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

REPLY BRIEF FOR THE PETITIONER

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The search in this case failed to meet the most fundamental requirement of reasonableness under the Fourth Amendment: the police officer's discretion to search Petitioner was not limited by an individualized suspicion standard or by other adequate safeguards. The Fourth Amendment was adopted precisely to prohibit discretionary searches by officers in the field. Accordingly, the States' leeway to search parolees under the Fourth Amendment does not extend to the search in this case. Indeed, Respondent stands virtually alone among all the States and the federal government in authorizing the search at issue here.

I. The Search Was Unreasonable Under A Balancing Analysis.

A. The Search Condition Is Unreasonable Because It Grants Unconstrained Discretion To Officers In The Field.

"The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials." *Delaware* v. *Prouse*, 440 U.S. 648, 653-54 (1979). In most cases, discretion is limited by requiring "that the facts upon which an intrusion is based be capable of measurement against 'an objective standard,' whether this be probable cause or a less stringent test" such as reasonable suspicion. *Id.* at 654 (note omitted). Where "the balance of interests precludes insistence upon 'some quantum of individualized suspicion,' other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'" *Id.* at 654-55 (quoting *Camara* v. *Municipal Court*, 387 U.S. 523, 532 (1967)). In case after case, the Court has reaffirmed that grants of "standardless and unconstrained discretion" violate the Fourth

Amendment.[1] *Id.* at 661. The Court has applied this fundamental principle in cases analyzed under the "special needs" doctrine as well as under general Fourth Amendment balancing analysis.[2]

The requirement that the individual officer's discretion to search be limited is central to the Fourth Amendment. "[T]he evil toward which the Fourth Amendment was primarily directed was the resurrection of the pre-Revolutionary practice of using general warrants or 'writs of assistance' to authorize searches for contraband by officers of the Crown." *New Jersey* v. *T.L.O.*, 469 U.S. 325, 335 (1985). "The hated writs of assistance" granted the King's officers "blanket authority to search where they pleased." *Payton* v. *New York*, 445

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[1] *See, e.g., United States* v. *Brignoni-Ponce*, 422 U.S. 873, 882 (1975) (roving Border Patrol stop unreasonable because the "Fourth Amendment demands something more than the broad and unlimited discretion sought by the government"); *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 270 (1973) (search unreasonable because it was "conducted in the unfettered discretion of the members of the Border Patrol"); *United States* v. *United States District Court*, 407 U.S. 297, 317 (1972) ("those charged with . . . investigative . . . duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks"); *Camara*, 387 U.S. at 532-33. *See also Florida* v. *Wells,* 495 U.S. 1, 4-5 (1990) (container search unreasonable because State "had no policy whatever with respect to the opening of closed containers encountered during an inventory search").

[2] *See, e.g., Illinois* v. *Lidster*, 540 U.S. 419, 428 (2004) ("police stopped all vehicles systematically"); *Vernonia School Dist. 47J* v. *Acton*, 515 U.S. 646, 650 (1995) (no discretion to select students for drug tests); *Michigan Dep't of State Police* v. *Sitz*, 496 U.S. 444, 454 (1990) (fixed sobriety checkpoint limits officer's discretion to make stops); *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 622 (1989) ("minimal discretion" to administer drug tests); *Nat'l Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 667 (1989) (drug test "automatic"). In other special needs cases, the individual officer's discretion is limited by an individualized suspicion requirement. *See, e.g., Griffin* v. *Wisconsin*, 483 U.S. 868, 871 (1987) (probation officer's discretion limited by requirements of "reasonable grounds" and supervisor approval); *New Jersey* v. *T.L.O.*, 469 U.S. 325, 342 n.8 (1985) (reasonable suspicion requirement).

U.S. 573, 583 n.21 (1980). In 1761 James Otis denounced writs of assistance as "the worst instrument of arbitrary power" because they "'placed the liberty of every man in the hands of every petty officer.'" *Id.* (quoting *Boyd* v. *United States*, 116 U.S. 616, 625-27 (1886)). John Adams described Otis's denunciation as "the first scene of the first act of opposition to the arbitrary claims of Great Britain," and declared: "[T]hen and there the child Independence was born." *Id.* *See also Berger* v. *New York*, 388 U.S. 41, 58 (1967) (general warrants were "a motivating factor behind the Declaration of Independence").[3]

California's parole search condition permits the very evil that the Fourth Amendment forbids. By its terms, the search condition grants individual officers discretion to search parolees such as Petitioner, their houses, and their effects at any hour of the day or night, with or without a warrant and with or without cause. J.A. 48; Cal. Penal Code § 3067(a). Respondent placed Petitioner's liberty "in the hands of every petty officer." Unlike the probation officer in *Griffin*, the police officer in this case was not subject to a state regulation that required him to have "reasonable grounds" for a search and obtain approval from a supervisor. *Griffin*, 483 U.S. at 871. Instead, Officer Rohleder, like the officer in *Prouse*, was not "acting pursuant to any standards, guidelines, or procedures . . . promulgated by either his department or the State Attorney General." *Prouse*, 440 U.S. at 650. Officer Rohleder testified that sometimes he

[3] *See also* Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 51-105 (1970); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 578 (1999) ("delegation of discretionary authority to ordinary, 'petty,' or subordinate' officers was anathema to framing-era lawyers"); Tracey Maclin, *The Central Meaning of the Fourth* Amendment, 35 Wm. & Mary L. Rev. 197, 248 (1993) ("[T]he central purpose of the Fourth Amendment" is "distrust of discretionary police power."); NACDL Amicus Br. 16-18.

searches parolees and sometimes he does not. J.A. 39 ("I don't go after everybody all the time."). That is precisely the unconstrained discretion that is forbidden by the Fourth Amendment.

Contrary to Respondent's contention (Br. 10-12) the officer's discretion to search Petitioner was not effectively constrained by the requirement of California law that parolee searches not be "arbitrary, capricious, or harassing."[4] This Court has never held that such a general standard is a constitutionally adequate limitation on the officer's discretion. Moreover, California has interpreted its "arbitrary, capricious, and harassing" standard in a way that ensures it is *not* an effective limitation on the officer's discretion to search. The California Supreme Court has held that a search is "arbitrary, capricious, or harassing" only if "the motivation for the search is *unrelated* to rehabilitative, reformative, or legitimate law enforcement purposes." *People* v. *Reyes*, 968 P.2d 445, 451 (Cal. 1998) (emphasis added). *See also* Resp. Br. 11 (California forbids searches conducted "solely to harass"). *Any* search for evidence of criminal activity is at least related to a legitimate law enforcement purpose. So long as the officer testifies that he was looking for evidence of crime, the search satisfies California's standard. Respondent's argument would justify searches pursuant to writs of assistance, so long as the officer searched for contraband or other evidence of crime.

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[4] The United States briefly contends (U.S. Br. 20) that the officer's discretion was properly limited because the search condition applies only to persons on parole. That is contrary to this Court's decisions, which have insisted that the individual officer's discretion must be limited even when only a subsection of the general population is subject to search. *See, e.g., Von Raab*, 489 U.S. at 667; *Berger*, 388 U.S. at 59 (statute authorizing wiretaps of a particular named person or persons "leaves too much to the discretion of the officer executing the order").

The emptiness of California's "arbitrary, capricious, and harassing" standard is confirmed by the undisputed fact that no California court has *ever* held that a parolee or probationer search violated the standard. *See* Pet. Br. 20. S*ee also* Resp. Br. 15 (noting that more than 130,000 persons are on parole in California at any given time).

Respondent contends (Br. 10, 12-13) that the "arbitrary, capricious, and harassing" standard prohibits searches that occur at an unreasonable hour or are unreasonably prolonged, frequent, or humiliating. The Court has never accepted such marginal limitations on discretion as constitutionally sufficient. Otherwise, searches pursuant to writs of assistance would be constitutional so long as they were not too lengthy or frequent.

The unprecedented *scope* of the searches authorized by California's search condition further expands the officer's discretion and renders California's "objective" limitations ineffective. A parolee search in California is unlike a search authorized by a warrant, which is "narrowly limited in its objectives and scope," *Skinner*, 489 U.S. at 622, because of the constitutional requirement that the warrant must "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. It is also unlike a warrantless frisk for weapons based upon reasonable suspicion, which must 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." *Terry* v. *Ohio*, 392 U.S. 1, 29 (1968). And a parolee search in California is unlike the suspicionless searches this Court has approved, which have also been limited in scope. *See, e.g., Vernonia*, 515 U.S. at 658; *Sitz*, 496 U.S. at 453. Unlike searches this Court has found to be reasonable, California's parole search condition grants police officers blanket authority to search parolees, their houses, and their effects for evidence of *any* crime. The police officer

is not required to consider, or even know, what crimes the parolee has committed or is likely to commit. The single fact justifying the search is that the person is on parole. Lengthy, frequent, and intrusive searches can be justified on the ground that they might conceivably turn up evidence of *some* crime.[5] It is therefore not surprising that the California courts have not invalidated a single parolee or probationer search on any of these grounds.

In short, the search of Petitioner "was conducted in the unfettered discretion of" the police officer and "thus embodied precisely the evil" this Court repeatedly has held to be impermissible under the Fourth Amendment. *Almeida-Sanchez*, 413 U.S. at 270.

B. The Harm To Privacy Interests Outweighs The Benefit To The State's Interests.

1. Suspicionless Searches Effectively Extinguish Parolees' Privacy Interests And Invade The Privacy Of Third Parties. A search condition that subjects a person to searches by any law enforcement officer at any time of the day or night, without a warrant and without cause, undeniably is an extreme intrusion upon personal privacy. The degree of intrusion in this case thus differs sharply from other cases in which the Court has upheld suspicionless searches. *See, e.g., Lidster*, 540 U.S. at 427 ("interfered only minimally"); *Vernonia*, 515 U.S. at 660 (invasion of privacy "not significant"); *Sitz*, 496 U.S. at 451 ("slight" intrusion).

Respondent contends (Br. 9) that the extreme intrusion upon Petitioner's privacy is entitled to no weight because Petitioner had "no subjective expectation

[5] For example, Respondent could defend a home search conducted after midnight on the ground that forbidding such searches would allow parolees to engage in criminal activity during those hours. Similar arguments could be made in defense of frequent and intrusive searches.

of privacy whatever." That contention conflicts with this Court's recognition that, while probationers are subject to "a degree of impingement upon privacy that would not be constitutional if applied to the public at large," "[t]hat permissible degree is not unlimited" and may be "exceeded." *Griffin*, 483 U.S. at 875. The Court has also recognized that a parolee's "condition is very different from that of confinement in a prison . . . [and] includes many of the core values of unqualified liberty." *Morrissey* v. *Brewer*, 408 U.S. 471, 482 (1972). Under this Court's decisions, Petitioner clearly had *some* legitimate expectation of privacy.[6]

Respondent does not dispute that suspicionless searches of parolees entail "a massive intrusion on the privacy interests of third persons solely because they reside with a parolee." *People* v. *Burgener*, 714 P.2d 1251, 1269 (Cal. 1986). In this case, the search of Petitioner plainly intruded on the privacy interests of third persons. Petitioner's two companions were effectively stopped and one of them, Deborah Watson, was searched. Watson testified that she did not consent to the search; the officer testified that she did. J.A. 11, 56-57. If Watson had not associated with Petitioner, there is no reason to think that the officer would have sought to search her. Watson's association with Petitioner thus placed her in a situation in which she was required to choose between consenting to a humiliating public search by a police officer or risking the consequences of refusing to consent.

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[6] Respondent contends (Br. 9) that Petitioner's subjective expectation of privacy was extinguished because he was notified that he could be searched by any police officer without cause. But notice, by itself, cannot extinguish all legitimate expectations of privacy. *See Smith* v. *Maryland*, 442 U.S. 735, 740 n. 5 (1979) ("[I]f the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry," loss of subjective expectation of privacy would play "no meaningful role" in the Fourth Amendment analysis).

Many reasonable citizens would think twice about associating with a person who subjects them to such risks.

2. Suspicionless Searches Do Not Further The State's Interest In Reintegrating Parolees Into The Community. The California Supreme Court has 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 optimal successful functioning of the probation system." *People* v. *Sanders*, 73 P.3d 496, 508 (Cal. 2003) (brackets in original) (marks and citation omitted). Respondent does not dispute this, but instead dismisses it as a "social concern[]" that is not addressed by the Fourth Amendment. Resp. Br. 16. That is clearly incorrect. This Court has recognized that, for purposes of the Fourth Amendment, one of the State's two legitimate concerns with a probationer is "that he will successfully complete probation and be integrated back into the community." *United States* v. *Knights*, 534 U.S. 112, 120-21 (2001). California also recognizes that "reintegration of the offender into society" is a primary purpose of parole. Cal. Pen. Code § 3000(a)(1). The fact that suspicionless searches give third parties an incentive not to associate with parolees, and thus make it more difficult for parolees to reintegrate into society, is plainly relevant to the constitutional balancing analysis and weighs against suspicionless searches.

3. The State's Interest In Preventing Parolee Crime Does Not Justify Suspicionless Searches. Respondent and its amici do not dispute that California stands virtually alone in authorizing the search in this case. With the possible exception of South Dakota, no other State allows police officers to conduct suspicionless

searches of parolees absent consent or a particularized determination that such searches are reasonable in the circumstances. *See* Pet. Br. 28-31 & App. 12a-19a.[7]

The United States acknowledges that the federal government has "elected to impose an individualized suspicion standard" on parolee searches. U.S. Br. 23 n.8 (citing U.S. Parole Comm'n R. & Proc. Man. (Aug. 2003)).[8] Moreover, the federal statutes governing "supervised release" (which has largely replaced parole in the federal system) omit *any* search condition—let alone a suspicionless search condition—from both the general conditions of supervised release *and* the discretionary conditions specified by statute. *See* 18 U.S.C. §§ 3563(b) & 3583(d). Only a federal court may impose a search condition as a condition of supervised release, and then only upon a finding that the condition is "appropriate" and "involves no greater deprivation of liberty than is reasonably necessary." *Id.* § 3583(d)(2).[9]

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[7] Respondent asserts (Br. 18) that many States prohibit suspicionless parolee searches because they have concluded that such searches are unconstitutional. That is so, but the constitutional analysis includes an assessment of "the degree to which [the search] is needed." *Knights*, 534 U.S. at 119. The fact that "the vast majority of jurisdictions that have considered the issue" disagree with California supports Petitioner's position. *People* v. *Reyes*, 968 P.2d 445, 453 (Cal. 1998) (Kennard, J., dissenting).

[8] The United States describes this requirement as having "no legal force," U.S. Br. 23 n.8, but it represents the federal government's considered determination that suspicionless parolee searches are inappropriate. Moreover, the Parole Commission's regulations require that *any* search condition be based on an individualized determination of need. 28 C.F.R. § 2.204(b)(2)(iv).

[9] The United States asserts (U.S. Br. 1) that federal courts have imposed search conditions "similar" to the one in this case in "some" cases. But it cites only one case in support of that proposition, and in that case the court reversed the district court in part despite "exceptional conditions that required exceptional vigilance." *United States* v. *Monteiro*, 270 F.3d 465, 467-68 (7th Cir. 2001); *see also id.* at (continued…)

There is no evidence that other States and the federal government experience greater parolee recidivism, compared to California, because they do not authorize police officers to search parolees in the absence of reasonable suspicion of wrongdoing. *See Payton*, 445 U.S. at 602 (considering "absence of any evidence that effective law enforcement has suffered" in other States). To the contrary, California's recidivism rates are higher than those of most other States despite its authorization of suspicionless parolee searches.[10] Nor is there any evidence that the California Supreme Court's elimination of the reasonable suspicion requirement in *Reyes* has led to a decrease in recidivism in California. Instead, recidivism rates in California remained virtually unchanged following *Reyes*.[11]

Respondent contends (Br. 19) that, regardless of the practices of other States and the federal government, the Court should defer to California's determination that

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470-71 (discussing other cases in which appellate court invalidated search condition).

[10] Parolees nationwide successfully completed parole at twice the rate of parolees in California during the 1990s. U.S. Dept. of Justice, Bureau of Justice Statistics, *Trends in State Parole 1990-2000*, at 11 (Oct. 2001). *See also* Joan Petersilia, *Challenges of Prisoner Reentry and Parole in California*, 12 CPRC 3 (June 2000). The difference between California and other States largely results from California's decision to imprison parolees for technical violations at rates well above the national average. *See* Jeremy Travis and Sarah Lawrence, *California's Parole Experiment*, Urban Institute Justice Policy Center, at 5 (Aug. 2002) ("The vast majority of the returns to prison in California are for technical violations, such as missing an appointment with a parole officer or failing a drug test—not for new crimes. It is in this area of policy and practice that California departs most sharply from national trends."). Indeed, "[n]early two-thirds of [California] prison admissions are for parole violations, compared to about one-third nationally." *Id.*

[11] *See* U.S. Dept. of Justice, Bureau of Justice Statistics, *Trends in State Parole 1990-2000*, at 11 (Oct. 2001) (noting that 19.4% of California parolees were successfully discharged from parole in 1990, 20.9% were discharged in 1995, and 21.3% were discharged in 1999).

suspicionless parolee searches are justified. But Fourth Amendment balancing analysis requires the Court to weigh the harm to privacy interests against the gain to the State. *Knights*, 534 U.S. at 118-19. *See also Payton*, 445 U.S. at 578, 600 (1980) (statutorily-authorized search unreasonable); *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 324-25 (1978) (same); *Camara*, 387 U.S. at 534 (same). To the extent that the Court may properly defer to legislatures and law enforcement entities in striking this balance, the overwhelming judgment of those bodies is that police officers should not be permitted to conduct suspicionless parolee searches. *See California* v. *Greenwood*, 486 U.S. 35, 43 (1988) (Court has "never intimated . . . that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs").

The Court has held that some suspicionless searches are reasonable in situations in which "the concept of individualized suspicion has little role to play." *Lidster*, 540 U.S. at 424; *see also Von Raab*, 489 U.S. at 668 ("probable-cause standard may be unhelpful in analyzing the reasonableness of routine administrative functions"). Similarly, the Court has noted that "[r]ailroad supervisors," "school officials," and "hospital administrators" "are not in the business of investigating violations of the criminal laws" and "have little occasion to become familiar with the intricacies of this Court's Fourth Amendment jurisprudence." *Skinner*, 489 U.S. at 623. Police officers, in contrast, *are* in the business of investigating violations of the criminal laws, and *do* have occasion to become familiar with requirements such as probable cause and reasonable suspicion.

Although the reasonable suspicion standard requires only "some minimal level of objective justification" for a search, *INS* v. *Delgado*, 466 U.S. 210, 217 (1984), Respondent contends that the standard would not be met

if a police officer received an "uncorroborated tip" that a parolee is engaged in criminal activity. Resp. Br. 18 (citing *Florida* v. *J.L.*, 529 U.S. 266 (2000)). There was no indication that J.L. was a parolee, and Respondent's argument assumes that parole status cannot be considered as a factor in determining whether there is reasonable suspicion of criminal activity. Courts have recognized that prior criminal history may be considered in determining whether there is reasonable suspicion,[12] and have applied similar reasoning to parolee and probationer searches. *See Soca* v. *State*, 673 So. 2d 24, 25 n.1 (Fla. 1996) ("probationary status may be used as a factor to establish probable cause"); *People* v. *Huntley*, 371 N.E.2d 794, 797 (NY 1977) ("fact of parole status may well be significant" in establishing probable cause).

Respondent also contends (Br. 20) that in some circumstances, such as *Terry* stops, all citizens are subject to a reasonable suspicion standard, and thus applying that standard to parolees in all circumstances would sometimes afford them the same Fourth Amendment rights as citizens in general. That is also incorrect. Where the reasonable suspicion standard applies to citizens in general, it authorizes only a limited search, such as a brief pat-down for weapons. *Terry*, 392 U.S. at 26. In the case of a parolee, reasonable suspicion provides the basis for a much broader search. *Knights*, 534 U.S. at 115, 122. Moreover, the question in this case is not whether suspicionless stops of parolees are reasonable (since Petitioner is not challenging the stop and frisk in this case). Instead, the question is whether an officer, having stopped a parolee and frisked him for weapons,

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[12] *See, e.g., United States* v. *Johnson*, 427 F.3d 1053, 1057 (7th Cir. 2005) ("[A]lthough a law enforcement officer's knowledge of a suspect's criminal history may support the existence of reasonable suspicion, such knowledge in itself is not enough.") (citation omitted); *Burrell* v. *McIlroy*, 423 F.3d 1121, 1124 n.3 (9th Cir. 2005) (same).

may proceed to a full-blown search in the absence of any reasonable suspicion.

Respondent unquestionably has a strong interest in protecting society from crimes committed by parolees. But "the gravity of the threat alone cannot be dispositive." *City of Indianapolis* v. *Edmond*, 531 U.S. 32, 42-43 (2000). Moreover, States have great flexibility to search parolees within the limits imposed by the Fourth Amendment. Under *Knights*, neither a search warrant nor probable cause is required. The exclusionary rule does not apply in parole revocation hearings. *Pennsylvania Board of Probation & Parole* v. *Scott*, 524 U.S. 357, 369 (1998). Other avenues are open to Respondent. *See Prouse*, 440 U.S. at 663 (State is free to develop methods "that involve less intrusion or that do not involve the unconstrained exercise of discretion"). For example, California is free to adopt statutory or regulatory guidelines on parolee searches similar to those adopted by the United States or other States. It could also seek to impose a suspicionless search condition based on a particularized determination of need.[13] What Respondent may not do, consistent with the Fourth Amendment, is grant individual police officers unfettered discretion to search parolees.

The harm to individual privacy in this case outweighs any gain to the State's legitimate interests. Moreover,

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[13] The Fourth Amendment does not impose a "least restrictive means" test under which a search is unreasonable *solely* because the government has alternative means of achieving its purposes that are less invasive of individual privacy. *See, e.g., Vernonia*, 515 U.S. at 663. But the existence of effective alternatives is a *factor* in the reasonableness analysis. *See, e.g., T.L.O.*, 469 U.S. at 343 (Fourth Amendment "ensure[s] that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools"); *Brignoni-Ponce*, 422 U.S. at 881, 883 n.8 (1975) (considering "availability of alternatives to [suspicionless] random stops" and "absence of practical alternatives" to stops based on reasonable suspicion).

granting police officers unconstrained discretion to search is not a permissible means of combating crime under the Fourth Amendment. Accordingly, the search was unreasonable.

II. The "Special Needs" Doctrine Does Not Justify The Search.

Respondent contends (Br. 21-31) that the "special needs" doctrine provides an alternative justification for the search. The United States, apparently recognizing that a balancing analysis does not favor Respondent, advances the "special needs" doctrine as the primary justification for the search. U.S. Br. 8-27. This Court's decisions clearly point to the conclusion that the special needs doctrine does not apply in this case. And even if it did, the search could not be justified under that doctrine.

In *Edmond*, the Court held that "a 'general interest in crime control'" cannot serve as the "justification for a regime of suspicionless stops." 531 U.S. at 41 (quoting *Prouse,* 440 U.S. 648, 659 n.18 (1979)). *See also id.* at 54 (Rehnquist, C.J., dissenting) (special needs doctrine "has been used to uphold certain suspicionless searches performed for reasons unrelated to law enforcement"). In *Ferguson* v. *City of Charleston*, 532 U.S. 67 (2001), the Court reaffirmed that the "special needs" doctrine applies only where the "special need" advanced as the justification for the search is "divorced from the State's general interest in law enforcement." 532 U.S. at 79. *See also id.* at 88 (Kennedy, J., concurring) ("special needs" cases "do not sustain the active use of law enforcement, including arrest and prosecutions, as an integral part of a program which seeks to achieve legitimate, civil objectives").

Petitioner was searched by a police officer engaged in law enforcement, and thus the "special needs" doctrine does not apply. Police officers are "engaged in the often competitive enterprise of ferreting out crime." *Scott*, 524

U.S. at 368 (marks and citation omitted). *See also Ferguson*, 532 U.S. at 100 (Scalia, J., dissenting) (law enforcement officials "ordinarily have a law enforcement objective"). Officer Rohleder confirmed that he searched petitioner "to make sure he's still obeying the laws." J.A. 38.

In *Griffin*, the Court applied the special needs doctrine to a probationer search. But the search in *Griffin*, unlike the search in this case, was "carried out entirely by the probation officers." 483 U.S. at 871. The Court's opinion stressed that while "a probation officer is not an impartial magistrate, neither is he the police officer who normally conducts searches against the ordinary citizen." *Id.* at 876. The Court observed that probation officers have "an ongoing supervisory relationship" with the probationer that "is not, or at least not entirely, adversarial," and a probation agency can "proceed on the basis of its entire experience with the probationer, and . . . assess probabilities in the light of its knowledge of his life, character, and circumstances." *Id.* at 879; *see also Scott*, 524 U.S. at 368 (parole officers, unlike police officers, have a "relationship with parolees [that] is more supervisory than adversarial"). In this case, unlike *Griffin*, no parole officer had any involvement in the search.

Moreover, the Court explained in *Ferguson* that *Griffin* must be read in the light of the Court's subsequent decisions applying the "special needs" doctrine, which have clearly required that "there was no law enforcement purpose behind the searches" and "little if any, entanglement with law enforcement." 532 U.S. at 79 n.15. In addition, a post-*Griffin* decision expressly "reserved the question whether 'routine use in criminal prosecutions of evidence obtained pursuant to [an] administrative scheme'" would invalidate the search program. *Id.* (quoting *Skinner*, 489 U.S. at 621 n.5).

Respondent seeks to rely on the Court's statement in *Ferguson* that "*Griffin* is properly read as limited by the fact that probationers have a lesser expectation of privacy than the public at large." 532 U.S. at 79 n.15. But a lesser expectation of privacy may lead to a reduced degree of Fourth Amendment protection under a balancing analysis (as the Court held in *Knights*). But it has no logical bearing on whether the search is conducted by a police officer for a law enforcement purpose, and thus is irrelevant to whether the "special needs" doctrine applies here. In *Knights*, the Court applied general Fourth Amendment balancing analysis, rather than "special needs" analysis, to a police officer's search of a California probationer. The same analysis applies here. *See* Pet. Br. 36-37.

Even if the "special needs" doctrine did apply, it would not justify the search in this case. The Court's "special needs" cases have "employed a balancing test." *Ferguson*, 532 U.S. at 78. For the reasons explained in Part I above, the balance here tips decidedly against Respondent. In particular, this Court's decisions applying the special needs doctrine have required either individualized suspicion or other safeguards to limit the discretion of the officer in the field. *See* note 1, *supra* (collecting cases). In *New York* v. *Burger*, 482 U.S. 691 (1987), cited by Respondent (Br. 28), the Court dealt with searches of regulated businesses rather than human beings. The Court emphasized that a "properly administrative" regulatory scheme "must limit the discretion of the inspecting officers," and "must be 'carefully limited in time, place, and scope.'" *Id.* at 703 (quoting *United States* v. *Biswell*, 406 U.S. 311, 315 (1972)). The Court noted that officers were "allowed to conduct an inspection only during the regular and usual business hours," and the scope of the search was limited to "the records as well as any vehicles or parts of vehicles which are subject to the record keeping requirements" of the statute. *Id.* at 711-12 (brackets and marks omitted).

The parole search condition at issue in this case imposes no such limitations on the discretion of police officers.[14]

III. The "Consent" Rationale Does Not Apply.

Contrary to Respondent's contention (Br. 32-37), the search in this case cannot be upheld on a consent rationale.[15] The California Supreme Court has held that "[t]he consent exception to the warrant requirement may not be invoked to validate the search of an adult parolee" in California. *Reyes*, 968 P.2d at 448. The court explained that, under California law, "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.* (citation omitted). This Court is bound by the California Supreme Court's interpretation of state law. *See Griffin*, 483 U.S. at 875.

Respondent incorrectly contends (Br. 32-33) that the California Supreme Court's rejection of the consent rationale in *Reyes* was superseded by Cal. Penal Code § 3067. *Reyes* was decided after the enactment of Section 3067, and subsequent decisions have reaffirmed its

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[14] Searches made at the border (rather than *near* the border as in *Brignoni-Ponce* and *Almeida-Sanchez*) are in a special category: "'[S]earches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border." *United States* v. *Flores-Montano*, 541 U.S. 149, 152-53 (2004) (quoting *United States* v. *Ramsey*, 411 U.S. 606, 616 (1977)). That rationale does not apply to parolee searches.

[15] Respondent did not argue in the courts below or in its brief in opposition to certiorari that Petitioner consented to the search. Accordingly, Respondent is not entitled to raise the issue here. *See* S. Ct. Rule 15.2; *Payton* v. *New York*, 445 U.S. at 583.

holding that the consent rationale does not apply to parole search cases in California.[16]

Section 3067 does not provide that an "inmate will not be released until he or she has agreed to all parole conditions." Resp. Br. 9 n.6. Instead, it provides that an inmate shall not be released on parole until he agrees to the search condition "or has no remaining worktime credit, *whichever occurs earlier*." Cal. Penal Code § 3067(b) (emphasis added). [17] Respondent's contention also conflicts with other provisions of California law. *See* Cal. Penal Code § 3000(b)(1) ("At the expiration of a term . . . of imprisonment imposed pursuant to Section 1170 . . . the inmate shall be released on parole . . ."); *Burgener*, 714 P.2d at 1266 n.12 (describing § 3000(b)(1) as a "mandatory kick-out" provision); Cal. Code Regs. tit. 15, § 2512(a) ("[P]arole conditions are not a contract but are specific rules governing all parolees whether or not the

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[16] *See, e.g., People* v. *Guzman*, 107 P.3d 860, 867 (Cal. 2005) (parole is "mandatory from the offender's perspective"); *Sanders*, 73 P.3d at 503 n.3 (search condition "imposed as a condition of parole, which defendant could not refuse"); *People* v. *Willis*, 46 P.3d 898, 908-09 (2002) ("Under section 3067, a California parolee must agree 'to be subject to search or seizure by a parole officer or other peace officer.'"); *People* v. *Lewis*, 74 Cal. App. 4th 662, 668 (Cal. Ct. App. 1999) (parole search conditions are "automatic, and imposed on every parolee" in California); *People* v. *Buckley*, 2003 WL 122258, at *4 (Cal. Ct. App., Jan 7, 2003) (unpublished) ("parole search condition is not justified by a consent theory since parolees have no choice but to accept a search condition"). *See also United States* v. *Crawford*, 372 F.3d 1048, 1063-64 (9th Cir. 2004) (en banc) (Trott, J., concurring) ("It 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.").

[17] In California "most felonies"—including violations of California Penal Code § 12021, for which Petitioner was sentenced—"carry a 'determinate' prison sentence consisting of a specific number of months or years in prison." *People* v. *Jefferson*, 980 P.2d 441, 445 (Cal. 1999). A prisoner sentenced to a determinate sentence "must be released upon *expiration* of his 'term' less good-time credits." *Id.* at 447 (alteration in original) (marks and citation omitted).

parolee has signed the form containing the parole conditions."); *id.* § 2511 (notice of parole must contain parole search condition).

The legislative history of § 3067 confirms its plain meaning. The California Assembly passed a bill that would have provided that an inmate "shall not be released on parole unless he or she agrees" to the search condition. A.B. 2284, 1995-96 Reg. Legis. Session, at 14 (Cal. 1996) (amended by Assembly on May 6, 1996). The bill would have accomplished this result by "provid[ing] that all terms of imprisonment are indeterminate." S. Comm. on Crim. Proc., *Comm. Rep. for Assembly Bill 2284*, 1995-96 Reg. Legis. Session, at 3 (Cal. 1996). The Senate rejected this approach and instead passed a provision providing only for loss of worktime credits. A.B. 2284, 1995-96 Reg. Legis. Session, at 7 (Cal. 1996) (amended by Senate on Aug. 26, 1996). The Senate's version was enacted into law. 1996 Cal. Stat. 4656-57.[18]

Even if the consent rationale was properly presented in this case and not foreclosed by California statutes and judicial decisions, Respondent has not proved that Petitioner consented to blanket suspicionless searches, and that his consent was "freely and voluntarily given." *Bumper* v. *North Carolina*, 391 U.S. 543, 548-49 (1968).[19]

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[18] Respondent also cites Cal. Penal Code § 3060.5, but that provision deals with revocation of parole, not refusal to grant parole, and it went into effect long before *Reyes* was decided. The California Supreme Court expressly considered § 3060.5 in its opinion in *People* v. *Burgener* and concluded that parolees in California do not consent to suspicionless searches. 714 P.2d 1251, 1266 n.12 (Cal. 1986). The court reaffirmed that conclusion in *Reyes*.

[19] "Questions not raised below are those on which the record is very likely to be inadequate." *Cardinale* v. *Louisiana*, 394 U.S. 437, 439 (1969). Here, a single witness testified that Petitioner signed a document consenting to suspicionless searches. J.A. 48. But the witness testified that he was not present when the document was signed and could not say whether the signature is Petitioner's. J.A. 50. Moreover, a "Notice and Conditions of Parole" form issued by the (continued…)

Whether the "alternative" to consent was an additional period of imprisonment followed by parole subject to suspicionless searches, or imprisonment (subject to suspicionless searches) for the entire time the prisoner would otherwise be on parole, Petitioner could not avoid being subject to suspicionless searches. Consequently, "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." 5 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 10.10(b), at 440-41 (4th ed. 2004) (marks and note omitted). Moreover, the consent rationale could be employed to strip parolees of any number of constitutional rights for lengthy periods, up to and including the remainder of their lives. This Court expressed its disapproval of using the consent rationale to strip probationers of constitutional rights in *Minnesota* v. *Murphy*, 465 U.S. 420, 435 & n.7 (1984), and it did not apply the consent rationale in *Knights*. It should not do so here.

CONCLUSION

The judgment of the court of appeals should be reversed.

California Department of Corrections requires only an acknowledgement that "I have read or have had read to me and understand the conditions of parole as they apply to me." *See* NACDL Br. 1a-2a. This suggests that Petitioner's "agreement," if any, was "essentially no more than acknowledgement of the force of law." *Crawford*, 323 F.3d at 727 (Trott, J., dissenting).

Respectfully submitted,

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