No. 04-9728

IN THE
Supreme Court of the United States

DONALD CURTIS SAMSON,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Does the Fourth Amendment prohibit police from conducting a warrantless search of a person who is subject to a parole search condition, where there is no suspicion of criminal wrongdoing and the sole reason for the search is that the person is on parole?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

Page(s)

STATUTES & REGULATIONS

OTHER

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, Division One (J.A. 9-29) is unreported.

JURISDICTION

The judgment of the Court of Appeal was entered on October 14, 2004. J.A. 9. The California Supreme Court denied a petition for review on January 12, 2005. J.A. 30. The petition for a writ of certiorari was filed on April 12, 2005, and granted on September 27, 2005. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States and relevant portions of §§ 3000, 3000.1, 3001, and 3607 of the California Penal Code and §§ 2511 and 2512 of the California Code of Regulations are reprinted in Appendix A to this brief. *See* App. A, *infra*, 1a-11a.

STATEMENT

1. California's Parole System. The California legislature has determined that "the period immediately following incarceration is critical to successful reintegration of the offender into society and to positive citizenship." Cal. Pen. Code § 3000(a)(1). In order to "provide for the supervision of and surveillance of parolees," and "to provide educational, vocational, family and personal counseling necessary to assist parolees in the transition between imprisonment and discharge," California law requires that "[a] sentence pursuant to Section 1168 or 1170 [the general sentencing provisions of

the California Penal Code] shall include a period of parole, unless waived as provided in this section." *Id.*

The period of parole lasts up to three years for certain offenses, and up to five years for others. *Id.* § 3000(b)(1), (2). If a person receives a life sentence and is subsequently paroled, the period of parole is five years, and may be extended for an additional five years. *Id.* § 3000(b)(3). In the case of a person sentenced for first or second degree murder, "the period of parole, if parole is granted, shall be the remainder of the person's life." *Id.* § 3000.1(a).

Parolees may be discharged from parole before their periods of parole have been completed. Discharge occurs after one year if the parolee was convicted of a nonviolent felony, and after two or three years for most other felonies, unless the Board of Prison Terms determines that the person should be retained on parole for a longer period. *Id.* § 3001(a), (b). Persons subject to lifetime parole are discharged after five years (in the case of second-degree murder) or seven years (in the case of first-degree murder), unless the Board determines that they should be retained on parole. *Id.* § 3000.1(b).

2. The Parole Search Condition. California law provides for a "notice of parole," which is "a general description of rules and regulations governing parole." Cal. Code Regs. tit. 15, § 2511(a). By statute, "[t]he notice of parole shall read as follows: . . . Search. You and your residence and any property under your control may be searched without a warrant at any time by any agent of the Department of Corrections or any law enforcement officer." *Id.* § 2511(b).

California law specifies that "parole conditions are not a contract but are the specific rules governing all parolees whether or not the parolee has signed the form containing the parole conditions." *Id.* § 2512(a). California law nevertheless provides that "[a]ny inmate

who is eligible for release on parole pursuant to this chapter shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." Cal. Penal Code § 3067(a). An inmate who does not so agree loses "worktime credit on a day-for-day basis and shall not be released until he or she either complies with the provision of subdivision (a) or has no remaining worktime credit, whichever occurs earlier." *Id.* § 3067(b). Another provision of California law provides that "the parole authority shall revoke the parole of any prisoner who refuses to" take any of several specified actions, including "sign[ing] a parole agreement setting forth the general and any special conditions applicable to the parole." *Id.* § 3060.5. Confinement under this provision may not exceed six months except in certain circumstances. *Id.*[1]

The California Supreme Court has held that the net effect of these provisions is that "parole is not a matter of choice. The Board of Prison Terms must provide a period of parole; the prisoner must accept it. Without choice, there can be no voluntary consent to inclusion of the search condition." *People* v. *Reyes*, 968 P.2d 445, 448 (Cal. 1998) (citation omitted). *See also People* v. *Guzman*, 107 P.3d 860, 867 (Cal. 2005) (parole

[1] The provisions of the California Penal Code discussed in the text apply to the state-administered parole system. Separately, California counties supervise parolees from county and city correctional institutions. Cal. Pen. Code §§ 3074, 3076. California law requires each county to establish a Board of Parole Commissioners, and each county board makes rules under which prisoners in county and city prisons may be paroled. *Id.* §§ 3075, 3076. California law does not require any particular conditions of county parole other than that parole be supervised. *Id.* § 3088. Some county parolees are thus subject to a search condition, while others are not. *See* Brief of California Public Defenders Association as *Amici Curiae* at 5-6.

in California is "mandatory from the offender's perspective"); J.A. 10-11 n.3 (quoting *People* v. *Lewis*, 74 Cal. App. 4th 662, 668 (Cal. Ct. App. 1999) (search conditions "are now automatic, and imposed on every parolee")).

3. The Search of Petitioner. On September 6, 2002, at about 5:30 in the afternoon, Officer Alex Rohleder of the San Bruno, California Police Department was driving his patrol vehicle when he observed "two adults and a little baby walking down the street." J.A. 10, 31. The two adults were Petitioner and his friend Deborah Watson; the "baby" was Ms. Watson's three-year-old son. J.A. 10-11, 60. Petitioner and his companions were walking along a busy thoroughfare between a residential area and a major shopping area, near "family homes" and a school. J.A. 64-65.

Officer Rohleder was not actively looking for Petitioner, but "just happened to run across him." J.A. 34. The officer recognized Petitioner "from a prior contact." J.A. 10, 32. Officer Rohleder was aware that Petitioner was on parole, and "was under the impression that he might have a parolee at large warrant." *Id.*[2] The officer parked his patrol vehicle and "made contact" with Petitioner. J.A. 10, 32.

The officer conducted a pat-down search of Petitioner for weapons and found nothing. J.A. 65. The officer asked Petitioner whether he had an outstanding warrant. J.A. 10, 32. Petitioner responded "no, he didn't" and stated that "he was in good standing with his parole agent." *Id.* The officer called his dispatcher and

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[2] In California, a "parolee at large" warrant is issued when "a parolee's whereabouts are unknown, or [] he/she has remained unavailable for supervision." Cal. Dep't Corr. Admin. Bull. No. 93/15 (1993) ("Revised Parolee At Large Warrant Procedure").

confirmed that Petitioner's statements were correct. J.A. 10, 38.

The police officer then proceeded to search Petitioner more thoroughly. J.A. 33. The officer conducted this second search of Petitioner solely "[b]ecause it's a condition of his parole." J.A. 37. Petitioner, like other parolees in California, was subject to a search condition that provided: "You've agreed to search and seizure by a parole officer or other peace officer at any time of the night or day, with or without a search warrant or with or without cause." J.A. 48. "The warrantless search was predicated entirely upon the [Petitioner's] parole status." J.A. 14. Nothing about Petitioner's conduct gave rise to any suspicion that he was engaged in wrongdoing. J.A. 41. The search was not justified by "officer safety" concerns, and Petitioner did not consent to the search. J.A. 38, 40.

Officer Rohleder testified that he searches parolees on a "regular basis," but "I don't go after everybody all the time." J.A. 39, 44. The officer explained that, "being [a] parolee," Petitioner "needs to make sure he's still obeying the laws. It's a privilege for him to be out there." J.A. 38.

The officer searched Petitioner's pockets and found a "cigarette box in his left breast pocket." J.A. 33. The officer searched inside the cigarette box and found "a plastic baggy containing Methamphetamine." *Id.* The officer immediately arrested Petitioner. *Id.*

The officer also searched Petitioner's companion, Deborah Watson. J.A. 11. According to the officer, Ms. Watson consented to the search. *Id.* According to Ms. Watson, the officer did not ask permission to search her, but instead told her to empty her pockets and asked if she had any weapons or drugs. J.A. 11, 56. After the officer went through Watson's belongings on top of the hood of the car, he told her to "go home." J.A. 11, 57.

4. The Proceedings Below. Petitioner was charged with possession of methamphetamine. In the trial court, he moved to suppress the drugs as the product of an illegal search. J.A. 9. The trial court denied Petitioner's motion. Petitioner was found guilty of possession of methamphetamine and sentenced to seven years' imprisonment. J.A. 8.

On appeal, Petitioner contended that the officer did not conduct a valid parole search. He argued that the search was not justified by any individualized suspicion that he was engaged in criminal activity, and that the search was arbitrary, capricious, and harassing. J.A. 12.

The court of appeal rejected both arguments. As to the first argument, the California Supreme Court held in *People* v. *Reyes*, 968 P.2d 445 (Cal. 1998), that "an adult parolee subject to a search condition could be searched even if the searching officers did not have a reasonable suspicion that the parolee had violated or was planning to violate either the law or the conditions of parole." J.A. 12. *Reyes* overruled an earlier decision of the California Supreme Court, which held that "the appropriate standard of reasonableness to justify a parole search is a reasonable suspicion on the part of the parole officer that the parolee is again involved in criminal activity, or has otherwise violated his parole, and that the search may turn up evidence of that activity." *People* v. *Burgener*, 714 P.2d 1251, 1271 (Cal. 1986). The court of appeal noted that, as an intermediate appellate court, it was bound to follow the California Supreme Court's decision in *Reyes*. J.A. 13. The court of appeal "therefore conclude[d] that the parole search of defendant did not require a particularized suspicion of criminal activity." J.A. 13 (citation omitted).

The court of appeal also held that the search was not arbitrary, capricious, or harassing. J.A. 13-14. The court concluded that the officer identified "a legitimate law enforcement purpose" for the search ("to determine

whether [Petitioner], as a parolee, was 'still obeying the laws'"). J.A. 14. The court also concluded that the officer's testimony that "he customarily searches identified parolees does not demonstrate arbitrariness, and indicates that the search was not conducted by the officer for the purpose of harassment or due to any personal animosity toward the defendant." *Id.*[3]

Petitioner filed a petition for review with the California Supreme Court, which denied the petition. J.A. 30.

SUMMARY OF THE ARGUMENT

1. A search ordinarily is unreasonable in the absence of individualized suspicion of wrongdoing. In deciding whether a search falls within the closely guarded category of constitutionally permissible suspicionless searches, the Court balances the degree to which the search intrudes on individual privacy interests against the degree to which it is needed to promote legitimate government interests. That balancing analysis leads to the conclusion that suspicionless searches of parolees by law enforcement officers are unreasonable.

The State's interest in supervising probationers (and, by extension, parolees) "permit[s] a degree of impingement upon privacy that would not be constitutional if applied to the public at large." *Griffin* v. *Wisconsin*, 483 U.S. 868, 875 (1987). But "[t]hat permissible degree is not unlimited," and may be "exceeded." *Id.* *See also United States* v. *Knights*, 534 U.S. 112, 121 (2001) ("When an officer has reasonable

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[3] The court of appeal also rejected Petitioner's argument that his sentence was unlawful under *Blakely* v. *Washington*, 542 U.S. 296 (2004), and directed the trial court to award Petitioner three additional days of sentence credits. J.A. 14-28.

suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion into the probationer's significantly diminished privacy interests is reasonable.").

A regime of suspicionless, nonconsensual parolee searches virtually extinguishes parolees' privacy interests, contrary to this Court's recognition that parolees' privacy interests are diminished but not extinguished. Moreover, parolee searches seriously intrude upon the privacy interests of third parties. California's search regime gives individual law enforcement officers unconstrained discretion to conduct parolee searches. The Court has repeatedly held that it is unreasonable to give police officers unbridled discretion to make even brief stops, let alone extensive searches, in the absence of any individualized suspicion of wrongdoing.

California's requirement that parolee searches not be "arbitrary," "capricious," or "harassing" is both ineffective as a limitation on parolee searches and inconsistent with this Court's Fourth Amendment decisions. This Court has been reluctant to create additional standards of reasonableness, beyond the established "probable cause" and "reasonable suspicion" standards. California's standard also requires an inquiry into the officer's subjective purpose, contrary to this Court's decisions that the subjective intentions of individual law enforcement officers generally play no role in Fourth Amendment analysis.

A blanket regime of suspicionless parolee searches does not significantly advance the State's legitimate interests, and certainly does not warrant such an extreme intrusion upon privacy interests. Suspicionless searches are likely to undermine the State's interest in reintegrating parolees into society. Subjecting parolees to unrestricted searches that may inflict great indignity and arouse strong resentment, in the absence of even minimal

suspicion of wrongdoing, is not likely to promote reintegration of the parolee into society at large. And because suspicionless searches result in intrusions upon the privacy rights of third parties who share a home with parolees, they may prevent parolees from finding suitable housing and forming close relationships.

While the State has a strong interest in preventing parolees from engaging in criminal conduct, "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose." *City of Indianapolis* v. *Edmond*, 531 U.S. 32, 42 (2000). States have great flexibility to search parolees without subjecting them to a blanket regime of suspicionless searches. Parole officers or police officers may search a parolee's home without a search warrant or probable cause. The relatively undemanding "reasonable suspicion" standard requires only some minimal level of objective justification. And any evidence discovered in a parolee search may be used to revoke parole even if it is not admissible in a criminal trial.

States may also seek to adopt other means of supervising and searching parolees short of the extreme search regime adopted by California. For example, a state may argue that it is reasonable for a judge or parole board to impose a suspicionless search condition based upon consideration of the individual's circumstances. Or a state may seek to justify suspicionless searches by parole officers pursuant to the State's "special needs" beyond ordinary law enforcement. Or the State may argue that a parolee has knowingly and voluntarily consented to the search.

Indeed, nearly every other State and the Federal Government do *not* authorize police to conduct unlimited suspicionless, nonconsensual, searches of parolees. The experience of these other jurisdictions confirms that governments have effective means to advance their

legitimate interests in supervising and searching paroles, and do not need to impose an unlimited regime of suspicionless searches by police officers.

2. The "special needs" doctrine does not justify the search in this case. That doctrine cannot be used to justify a suspicionless search unless "the 'special need' that was advanced as a justification for the absence of a warrant or individualized suspicion was one divorced from the State's general interest in law enforcement," and there was "little, if any, entanglement with law enforcement." *Ferguson* v. *City of Charleston*, 532 U.S. 67, 79 & n.15 (2001); *see also Edmond*, 531 U.S. at 32.

The Court applied ordinary Fourth Amendment analysis rather than "special needs" analysis in *Knights*, and the same analytical framework applies in this case. Here, as in *Knights*, the search was undertaken by a law enforcement officer without a probation or parole officer. Police officers are "engaged in the often competitive enterprise of ferreting out crime"; parole officers, in contrast, have "a relationship with parolees that is more supervisory than adversarial," and are responsible for assisting parolees, offering them guidance, and trying to guide them into constructive development. *Pennsylvania Bd. of Probation & Parole* v. *Scott*, 524 U.S. 357, 368 (marks and citation omitted). Like *Knights*, this case "simply does not fit within the closely guarded category of 'special needs.'" *Ferguson*, 532 U.S. at 84.

3. Finally, the search in this case cannot be justified under a "consent" rationale. The Supreme Court of California has held that "[t]he consent exception to the warrant requirement may not be invoked to validate the search of an adult parolee." *Reyes*, 968 P.2d at 448. In California "parole is not a matter of choice. The Board of Prisons must provide a period of parole; the prisoner must accept it. Without choice, there can be no voluntary consent to inclusion of the search condition." *Id.* (citation omitted). The California Supreme Court is the final

authority on matters of California law, and therefore the "consent" rationale is inapplicable.

ARGUMENT

I. Suspicionless, Nonconsensual, Discretionary Searches Of Parolees By Police Officers Are Unreasonable.

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., amend. IV. "The touchstone of the Fourth Amendment is reasonableness." *Knights*, 534 U.S. at 118-19. "A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing." *Edmond*, 531 U.S. at 37 (citing *Chandler* v. *Miller*, 520 U.S. 305, 308 (1997)). Accordingly, this Court has "closely guarded" the category of "constitutionally permissible suspicionless searches." *Ferguson*, 532 U.S. at 77.

"[T]he reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Knights*, 534 U.S. at 118-19 (quoting *Wyoming* v. *Houghton*, 526 U.S. 295, 300 (1999)). "[I]n determining whether individualized suspicion is required, [the Court] must consider the nature of the interests threatened and their connection to the particular law enforcement practices at issue." *Edmond*, 531 U.S. at 42-43.

The search in this case falls outside the "closely guarded" category of constitutionally permissible suspicionless searches. A police officer, exercising

unconstrained discretion, stopped and searched Petitioner as he was "walking down the street." J.A. 31, 41. Petitioner was not doing anything that appeared to be illegal or inappropriate. J.A. 41. He did not consent to the search, and the search was not based on concern for the officer's safety. J.A. 38, 54. The sole basis for the search was Petitioner's status as a parolee. J.A. 37. Such searches are unreasonable because they result in an extreme intrusion upon privacy interests and they are not needed to advance the government's legitimate interests.

A. Parolees' Privacy Interests Receive A Degree Of Protection Under The Fourth Amendment.

The Court has recognized that a person's status as a parolee significantly diminishes, but does not extinguish, his expectation of privacy under the Fourth Amendment. In *Griffin*, the Court stated that "[a] probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.'" 483 U.S. at 873. The Court observed that "[t]o a greater or lesser degree, it is always true of probationers (as we have said it to be true of parolees) that they do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions.'" *Id.* at 874 (quoting *Morrissey* v. *Brewer*, 408 U.S. 471, 480 (1972)). The Court held in *Griffin* that probationer supervision "is a 'special need' of the State" that justifies a probation officer's search of a probationer's home based upon "reasonable grounds" that the home contains contraband. *Id.* at 875. But in holding that supervision of probationers "permit[s] a degree of impingement upon privacy that would not be constitutional if applied to the public at large," the Court expressly stated: "That permissible degree is not unlimited," and may be "exceeded." *Id.*

Griffin cited *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), which recognized that a parolee's "condition is very different from that of confinement in a prison." *Id.* at 482. In *Morrissey*, the Court said:

> The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. The parolee has been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person. Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life.

Id. at 482. For these reasons, the Court concluded, "the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty." *Id.* Termination of parole "inflicts a 'grievous loss' on the parolee and often on others." *Id.*[4]

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[4] In *Morrissey* the Court held that "[i]t is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege.'" 408 U.S. at 482. *Morrissey* thus rejected the theory, suggested in dicta in *Escoe* v. *Zerbst*, 295 U.S. 490, 492-93 (1935), that parole is an "act of grace" that may be "coupled with such conditions . . . as [government] may impose." *See Gagnon* v. *Scarpelli*, 411 U.S. 778, 782 n.4 (1973) ("It is clear . . . that a probationer can no longer be denied due process, in reliance on the dictum in *Escoe* v. *Zerbst* the probation is an 'act of grace.'"). *Morrissey* also noted that a parolee, like a prisoner, "is often formally described as being 'in custody,'" but flatly rejected the argument that "summary treatment is necessary as it may be with respect to controlling a large group of potentially disruptive prisoners in actual custody." 408 U.S. at 483. *See also* 5 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth* (...continued)

The Court's decisions in *Griffin* and *Morrissey* recognize a constitutional distinction between parolees and probationers on the one hand, and prison inmates on the other. In *Hudson* v. *Palmer*, decided shortly before *Griffin*, the Court held that prison inmates have *no* reasonable expectation of privacy. 468 U.S. 517, 525-526 (1984) ("[T]he Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell."). In reaching that conclusion, the Court observed that "[a] prison 'shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room.'" *Id.* at 527 (quoting *Lanza* v. *New York*, 370 U.S. 139, 143-44 (1962)).

In *Pennsylvania Board of Probation & Parole* v. *Scott*, the Court held that the exclusionary rule does not bar the introduction at parole revocation hearings of evidence seized in violation of parolees' Fourth Amendment rights. 524 U.S. 357, 365 (1998). The Court's opinion in *Scott* is based on a recognition that parolees have Fourth Amendment rights that may be violated by unreasonable searches.

Most recently, in *Knights*, the Court held that "[w]hen an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable." 534 U.S. at 121. The Court added: "The same circumstances that lead us to conclude that reasonable suspicion is constitutionally sufficient also render a

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Amendment § 10.10, at 434-42 (4th ed. 2004) (concluding that "constructive custody," "act of grace" and "waiver" theories of parolee searches are all unsound); Brief of NACDL as *Amicus Curiae*, at 11-16 (explaining that each of these theories is inapplicable).

warrant requirement unnecessary." *Id.* As in *Griffin* and *Morrissey*, the Court's decision placed persons on probation or parole in an intermediate status under the Fourth Amendment, with less protection than citizens at large but more protection than prisoners.[5]

In *Knights*, the Court stated that the probationer's reasonable expectation of privacy was "significantly diminished" because the probation order "clearly expressed the search condition and Knights was unambiguously informed of it." 534 U.S. at 119-20. Although notice of the government's intentions is undoubtedly a significant aspect of reasonable expectations, a government notice asserting authority to search cannot by itself determine the extent of a person's reasonable expectations of privacy. Otherwise, government officials could engage in unlimited searches and seizures, subject only to the requirement that they provide clear and unambiguous notice of their intentions. *See id.* at 120 n.6 (noting that although the terms of Knights's probation condition permitted suspicionless searches, the Court would not decide whether such searches would violate the Fourth Amendment).

In sum, this Court's decisions recognize that the privacy expectations of persons on parole and probation, while significantly diminished, receive a degree of protection under the Fourth Amendment.

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[5] Courts have applied the holding of *Knights* to parolees as well as probationers. *See, e.g.*, *United States* v. *Williams*, 417 F.3d 373, 376 & n.1 (3d Cir. 2005); *Knox* v. *Smith*, 342 F.3d 651, 657 (7th Cir. 2003); *United States* v. *Loney*, 331 F.3d 516, 520-21 (6th Cir. 2003); *United States* v. *Tucker*, 305 F.3d 1193, 1199 (10th Cir. 2002); *Riley* v. *Commonwealth*, 120 S.W.3d 622, 627 (Ky. 2003).

B. California's Suspicionless Search Regime Extinguishes Parolees' Privacy Interests And Seriously Intrudes Upon The Privacy Of Third Parties.

California's suspicionless parolee search regime intrudes upon individual privacy to an extreme degree. The Court has observed that even a limited pat-down search for weapons is "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment" and therefore "is not to be undertaken lightly." *Terry* v. *Ohio*, 392 U.S. 1, 17 (1968). The search in this case—which was preceded by a pat-down search for weapons—was considerably more intrusive. The police officer searched all of Petitioner's pockets, required Petitioner to remove his jacket, and then searched the jacket. J.A. 56. The officer removed the items he found in the pockets and searched them as well. J.A. 56. The search took place on a busy thoroughfare in front of Petitioner's companions, Ms. Watson and her three-year old child. J.A. 55-56, 64.

California's parole search condition permits police officers to search not only the parolee's person, but also the parolee's home and property. Cal. Code Regs. tit. 15, § 2511(b)(4) ("You and your residence and any property under your control may be searched without a warrant at any time by any agent of the Department of Corrections or any law enforcement officer."). Pursuant to this condition, any law enforcement officer may search at any hour of the day or night for no reason except that the person is on parole. Police officers are thus free to invade "the sanctity of private dwellings" at will, even though the home is "ordinarily afforded the most stringent Fourth Amendment protection." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 561 (1976).

California's suspicionless search regime also results in serious invasions of the privacy rights of persons who live with parolees. In *People* v. *Burgener*, the

California Supreme Court noted that "the authority to search the residence of a parolee extends to areas which are jointly controlled with other occupants of the residence." 714 P.2d 1251, 1269 (Cal. 1986), citing *United States* v. *Matlock*, 415 U.S. 164, 170-71 (1974). Consequently, the court observed, a regime of suspicionless searches of parolees' homes "necessarily portends a massive intrusion on the privacy interests of third persons solely because they reside with a parolee." 714 P.2d at 1269. The Court cited the privacy rights of third persons as one of the considerations weighing against suspicionless searches of parolees. *Id.*

Shortly after the California Supreme Court overruled *Burgener* and authorized suspicionless searches of parolees, its observation concerning the privacy rights of third parties was validated. In *People* v. *Woods*, 981 P.2d 1019, 1021 (Cal. 1999), the California Supreme Court upheld the introduction of "incriminating evidence against a third party residing in the house" shared by a probationer, even though the "sole reason for searching the residence was to discover evidence against" the probationer's housemate, who was not on probation. *Id.* at 1023.

C. California's Search Regime Gives Individual Law Enforcement Officers Unconstrained Discretion To Conduct Suspicionless Parolee Searches.

The Court has held that "[t]o insist neither upon an appropriate factual basis for suspicion . . . nor upon some other substantial and objective standard or rule to govern the exercise of discretion 'would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches.'" *Delaware* v. *Prouse*, 440 U.S. at 661 (quoting *Terry*, 392 U.S. at 22). Under California's suspicionless search regime, not even an "inarticulate hunch" is required. California grants to individual law enforcement officers precisely the

"'standardless and unconstrained discretion'" that this Court consistently has rejected. *Edmond*, 531 U.S. at 39 (quoting *Prouse*, 440 U.S. at 661). Indeed, California's grant of unfettered authority to law enforcement officers to search whenever and wherever they wish resembles the general warrants and writs of assistance that gave rise to the Fourth Amendment. *See Payton* v. *New York*, 445 U.S. 573, 583 n.20 (1980) ("[G]eneral warrants[,] known as writs of assistance," gave authorities "blanket authority to search where they pleased," and were denounced because they "they placed the liberty of every man in the hands of every petty officer." (citations and marks omitted)). *See also* Brief of NACDL as *Amicus Curiae*, at 16-18 (discussing general warrants).

In *Prouse*, the Court held that that the Fourth Amendment forbids police spot-checks of vehicle registration without any suspicion of wrongdoing. 440 U.S. at 661. The Court described the officer's "unbridled discretion" as an "evil" that requires the "discretion of the official in the field be circumscribed, at least to some extent." *Id.* California does not circumscribe the officer's discretion to any extent. Under California's regime, each law enforcement officer is free to decide, without any objective basis or guidance from a court, parole officer, supervisor, or regulation, whether to search a particular parolee. The officer has equally unfettered discretion to decide where to search, when to search, what to search for, and how hard to look. Such unconstrained discretion is unreasonable. *See Id.*; *Florida* v. *Wells*, 495 U.S. 1 ("unconstrained discretion" is forbidden) (1990); *Edmond*, 531 U.S. at 49-50 (Rehnquist, C.J., dissenting) (explaining that the Court has viewed standardized operation of roadblocks as "markedly different from roving patrols, where the unbridled discretion of officers in the field could result in unlimited interference with motorists' use of the highways").

Similarly, the Court has insisted that the scope of a search must be "strictly tied to and justified by the circumstances which rendered its initiation permissible." *Terry*, 329 U.S. at 19 (marks and citation omitted). Thus, in cases that permit searches or seizures based on reasonable suspicion rather than probable cause, the Court has limited the scope of the search to the extent necessary to dispel the suspicion. In *Terry*, the Court required that a weapons frisk "be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." 392 U.S. at 29. In *New Jersey* v. *T. L. O.*, the Court held that a search of a student "will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." 469 U.S. 325, 342 (1985). And in *Florida* v. *Royer*, the Court held that "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." 460 U.S. 491, 500 (1983).

In California, however, the sole circumstance that justifies a parolee search is the fact that the individual is on parole. It is not necessary for the officer to know the offense the parolee committed, or any other fact save that the individual is a parolee. For example, if law enforcement officers reasonably suspect that a person is a "balloon swallower" (a person who attempts to transport illegal drugs in his alimentary canal), it may be reasonable to subject the person to a highly invasive search. *See United States* v. *Montoya de Hernandez*, 473 U.S. 531 (1985) (upholding detention at the U.S. border for 16 hours, followed by a body cavity search, based upon reasonable suspicion that the detainee was a balloon swallower). Under California's search regime, highly invasive searches, such as strip searches and body cavity searches, are reasonable so long as they are performed on a parolee, whether or not the particular parolee being

searched is likely to be concealing drugs or other contraband on her body.

The California Supreme Court has attempted to address some of these problems by holding that a suspicionless parolee search is unlawful if it is "arbitrary and capricious" because "the motivation for the search is unrelated to rehabilitative, reformative, or legitimate law enforcement purposes," because it is "motivated by personal animosity toward the parolee," or because it is undertaken by police "at their whim or caprice" and therefore "a form of harassment." *Reyes*, 968 P.2d at 451. In practice, this "arbitrary, capricious, and harassing" standard does not limit the discretion of law enforcement officers. Indeed, so far as we can determine, no California court has ever held that a search of a parolee or probationer was arbitrary, capricious, or harassing.[6] This result is not surprising. So long as the officer states that the motivation for the search is related to the "legitimate law enforcement purpose" of searching for evidence of criminal activity, the search is not arbitrary, capricious, or harassing under California's standard. *See, e.g.,* J.A. 13-14 (rejecting claim that search was arbitrary, capricious or harassing).

Moreover, California's "arbitrary, capricious, and harassing" standard is contrary to this Court's Fourth Amendment jurisprudence. *First*, it would result in another standard of reasonableness under the Fourth Amendment, in addition to the established standards of

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[6] The closest approach to such a holding came in an unpublished decision, *People* v. *Delong*, 2004 WL 902118 (Cal. Ct. App. Apr. 28, 2004), in which the court held that the State had failed to carry its burden of offering some explanation of the purpose for the search. Presumably, the State could have carried its burden simply by stating that the purpose of the search was to look for evidence of a crime.

"probable cause" and "reasonable suspicion." The Court has said: "We do not think that the Fourth Amendment's emphasis upon reasonableness is consistent with the creation of a third verbal standard in addition to 'reasonable suspicion' and probable cause.'" *Montoya de Hernandez*, 473 U.S. at 541 (citation omitted). The Court explained that in "dealing with a constitutional requirement of reasonableness, . . . subtle verbal gradations may obscure rather than elucidate the meaning of the provision in question." *Id.*[7]

Second, California's "arbitrary, capricious, and harassing" standard requires the court to inquire into the officer's subjective purpose and intentions. *See Reyes*, 968 P.2d at 451 (search is "arbitrary and capricious" if "the motivation for the search is unrelated to rehabilitative, reformative, or legitimate law enforcement purposes" or if the search is "motivated by personal animosity toward the parolee" or undertaken by law enforcement officers "at their whim or caprice"). In *Whren* v. *United States*, the Court held that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." 517 U.S. 806, 813 (1996). In *Knights*, the Court reaffirmed that "we have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers." 534 U.S. at 122. *See also Horton* v. *California*, 496 U.S. 128, 138 (1990) ("[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind

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[7] The Court has also recognized that a completely unguided "totality of the circumstances" test would also be unsatisfactory. "A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Dunaway* v. *New York*, 442 U.S. 200, 213-14 (1979) (citation omitted).

of the officer."). The Court has recognized a "limited exception" to this principle for "special needs and administrative search cases," but that exception has been limited to "programmatic purposes" rather than "an individual officer's subjective intentions." *Edmond*, 531 U.S. at 45-47. California's standard is thus incompatible with this Court's holding in *Whren*.[8]

Under *Whren,* the sole source of protection for Fourth Amendment rights is the requirement that there be an *objective* basis for searches and seizures. Absent a departure from *Whren* that would allow courts to inquire into individual officers' subjective purposes and intentions, parolees are accorded a limited degree of Fourth Amendment protection by applying the least demanding objective standard of reasonableness that can be readily understood by law enforcement officers: the "reasonable suspicion" standard.

D. Suspicionless, Nonconsensual Parolee Searches By Law Enforcement Officers Are Not Needed To Advance Government Interests.

Because suspicionless, nonconsensual searches of all parolees by all law enforcement officers intrude upon privacy interests to an extreme degree, *see* pp. 16-17, *supra*, such searches are unreasonable unless they are needed, to an even more extreme degree, to promote the government's legitimate interests. *See Knights*, 534 U.S. at 119 (balancing "degree to which [a search] intrudes upon an individual's privacy" against "degree to which it

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[8] In *People* v. *Woods*, the California Supreme Court cited *Whren* for the proposition that a law enforcement officer's subjective intent should be disregarded at least where "the circumstances, viewed objectively, show a possible probation violation that justifies a search of the probationer's house pursuant to a search condition." 981 P.2d at 1026.

is needed for the promotion of legitimate governmental interests.") (marks and citation omitted). "The State has a dual concern with a probationer. On the one hand is the hope that he will successfully complete probation and be integrated back into the community. On the other is the concern, quite justified, that he will be more likely to engage in criminal conduct than an ordinary member of the community." *Id.* at 120-21. Neither of these interests is significantly advanced—and at least one may be significantly undermined—by blanket suspicionless searches.

1. Suspicionless Searches By Law Enforcement Officers Are An Obstacle To Parolees' Reintegration Into The Community.

Suspicionless searches are unlikely to further, and could well undermine, the State's interest in rehabilitating parolees and reintegrating them into the community. California law regards parole as "critical to successful reintegration of the offender into society and to positive citizenship." Cal. Penal Code § 3000. In pursuit of this goal, the State accords parolees an intermediate status between prison and full freedom. A "reasonable suspicion" standard for parolee searches provides a modest degree of protection to parolees' privacy expectations, while a suspicionless search standard essentially equates parolees with prisoners in a cell. Subjecting parolees to "serious intrusion[s]" to privacy that "may inflict great indignity and arouse strong resentment," *Terry*, 392 U.S. at 17, absent any objective reason to believe that the parolee may be engaged in wrongdoing, is unlikely to further the State's goal of reintegrating parolees into society and positive citizenship.

Moreover, reintegration into society is promoted by finding affordable housing arrangements, employment,

and forming attachments to law-abiding citizens. As explained above, *see* p. 16-17 *supra*, a regime of suspicionless parolee searches inevitably intrudes upon the privacy of individuals who share a residence with or otherwise form a close attachment with a parolee. In a suspicionless police search regime, individuals who value their privacy rights have an incentive not to share a home or workplace with a parolee; this in turn isolates parolees and makes it more difficult for them to successfully reintegrate into society. In *People* v. *Sanders*, the California Supreme Court recognized that "[m]any law-abiding citizens might choose not to open their homes to probationers [or parolees] if doing so were to result in the validation of arbitrary police action. If increased numbers of probationers were not welcome in homes with supportive environments, higher recidivism rates and a corresponding decrease in public safety may be expected, both of which would detract from the optimum successful functioning of the probation system." 73 P.3d 496, 498, 508 (Cal. 2003) (quoting *People* v. *Robles*, 3 P.3d 311, 317 (Cal. 2000)) (marks omitted).[9]

2. Blanket Suspicionless Searches By Law Enforcement Officers Do Not Significantly Advance the State's Law Enforcement Interest.

The State also has a legitimate interest in preventing parolees from committing crimes while they are on parole. "The recidivism rate of probationers is significantly higher than the general crime rate." *Knights*, 534 U.S. at 120 (citations omitted). Moreover, "probationers have even more of an incentive to conceal

[9] The holding of *Sanders*, that officers must know that an adult is on parole or probation at the time of the search, is no answer to this problem.

their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal because probationers are aware that they may be subject to supervision and face revocation of probation, and possible incarceration, in proceedings in which the trial rights of a jury and proof beyond a reasonable doubt, among other things, do not apply." *Id.* (citations omitted). Although parolee crime is a serious threat, "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose. Rather, in determining whether individualized suspicion is required, [the Court] must consider the nature of the interests threatened and their connection to the particular law enforcement practices at issue." *Edmond*, 531 U.S. at 42-43. *See also Ferguson*, 532 U.S. at 86 (same). Here, governments have great flexibility to supervise and search parolees without imposing a suspicionless search regime, and thus there is no basis for to conclude that such searches are needed to advance the State's law enforcement interests.

In at least three respects, current law allows governments significant flexibility to search parolees. *First*, police officers may search parolees and their homes without obtaining a search warrant and without probable cause. *Knights*, 534 U.S. at 121.[10] This rule makes it much easier to search a person on parole than a citizen at large. In particular, the concern that parolees may dispose of evidence more quickly than other criminals who commit crimes, is dispelled by eliminating the warrant requirement.

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[10] Petitioner assumes that the *Knights* rule would apply to parolees.

Second, the reasonable suspicion standard sets a relatively low threshold for parolee searches—the lowest objective standard that is available under this Court's Fourth Amendment decisions. "'[R]easonable suspicion' is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." *Illinois* v. *Wardlow*, 528 U.S. 119, 123 (2000). Reasonable suspicion may be based on less information that is less specific and "less reliable than that required to show probable cause." *Alabama* v. *White*, 496 U.S. 325, 330 (1990). It need not "be based on the officer's personal observation," but may instead rest on "information supplied by another person." *Adams* v. *Williams*, 407 U.S. 143, 147 (1972). In short, only "'some minimal level of objective justification'" is required. *United States* v. *Sokolow*, 490 U.S. 1, 9 (1971) (quoting *INS* v. *Delgado*, 466 U.S. 210, 217 (1984)).

In many cases in which parolees are engaged in criminal activity, trained law enforcement officers will have a minimal level of objective justification for searching them. Indeed, courts routinely hold that parolee or probationer searches are justified by reasonable suspicion. *See, e.g., Knights*, 534 U.S. at 122; *Griffin*, 483 U.S. at 880 & n.8 (upholding search based upon "reasonable grounds"); App. B, *infra* (collecting State court decisions). Moreover, once this relatively undemanding standard is met, it justifies not only a pat-down search for weapons, but a full-scale search of the parolee's person, property, and home. In contrast, situations in which trained law enforcement officers cannot develop even "some minimal level of objective justification" for a search are precisely those situations in which a parolee is least likely to be engaged in criminal activity.

Third, any evidence discovered during a parolee search is admissible at a parole revocation hearing. *Scott*, 524 U.S. at 364 (holding that "application of the

[exclusionary] rule in the criminal trial context already provides significant deterrence of unconstitutional searches" of parolees, so that applying the exclusionary rule to revocation proceedings would provide only "minimal deterrence benefits.").

Apart from these established principles, States are free to explore other options that fall well short of California's extreme suspicionless search regime. For example:

- A State is free to argue that it is reasonable for a court or parole board to impose a suspicionless search condition based on consideration of an individual's particular circumstances. *See Knights*, 534 U.S. at 119 ("The judge who sentenced Knights to probation determined that it was necessary to condition the probation on Knights's acceptance of the search provision.").
- A State may seek to limit the discretion of officers to search parolees by regulation, or by establishing an administrative process for approving parolee searches.
- A State may argue that a suspicionless search of a parolee is reasonable if it is justified by a "special need" unrelated to law enforcement.
- A State may argue that a parolee has knowingly and voluntarily consented to a search.

The Court has not decided whether suspicionless searches are reasonable in any of these circumstances, none of which are presented in this case. As explained above, *see* p. 3, *supra*, California's parole search condition is imposed by statute on all parolees, regardless of their circumstances, and California imposes no limits on the discretion of individual police officers. For the reasons explained in Part II, below, at pp. 32-39, the "special needs" doctrine cannot justify the search in this case,

which was undertaken by a law enforcement officer for law enforcement purposes without the knowledge or approval of Petitioner's parole officer. And for the reasons explained in Part III below, at pp. 39-41, Petitioner did not consent to the search in this case. The point is simply that there is a wide spectrum of options, short of California's blanket suspicionless search regime.

In fact, California's parolee search regime goes well beyond that of most other States and the Federal Government. Indeed, with the possible exception of North Dakota, no State other than California permits police officers to engage in suspicionless, nonconsensual searches of parolees. *See* App. B, *infra* (summarizing state law). Thirty States require that nonconsensual parolee or probationer searches be based upon reasonable suspicion or reasonable grounds.[11] In many of those jurisdictions authority to search parolees based upon reasonable suspicion rather than probable cause is limited to parole officers, or police officers working with parole officers. Two additional States (Florida and Iowa) require that parolee searches be based upon probable cause even when undertaken by a parole officer if the evidence will be used in a criminal trial. West Virginia requires probable cause for parolee searches in all cases. Other States (including Kansas, Nebraska, and South Dakota) have upheld parolee searches based upon reasonable suspicion, without expressly holding that reasonable suspicion is required. Where State courts

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[11] The States requiring reasonable suspicion are: Alabama, Arizona, Arkansas, Connecticut, Delaware, Georgia (absent consent), Hawaii, Idaho (absent consent), Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Utah, Vermont, Washington, Wisconsin, and Wyoming. *See* App. B, *infra*.

have approved suspicionless searches of parolees or probationers, they have done so on the basis of consent, an individualized determination by a court or parole board that a suspicionless search condition was reasonable, or by limiting the authority to conduct the search to parole or probation officers.[12]

The Federal Government, like most States, prohibits suspicionless searches of parolees.[13] The United States Parole Board's Rules and Procedure Manual provides that a search condition "shall permit searches

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[12] *See*, *e.g.*, *People* v. *McCullough*, 6 P.3d 774, 781-82 (Colo. 2000) (search must be "in furtherance of the purposes of parole" and "carried out under the authority of a parole officer"); *State* v. *Devore*, 2 P.3d 153, 156-57 (Idaho Ct. App. 2000) (suspicionless searches by parole officers or probation officers are reasonable if probationer or parolee consents to search condition; otherwise they require "reasonable grounds"); *State* v. *Zeta Chi Fraternity*, 696 A.2d 530, 540-41 (N.H. 1997) (trial court determined that a search condition authorizing probation officer to conduct random searches of fraternity convicted of selling alcohol to minors was reasonable in light of the circumstances of the case). In *State* v. *Maurstad*, 647 N.W.2d 688, 697-98 (N.D. 2002), the North Dakota Supreme Court stated, "we need not decide whether a suspicionless search would satisfy the Fourth Amendment," and declined to apply its earlier decision in *State* v. *Smith*, 589 N.W.2d 546 (N.D. 1999) (reasonable suspicion not required for a probation or a parole search). In *Owens* v. *Kelley*, 681 F.2d 1362, 1364 (11th Cir. 1982), the court approved a suspicionless search condition imposed by a Georgia state judge, but warned against using probation searches as "a subterfuge for criminal investigations." The Supreme Court of Georgia subsequently held that, absent consent, a probation search must be based on "reasonable grounds." *Fox* v. *State*, 527 S.E.2d 847, 850 (Ga. 2000).

[13] Although Congress abolished federal parole for crimes committed after November 1, 1987, the U.S. Parole Board retains jurisdiction over parolees convicted of crimes committed before November 1, 1987 as well as parole decisions for the District of Columbia.

only if the Supervision Officer has a reasonable belief that contraband or evidence of a violation of the conditions of release may be found." U.S. Parole Comm'n R. & Proc. Man. § 2.204-18(b)(2).[14] The Commission's "Model Search Condition" provides: "The releasee shall submit his person, residence, office, or vehicle to a search, conducted by a Supervision Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the release shall warn any other residents that the premises may be subject to searches pursuant to this condition." *Id.* § 2.204-18(b)(3).

The Manual provides that in general, "[s]earches by Supervision Officers are disfavored" and "[o]ther techniques should be relied upon to monitor compliance with conditions of supervision." *Id.* § 2.204-18(a). The Commission's rules state that search conditions should not be "routinely" imposed on federal parolees, but instead should be requested "only in those cases in which the Officer determines, based upon the offense of conviction (including the nature and circumstances of the offense behavior) and background of the offender, that resort to such a condition is necessary to enforce the conditions of release or to protect the public." *Id.* § 2.204-18(b)(1). Federal parolee searches "shall be conducted

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[14] The Commission's Manual includes notes and procedures "that clarify and supplement" the Commission's rules, which are codified at 28 C.F.R. §§ 2.1-2.107 and 2.200-2.220. U.S. Parole Comm'n R. & Proc. Man. 8. The rules related to conditions of release specified in 28 C.F.R. § 2.204 and the accompanying guidance in the Manual apply to offenders released after a violation of the District of Columbia Code. 28 C.F.R. § 2.200(a). These provisions also apply to persons released on federal parole. 28 C.F.R. § 2.40(a)(1); U.S. Parole Comm'n R. & Proc. Man. § 2.240-01.

only upon the written approval of an application for such search." *Id.* § 2.204-18(e). The application for a search must be in writing, must be reviewed by the Supervision Officer's supervisor, and must be approved in writing by the Chief Supervision Officer of the district or his designee. In exigent circumstances the application to search "may be presented orally and reduced to writing at the earliest opportunity." *Id.*

There is no evidence that the Federal Government and virtually every State other than California experience higher parolee recidivism rates because they do not authorize blanket suspicionless searches of parolees.[15] The fact that an overwhelming majority of the States do not allow blanket suspicionless searches of parolees demonstrates convincingly that such searches are not needed to advance legitimate government interests.

In *Knights*, the Court held that "[w]hen an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable." 534 U.S. at 121. That standard strikes a reasonable balance between the diminished privacy interests of parolees and the government's legitimate interests in rehabilitation and crime prevention. In contrast, a blanket regime of suspicionless, nonconsensual, discretionary searches by

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[15] A recent study by a respected scholar concluded that close supervision "did not decrease subsequent arrests or overall justice system costs," and rejected the hypothesis that "increased surveillance acts as a constraint on the offender." Joan Petersilia, *A Decade of Experimenting with Intermediate Sanctions: What Have We Learned?*, 62 Federal Probation 3, 6 (Dec. 1998).

police officers severely impairs privacy rights and is not needed to advance the government's interests. Accordingly, a law enforcement officer's nonconsensual search of a parolee is not reasonable unless it is based upon individualized suspicion.

II. The "Special Needs" Doctrine Does Not Justify The Search In This Case.

The search in this case also cannot be upheld under the "special needs" doctrine. The Court has applied that doctrine to uphold "certain regimes of suspicionless searches where the program was designed to serve 'special needs, beyond the normal need for law enforcement.'" *Edmond*, 531 U.S. at 37 (citation omitted). In *Griffin*, the Court held that the State's "special need" to supervise probationers justified a regulation authorizing probation officers to search probationers' homes in the absence of a search warrant or probable cause, so long as the probation officer had "reasonable grounds" to believe the house contained contraband. 483 U.S. at 876. In subsequent cases, the Court has held that the "special need" that is "advanced as a justification for the absence of a warrant or individualized suspicion" must be "one divorced from the State's general interest in law enforcement." *Ferguson*, 532 U.S. at 79; *see also Edmond*, 531 U.S. at 41. In this case, as in *Knights*, the search was undertaken for a law enforcement purpose by a police officer rather than a parole or probation officer. Accordingly, as in *Knights*, the "special needs" doctrine does not apply.

A. Suspicionless Searches Cannot Be Justified Under The "Special Needs" Doctrine Unless They Are "Divorced From The State's General Interest In Law Enforcement."

In *Edmond*, the Court held that a highway checkpoint program designed to interdict illegal drugs violated the Fourth Amendment because the checkpoint was employed "primarily for the ordinary enterprise of investigating crimes." 531 U.S. at 44. The Court declined to "sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime." *Id.*; *see also id.* at 54 (2000) (Rehnquist, C.J., dissenting) ("The 'special needs' doctrine, which has been used to uphold certain suspicionless searches performed for reasons *unrelated to law enforcement*, is an exception to the general rule that a search must be based on individualized suspicion of wrongdoing.") (emphasis added).

The Court's opinion in *Edmond* explained that its holding was consistent with the "limited circumstances" in which it has recognized an exception to "the usual rule" that "[a] search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing." 531 U.S. at 37 (citation omitted). *See id.* (citing *Vernonia School Dist. 47J* v. *Acton*, 515 U.S. 646 (1995) (random drug testing of student athletes); *Treasury Employees* v. *Von Raab*, 489 U.S. 656 (1989) (drug tests for U.S. Customs Service employees seeking promotion or transfer to certain positions); *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (drug and alcohol tests for railway employees involved in train accidents). Similarly, the Court has upheld certain administrative searches that serve purposes other than the investigation of crime. *See Edmond,* 531 U.S. at 37 (citing *Camara* v. *Municipal Court*, 387 U.S. 523, 537 (1967) (administrative searches

to ensure compliance with a city housing code and not "aimed at the discovery of evidence of crime"); *New York* v. *Burger*, 482 U.S. 691, 702-04 (1987) (administrative inspection of premises of "closely regulated" business); *Michigan* v. *Tyler*, 436 U.S. 499, 507-09, 511-12 (1978) (administrative inspection of premises to determine cause of fire). And the Court has upheld "brief suspicionless seizures of motorists at a fixed Border Patrol checkpoint . . . designed to intercept illegal aliens" or "a sobriety checkpoint aimed at removing drunk drivers from the road." *Edmond*, 431 U.S. at 37 (citing *Martinez-Fuerte*, 428 U.S. at 561; *Michigan Dep't of State Police* v. *Sitz*, 496 U.S. 444 (1990). Based on this review of its prior decisions and consideration of Fourth Amendment principles, the Court concluded that "a 'general interest in crime control'" cannot serve as the "justification for a regime of suspicionless stops." *Id.* at 41 (quoting *Delaware* v. *Prouse*, 440 U.S. 648, 659 n.18 (1979)).

The Court reaffirmed the limitations on "special needs" searches in *Ferguson*, holding that the "special needs" doctrine does not justify a diagnostic test performed to obtain evidence of a patient's criminal conduct for law enforcement purposes without the patient's consent. 532 U.S. 67. The Court again reviewed its prior decisions, and again concluded that "[i]n none of our previous special needs cases have we upheld the collection of evidence for criminal law enforcement purposes." *Id.* at 83 n.20. The Court held that "[t]he critical difference" between cases that authorized suspicionless drug testing and *Ferguson* is that where suspicionless searches were authorized "the 'special need' that was advanced as a justification for the absence of a warrant or individualized suspicion was one divorced from the State's general interest in law enforcement." *Id.* at 79. Even though "the ultimate goal of the program" in *Ferguson* "may well have been to get the women in question into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate

evidence *for law enforcement purposes*." *Id.* at 82-83. The Court held that this rendered the "special needs" doctrine inapplicable, and the searches unreasonable.[16]

B. The Search In This Case Was Undertaken By A Law Enforcement Officer For A Law Enforcement Purpose.

The State cannot establish that "there was no law enforcement purpose behind the search[]" in this case, or that there was "little, if any, entanglement with law enforcement." *Id.* at 81. The search was undertaken solely by a police officer "to make sure [Petitioner] is still obeying the laws." J.A. 38. Moreover, California law provides (with exceptions not applicable here) that "parole may not be suspended or revoked for commission of a nonviolent drug possession offense." Cal. Pen. Code § 3063.1(a). In lieu of parole revocation, California has mandated "participation in and completion of an

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[16] In *Ferguson* the Court expressly concluded that *Griffin* does not support the proposition that "the special needs doctrine 'is ordinarily employe[d], precisely to enable searches *by law enforcement officials* who, of course, ordinarily have a law enforcement objective." 532 U.S. at 81 n.15. In rejecting that contention, the Court made four points. *First*, this Court's other "special needs" cases have required that "there was no law enforcement purpose behind the searches" and "little, if any, entanglement with law enforcement." *Id.* *Second*, following *Griffin* the Court reserved the question whether "routine use in criminal prosecutions of evidence obtained" through an administrative scheme would invalidate the search program. *Id.*, (quoting *Skinner*, 489 U.S. at 621 n.5). *Third*, the Court's opinion in *Griffin* emphasized that the probation officer who conducted the search, while not "an impartial magistrate," is also not "a police officer who normally conducts searches against the ordinary citizen." *Id.* (quoting *Griffin*, 483 U.S. at 876). And *fourth*, "*Griffin* is properly read as limited by the fact that probationers have a lesser expectation of privacy than the public at large," *id.* – a factor that that does not justify application of the "special needs" doctrine.

appropriate drug treatment program." *Id.* Had the search of Petitioner been related to the state's need to supervise parolees, Petitioner should have been assigned to such a program. Rather than following the State's own procedure for parolees found to be in possession of drugs, the State charged Petitioner with a new offense.

The Court did not apply "special needs" analysis in *Knights*, applying instead "ordinary Fourth Amendment analysis," balancing "the degree to which [the search] intrudes upon an individual's privacy" against "the degree to which it is needed for the promotion of legitimate governmental interests." 534 U.S. at 119, 122 (marks and citation omitted). The Court's opinion indicates that "special needs" analysis was inappropriate because there was a law enforcement purpose for the search. The Court noted that the Supreme Court of California had upheld the search condition "'whether the purpose of the search is to monitor the probationer or to serve *some other law enforcement purpose*.'" *Id.* at 117 (quoting *People* v. *Woods*, 981 P.2d at 1024 (emphasis added)). The Court therefore framed the issue in *Knights* as "whether the Fourth Amendment limits searches pursuant to this probation condition to those with a 'probationary' purpose," that is, those that are not related to "some other law enforcement purpose." *Id.* Because the search at issue in *Knights was* related to a law enforcement purpose, "special needs" analysis was inappropriate and the Court applied the general Fourth Amendment balancing test. *Id.* at 118-19.

The Court's decision not to apply "special needs" analysis in *Knights* was correct and follows directly from *Ferguson*, *Edmond*, and *Griffin*. As a leading commentator has explained, "the search in *Knights* was by a police officer for the purpose of general criminal investigation . . . and thus could not have passed muster under *Griffin* in light of that case's emphasis upon the probationer-probation officer relationship and also the

Court's firm stand just the previous Term that 'special needs' cases (*Griffin* being one) must involve a purpose other than 'to detect evidence of ordinary criminal wrongdoing.'" 5 LaFave, *Search and Seizure* § 10.10, at 451 (citations omitted). The outcome is the same in this case, and for the same reasons. Here, as in *Knights*, the search condition is not limited to searches conducted by parole officers, nor is it limited to searches conducted for a parole purpose. Here, as in *Knights*, the search was undertaken by a law enforcement officer rather than a parole officer or a probation officer. And here, as in *Knights*, no parole or probation officer requested, approved, or even knew about the search. The purpose the search was "to uncover evidence of ordinary criminal wrongdoing," *Edmond*, 531 U.S. at 41-42 & 48, and the involvement of law enforcement officers in the search was not only "pervasive" but exclusive, *Ferguson*, 532 U.S. at 85.[17]

That is not to say that a state's operation of its parole system does not present "special needs" beyond law enforcement that can justify parolee searches in appropriate cases. In *Griffin*, the Court applied the "special needs" doctrine to uphold a state regulation that authorized probation officers to conduct searches if they had "reasonable grounds" to do so. 483 U.S. at 880 & n.8. The Court concluded that the State's operation of its probation system qualified as a special need that made "the warrant requirement impractical, and justif[ied] replacement of the standard of probable cause by 'reasonable grounds.'" *Id.* at 876. The Court compared

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[17] The Court's decisions in *Ferguson* and *Edmond* distinguish between the immediate and ultimate goals of a search. *See Ferguson*, 532 U.S. at 81-84; *Edmond*, 531 U.S. at 42. In this case, the immediate and ultimate goals of the search were the same: in the police officer's own words, "to make sure [Petitioner is] still obeying the laws." J.A. 14, 38.

Wisconsin's operation of a probation system to "its operation of a school, government office or prison, or its supervision of a regulated industry." *Id.* at 873. The Court concluded that these programs "present[] 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." *Id.* at 873-74. In these circumstances, *Griffin* holds that the "special needs" doctrine may be used to justify a search. That doctrine cannot be expanded, however, to encompass suspicionless searches by police officers for law enforcement purposes.

In *Griffin*, the Court noted that a probation officer rather than a police officer conducted the search. *See id.* at 876 ("Although a probation officer is not an impartial magistrate, neither is he the police officer who normally conducts searches against the ordinary citizen."). The distinction is significant because police officers, unlike parole officers, are "engaged in the often competitive enterprise of ferreting out crime." *Scott*, 524 U.S. at 368 (quoting *United States* v. *Leon*, 468 U.S. 897, 914 (1984)). *See also T.L.O.*, 469 U.S. at 349 (Powell, J., concurring) (Police "function as adversaries of criminal suspects." They "have the responsibility to investigate criminal activity, to locate and arrest those who violate our laws, and to facilitate the charging and bringing of such persons to trial.").

Parole officers, in contrast, have a "relationship with parolees [that] is more supervisory than adversarial." *Scott*, 524 U.S. at 368. They "are part of the administrative system designed to assist parolees and to offer them guidance." *Morrissey*, 408 U.S. at 478. "The combination [of parole prohibitions and reporting conditions] puts the parole officer into the position in which he can try to guide the parolee into constructive development." *Id.* In contrast to police, the probation officer is "charged with protecting the public interest,

[and] is also supposed to have in mind the welfare of the probationer." *Id.*

In sum, while the "special needs" doctrine may be used to justify some searches of parolees and probationers, it may not be extended to suspicionless searches by law enforcement officers that are "specifically designed to gather evidence of violations of penal laws." *Ferguson*, at 83 n.21. *See also* Brief of ACLU as *Amicus Curiae* at 13-20. Accordingly, this case "simply does not fit within the closely guarded category of 'special needs.'" *Id.* at 84.[18]

III. The "Consent" Rationale Does Not Apply To The Search In This Case.

In *Knights*, this Court considered, but did not decide, whether a search of a California *probationer* "satisfied the Fourth Amendment under the 'consent' rationale of cases such as *Zap* v. *United States*, 328 U.S. 624 (1946), and *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973). 534 U.S. at 118. No matter how the probationer search question left open in *Knights* is answered, it is clear that the "consent" rationale does not justify the search of a California *parolee* such as Petitioner. The California Supreme Court held in *People* v. *Reyes*, 968 P.2d 445 (1998), that "[t]he consent exception to the warrant requirement may not be invoked to validate the search of an adult parolee" in California. *Id.* at 448. The Court explained that "under the [California] Determinate

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[18] Even if "special needs" analysis did apply, the Court's "special needs" cases have "employed a balancing test that weighed the intrusion on the individual's interest in privacy against the 'special needs' that supported the program." *Ferguson*, 532 U.S. at 78. For the reasons explained in Part I, *supra*, at pp. 11-32, the benefit to the State of allowing police to conduct suspicionless parolee searches does not outweigh the substantial intrusion on privacy.

Sentencing Act of 1976, parole is not a matter of choice. The Board of Prison Terms must provide a period of parole; the prisoner must accept it. Without choice, there can be no voluntary consent to inclusion of the search condition." *Id.* (citations omitted). *See also* Cal. Code Regs. tit. 15 § 2512(a) ("The parole conditions are not a contract but are the specific rules governing all parolees whether or not the parolee has signed the form containing the parole conditions."); *People* v. *Guzman*, 107 P.3d 860, 867 (Cal. 2005) (parole is "mandatory from the offender's perspective"); J.A. 12 (quoting *People* v. *Lewis*, 74 Cal. App. 4th 662, 668 (Cal. Ct. App. 1999) (Search conditions are "automatic, and imposed on every parolee" in California)). Consequently, "[i]t is a conceptual mistake to consider the imposition of conditions on a parolee in California as a 'waiver' of rights . . . . [T]he consent/waiver doctrine is irrelevant in this context." *United States* v. *Crawford*, 372 F.3d 1048, 1063-64 (2004) (en banc) (Trott, J., concurring).

The California Supreme Court's interpretation of California law is binding on this Court. *See Griffin*, 483 U.S. at 875 (noting that the Wisconsin Supreme Court is "the ultimate authority on issues of Wisconsin law," and therefore this Court is "bound by the state court's interpretation" of state law). The parolee search in this case thus cannot be justified under a "consent" rationale.[19]

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[19] The State did not seek to justify the search in this case under a consent rationale in the courts below or in its brief in opposition to certiorari. In its brief to this Court in *Knights*, California confirmed that "parolees, who may not refuse release, are by law subject to searches without warrant or cause at any time of the day or night by parole or peace officers. Amicus Br. of California in No. 00-1260, at 8 n.3. *See also* Br. for the United States in No. 00-1260, at 17 n.8 ("parolees and juvenile probationers, who are not offered the opportunity to (...continued)

In *People* v. *Bravo*, 738 P.2d 336 (Cal. 1987), the California Supreme Court held that *probationer* searches, unlike parolee searches, can be justified under a "consent" rationale. Although *Knights* leaves open the probationer consent question decided in *Bravo*, this Court has stated that "[w]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given." *Bumper* v. *North Carolina*, 391 U.S. 543, 548-49 (1968). *See also Ferguson*, 532 U.S. at 85 ("knowing waiver" standard). It is doubtful whether a probationer's consent to a blanket search condition is free, voluntary, and knowing. As one leading commentator has said, "to speak of consent in this context is to resort to a manifest fiction, for the probationer who purportedly waives his rights by accepting such a condition has little genuine option to refuse." *See* 5 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 10.10(b), at 440-41 (4th ed. 2004) (marks and citations omitted). Moreover, the Court has indicated that a "consent" rationale may not be used to strip probationers of constitutional rights. *See Minnesota* v. *Murphy*, 465 U.S. 420, 435 & n.7 (1984) (indicating that government may not condition release on probation upon the individual's willingness to waive the Fifth Amendment privilege against self-incrimination).

The Court need not reach these additional arguments, however, because the parolee consent issue in this case is resolved by the California Supreme Court's determination that parolees such as Petitioner do not consent to suspicionless searches.

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decline conditional release, cannot be said to have consented to searches conducted without a warrant or probable cause").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Appendix A
Constitutional And Statutory Provisions Involved

1. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. The California Penal Code provides, in part:

§ 3000. Release and period of parole

(a)(1) The Legislature finds and declares that the period immediately following incarceration is critical to successful reintegration of the offender into society and to positive citizenship. It is in the interest of public safety for the state to provide for the supervision of and surveillance of parolees, including the judicious use of revocation actions, and to provide educational, vocational, family and personal counseling necessary to assist parolees in the transition between imprisonment and discharge. A sentence pursuant to Section 1168 or 1170 shall include a period of parole, unless waived, as provided in this section.

(2) The Legislature finds and declares that it is not the intent of this section to diminish resources allocated to the Department of Corrections for parole functions for which the department is responsible. It is also not the intent of this section to diminish the resources allocated to the Board of Prison Terms to execute its duties with

respect to parole functions for which the board is responsible.

(3) The Legislature finds and declares that diligent effort must be made to ensure that parolees are held accountable for their criminal behavior, including, but not limited to, the satisfaction of restitution fines and orders.

(4) Any finding made pursuant to Article 4 (commencing with Section 6600) of Chapter 2 of Part 2 of Division 6 of the Welfare and Institutions Code, that a person is a sexually violent predator shall not toll, discharge, or otherwise affect that person's period of parole.

(b) Notwithstanding any provision to the contrary in Article 3 (commencing with Section 3040) of this chapter, the following shall apply:

(1) At the expiration of a term of imprisonment of one year and one day, or a term of imprisonment imposed pursuant to Section 1170 or at the expiration of a term reduced pursuant to Section 2931 or 2933, if applicable, the inmate shall be released on parole for a period not exceeding three years, except that any inmate sentenced for an offense specified in paragraph (3), (4), (5), (6), (11), (16), or (18) of subdivision (c) of Section 667.5 shall be released on parole for a period not exceeding five years, unless in either case the parole authority for good cause waives parole and discharges the inmate from the custody of the department.

(2) In the case of any inmate sentenced under Section 1168, the period of parole shall not exceed five years in the case of an inmate imprisoned for any offense other than first or second degree murder for which the inmate has received a life sentence, and shall not exceed three years in the case of any other inmate, unless in either case the parole authority for good cause waives parole and discharges the inmate from custody of the department. This subdivision shall also be applicable to inmates who

committed crimes prior to July 1, 1977, to the extent specified in Section 1170.2.

(3) Notwithstanding paragraphs (1) and (2), in the case of any offense for which the inmate has received a life sentence pursuant to Section 667.61 or 667.71, the period of parole shall be five years. Upon the request of the Department of Corrections, and on the grounds that the paroled inmate may pose a substantial danger to public safety, the Board of Prison Terms shall conduct a hearing to determine if the parolee shall be subject to a single additional five-year period of parole. The board shall conduct the hearing pursuant to the procedures and standards governing parole revocation. The request for parole extension shall be made no less than 180 days prior to the expiration of the initial five-year period of parole.

(4) The parole authority shall consider the request of any inmate regarding the length of his or her parole and the conditions thereof.

(5) Upon successful completion of parole, or at the end of the maximum statutory period of parole specified for the inmate under paragraph (1), (2), or (3), as the case may be, whichever is earlier, the inmate shall be discharged from custody. The date of the maximum statutory period of parole under this subdivision and paragraphs (1), (2), and (3) shall be computed from the date of initial parole or from the date of extension of parole pursuant to paragraph (3) and shall be a period chronologically determined. Time during which parole is suspended because the prisoner has absconded or has been returned to custody as a parole violator shall not be credited toward any period of parole unless the prisoner is found not guilty of the parole violation. However, in no case, except as provided in Section 3064, may a prisoner subject to three years on parole be retained under parole supervision or in custody for a period longer than four years from the date of his or her initial parole, and, except

as provided in Section 3064, in no case may a prisoner subject to five years on parole be retained under parole supervision or in custody for a period longer than seven years from the date of his or her initial parole or from the date of extension of parole pursuant to paragraph (3).

(6) The Department of Corrections shall meet with each inmate at least 30 days prior to his or her good time release date and shall provide, under guidelines specified by the parole authority, the conditions of parole and the length of parole up to the maximum period of time provided by law. The inmate has the right to reconsideration of the length of parole and conditions thereof by the parole authority. The Department of Corrections or the Board of Prison Terms may impose as a condition of parole that a prisoner make payments on the prisoner's outstanding restitution fines or orders imposed pursuant to subdivision (a) or (c) of Section 13967 of the Government Code, as operative prior to September 28, 1994, or subdivision (b) or (f) of Section 1202.4.

(7) For purposes of this chapter, the Board of Prison Terms shall be considered the parole authority.

(8) The sole authority to issue warrants for the return to actual custody of any state prisoner released on parole rests with the Board of Prison Terms, except for any escaped state prisoner or any state prisoner released prior to his or her scheduled release date who should be returned to custody, and Section 3060 shall apply.

(9) It is the intent of the Legislature that efforts be made with respect to persons who are subject to subparagraph (C) of paragraph (1) of subdivision (a) of Section 290 who are on parole to engage them in treatment.

§ 3000.1. Life parole for first or second degree murder offense; Discharge; Revocation

(a) In the case of any inmate sentenced under Section 1168 for any offense of first or second degree murder with a maximum term of life imprisonment, the period of parole, if parole is granted, shall be the remainder of the inmate's life.

(b) Notwithstanding any other provision of law, when any person referred to in subdivision (a) has been released on parole from the state prison, and has been on parole continuously for seven years in the case of any person imprisoned for first degree murder, and five years in the case of any person imprisoned for second degree murder, since release from confinement, the board shall, within 30 days, discharge that person from parole, unless the board, for good cause, determines that the person will be retained on parole. The board shall make a written record of its determination and transmit a copy of it to the parolee.

(c) In the event of a retention on parole, the parolee shall be entitled to a review by the board each year thereafter.

(d) There shall be a hearing as provided in Sections 3041.5 and 304l.7 within 12 months of the date of any revocation of parole to consider the release of the inmate on parole, and notwithstanding the provisions of paragraph (2) of subdivision (b) of Section 3041.5, there shall be annual parole consideration hearings thereafter, unless the person is released or otherwise ineligible for parole release. The panel or board shall release the person within one year of the date of the revocation unless it determines that the circumstances and gravity of the parole violation are such that consideration of the public safety requires a more lengthy period of incarceration or unless there is a new prison commitment following a conviction.

(e) The provisions of Section 3042 shall not apply to any hearing held pursuant to this section.

§ 3001. Discharge from parole

(a) Notwithstanding any other provision of law, when any person referred to in paragraph (1) of subdivision (b) of Section 3000 who was not imprisoned for committing a violent felony, as defined in subdivision (c) of Section 667.5, has been released on parole from the state prison, and has been on parole continuously for one year since release from confinement, within 30 days, that person shall be discharged from parole, unless the Department of Corrections recommends to the Board of Prison Terms that the person be retained on parole and the board, for good cause, determines that the person will be retained. Notwithstanding any other provision of law, when any person referred to in paragraph (1) of subdivision (b) of Section 3000 who was imprisoned for committing a violent felony, as defined in subdivision (c) of Section 667.5, has been released on parole from the state prison for a period not exceeding three years and has been on parole continuously for two years since release from confinement, or has been released on parole from the state prison for a period not exceeding five years and has been on parole continuously for three years since release from confinement, the department shall discharge, within 30 days, that person from parole, unless the department recommends to the board that the person be retained on parole and the board, for good cause, determines that the person will be retained. The board shall make a written record of its determination and the department shall transmit a copy thereof to the parolee.

(b) Notwithstanding any other provision of law, when any person referred to in paragraph (2) or (3) of subdivision (b) of Section 3000 has been released on parole from the state prison, and has been on parole continuously for three years since release from confinement or since extension of parole, the board shall discharge, within 30

days, the person from parole, unless the board, for good cause, determines that the person will be retained on parole. The board shall make a written record of its determination and the department shall transmit a copy thereof to the parolee.

(c) In the event of a retention on parole, the parolee shall be entitled to a review by the parole authority each year thereafter until the maximum statutory period of parole has expired.

(d) The amendments to this section made during the 1987-88 Regular Session of the Legislature shall only be applied prospectively and shall not extend the parole period for any person whose eligibility for discharge from parole was fixed as of the effective date of those amendments.

§ 3060.5. Revocation of parole for refusal to sign parole agreement; Length of resulting confinement

Notwithstanding any other provision of law, the parole authority shall revoke the parole of any prisoner who refuses to sign a parole agreement setting forth the general and any special conditions applicable to the parole, refuses to sign any form required by the Department of Justice stating that the duty of the prisoner to register under Section 290 has been explained to the prisoner, unless the duty to register has not been explained to the prisoner, or refuses to provide samples of blood or saliva as required by the DNA and Forensic Identification Data Base and Data Bank Act of 1998 (Chapter 6 (commencing with Section 295) of Title 9 of Part 1), and shall order the prisoner returned to prison. Confinement pursuant to any single revocation of parole under this section shall not, absent a new conviction and commitment to prison under other provisions of law, exceed six months, except as provided in subdivision (c) of Section 3057.

§ 3067. Agreement

(a) Any inmate who is eligible for release on parole pursuant to this chapter shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause.

(b) Any inmate who does not comply with the provision of subdivision (a) shall lose worktime credit earned pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 on a day-for-day basis and shall not be released until he or she either complies with the provision of subdivision (a) or has no remaining worktime credit, whichever occurs earlier.

(c) This section shall only apply to an inmate who is eligible for release on parole for an offense committed on or after January 1, 1997.

(d) It is not the intent of the Legislature to authorize law enforcement officers to conduct searches for the sole purpose of harassment.

(e) This section does not affect the power of the Director of Corrections to prescribe and amend rules and regulations pursuant to Section 5058.

3. The California Code of Regulations provides, in part:

§ 2511. Notice of Parole

(a) Definition. The notice of parole is a general description of rules and regulations governing parolees.

(b) Notice. The notice of parole shall read as follows:

1. Release. You will be released on parole effective ..... for a period of ..... This parole is subject to the following notice and conditions. Should you violate any conditions of this parole, you are subject to arrest and the board may modify, suspend, or revoke your parole and/or order your

return to custody. You have read or have had read to you these conditions of parole and you fully understand them. Whenever any problems arise or you do not understand what is expected of you, talk to your parole agent.

2. Extradition. You waive extradition to the State of California from any State or Territory of the United States, or from the District of Columbia. You will not contest any effort to return you to the State of California.

3. Psychiatric Returns. If the board determines that you suffer from a mental disorder which substantially impairs your ability to maintain yourself in the community or which makes you a danger to yourself or others, the board may order your placement in a community treatment facility or state prison, if necessary for treatment. The board may revoke your parole and order you returned to prison for psychiatric treatment if the necessary treatment cannot be provided in the community.

4. Search. You and your residence and any property under your control may be searched without a warrant at any time by any agent of the Department of Corrections or any law enforcement officer.

5. Detainer. If another jurisdiction has lodged a detainer against you, you may be released to the custody of that jurisdiction. Should you be released from their custody prior to the expiration of your California parole, or should the detainer not be exercised, you are to immediately contact the nearest Department of Corrections' Parole and Community Services Division Office for instructions concerning reporting to a parole agent.

6. Residence. The establishment and maintenance of a residence upon release from prison is critical to the successful reintegration of a parolee into society and is in the interest of the public.

7. Certificate of Rehabilitation. You have been informed and have received in writing the procedure for obtaining a Certificate of Rehabilitation.

§ 2512. General Conditions of Parole

(a) The parole conditions are not a contract but are the specific rules governing all parolees whether or not the parolee has signed the form containing the parole conditions. A violation of any of these conditions of parole may result in the revocation of parole and the parolee's return to prison. The general conditions of parole shall read as follows:

"(1) Special conditions. Any special condition imposed by the department or the board.

(2) Release, Reporting, Residence and Travel. Unless other arrangements are approved in writing, you will report to your parole agent within 24 hours or the next working day if released on the day before a holiday or weekend. Your residence and any change of residence shall be reported to your parole agent in advance. You will inform your parole agent within 72 hours of any change of employment location, employer or termination of employment.

(3) Parole Agent Instructions. You shall comply with all instructions of your parole agent and will not travel more than 50 miles from your residence without his/her prior approval. You will not be absent from your county of residence for a period of more than 48 hours and not leave the State of California without prior written approval of your parole agent.

(4) Criminal Conduct. You shall not engage in criminal conduct. You shall immediately inform your parole agent if you are arrested for a felony or misdemeanor under federal, state, or county law.

(5) Weapons. You shall not own, use, have access to, or have under your control: (a) any type of firearm or

instrument or device which a reasonable person would believe to be capable of being used as a firearm or any ammunition which could be used in a firearm; (b) any weapon as defined in state or federal statutes or listed in California Penal Code Section 12020 or any instrument or device which a reasonable person would believe to be capable of being used as a weapon; or (c) any knife with a blade longer than two inches, except kitchen knives which must be kept in your residence and knives related to your employment which may be used and carried only in connection with your employment; or (d) a crossbow of any kind.

(6) You shall sign the parole agreement containing the conditions of parole specified in this section and any special conditions imposed as specified in section 2513."

Appendix B
State Parole and Probation Search Conditions

Alabama: *Toney* v. *State*, 572 So. 2d 1308, 1312 (Ala. Crim. App. 1990) (upholding parole search pursuant to regulation requiring "reasonable grounds" for search).

Alaska: *Roman* v. *State*, 570 P.2d 1235, 1244 (Alaska 1977) (parole board may impose condition authorizing parole officer to conduct search without probable cause, where condition has a "reasonable nexus" to parolee's crime); Alaska Stat. § 33.16.150(b)(3) (search condition limited to reasonable searches by parole officer or "peace officer acting under the direction of a parole officer").

Arizona: *State* v. *Webb*, 717 P.2d 462, 467 (Ariz. Ct. App. 1985) (parolee search pursuant to search condition must be based on "reasonable cause").

Arkansas: *Cherry* v. *Arkansas*, 791 S.W.2d 354, 356-57 (Ark. 1990) (upholding parole search condition requiring parole officer to have "reasonable grounds" for search); Ark. Reg. 158.00.001(XV)(10,12) (releasee may be searched by Department officer if "reasonable grounds" or "reasonable suspicion" to believe violation of release conditions).

Colorado: *People* v. *McCullough*, 6 P.3d 774, 781-82 (Colo. 2000) (statute imposing search condition on all parolees does not require "reasonable grounds," but search must be "in furtherance of the purposes of parole" and "carried out under the authority of a parole officer").

Connecticut: *State* v. *Smith*, 540 A.2d 679, 691, 691 n.13 (Conn. 1988) (standard for parolee and probationer searches is "reasonable suspicion"); *State* v. *Whitfield*, 599 A.2d 21, 24 (Conn. App. Ct. 1991) (right to conduct parole search based on mere suspicion extends only to parole officer).

Delaware: *State* v. *Harris*, 734 A.2d 629, 634-35 (Del. Super. Ct. 1998) (administrative regulation ensured "reasonable grounds" for probation search; regulation did not permit search based solely on request from law enforcement officer); *State* v. *Redden*, No. CR.A. IN-03-04-0161, 2003 WL 22853419, at *2 (Del. Super. Ct. Oct. 22, 2003) (regulation requires that parolee search be based on "reasonable grounds").

Florida: *Soca* v. *State*, 673 So. 2d 24, 25 (Fla. 1996) (Florida Constitution requires probable cause for probationer search before evidence may be used in a new trial); *State* v. *Yule*, 905 So. 2d 251, 254-55 (Fla. Dist. Ct. App. 2005) (allowing evidence seized during warrantless probation search supported by reasonable suspicion to be used in the trial of a nonprobationer present in probationer's home).

Georgia: *Fox* v. *State*, 527 S.E.2d 847, 850-51 (Ga. 2000) (absent consent, warrantless search of probationer's home requires "reasonable grounds" or "reasonable suspicion").

Hawaii: *State* v. *Propios*, 897 P.2d 1057, 1060, 1061 n.6, 1063 (Haw. 1994) (parolee and probationer may be subject to warrantless search based on "reasonable suspicion," so long as search is not used "to facilitate a criminal investigation").

Idaho: *State* v. *Devore*, 2 P.3d 153, 156 (Idaho Ct. App. 2000) (absent consent to search, parole officer must have "reasonable grounds").

Illinois: *People* v. *Wilson*, 836 N.E.2d 159, 164-66 (Ill. App. Ct. 2005) (under 730 Ill. Comp. Stat. 5/3-3-7(10), proper standard for search of person on parole or mandatory release is reasonable suspicion).

Indiana: *Fitzgerald* v. *State*, 805 N.E.2d 857, 865 (Ind. Ct. App. 2004) (probation search authorized if reasonable suspicion probation conditions are being violated); Ind. Code § 11-13-3-7(a)(6) (employee assigned to supervise

parolee may search parolee if "reasonable cause" to believe existence of parole violation).

Iowa: *State* v. *Cullison*, 173 N.W.2d 533, 537 (Iowa 1970) (with respect to evidence used in new trial, parolee has the same right against unreasonable searches and seizures as ordinary person).

Kansas: *State* v. *Rhodes*, No. 90827, 2004 WL 1878343, at *3 (Kan Ct. App. Aug. 20, 2004) (search pursuant to probation condition proper where "reasonable suspicion" to believe violation of probation terms).

Kentucky: *Smith* v. *Commonwealth*, No. 2004-CA-002099-MR, 2005 WL 2807188, at *3 (Ky. Ct. App. Oct. 28, 2005) (Department of Corrections regulations and policies authorize parole officer to search based on "reasonable suspicion" that parolee is violating a condition of supervision).

Louisiana: *State* v. *Perry*, 900 So. 2d 313, 318 (La. Ct. App. 2005) (parolee search must be based on reasonable suspicion and cannot be a "subterfuge for criminal investigations"); La. Rev. Stat. § 15:574.4(H)(4)(r) (parole board may require parolee to agree to search by parole officer based on "reasonable suspicion").

Maine: No authority located.

Maryland: *State* v. *Raines*, 857 A.2d 19, 28 (Md. 2004) (*Knights* does not adopt a per se rule requiring individualized suspicion for all searches); Md. Code, Corr. Serv. § 6-109 (before entering dwelling of an individual on parole in a home detention program, the Director of the Division of Parole and Probation must apply for a warrant; judge shall issue warrant if (1) scope of the proposed search is reasonable, and (2) requiring consent would jeopardize the attempt to take custody of the offender).

Massachusetts: *Commonwealth* v. *LaFrance*, 525 N.E.2d 379, 381-82, 382 n.5, 382-83 (Mass. 1988)

(requires reasonable suspicion for probation searches; absent *Griffin*-like regulation, warrant based on reasonable suspicion required; police may not use probation officer as a subterfuge to conduct search of probationer).

Michigan: *People* v. *Harris*, No. 250802, 2004 WL 2601272, at *1 (Mich. Ct. App. Nov. 16, 2004) (regulation requires parole agent to have reasonable cause before searching parolee); Mich. Admin. Code. r. 791.7735(2) (parole agent may search parolee if "reasonable cause to believe that a violation of parole exists," and parole agent files a written report with supervisor setting forth specific reasons for search).

Minnesota: *State* v. *Earnest*, 293 N.W.2d 365, 368 n.2, 369 (Minn. 1980) (upholding warrantless search of probationer based on probable cause; no material difference between probationer and parolee); *In re Welfare of D.M.N.*, No. CX-02-1827, 2003 WL 21060843, at *2-3 (Minn. Ct. App. May 13, 2003) ("minimal standard" for probation search is reasonable suspicion).

Mississippi: *Robinson* v. *State*, 312 So.2d 15, 18 (Miss. 1975) (observing in dicta that authorities "generally hold" that "parole authorities" may subject parolees "to inspection and search as may seem advisable to them").

Missouri: *State* v. *Williams*, 486 S.W.2d 468, 473 (Mo. 1972) (parole officer in daily contact with parolee may conduct search "in the reasonable exercise of the officer's judgment"; upholding search where parole officer had "sufficient information" to arouse suspicion of criminal activity involving drugs).

Montana: *State* v. *Burchett*, 921 P.2d 854, 856 (Mont. 1996) (probation officer may conduct a warrantless search of probationer's residence if officer has "reasonable cause" for search); Mont. Admin. R. 20.7.1101(7) (parolee shall submit to search by parole officer based on "reasonable cause").

Nebraska: *State* v. *Davis*, 577 N.W.2d 763, 772 (Neb. Ct. App. 1998) (upholding search of parolee where parole officer had "reasonable grounds" to suspect parole violations).

Nevada: *Allan* v. *State*, 746 P.2d 138, 140 (Nev. 1987) (parole officer must have "reasonable grounds" to suspect parole violation before conducting warrantless search).

New Hampshire: *State* v. *Zeta Chi Fraternity*, 696 A.2d 530, 540 (N.H. 1997) (particularized suspicion not required where search condition is "reasonably related" to supervision and rehabilitation of probationer; search may not be used as a subterfuge for uncovering evidence of criminal activity); *see also Anderson* v. *Peterson*, No. Civ. 02-315-M, 2003 WL 23100320, at *6 n.10 (D. N.H. Dec. 31, 2003) (stating that New Hampshire Supreme Court in *Zeta Chi* addressed a specific condition of probation, rather than a regulation with general applicability).

New Jersey: *State* v. *Maples*, 788 A.2d 314, 318 (N.J. Super. Ct. App. Div. 2002) (administrative regulation for parole search requiring reasonable suspicion satisfies *Griffin* standard); N.J. Admin. Code tit. 10A, § 72-6.3(a) (parole officer's search of parolee's residence must be based on "reasonable articulable suspicion"; supervisor must provide prior approval of search unless circumstances require immediate action).

New Mexico: *State* v. *Baca*, 90 P.3d 509, 522 (N.M. Ct. App. 2004) (warrantless search of probationer must based on reasonable suspicion).

New York: *People* v. *Huntley*, 43 N.Y.2d 175, 181 (N.Y. 1977) (search by police officer of parolee generally requires probable cause; search by parole officer must be "substantially related" to the performance of parole officer's duty); *People* v. *Daniels*, 752 N.Y.S.2d 218, 223 (N.Y. Sup. Ct. 2002) (upholding parolee search pursuant to regulation requiring parole officer to have an "articulable reason" for conducting search).

North Carolina: *State* v. *Robinson*, 560 S.E.2d 154, 159 (N.C. Ct. App. 2002) (probationer search conducted by law enforcement officer valid if based on reasonable suspicion); N.C. Gen. Stat. § 15A-1374(b)(11) (parolee may be required to "submit at reasonable times to searches of his person by a parole officer for purposes reasonably related to his parole supervision"; parolee not required to consent to search that would otherwise be unlawful).

North Dakota: *State* v. *Maurstad*, 647 N.W.2d 688, 696-99 (N.D. 2002) (court will not apply prior decision in *State* v. *Smith*, 589 N.W.2d 546, 548 (N.D. 1998), holding that reasonable suspicion is not required for probation search; "we need not decide whether a suspicionless search would satisfy the Fourth Amendment"); N.D. Cent. Code § 12.1-32-07(4)(n) (court ordering probation "may impose such conditions as it deems appropriate," including requiring probationer to submit to search by probation officer any time of the day or night, with or without a search warrant).

Ohio: *State* v. *Mattison*, No. 17554, 1999 WL 957648, at *2, 4 (Ohio Ct. App. Sept. 3, 1999) (parolee search pursuant to statute requires "reasonable grounds"); Ohio Rev. Code § 2967.131(B) (authorized field officers, acting within scope of supervisory duties, may search parolee if "reasonable grounds" to believe parolee is violating the law or terms of parole).

Oklahoma: *Ott* v. *State*, 967 P.2d 475, 474-76 (Okla. Crim. App. 1998) (parole officer must have "reasonable grounds" for search).

Oregon: *State* v. *Gulley*, 921 P.2d 396, 400-01 (Or. 1996) (state statute requiring probationer to consent to search based on reasonable grounds applies if search is based on a level of suspicion below probable cause but above reasonable suspicion needed for *Terry* stop).

Pennsylvania: *Commonwealth* v. *Williams*, 692 A.2d 1031, 1036-37 (Pa. 1997) (parole officer has right to

search parolee if (1) search is based on reasonable suspicion, and (2) search is reasonably related to parole officer's duty); *Commonwealth* v. *Altadonna*, 817 A.2d 1145, 1152-53 (Pa. Super. Ct. 2003) (police officers must have probable cause to search parolee's person or property); Pa Stat. tit. 61, § 331.27a(d)(1)(i) (permitting searches by parole officer of parolee based on "reasonable suspicion").

Rhode Island: No authority located.

South Carolina: Carl N. Lundberg & Mark V. Desser, 26 S.C. Jur. Probation, Parole, & Pardon § 7 (State policy prevents parole officers from conducting warrantless searches based only on "reasonable grounds").

South Dakota: *State* v. *Ashley*, 459 N.W.2d 828, 830-31 (S.D. 1990) (upholding search pursuant to condition requiring parolee to submit to search without warrant, "whenever reasonable cause was ascertained by a parole agent"; parole officer may not act as an agent of the police).

Tennessee: *State* v. *Miller*, No. W2001-02045-CCA-R3-CD, 2002 WL 1483197, at *4 (probation conditions must be "reasonably related" to offender's sentence). Tenn. Code § 40-35-303(d)(9) (probation conditions may include those "reasonably related to the purpose of the offender's sentence," and not unduly restrictive of offender's liberty, or incompatible with his freedom of conscience).

Texas: *Ballard* v. *State*, 33 S.W.3d 463, 466 (Tex. App. 2000) (probable cause not necessary for arrest or search of parolees) (citing *Garrett* v. *State*, 791 S.W.2d 137, 140 (Tex. Crim. App. 1990, holding parolee may be arrested where there is "reason to believe" that person has violated parole conditions).

Utah: *State* v. *Velasquez*, 672 P.2d 1254, 1263 (Utah 1983) (parole officer must have "reasonable suspicion" for search); *State ex rel. A.C.C.*, 44 P.3d 708, 712-13, 713 n.5

(Utah 2002) (probation officer may search juvenile probationer without individualized suspicion).

Vermont: *State* v. *Lockwood*, 632 A.2d 655, 663 (Vt. 1993) (probation search must be based on "reasonable grounds").

Virginia: *Anderson* v. *Commonwealth*, 507 S.E.2d 339, 340, 342 (Va. 1998) (defendant voluntarily waived Fourth Amendment right to be free from unreasonable searches from law enforcement for one year in exchange for suspended sentence).

Washington: *State* v. *Massey*, 913 P.2d 424, 425 (Wash. Ct. App. 1996) (search of parolee "is reasonable if an officer has a well-founded suspicion that a violation has occurred").

West Virginia: *Hughes* v. *Gwinn*, 290 S.E.2d 5, 9-10 (W. Va. 1982) (probationer search requires probable cause; probationer's status is a factor in determining whether probable cause exists).

Wisconsin: *State* v. *Martinez,* 542 N.W.2d 215, 219 (Wis. Ct. App. 1995) (warrantless probation search valid if based on "reasonable grounds"); Wis. Admin. Code § DOC 328.21(3)(a) (probationer's residence may be searched if "reasonable grounds" to believe presence of contraband; approval of supervisor necessary absent exigent circumstances).

Wyoming: *Jones v. State*, 41 P.3d 1247, 1258 (Wyo. 2002) (probation condition permitting random searches of defendant, his residence, and vehicle for presence of alcohol or controlled substances permissible where condition is reasonably related to probationer's prior crime, rehabilitation, or future conduct); *Pena* v. *State*, 792 P.2d 1352, 1358 (Wyo. 1990) (parole officer must have reasonable suspicion that parolee has committed a parole violation or crime to conduct search).