, it doesn't seem to be a
15 limitation at all. What -- am I -- am I missing
16 something?

17 MR. NIVER: It does apply -- it is a
18 limitation. It is not a limitation that would protect
19 the expectation of privacy of a nonparole --

20 JUSTICE SOUTER: Well, how does the
21 limitation work? The guy is on 1st Street, and an
22 officer says, you know, "I recognize this person is a
23 parolee, and I have a law enforcement objective. Is
24 the person committing a crime? Is the -- is the person
25 a recidivist? Is the person violating parole?" So, he

1 searches him. The person gets to 2nd Street, another
2 officer does the same thing. Three hours later, a
3 third officer does the same thing. In each case, it
4 seems to me, their justification would not fall afoul
5 of the arbitrary, capricious, or harassment standard.
6 It's not coordinated. They have a -- both a parole
7 and a law enforcement objective. Why is there any
8 limitation, then, on the right to search?

9 MR. NIVER: If these are, as I understand
10 Your Honor's hypothetical, three independent searches -
11 -

12 JUSTICE SOUTER: Uh-huh.

13 MR. NIVER: -- to the extent that that could
14 happen, and I suppose it could, the -- again, the
15 limitation is it be, as Your Honor states, for a
16 valid law enforcement purpose, and it would require --

17 JUSTICE SOUTER: No. No, but let's get
18 behind the rhetoric. Is there any reason my
19 hypothetical could not, in fact, turn out to be true?

20 MR. NIVER: There is no --

21 JUSTICE SOUTER: Apart from the unlikelihood
22 of all those police officers out there. But, leaving
23 that aside, is there -- is there any reason, in the
24 standard, that my hypothetical could not be true?

25 MR. NIVER: Well, Your Honor, no, there is no

1 reason, but it would -- it requires more than testimony
2 by the officers. If the officers at -- each testified
3 that they conducted the search, they're -- also
4 requires a finding of fact by the trial court that the
5 searches were, in fact, for a valid law enforcement
6 purpose.

7 JUSTICE SOUTER: Okay. I mean, let's assume
8 the police are telling the truth, and the judge says,
9 "Sure." So, there is no limitation. And it sounds to
10 me, then, as though about the only limitation that
11 would be enforceable would be the limitation against
12 harassment. If one officer did it every 15 minutes to
13 the same person, or if there were a departmental
14 systematic policy saying, you know, "Get so-and-so,"
15 that I can understand as being a limitation. But I
16 don't see any other limit.

17 MR. NIVER: Well, the limitation is, as Your
18 Honor states, if it's a -- for a valid law enforcement
19 purpose or to promote rehabilitation or --

20 JUSTICE SOUTER: No, I realize --

21 MR. NIVER: -- recommend --

22 JUSTICE SOUTER: -- but do you --

23 MR. NIVER: But --

24 JUSTICE SOUTER: -- do you agree that there
25 is not any practical limitation, other than the

1 harassment limitation?

2 MR. NIVER: I -- well, that harassment
3 limitation is sufficient to protect the residuum of an
4 expectation --

5 JUSTICE SOUTER: Well, maybe --

6 MR. NIVER: -- of --

7 JUSTICE SOUTER: -- maybe it is. But what's
8 the answer to my question? Is that, in practical
9 terms, the only limitation?

10 MR. NIVER: It is a -- but it -- yes, Your
11 Honor, that is the protection.

12 JUSTICE SOUTER: Okay.

13 JUSTICE SCALIA: I thought you said that
14 maybe cavity searches would not -- would not be allowed
15 without some special reason for them. And that
16 wouldn't necessarily be harassment.

17 MR. NIVER: I think it depends on the
18 circumstances of the search.

19 JUSTICE SCALIA: Yes --

20 MR. NIVER: There's an --

21 JUSTICE SCALIA: I mean --

22 MR. NIVER: -- overarching principle here,
23 under the Fourth Amendment, that the search be
24 reasonable, in terms of manner and scope.

25 JUSTICE SCALIA: Okay.

1 MR. NIVER: That applies equally to a
2 suspicionless search as it would to a search based on
3 individual suspicion. To that extent, it's really not
4 an issue that arises from the fact that this is
5 suspicionless.

6 JUSTICE GINSBURG: What would be arbitrary
7 and capricious? You told us harassing would be the
8 repeated searches by the same officer.

9 MR. NIVER: Or an -- or a needlessly intrusive
10 search, as has been just described, or --

11 JUSTICE SOUTER: Well, let's assume -- let's
12 assume that the cavity search is demanded at the bus
13 station, and the officer says, "We know that drugs get
14 transported by people who ingest them in the balloons,
15 and they get on buses and they travel back and forth
16 from city A to city B." Any reason that that would run
17 afoul of arbitrary and capricious?

18 MR. NIVER: Depends on the circumstances of
19 the search. Again, Your Honor --

20 JUSTICE SOUTER: All I'm telling you is, he's
21 at a bus station. The facts are that a lot of people
22 who travel on buses are drug couriers. This person is
23 a parolee. Would that run afoul of the -- of any
24 arbitrary and capricious limitation?

25 MR. NIVER: It would, for example, if it were

1 done in public view. If the officer didn't, then --

2 JUSTICE SOUTER: Well, sure, but the officer
3 says, "All right. I'm taking you down to the station
4 for a cavity search."

5 MR. NIVER: Again, the office -- if the
6 officer did it under those circumstances, it's for the
7 finder of fact to decide whether it was done for a
8 legitimate purpose or --

9 JUSTICE SOUTER: Well, you're -- I'm asking
10 you to be the finder of fact for me. This is the
11 officer's explanation. This is the factual -- set of
12 factual premises on which he acts. Has he violated the
13 arbitrary and capricious limitation?

14 MR. NIVER: If, in fact, it was for the
15 purpose that you state, a legitimate law enforcement
16 purpose, and he has been removed from public view, and
17 it's reasonable, in terms of manner and intensity, then
18 it would be permissible.

19 JUSTICE KENNEDY: I have one --

20 JUSTICE SCALIA: Well, suppose you couldn't -
21 -

22 JUSTICE KENNEDY: I have one --

23 JUSTICE SCALIA: -- you couldn't --

24 JUSTICE KENNEDY: I have --

25 JUSTICE SCALIA: -- conduct cavity searches

1 without some special reason, even in prison. Wouldn't
2 that be -- isn't there some remnant of a fourth-
3 amendment right in prison that you cannot subject, you
4 know, the whole cellblock to cavity searches?

5 MR. NIVER: That would depend, Your Honor, on
6 the prison, the prison regs, the State. I can't answer
7 that question --

8 JUSTICE SOUTER: Well, I --

9 MR. NIVER: -- in --

10 JUSTICE SOUTER: -- I thought the assumption
11 of your answer to my question a moment ago was that
12 there was no such limitation, so far as California is
13 concerned.

14 MR. NIVER: No, there is a limitation, in
15 terms of manner and scope.

16 JUSTICE SOUTER: Well, sure. But we -- the
17 manner, in this case, is, they take him down to the
18 station, so that they're not going through this in the
19 middle of a crowded bus terminal. But the point of the
20 question was, any parolee at a bus terminal could be
21 subjected to this demand for search, and I thought your
22 answer was, yes, he could be. And now, in response to
23 Justice Scalia's question, you're saying, "Well, there
24 may be some limitation." So, which is it?

25 MR. NIVER: That if the search is a -- for a

1 valid law enforcement purpose, and it is reasonable in
2 scope and manner, then it is a permissible parolee
3 search, in California.

4 CHIEF JUSTICE ROBERTS: Does it depend -- I
5 mean, what if he's on parole for transporting drugs in
6 balloons from bus stations? Does that make a
7 difference? -- as opposed to, he's on parole for tax
8 fraud.

9 MR. NIVER: It certainly might, Your Honor.
10 And, again, that would be -- that -- an additional bit
11 of evidence to present -- to be presented to the
12 suppression court to determine whether the scope of the
13 search was reasonable.

14 JUSTICE GINSBURG: But all this is on a case
15 -- would be on a case-by-case basis. There are no
16 going-in guides for the officer on the street.

17 MR. NIVER: It's necessarily determined on
18 the -- any search has to be decided -- the
19 reasonableness of any search has to be decided on a
20 case-by-case basis.

21 JUSTICE SCALIA: Do we --

22 JUSTICE BREYER: But the reasonableness here
23 would be unreasonable, unless there are some checks.
24 We're talking about suspicionless searches. And you
25 could have checks. But what about saying -- why is it

1 reasonable to do it without any rule-based controls on
2 the behavior of the police? That's the question.

3 MR. NIVER: Okay. And the answer is, in
4 terms of the competing interests, the lowered
5 expectations --

6 JUSTICE BREYER: Okay. But what interest
7 does it serve not to have some rules, manuals,
8 regulations that help make sure it really is random, or
9 help make sure it isn't harassing, or help make sure
10 that it's serving the very ends that you hope to serve
11 with the suspicionless searches?

12 MR. NIVER: If a State wishes to adopt such
13 rules, those would -- may comply with the Fourth
14 Amendment. The question is not, what could be done?
15 The question is, What was done? The question is
16 whether California's rule, which permits parolee
17 searches that -- with the -- absolute prohibition of
18 arbitrary, capricious, and harassing suits, and which
19 must be conducted under the Fourth Amendment, in terms
20 -- reasonable, in terms of time, place, manner, and
21 scope -- the question is whether that system, the
22 California scheme, is constitutional under the Fourth
23 Amendment. And here, the system was designed to
24 address an overwhelming problem that the Court, this
25 Court, has well defined. The -- over 100,000 parolees

1 are on the street at any given time. Almost 90,000 of
2 them will be revoked in any given period. They -- the
3 California parolees require intense supervision. The
4 statute, 3067, was enacted to permit that kind of
5 intense supervision. And the protection afforded to
6 the parolee, in terms of a requirement of a proper
7 purpose --

8 CHIEF JUSTICE ROBERTS: Thank you, Mr. Niver.
9 Mr. Marcus.

10 ORAL ARGUMENT OF JONATHAN L. MARCUS

11 FOR THE UNITED STATES, AS AMICUS CURIAE,

12 IN SUPPORT OF RESPONDENT

13 MR. MARCUS: Thank you. Mr. Chief Justice,
14 and may it please the Court:

15 Concerned about the threat that parolees pose
16 to public safety, the California Legislature, in 1996,
17 authorized both police and parole officers to search
18 them without individualized suspicion. Whether
19 evaluated under the special-needs doctrine applied in
20 Griffin, or the totality-of-the-circumstances approach
21 applied in Knights, the search of Petitioner in this
22 case, pursuant to his search condition, was reasonable
23 under the Fourth Amendment.

24 JUSTICE ALITO: Do we have --

25 JUSTICE KENNEDY: But not the consent --

1 CHIEF JUSTICE ROBERTS: -- to decide --

2 JUSTICE KENNEDY: -- not the consent

3 approach, I take it. I didn't get an opportunity to

4 ask the counsel who argued just previously. Seemed to

5 me that he argued consent when he answered Justice

6 Stevens's question about the tax-evader. But he argued

7 the overwhelming practical needs when he argued the

8 rest of the case. And I thought I saw some tension in

9 the argument there. And I take it the Government does

10 not embrace the consent argument?

11 MR. MARCUS: No, we do embrace it. We -- but

12 we briefed --

13 JUSTICE KENNEDY: But you --

14 MR. MARCUS: -- the --

15 JUSTICE KENNEDY: -- just --

16 MR. MARCUS: It --

17 JUSTICE KENNEDY: -- put it in number --

18 MR. MARCUS: We --

19 JUSTICE KENNEDY: -- you put it --

20 MR. MARCUS: We --

21 JUSTICE KENNEDY: -- in number three?

22 MR. MARCUS: Right. It --

23 JUSTICE KENNEDY: In --

24 MR. MARCUS: -- well, primarily -- for a

25 couple of reasons. First, Your Honor, the California

1 Supreme Court has not had a chance to interpret
2 3067(a), you know, after the Reyes decision. They
3 weren't interpreting it there. And so, they haven't
4 had a chance to revisit their ruling that, as a matter
5 of State law, it's not -- there's no consent when it
6 comes to a parolee. And that's -- so, we thought maybe
7 that would be a reason this Court, prudentially,
8 wouldn't want to reach that issue.

9 And, secondly, the -- while the joint
10 appendix contains a portion of the agreement that the
11 Petitioner signed, it doesn't contain the whole content
12 of the agreement. The appellate record doesn't contain
13 the whole content of the agreement. So, we didn't --

14 JUSTICE KENNEDY: But in your view, if the
15 consent was straightforward in the documents, would
16 that be the strongest argument or the weakest argument?

17 MR. MARCUS: Well, I think --

18 JUSTICE KENNEDY: I mean, I take you'll win
19 on any --

20 MR. MARCUS: We --

21 JUSTICE KENNEDY: -- argument --

22 MR. MARCUS: Right, we think all --

23 JUSTICE KENNEDY: -- you can take.

24 MR. MARCUS: -- we think all three arguments
25 are strong. I don't think -- one isn't necessarily

1 stronger than the other. And -- but -- and this Court
2 -- but if the Court -- I mean, the Court certainly, at
3 a minimum, can look at the statutes under California
4 law, and can certainly conclude from the statutes that
5 if a -- if some -- if an inmate doesn't sign the
6 papers, he stays in prison until his sentence basically
7 terminates. And then -- and then, at that point, when
8 he's released, this -- another provision, section
9 3060.5, kicks in, and his parole -- his parole is
10 revoked. And he eventually will -- he ultimately will
11 serve his whole term of parole in prison, so that the
12 Court can see by the statutes that it is, effectively,
13 a choice, statutorily, that he -- someone who does not
14 want to be on parole does not have -- does not have to
15 sign the condition, and will never go on parole.

16 JUSTICE GINSBURG: Mr. Long seemed to have --
17 tell us something different about that. It's -- they
18 had -- they must go out. He seemed to say they didn't
19 have the choice of staying in.

20 MR. MARCUS: Well, I think it's fairly clear,
21 Your Honor, under -- if you look at the appendix to the
22 Petitioner's brief, if you -- if you look at a
23 combination of section 3067(b), and then -- which --

24 JUSTICE SCALIA: I think he said he was
25 unaware of anybody who was dragged out kicking and

1 screaming.

2 MR. MARCUS: Right. And then if you look at
3 3067(b), and then you also look at -- 3067(a) and (b),
4 and then you look at section 3060.5, which provides for
5 revocation if the -- if the inmate is -- or the parolee
6 is unwilling to --

7 JUSTICE GINSBURG: But it really --

8 MR. MARCUS: -- sign the --

9 JUSTICE GINSBURG: -- it really isn't.

10 MR. MARCUS: -- agreement.

11 JUSTICE GINSBURG: It's -- this is not like
12 you sign an agreement and you're -- you can do it or
13 you can not do it. I mean, this is a real Hobson's
14 choice, isn't it?

15 MR. MARCUS: Well, you know, again, if you
16 think that --

17 JUSTICE GINSBURG: You can't --

18 MR. MARCUS: -- there --

19 JUSTICE GINSBURG: -- negotiate, "I don't" --

20 MR. MARCUS: There --

21 JUSTICE GINSBURG: -- "want this part."

22 MR. MARCUS: There undoubtedly are adverse
23 consequences to not signing the agreement.

24 CHIEF JUSTICE ROBERTS: Could you --

25 MR. MARCUS: But --

1 CHIEF JUSTICE ROBERTS: -- waive your --
2 could you waive --

3 MR. MARCUS: But --

4 CHIEF JUSTICE ROBERTS: -- your Eighth
5 Amendment rights? You know, if your parole's revoked,
6 you're going to go back into a very cruel and unusual
7 prison, not the one you left.

8 MR. MARCUS: Well, I mean, I think -- I think
9 the test would be whether it's -- whether it's
10 reasonably the consent -- what they're asking you to
11 agree to is reasonably related to the purposes of
12 punishment. And, in this case, the -- you know, the
13 supervision of the parolee, rehabilitation, protection
14 of public safety. And so, we think the consent
15 argument works very well here.

16 But, if I could, I'd like to also address our
17 arguments under the totality of the circumstances and
18 special needs. Faced with a serious recidivism
19 problem, California has made the reasonable judgment
20 that subjecting parolees to suspicionless searches is
21 necessary to protect public safety and to promote
22 rehabilitation.

23 JUSTICE ALITO: What if it's the case --

24 MR. MARCUS: But --

25 JUSTICE ALITO: -- that this program would

1 allow some searches that are -- that violate the Fourth
2 Amendment, but that this particular search would not?
3 How closely can we focus just on what happened here, or
4 do we have to consider all the -- all the types of
5 searches and the circumstances of searches that the
6 California program might permit?

7 MR. MARCUS: Well, I -- no, I mean, I think
8 typically this Court applies a very, sort of, narrowly
9 tailored approach to Fourth Amendment questions, and
10 focuses narrowly on the context in which the search was
11 conducted. In this case, for example, you wouldn't --
12 you wouldn't have to reach the question of whether a
13 search of a home was constitutional. This -- I mean,
14 the question here is whether a search of the Petitioner
15 on a public street was constitutional. And the Court
16 does typically limit its Fourth Amendment cases to the
17 facts presented.

18 So -- but, at the same time, in analyzing
19 that, I think you do have to consider what the Fourth
20 Amendment standard is. And we believe the Fourth
21 Amendment does impose -- the Fourth Amendment itself
22 imposes restrictions on the discretion of police
23 officers and parole officers that are meaningful, that
24 -- as the Reyes Court said, there are restrictions on
25 the timing, the frequency, the duration, and the

1 oppressiveness of the search. So, police officers and
2 parole officers are on notice that courts will review
3 suspicionless searches very carefully. They're on
4 notice that there are limits to what they can do. And
5 they're --

6 JUSTICE STEVENS: But following --

7 MR. MARCUS: -- on notice that --

8 JUSTICE STEVENS: -- up on Justice --

9 MR. MARCUS: -- if a search is --

10 JUSTICE STEVENS: -- Alito's thought,
11 supposing there were no restrictions whatsoever, but
12 this particular search didn't seem very offensive.
13 Would you still defend it?

14 MR. MARCUS: If there were no -- no, we --
15 no, we think there are -- the Fourth Amendment imposes
16 restrictions -- time, place, and manner restrictions --
17 on the suspicionless searches.

18 JUSTICE SCALIA: No.

19 MR. MARCUS: And so, that --

20 JUSTICE SCALIA: He's asking you, I think,
21 Justice Alito's question, "Do we have to get into
22 that?" So long as this one's okay, why do -- why do we
23 have to get into whether there might be some other ones
24 that aren't okay?

25 MR. MARCUS: I -- that's correct. I don't --

1 I mean, I --

2 JUSTICE STEVENS: And it --

3 MR. MARCUS: -- I think you just --

4 JUSTICE STEVENS: -- it was assumed

5 California --

6 MR. MARCUS: Right.

7 JUSTICE STEVENS: -- didn't say if they had

8 protection against harassment and so forth. Suppose

9 they just said, "Cart blanche, you can search any

10 parolee at any time, any place." And then you'd ask

11 whether this search was reasonable.

12 MR. MARCUS: Right. And I think, in determining

13 that, you would -- in determining it and looking at the

14 facts of this case, you would -- you would apply a Fourth

15 Amendment standard to determine whether this search was

16 objectively reasonable. And you would look at factors

17 like the time, place, frequency, and manner to

18 determine whether a search was, in fact, reasonable --

19 JUSTICE STEVENS: So, it would uphold this.

20 MR. MARCUS: -- and objective --

21 JUSTICE STEVENS: There's --

22 MR. MARCUS: -- objective --

23 JUSTICE STEVENS: -- no matter now

24 unreasonable the California statute might be in other

25 applications.

1 MR. MARCUS: That's correct. And it's to see
2 whether it's objective -- whether the search in this
3 case was objectively related to the purposes of
4 supervision, to protect public safety, and to promote
5 rehabilitation. That, we think, is the test under the
6 Fourth Amendment. And while Petitioner points out that
7 there are a hundred cases out there where the standard,
8 you know, hasn't been used to throw out a search, at
9 the same time, he hasn't pointed to any cases where a
10 prosecution has been based on an abusive search that
11 this standard has been too toothless to throw out. And
12 we think that's significant, given that this type of
13 condition has been in place for over 20 years for
14 probationers, since the Bravo decision in 1987. And
15 the parole condition has been in place since 1996, when
16 the Legislature authorized this and made a considered
17 decision to switch from a reasonable-suspicion standard
18 to a suspicionless standard for parolees.

19 JUSTICE KENNEDY: The Government -- is the
20 Government of the United States somewhat behind the
21 State of California? It's not efficient in -- as
22 efficient as California in supervising its parolees?
23 Because you don't have this rule.

24 MR. MARCUS: We don't have this program.
25 There are -- I mean, District Courts have the authority

1 to impose a suspicionless search condition. And some
2 have. I think the important thing to keep in mind here
3 is that this is a -- the Court has traditionally given
4 a lot of deference to States in dealing with convicted
5 felons in their criminal justice system, in making
6 sentencing determinations, reasonable sentencing
7 determinations, as this Court emphasized in the Ewing
8 decision. And so, California clearly has a big problem
9 on their hands. The recidivism rates are demonstrated,
10 they're in the record. The -- California was
11 responding to those high recidivism rates. They were
12 also responding to some high-profile crimes involving
13 parolees. And the -- and, on top of that, we do have a
14 brief that's submitted by 21 States who say that they
15 do need this authority to effectively supervise
16 parolees.

17 JUSTICE GINSBURG: Has --

18 MR. MARCUS: But --

19 JUSTICE GINSBURG: -- the recidivism rate
20 gone down in the years since the Reyes decision, since
21 this is suspicionless search, as opposed to reasonable
22 suspicion?

23 MR. MARCUS: Well, I -- I mean, I'm not sure
24 if the studies have been -- statistics have been, sort
25 of, documented up to this -- to this date, but I think

1 it's fair to say that it would be difficult to draw
2 conclusions from those statistics, because, of course,
3 this gives -- this provision gives the California
4 parole and police officers more authority to conduct
5 searches; and so, there's -- to the extent it's
6 increasing the detection of crime, and so more people
7 are actually being, you know, put back in prison on a
8 parole violation or a criminal violation, it wouldn't
9 necessarily mean that it's -- this isn't, you know,
10 being successful in reducing recidivism, because
11 there's --

12 JUSTICE SOUTER: Do --

13 MR. MARCUS: -- I mean, there's that side to
14 it, too.

15 JUSTICE SOUTER: Even apart from the -- what
16 -- the lack of evidence for any change since the Reyes
17 decision, do we have any empirical evidence, perhaps
18 involving a control group, about the likelihood of the
19 -- this liberal search policy in reducing recidivism?

20 MR. MARCUS: May I answer the question, Your
21 Honor?

22 CHIEF JUSTICE ROBERTS: Go ahead.

23 MR. MARCUS: I think, you know, traditionally
24 this Court has been very deferential to State decisions
25 on -- you know, on efficacy, on whether a particular

1 program is going to be efficacious -- I mean, cases
2 like Martinez-Fuerte and the Sitz decision involving
3 checkpoints for drunk driving -- in a court. Even
4 with, you know, very strong, you know, low efficacy
5 rates -- in, you know, a program that's showing very
6 low efficacy rates, the Court said that these are
7 judgment that -- judgments that the States need to
8 make, and they ought to be given a lot of deference,
9 even if, you know, their -- the numbers, you
10 know, of -- don't show, by clear and convincing proof,
11 that the problem isn't being ameliorated.

12 CHIEF JUSTICE ROBERTS: Thank you, Mr.
13 Marcus.

14 Mr. Long, you have 2 minutes remaining.

15 REBUTTAL ARGUMENT OF ROBERT A. LONG, JR.,
16 ON BEHALF OF PETITIONER

17 MR. LONG: In answer to Justice Alito's
18 question, this search is unconstitutional, because the
19 officer was completely at liberty -- he had complete
20 discretion to decide whether to search. And it would
21 not be acceptable if California said, "You can search
22 anybody on the street," if the answer was, "Well, it
23 wasn't a particularly invasive search." Granted,
24 parolees have far less Fourth Amendment rights than
25 others, but this is so much the core of the Fourth

1 Amendment. This is what the framers wrote the Fourth
2 Amendment to stop, these general warrants and writs of
3 assistance. One --

4 JUSTICE SCALIA: But we --

5 MR. LONG: -- consent --

6 JUSTICE SCALIA: -- we normally don't look
7 into the mind of the officer to decide whether his
8 action was okay or not.

9 MR. LONG: Well, and we're not asking you to
10 look into the mind of the officer. It's --
11 California's system, it's quite clear -- they admitted
12 it here -- leaves it up to -- the officer can have any
13 reason for doing the search. It's arbitrary, in the
14 sense this Court would use, but not California.

15 On consent, very quickly, footnote 16 of our
16 reply brief, the California Supreme Court has said
17 repeatedly that -- including very recently, since this
18 section 3067 -- that parole is not a matter of consent;
19 it is imposed on you. This is a question of State law.

20 Perhaps this Court would read the State law
21 differently. But, as the Court said in Griffin, the
22 State Supreme Court is the last word on the questions
23 of State law.

24 As to abuses, there are a number. One that
25 I'll just mention, the California Supreme Court has

1 held that it's perfectly okay -- if the officer knows
2 somebody in the house is on parole or probation, they
3 can use that as a lever to go in and search to try to
4 find evidence about somebody else who's in the house.
5 That is permissible under the California standard.

6 But the bottom line here is that this type of
7 search regime is at the core of the prohibition of the
8 Fourth Amendment. It's what the framers wrote the
9 Fourth Amendment to prohibit. So, if parolees have any
10 Fourth Amendment rights, other than, you know, an
11 essentially useless arbitrary-and-capricious standard
12 that's never going to work, the Fourth Amendment has to
13 prohibit this search. There are many other things the
14 States can do. They have many options. This is at the
15 endpoint on the spectrum.

16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you, Mr. Long.

18 The case is submitted.

19 [Whereupon, at 11:18 a.m., the case in the
20 above-entitled matter was submitted.]

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