NO. 04-9728

IN THE SUPREME COURT OF THE UNITED STATES

DONALD CURTIS SAMSON, *Petitioner,*

v.

STATE OF CALIFORNIA, *Respondent.*

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

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Does the Fourth Amendment permit the suspicionless search of a parolee to determine whether he or she is complying with the conditions of his or her parole?

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

Page

Constitutional Provisions

TABLE OF AUTHORITIES (continued)

Page

Statutes

TABLE OF AUTHORITIES (continued)

Other Authorities

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OPINIONS BELOW

The opinion of the California Court of Appeal, First Appellate District, J.A. 9-29, is unreported. The order of the California Supreme Court denying review, J.A. 30, is unreported.

JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States, California Penal Code sections 3000, 3000.1, 3001, 3060.5, and 3067, and sections 2511 and 2512 of title 15 of the California Code of Regulations are reprinted in Appendix A of the Brief of Petitioner at pages 1a-11a.

STATEMENT

1. California's Statutory Parole Scheme

In California, convicted felons sentenced to state prison receive either determinate sentence terms or indeterminate sentence terms depending on the nature of the offense. Cal. Penal Code §§ 1168, 1170. All state prison sentences trigger a subsequent period of parole of three years, five years, or, in the case of a life sentence for murder, a term of life on parole. Cal. Penal Code §§ 3000(b)(1)-(3), 3000.1(a). A determinate sentence inmate is eligible for parole when the actual days served plus statutory time credits equal the term imposed by the state trial court. Cal. Penal Code §§ 2931, 2933, 3000(b)(1). Prisoners on parole remain under the legal custody of the Department of Corrections and Rehabilitation. Cal. Penal Code §§ 3056, 5000. Parole ends upon successful completion of parole or at the end of the maximum statutory period of parole, whichever is earlier. Cal. Penal Code § 3000(b)(5). The Board of Parole Hearings establishes and enforces the rules governing state parole release. Cal. Penal Code §§ 3052, 5075. Upon granting parole to any prisoner, the Board of Parole Hearings may also impose on the parolee any conditions that it may deem proper. Cal. Penal Code § 3053(a).

In 1996, the California Legislature enacted Penal Code section 3067, mandating that every prisoner eligible for release on state parole "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).

The stated intent of the legislation resulting in Penal Code section 3067 was that "all parolees be subject to intense supervision and surveillance by law enforcement officers." Final Comm. Rep. Cal. Assemb. B. No. 2284, 1995-96 Reg. Sess. (Aug. 30, 1996). "[T]he Legislature passed section 3067 'to provide for search of parolees by law enforcement officers without cause' and to 'give . . . local law enforcement officers the tools they need to adequately supervise . . . parolees.'"

(*People v. Willis*, 28 Cal. 4th 22, 39, 46 P.3d 898, 909, 120 Cal. Rptr. 2d 105, 118 (2002) quoting S. Comm. on Crim. Proc., Rep. on Cal. Assemb. B. No. 2284 1995-96 Reg. Sess. at 4 (June 25, 1996)) (ellipses original, footnote and emphasis omitted).

2. The Search

At 5:34 p.m. on September 6, 2002, Officer Alex Rohleder of the San Bruno, California, Police Department saw petitioner Donald Curtis Samson walking down the street with a woman and child in the vicinity of Angus Avenue and Mastick Street. J.A. 31-33. Officer Rohleder recognized petitioner from a "prior contact" involving an arrest for an "incident" with his girlfriend. J.A. 32, 35. At that time petitioner said the "police weren't going to take me back to prison." J.A. 43. On the present occasion, "under the impression that he might have a parolee at large warrant," the officer "made contact" with petitioner, "ask[ing] if I could speak with him." J.A. 32. Asked whether he had a parole warrant outstanding, petitioner replied that "[h]e had already taken care of it. And he was released from custody." J.A. 32.[1/]

Officer Rohleder radioed his dispatcher and was informed that petitioner was on parole but that the warrant was no longer outstanding. J.A. 33, 36-38, 52. Nevertheless, the officer decided to search petitioner "[b]ecause it's a condition of his parole. I believe that being [a] parolee, that he needs to make sure he's still obeying the laws." J.A. 38. Although Officer Rohleder does not "go after [all parolees] all the time," J.A. 39, he does search them on a "regular basis," J.A. 44. If a "parolee or person [is] subject to [a] search or seizure [condition], I would search them . . . . J.A. 44-45. The officer regarded

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1. Bernard Martinez, petitioner's parole officer, testified that the warrant was issued on June 21, 2002, and that petitioner was taken into custody on June 24 and released on August 28, nine days before his encounter with Officer Rohleder. J.A. 51-52. Petitioner does not challenge the validity of his detention.

interaction with parolees as a matter of "[c]ommunity policing." J.A. 39. He testified that he intended to release petitioner "if he had nothing on him illegal." J.A. 44.

Officer Rohleder's search[2/] of petitioner disclosed methamphetamine in a plastic baggie secreted in a cigarette box in his left pocket. J.A. 33.[3/]

At the time of the search, petitioner was on parole and subject to a search condition, under which he agreed to be searched "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. 47, 48.

3. Proceedings In State Court

The trial court upheld the search as a valid parole search, which was not arbitrary or capricious. J.A. 62.

Charged with possession of methamphetamine, in violation of California Health & Safety Code § 11377(a), petitioner was found guilty by a San Mateo County jury on March 20, 2003. Reporter's Transcript 233. The trial court found that petitioner had committed four prior felonies, including in 1997 the possession by a felon of a firearm, in violation of California Penal Code section 12021, for which he was on parole at the time of the search. *Id.* at 249-50. Based on the jury's verdict and the court's findings, the court sentenced petitioner to seven years in state prison. J.A. 7.

The California Court of Appeal affirmed petitioner's conviction. Relying on the California Supreme Court decision

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2. At trial Officer Rohleder testified that he had patsearched petitioner for weapons before he had conducted the more thorough search which disclosed the methamphetamine. J.A. 65. Officer Rohleder did not conduct the parole search until his cover officer arrived two to ten minutes later. J.A. 42.

3. Deborah Watson was petitioner's companion at the time of the search. J.A. 53-54. Officer Rohleder testified that she consented to the search of her person. J.A. 42. She disputed that the search was consensual. J.A. 56.

in *People v. Reyes*, 19 Cal. 4th 743, 968 P.2d 445, 80 Cal. Rptr. 2d 734 (1998), the court of appeal rejected petitioner's position that the suspicionless search of a parolee violates the Fourth Amendment. J.A. 12-13. The court of appeal also found that the officer's stated purpose for conducting the search—"to determine whether petitioner, as a parolee, was 'still obeying the laws'"—established that the search was not arbitrary, capricious or conducted for the purpose of harassment, in violation of California law. J.A. 14.

The California Supreme Court denied review. J.A. 30.

SUMMARY OF ARGUMENT

Petitioner's challenge to California's parole search condition must be rejected for the following reasons:

First, as the California Supreme Court has concluded, a parolee has no reasonable expectation of privacy given a parole search condition allowing suspicionless intrusions, which serves a compelling, if not overwhelming, need. Under this Court's totality-of-the-circumstances jurisprudence, the California parole search condition is reasonable under the Fourth Amendment. The parolee's severely diminished expectation of privacy, adequately protected by the state law prohibition against harassing searches, must yield to the overwhelming governmental need to supervise over 100,000 parolees.

Second, this Court's jurisprudence has validated the supervision of probationers and parolees as a "special need" that can justify a suspicionless search. Although a parole search may serve a law enforcement purpose, the programmatic objective is to supervise parolees. Its primary purpose is not to detect evidence of criminal wrongdoing for use in a criminal prosecution. Any evidence may be used for the purpose of an administrative revocation of parole. Authorization of police officers to conduct parole searches does not alter the "special needs" nature of the search.

The discretion of the searching officer is not untrammeled, as petitioner claims. Rather, it is circumscribed by the state law requirement, found in decisional law and statute, that the search

not be arbitrary, capricious or conducted for the purpose of harassment. This circumscription adequately protects a person with the greatly reduced expectation of privacy possessed by a parolee.

Finally, despite petitioner's contention to the contrary, a parolee can reject parole by refusing to agree to the search condition. Petitioner's acceptance of the condition constitutes consent within the meaning of this Court's consent jurisprudence.

ARGUMENT

I.

UNDER THE TOTALITY OF THE CIRCUMSTANCES THE CALIFORNIA PAROLE SEARCH CONDITION IS REASONABLE UNDER THE FOURTH AMENDMENT

Petitioner contends that the California parole search condition authorizing a search in the absence of particularized suspicion violates the Fourth Amendment. He argues: (1) parolees enjoy a reasonable, although diminished, expectation of privacy; (2) that expectation is impermissibly extinguished by the California parole search condition, which confers unfettered discretion on law enforcement officers to conduct searches of parolees; and (3) this search condition does not promote any governmental interests not served by a reasonable suspicion requirement. For the reasons that follow, petitioner's arguments must be rejected. It is now time to decide the question reserved in *United States v. Knights*, 534 U.S. 112 (2001): "whether the probation [or parole] condition so diminished, or completely eliminated, [the probationer's or parolee's] reasonable expectation of privacy . . . that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment." *Id*. at 120 n.6. This question must be answered in respondent's favor.

A. The Balance Of Interests

"[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.'" *United States v. Knights*, 534 U.S. at 118-19. This Court must then "balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable." *Illinois v. McArthur*, 531 U.S. 326, 331 (2001). The status as a parolee subject to a search condition "informs both sides of that balance." *United States v. Knights*, 534 U.S. at 119.

B. The Parolee's Interest

At most, a California parolee has a significantly reduced expectation of privacy.[4/] In *Morrissey v. Brewer*, 408 U.S. 471 (1972), this Court described the conditions of parole imposed on parolees throughout the Nation:

> These conditions restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen. Typically, parolees are forbidden to use liquor or to have associations or correspondence with certain categories of undesirable persons. Typically, also they must seek permission from their parole officers before engaging in specified activities, such as changing employment or living quarters, marrying, acquiring or operating a motor vehicle, traveling outside the community, and incurring substantial indebtedness. Additionally, parolees must regularly report to the parole officer to whom they are assigned and sometimes they

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4. As Judge Trott cogently observed in his concurring opinion in *United States v. Crawford*, 372 F.3d 1048 (9th Cir. 2004), a California parolee has no subjective expectation of privacy. *Id*. at 1065. This view is supported by this Court's analysis in *United States v. Knights*, 534 U.S. at 119-20.

must make periodic written reports of their activities. *Id.* at 478.

It is difficult to conceive of a person other than a prison inmate whose reasonable or actual expectation of privacy is less than that of a parolee. *See Hudson v. Palmer*, 468 U.S. 517 (1984). Indeed, although at liberty, in California "[p]risoners on parole shall remain under the legal custody of the [California Department of Corrections and Rehabilitation]." Cal. Penal Code § 3056. This custody status is consistent with the principle that a parolee enjoys "only . . . the conditional liberty properly dependent on observance of special parole restrictions." *Morrissey v. Brewer*, 408 U.S. at 480.

Those restrictions[5/] further reduce a California parolee's expectation of privacy. *See* Cal. Penal Code § 3053(a); Cal. Code Regs. tit. 15, § 2510. General conditions of parole require all parolees to do the following: report to the assigned parole agent immediately upon release; inform the agent within 72 hours of any change in employment status, including termination; request permission to travel a distance more than 50 miles from the parolee's residence or to be absent from the county of residence for a period of more than 48 hours; refrain from the commission of criminal conduct; and refrain from the possession of firearms, specified weapons, or knives unrelated to employment. Cal. Code Regs. tit. 15, § 2512.

Special conditions, imposed under appropriate circumstances, include participation in a psychiatric treatment program; abstinence from alcoholic beverages; participation in anti-narcotic testing; residence in an approved location; refraining from participation in a prison gang, disruptive group or criminal street gang, as defined by statute; and "[a]ny other condition

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5. Apparently unknown at common law, parole conditions were first imposed by the English Penal Servitude Act of 1853 (16 & 17 Vict., c. 99, §§ 9-11). Comment, *The Parole System*, 120 U. Pa. L. Rev. 282, 307 (1971). Now parolees in the United States are subject to "numerous, complex, and often stringent conditions . . . ." *Id.*; *see Morrissey v. Brewer*, 408 U.S. at 478.

deemed necessary by the Board [of Parole Hearings] or the Department [of Corrections and Rehabilitation] due to unusual circumstances." Cal. Code Regs. tit. 15, § 2513.

Finally, the parolee's person, his residence, and any property under his control "may be searched without a warrant at any time by any agent of the Department of Corrections or any law enforcement officer." Cal. Code Regs. tit. 15, § 2511(b)(4). This search condition is not merely a requirement of the Department of Corrections and Rehabilitation; it is imposed by the People of California, acting through their elected state legislature. California Penal Code section 3067(a) provides: "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 day or night, with or without a search warrant and with or without cause."[6/] Consequently, it is irrefutable that petitioner, like all parolees who accept this condition, "had no subjective expectation of privacy whatsoever." *United States v. Crawford*, 372 F.3d at 1065 (Trott, J., concurring); *see United States v. Knights*, 534 U.S. at 119-20. For this reason alone, the officer's conduct was reasonable within the meaning of the Fourth

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6. The California parole search condition apparently has been the source of some confusion concerning its application to prisoners eligible for parole. Despite some judicial misapprehension to the contrary, *see United States v. Crawford*, 372 F.3d 1048, 1063-64 (9th Cir. 2004) (Trott, J., concurring), a parole-eligible inmate is not obliged to accept the search condition. It is true that, as the concurring opinion in *Crawford* noted, 372 F.3d at 1064, the California Supreme Court declared that a "prisoner must accept" parole. *People v. Reyes*, 19 Cal. 4th at 749, 968 P.2d at 447, 80 Cal. Rptr. 2d at 736 (1998). For reasons stated in Argument III-A, this view is incorrect. Furthermore, section 3067 was not before the court in *Reyes*. Section 3067 was enacted in 1996, 1996 Cal. Stat. 4656-57, and went into effect in 1997, Cal. Gov't Code § 9600. More importantly, failure or refusal by any inmate to agree in writing to the condition results in his continued incarceration. Cal. Penal Code §§ 3060.5, 3067(b). The inmate will not be released until he or she has agreed to all parole conditions. He will remain incarcerated until he signs or until he has served his full sentence plus his statutory period of parole. Cal. Penal Code §§ 3060.5, 3067(b).

Amendment. *See Smith v. Maryland*, 442 U.S. 735, 742-43 (1979).

Petitioner nevertheless contends that his privacy interest, though diminished, is impermissibly infringed in two respects. First, each parole or law enforcement officer "is free to decide, without any objective basis or guidance from a court, parole officer, supervisor, or regulations whether to search a particular parolee." Br. of Petitioner 18. Second, "the officer has equally unfettered discretion to decide where to search, when to search, what to search for, and how hard to look." *Id.* These claims will be addressed in turn.

1. Discretion To Search

California law provides that a search of a parolee or probationer may not be arbitrary, capricious, or conducted for the purpose of harassment. *See People v. Reyes*, 19 Cal. 4th at 753-54, 968 P.2d at 451, 80 Cal. Rptr. 2d at 740 (parole); *People v. Bravo*, 43 Cal.3d 600, 610-11, 738 P.2d 336, 342, 238 Cal. Rptr. 282, 288-89 (probation). Because state decisional law views a parole search on "whim or caprice" as a form of harassment, *People v. Reyes*, 19 Cal. 4th at 754, 968 P.2d at 451, 80 Cal. Rptr. 2d at 740; *People v. Bremmer*, 30 Cal. App. 3d 1058, 1062, 106 Cal. Rptr. 797 (1973), it is readily apparent that that harassment is now, and always has been, forbidden.[7/]

For example, state law protects a parolee from searches that are needlessly repetitive, made at an unreasonable hour, conducted in a humiliating manner, or under other oppressive circumstances. *People v. Clower*, 16 Cal. App. 4th 1737, 1741, 21 Cal. Rptr. 2d 38 (1993). If the circumstances, viewed in

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7. Indeed, in *People v. Woods*, 21 Cal. 4th 668, 981 P.2d 1019, 88 Cal. Rptr. 2d 88 (1999), in which the California Supreme Court held that, under *Whren v. United States*, 517 U.S. 806 (1996), the validity of a probation search is determined by the objective circumstances of the search, not the officer's subjective motivations, the court specifically excepted the circumstance of harassment. 21 Cal. 4th at 682, 981 P.2d at 1028, 88 Cal. Rptr. 2d at 98.

their totality, reflect the search was for the purpose of harassment, the search cannot be justified by the parole search doctrine.

This point deserves amplification. The prohibition against searches conducted solely for the purpose of harassment is not merely a matter of state law; it directly implicates the Fourth Amendment. Thus, a search conducted solely to harass serves no legitimate state interest and, as such, is per se unreasonable under the totality of circumstances test. This proposition is well supported by this Court's jurisprudence. For example, an automobile inventory search is not truly such a search and, consequently, is unconstitutional if the officer "acted in bad faith or for the sole purpose of [criminal] investigation." *Colorado v. Bertine*, 479 U.S. 367, 372 (1987); *see also New York v. Burger*, 482 U.S. 691, 716-17 n.27 (1987).

Petitioner argues that *Whren v. United States*, 517 U.S. 806 forbids such an inquiry into the officer's subjective intent. He is incorrect for the following reasons. First, state law specifically forbids a parole search made for the sole purpose of harassment. Consequently, a state trial court must determine this issue. That was not true in *Whren*.

Second, as this Court noted in *Whren*, 517 U.S. at 811-12, and reiterated in *United States v. Knights*, 534 U.S. at 122, the prohibition of inquiry into the subjective motivations of the searching officer does not apply to searches conducted in the absence of probable cause. *Whren* explained the exemption in these cases "from the need for probable cause (and warrant), is not accorded to searches that are *not* made for [the stated] purposes." 517 U.S. at 811-12.

Relying on dictum in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), petitioner argues that the exception recognized in *Whren* applies only to evidence of the "programmatic" purpose of the "special needs" search, not to the subjective motivation of the searching officer. Br. of Petitioner 22; (citing *City of Indianapolis v. Edmond*, 531 U.S. at 45-48). Petitioner's reliance is misplaced. The programmatic purpose of the California parole search scheme is that all parolees be

subject to suspicionless searches and seizures with the restriction that they may not be conducted for the improper purpose of harassment.[8/]

2. Circumstances Of The Search

For the reasons advanced in section B-1, *ante*, petitioner is incorrect that an officer's discretion in the conduct of the search is unfettered. The California Supreme Court has consistently insisted that a parole (or probation) "search [may not] be undertaken in a harassing or unreasonable manner." *People v. Woods*, 21 Cal. 4th at 682, 981 P.2d at 1028, 88 Cal. Rptr. 2d at 98. This insistence derives from this Court's principle "that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." *Terry v. Ohio*, 392 U.S. 1, 18 (1968). To determine the reasonableness of a search, "[c]ourts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

Thus, a search solely for the purpose of harassing the parolee may not be justified by the parole search doctrine. Evidence of such a purpose might include an excessive number of searches of the parolee, or a search that is prolonged, intrusive, or degrading in the absence of any justifying circumstances. In the absence of such evidence of harassment, or of an admission by the officer that his search was solely for the purpose of harassing the parolee, the search is justified by the parolee's status.

For purposes of justifying the scope and circumstances of the search, that status should be the functional equivalent of a custodial arrest, the triggering circumstance and justification for a search incident to arrest. *See United States v. Robinson*, 414 U.S. 218, 235 (1973).

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8. The state court of appeal specifically found that Officer Rohleder did not conduct the search for the purpose of harassment. JA 13-14.

In this case, petitioner did not challenge the scope or intensity of the search in state court. He apparently was quickly searched. It is true that the search was conducted in public, but the same is true of most *Terry* searches and searches incident to an arrest in public. Petitioner cannot validly claim that the scope or intensity of the search was unreasonable in relation to the purpose of the search.

C.The State's Interest

The California Legislature has determined that the "supervision and surveillance of parolees" is necessary to promote "the interest of public safety for the state . . . ." Cal. Penal Code § 3000(a)(1). This Court has concluded that the state interest in the successful management of the parole system to ensure compliance with parole conditions is "overwhelming." *Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 365 (1998). This Court has approved "close parole supervision" because "parolees are more likely to commit future criminal offenses than are average citizens." *Id.* at 365; *see Griffin v. Wisconsin*, 483 U.S. 868, 880 (1987).

Recent statistical compilations document the validity of the Court's observation. The concurring opinion of Judge Trott in *United States v. Crawford*, 372 F.3d 1048, summarized the relevant data:

> According to the authoritative California Journal, as of August 2000, California had 158,177 inmates in its prisons. Jeremy Travis and Sarah Lawrence, *California's Parole Experiment*, Cal. J. (Aug. 2002). Of that population, 126,117 inmates were released on parole during that year. *Id.* Sadly, of that figure, 90,000 were returned to prison, either following a conviction of a new crime or for violating parole conditions. The California Criminal Justice Statistics Center's report prepared in April 2001 indicates that 68% of adult parolees are returned to prison: 55% for a parole violation and 13% for the commission of a new felony offense. California Attorney General, *Crime in California*, April, 2001, at 37.

> According to the California Policy Research Center, "70% of the state's paroled felons reoffend within 18 months–the highest recidivism rate in the nation." Joan Petersilia, *Challenges of Prisoner Reentry and Parole in California*, 12 CPRC (June 2000).

372 F.3d at 1069 (footnote omitted).

In *Ewing v. California*, 538 U.S. 11 (2003), this Court discussed the nature and extent of the problem posed by recidivism in California and throughout the Nation:

> Recidivism is a serious public safety concern in California and throughout the Nation. According to a recent report, approximately 67 percent of former inmates released from state prisons were charged with at least one "serious" new crime within three years of their release. *See* U.S. Dept of Justice, Bureau of Justice Statistics, P. Langan & D. Levin, Special Report: Recidivism of Prisoners Released in 1994, p. 1 (June 2002). In particular, released property offenders like Ewing had higher recidivism rates than those released after committing violent, drug, or public-order offenses. *Id.*, at 8. Approximately 73 percent of the property offenders released in 1994 were arrested again within three years, compared to approximately 61 percent of the violent offenders, 62 percent of the public-order offenders, and 66 percent of the drug offenders. *Ibid.*
>
> In 1996, when the Sacramento Bee studied 233 three strikes offenders in California, it found that they had an aggregate of 1,165 prior felony convictions, an average of 5 apiece. See Furillo, Three Strikes–The Verdict: Most Offenders Have Long Criminal Histories, Sacramento Bee, Mar. 31, 1996, p. A1. The prior convictions included 322 robberies and 262 burglaries. *Ibid.* About 84 percent of the 233 three strikes offenders had been convicted of at least one violent crime. *Ibid.* In all, they were responsible for 17 homicides, 7 attempted slayings, and 91 sexual assaults and child molestations. *Ibid.* The Sacramento Bee concluded, based on its investigation, that "[i]n the

> vast majority of the cases, regardless of the third strike, the [three strikes] law is snaring [the] long-term habitual offenders with multiple felony convictions . . . ." *Ibid.*

538 U.S. at 26.

The difficulty attending the supervision of parolees is exacerbated by their penchant for secrecy. "And [parolees] have even more of an incentive to conceal their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal because [parolees] are aware that they may be subject to supervision and face revocation of [parole,] 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 . . . ." *United States v. Knights*, 534 U.S. at 120 (citations omitted).

Furthermore, although probationers and parolees are often regarded as comparable in terms of the need for supervision, they are, in fact, quite different. "[A]s distinguished from those not convicted of anything, those convicted of mere misdemeanors and either jailed or not jailed, and those convicted of felonies but not imprisoned for lengthy periods, parolees are persons deemed to have acted more harmfully than anyone else except those felons not released on parole." *United States v. Crawford*, 372 F.3d at 1077 (Kleinfeld, J., concurring).

As of November 30, 2005, California had over 130,000 released parolees, a figure which includes more than 20,000 absconded parolees. California Department of Corrections and Rehabilitation, Data Analysis Unit, Parole Counts, p. 6, Table 2 (Nov. 2005.)[9/] California's population of parolees is comparable to the population of Alexandria, Virginia. Such a city presents a problem of unprecedented magnitude.

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9. By contrast, in 2004, federal supervised releases totaled 86,567 throughout the Nation. U.S. Department of Justice, Bureau of Justice Statistics, Probation and Parole in the United States, 2004, p. 7, Table 4 (Nov. 2005).

D.Efficacy Of The Search Condition

Petitioner contends that the California parole search condition does not serve the State's interest in the supervision of its parolees. He argues that it interferes with the reintegration of parolees into society and that a requirement of reasonable suspicion to justify a search, adopted by a majority of other States, adequately serves California's supervisory need. Petitioner's submission is untenable.

To support his claim that the California parole search condition frustrates the reintegration of parolees into society, petitioner argues that equation of a parolee with a prisoner in a cell "is unlikely" to promote the stated objective of reintegration. Petitioner offers no evidence to support his assertion. Furthermore, as explained *post*, he overlooks the deterrent value of a suspicionless search, which will promote obedience to the law and positive citizenship.

Petitioner also speculates that the California parole search condition will discourage "law abiding citizens" from living with parolees, fearing that their living quarters would be subject to suspicionless searches. The Fourth Amendment simply was not intended to address the social concerns petitioner wishes to raise.

Petitioner next claims that the California parole search condition does not significantly advance the state interest in the supervision of parolees. Acting through its Legislature, California has concluded that the search condition does promote significant state interests. For reasons which follow, this conclusion is rational.

First, a determinate sentence prison inmate is entitled to parole when the actual days he or she served plus statutory time credits equal the term imposed by the state trial court. Cal. Penal Code §§ 2931, 2933, 3000(b)(1). Consequently, inmates may be released early regardless of their capacities to reintegrate themselves into society or the threat they pose to the communities to which they return. Many parolees, perhaps most of them, require intense supervision.

Second, this Court has recognized that "if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential." *United States v. Biswell*, 406 U.S. 311, 316 (1972); *accord New York v. Burger*, 482 U.S. at 710. Of course, under a regime of reasonable suspicion, searches can be only as frequent as the discovery of the requisite quantum of suspicion permits. The requirement of individualized suspicion, as the California Legislature concluded, would frustrate the need for effective supervision of parolees. Careful concealment of illegal activities—as petitioner did in this case—would allow these activities to go "undetected and uncorrected." *Griffin v. Wisconsin*, 483 U.S. at 878.

Third, this Court observed in *Griffin* "that more aggressive supervision can reduce recidivism, . . . and the importance of supervision has grown as probation has become an increasingly common sentence for those convicted of serious crimes." *Id.* at 875 (citation omitted). These concerns apply a fortiori to parolees.

The centerpiece of petitioner's challenge to the California parole search condition is his argument that a requirement of reasonable suspicion would serve the State's interest in the supervision of parolees equally effectively while intruding less into the privacy rights of parolees. This Court has consistently refused to hold that the reasonableness of a practice under the Fourth Amendment requires the absence of a less intrusive means to the same end. *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 837 (2002); *Vernonia Sch. Dist.* 47J *v. Acton*, 515 U.S. 646, 663 (1995); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 629 n.9 (1989); *Colorado v. Bertine*, 479 U.S. at 373-74; *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-57 n.12 (1976). Additionally, and dispositively, a requirement of reasonable suspicion would not be as effective as a suspicionless search in the supervision of parolees.

Although petitioner characterizes the quantum of reasonable suspicion as a "relatively undemanding standard," Br. of

Petitioner 26, he ignores the principle that the uncorroborated tip of an anonymous informant does not amount to reasonable suspicion. *Florida v. J.L.*, 529 U.S. 266, 271 (2000). Thus, a parole agent or other peace officer, receiving an anonymous tip of wrongdoing by a parolee, would be powerless to investigate by the simple expedient of a search. Efforts to seek corroboration would consume time during which the parolee could secrete or dispose of his incriminating evidence. Supervision of parolees' activities on the street would be greatly hampered under a reasonable suspicion regime.

Furthermore, petitioner's submission is inconsistent with *Griffin*, in which this Court upheld the search of a probationer's home based on the unverified tip supplied to a peace officer. Under *Florida v. J.L.*, that information did not rise to the level of reasonable suspicion. As petitioner notes in his Brief, at 21, there is no quantum of suspicion below reasonable suspicion. *United States v. Montoya de Hernandez*, 473 U.S. 531, 541 (1985). Consequently, acceptance of petitioner's argument would require a redefinition of reasonable suspicion in the context of the search of a probationer or parolee. As this Court pointed out, the creation of an additional level of reasonableness "may obscure rather than elucidate" the meaning of that term. *Id.*

Finally, surveying the law governing parole searches in other States, petitioner notes that a majority requires reasonable suspicion to justify a parole search. He concludes that these states have found suspicionless searches to be unnecessary. The logic of this reasoning is not immediately apparent. First, many courts based their requirement of reasonable suspicion on their construction of the Fourth Amendment or of state law.[10/] Their

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10. *E.g.*, *Williams v. State*, 321 Ark. 344, 902 S.W.2d 767 (1995); *Fox v. State*, 272 Ga. 163, 527 S.E.2d 847 (2000); *People v. Wilson*, 361 Ill. App.3d 93, 836 N.E.2d 159, 296 Ill. Dec. 744 (2005); *Commonwealth v. LaFrance*, 402 Mass. 789, 525 N.E.2d 379 (1988); *State v. Maples*, 346 N.J. Super. 408, 788 A.2d 314 (2002); *State v. Baca*, 135 N.M. 490, 90 P.3d 509 (N.M. Ct.App. 2004); *People v. Daniels*, 194 Misc.2d 320, 752 N.Y.S.2d

perception of constitutional law, not social policy, dictated the result in these cases. Second, and more fundamentally, petitioner has not shown that the States on whose decisions he relies have a parolee population or supervision problem which is remotely comparable to that of California. Each State must be permitted to address and resolve its social issues in its own fashion, with due regard for the constitutional rights of those affected. This resolution of these problems should not be encased in constitutional concrete, applicable to all other States by reason of their numerical plurality.[11/]

E. Striking The Balance

This balance of competing interests—the parolee's greatly diminished expectation of privacy and the State's need to supervise a person who was, and likely remains, a threat to society—justifies California's rule permitting suspicionless searches of parolees' persons and effects. A requirement of reasonable suspicion urged by petitioner would strike an inappropriate balance of the competing interests.

Nonconsensual street encounters between police and citizens are generally governed by the reasonable suspicion standard

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218 (N.Y. Sup. Ct. 2002); *Commonwealth v. Williams*, 547 Pa. 577, 692 A.2d 1031 (1997); *State v. Lockwood*, 160 Vt. 547, 632 A.2d 655 (1993); *Jones v. State*, 41 P.3d 1247 (Wyo. 2002).

11. Several courts have approved suspicionless parole and probation searches pursuant to a valid search condition. *E.g.*, *Owens v. Kelley*, 681 F.2d 1362, 1368 (11th Cir. 1982); *People v. McCollough*, 6 P.3d 774 (Colo. 2000); *State v. Smith*, 589 N.W. 2d 546 (N.D. 1999); *State v. Davis*, 6 Neb. App. 790, 803-05, 577 N.W. 2d 763, 772 (1998).

Petitioner asserts that all decisions of other jurisdictions upholding suspicionless searches are distinguishable because they are based either on consent, an individualized determination that a suspicionless search condition was reasonable, or a requirement that the search be conducted by a parole or probation officer. These distinctions are meaningless in light of the substantial protections provided by California to parolees and probationers: the search must not be arbitrary, capricious or conducted for the purpose of harassment; and it must be reasonable in execution.

announced in *Terry v. Ohio*, 392 U.S. 1. Thus, reasonable suspicion that a person is about to commit a crime justifies his detention; reasonable suspicion that he has a weapon justifies his search. Under petitioner's view of the law, a parolee would receive virtually as much protection from the Fourth Amendment as a citizen who was not on parole. The only difference would be the circumstance in which the officer had reasonable suspicion to believe that the person under investigation possessed incriminating evidence other than a weapon. In that situation, the nonparolee could not be searched, *Minnesota v. Dickerson*, 508 U.S. 366 (1993), but, petitioner submits, the parolee properly could be searched. Such a *de minimis* difference is wholly inadequate to serve the compelling state interest in the supervision of parolees.

As the Court has noted in discussing the compelling state need for effective probation supervision, the goals of rehabilitation and protection of the community (both of which are typically identified as the objectives of probation and parole) "require and justify the exercise of supervision to assure that the [probation or parole] restrictions are in fact observed. Recent research suggests that more intensive supervision can reduce recidivism . . . ." *Griffin v. Wisconsin*, 483 U.S. at 875. By contrast, petitioner's position would result in less, not more, supervision. The prohibition of searching based on an uncorroborated tip is only one example. Thus, the requirement of reasonable suspicion would "completely undermine the purpose of the search condition." *Owens v. Kelley*, 681 F.2d at 1368.

F. Conclusion

This balance of competing interests confirms the wisdom of *People v. Reyes*, 19 Cal. 4th at 753, 968 P.2d at 451, 80 Cal. Rptr. 2d at 740:

> The level of intrusion is de minimis and the expectation of privacy greatly reduced when the subject of the search is on notice that his activities are being routinely and closely monitored. Moreover, the purpose of the search condition

is to deter the commission of crimes and to protect the public, and the effectiveness of the deterrent is enhanced by the potential for random searches. We thus conclude a parole search may be reasonable despite the absence of particularized suspicion.

II.

THE CALIFORNIA PAROLE SEARCH CONDITION IS JUSTIFIED BY THIS COURT'S "SPECIAL NEEDS" JURISPRUDENCE

If this Court should conclude that the totality of circumstances analysis is inapplicable to the California parole search condition, respondent submits that it is justified by this Court's "special needs" jurisprudence.

A. Special Needs

It is generally true that the Fourth Amendment requires at least reasonable suspicion of criminal activity within the meaning of *Terry v. Ohio*, 392 U.S. 1, to justify a search by a state agent, *City of Indianapolis v. Edmond*, 531 U.S. at 37; *Chandler v. Miller*, 520 U.S. 305, 308 (1997). However, individualized suspicion "is [not] an indispensable component of reasonableness in every circumstance." *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989); *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.8 (1985). "[T]he Fourth Amendment imposes no irreducible requirement of such suspicion." *United States v. Martinez-Fuerte*, 428 U.S. at 561.

One species of search which this Court has found to be valid without a showing of individualized suspicion is denominated "special needs." *See Illinois v. Lidster*, 540 U.S. 419 (2004); *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822; *Vernonia Sch. Dist.* 47J *v. Acton*, 515 U.S. 646; *Von Raab*, 489 U.S. 656; *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602; *Griffin v. Wisconsin*, 483 U.S. 868. First identified in Justice Blackmun's concurring opinion in *T.L.O.*, the "special needs" doctrine refers to those "'needs, beyond the normal need for law

enforcement, [that] make the warrant and probable-cause requirement impracticable.'" *Griffin v. Wisconsin*, 483 U.S. at 873 (quoting *New Jersey v. T.L.O.*, 469 U.S. at 351 (Blackmun J., concurring)).

In *Griffin*, this Court held that a state's operation of a probation system "presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements." 483 U.S. at 873-74. The Court explained:

> [P]robation, like incarceration, is "a form of criminal sanction imposed by a court upon an offender after verdict, finding, or a plea of guilty". . . . [P]robationers (as we have said it to be true of parolees) . . . do not enjoy "the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions." [¶] These restrictions are meant to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large. These same goals require and justify that the restrictions are in fact observed.

Id. at 874-75 (citations omitted and last ellipsis and third brackets original).

Although *Griffin* involved probation, its reasoning and concerns apply "with equal, if not greater, force, to the parole system." *People v. McCullough*, 6 P.3d at 779 n.10. Because parolees "are more likely to commit future criminal offenses than are average citizens," *Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. at 365, this Court recognizes that a State can "accord[] a limited degree of freedom in return for the parolee's assurance that he will comply with the often strict terms and conditions of his release. In most cases, the State is willing to extend parole only because it is able to condition it upon compliance with certain requirements. The State thus has an 'overwhelming interest' in ensuring that a parolee complies with those requirements and is returned to prison if he fails to do so." *Id.* Given that "parole may be an even more severe

restriction on liberty because the parolee has already been adjudged in need of incarceration[,] . . . the 'special needs' of probation discussed in *Griffin* would appear to be heightened for parole." *People v. McCullough*, 6 P.3d at 779 n.10; *accord United States v. Crawford*, 372 F.3d at 1077 (Trott, J., concurring).

This Court has cautioned that the "special needs" dispensation of individualized suspicion does not apply to a program whose primary purpose is to detect evidence of "ordinary criminal wrongdoing." *City of Indianapolis v. Edmond*, 531 U.S. at 38. Consequently, this Court may inquire into the purpose of such a program or scheme. *Id.* at 45-46. As the California Supreme Court found, "the Legislature passed [Penal Code] section 3067 [which permits suspicionless searches] 'to provide for search of parolees by law enforcement officers without cause' and to 'give . . . local law enforcement officers the tools they need to adequately supervise . . . parolees.'" *People v. Willis*, 28 Cal. 4th 22, 39, 46 P.3d 898, 909, 120 Cal. Rptr. 2d 105, 118 (2002) (quoting S. Comm. on Crim. Proc., Rep. on Cal. Assemb. B. No. 2284, 1995-96 Reg. Sess. at 4 (June 25, 1996)) (ellipses original, footnote and emphasis omitted). The intent of the legislation was that "all parolees be subject to intense supervision and surveillance by law enforcement officers." Final Comm. Rep. Cal. Assemb. B. No. 2284, 1995-96 Reg. Sess. (Aug. 30, 1996). California's parole search condition therefore falls squarely within the parameters of this Court's "special needs" search jurisprudence. *Griffin v. Wisconsin*, 483 U.S. at 873-74.

Petitioner challenges this conclusion, advancing the following arguments in support of his position. First, he submits, a "special needs" search must be for a purpose completely "divorced from the State's general interest in law enforcement." *Ferguson v. City of Charleston*, 532 U.S. 67, 79 (2001). Second, he asserts, the search was "undertaken by a law enforcement officer for a law enforcement purpose." Br. of Petitioner 35. Both aspects of this argument are fallacious.

1. Purpose Of Search

Relying on decisions in which the subject of the "special needs" search was not criminally prosecuted, *e.g. Vernonia Sch. Dist.* 47J *v. Acton*, 515 U.S. 646; *National Treasury Employees Union v. Von Raab*, 489 U.S. 656; *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, petitioner contends the "special needs" doctrine cannot justify a search unless its purpose is "divorced" from the State's general interest in law enforcement. Petitioner proposes too broad a gauge by which to measure relevant Fourth Amendment interests.

To begin with, petitioner's test is unsupported by precedent. The relevant test is stated in *City of Indianapolis v. Edmond*, which held that the "special needs" doctrine could not justify a "program whose primary purpose was to detect evidence of ordinary criminal wrongdoing." 531 U.S. at 38. By contrast, the purpose of a parole search is primarily to uncover evidence which reveals whether the parolee is complying with, or violating, the conditions of parole. Not all such evidence constitutes proof of criminal activity. For example, a parolee who had been convicted of sex crimes against children may be forbidden from possessing any pornography. Parole supervision may be considered a "law enforcement" objective, but not every such objective is synonymous with the "general interest in crime control" which this Court's jurisprudence excludes as a special need. *See Illinois v. Lidster*, 540 U.S. at 424.

Second, it is true that many parolees violate the conditions of their parole by the commission of a criminal offense, but that circumstance does not invalidate parole supervision as a special need. In *New York v. Burger*, 482 U.S. 691, in upholding a warrantless inspection of an automobile junk yard authorized by a statute covering vehicle dismantlers, this Court rejected the New York Court of Appeals' conclusion that the statute lacked a truly administrative purpose as it was "'designed simply to give the police an expedient means of enforcing penal sanctions for possession of stolen property.'"

482 U.S. at 712. This Court explained:

> In arriving at this conclusion, the Court of Appeals failed to recognize that a State can address a major social problem *both* by way of an administrative scheme *and* through penal sanctions. Administrative statutes and penal laws may have the same *ultimate* purpose of remedying the social problem, but they have different subsidiary purposes and prescribe different methods of addressing the problem. An administrative statute establishes how a particular business in a "closely regulated" industry should be operated, setting forth rules to guide an operator's conduct of the business and allowing government officials to ensure that those rules are followed. Such a regulatory approach contrasts with that of the penal laws, a major emphasis of which is the punishment of individuals for specific acts of behavior.

Burger, 482 U.S. at 712-13.

Although *Burger* involved a "closely regulated" industry rather than a "special need," its reasoning applies with equal force to this case.[12/] Parole violation can be addressed either administratively, through the revocation of parole, or by the use of the criminal process. At the time of the search the parole agent or law enforcement officer cannot be certain about the nature of the ultimate discovery. That it may be evidence of criminal activity and result in a criminal prosecution does not minimize the importance of the search to promote adherence to parole conditions and, concomitantly, to deter violations of those conditions.

Furthermore, the commission of a criminal offense necessarily violates the conditions of parole. It would be

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12. Indeed, it is difficult to conceive of conduct more closely regulated than a parolee's.

illogical to apply the "special needs" doctrine only to those searches directed at violations of parole *other* than criminal offenses. Although upholding a probation search under the test of totality of the circumstances, this Court in *Knights* was undisputably (and unanimously) correct in holding that "the Fourth Amendment does not put the State to . . . a choice" between searching for evidence of crime and investigating a parole or probation violation. 534 U.S. at 121. A probation (or parole) search unavoidably requires the search for criminal evidence as a necessary part of the supervisory function.

Third, petitioner's reliance on *Ferguson v. City of Charleston*, 532 U.S. 67, is unavailing. In *Ferguson*, this Court disapproved of a combined hospital, police, and public policy to test pregnant patients for evidence of drug use and to submit evidence of positive use to the police for prosecution. This Court found that the policy "'is ultimately indistinguishable from the general interest in crime control.'" *Id.* at 81 (quoting *Indianapolis v. Edmond*, 531 U.S. at 44). Although the ultimate objective of the program was "to get the women into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence for law enforcement purposes in order to reach that goal." *Ferguson*, 532 U.S. at 82-83 (emphasis omitted).

To the extent that this Court found the program was primarily motivated by an intent to find evidence of criminal wrongdoing for criminal prosecution, *Ferguson* is consistent with, and supported by, *Edmond*. Consequently, the observation that "a special need" must be "divorced from the State's general interest in law enforcement," 532 U.S. at 79, is dictum which was wholly unnecessary to the disposition of the case.

Additionally, respondent is constrained to suggest that the dictum proposes an unrealistic and, ultimately, an unworkable test. Many social problems should and must be addressed by governmental implementation of multiple, and occasionally overlapping, programs. To require complete separation of special needs from crime control would be to

discourage government from simultaneously developing several programs to deal with various aspects of a social ill. The problem presented by this case is an obvious, but by no means the only, example. The purpose of parole is to supervise recently incarcerated offenders who have been released and are attempting to adjust to a free and largely unregulated society. To that end, parolees are subject to conditions to ensure that they reintegrate into society. But as criminal offenders who pose a sufficient threat to society that imprisonment was the appropriate punishment, they need to be monitored to protect the public safety. That vital, indeed, "overwhelming," concern should not disqualify parolee supervision as a "special need."

Fourth, in *Ferguson* this Court reaffirmed the validity of *Griffin*, in which police had initiated contact with the probation office, encouraged probation officers to search the probationer's residence, accompanied them during the search, and processed the evidence produced by the search, which evidence was used not merely to revoke probation but was given to the district attorney's office to permit prosecution on new charges. *Griffin*, 483 U.S. at 870-72. This Court concluded 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." *Ferguson*, 532 U.S. at 81 n.15 (citing *Griffin*, 483 U.S. at 874-75).

Petitioner submits that a parolee's reduced expectation of privacy is "a factor that does not justify application of the 'special needs' doctrine." Br. of Petitioner 35 n.16. The application of the doctrine is triggered by the overwhelming need to supervise more than 100,000 released offenders. As explained in the next section, the lowered expectation of privacy justifies the use of law enforcement personnel.

2. Use Of Law Enforcement Personnel For A Law Enforcement Purpose

Petitioner argues that the "special needs" doctrine is inapplicable because the search was "undertaken by a law

enforcement officer for a law enforcement purpose." Br. of Petitioner 35 (capitalization omitted). He emphasizes that the search was conducted by a police officer, not petitioner's parole officer, "to make sure [petitioner is] still obeying the laws." J.A. 14, 38. Neither circumstance upon which petitioner relies removes the search from the scope of the "special needs" doctrine.

First, the use of law enforcement officers does not offend the doctrine. As this Court observed in *New York v. Burger*, 482 U.S. 691, in which police officers conducted a warrantless search of an automobile junkyard,

> many states [that use police for such purposes] do not have the resources to assign the enforcement of a particular scheme to a specialized agency. So long as a regulatory scheme is properly administrative, it is not rendered illegal by the fact that the inspecting officer has the power to arrest individuals for violations other than those created by the scheme itself. In sum, we decline to impose upon the State, the burden of requiring the enforcement of their regulatory statutes to be carried out by specialized agents.

Id. at 717-18 (footnote omitted).

California invests parole officers and "other peace officer[s]" with the authority to conduct parole searches. Cal. Penal Code § 3067(a). This empowerment rationally serves the California parolee supervision program. Indeed, it is doubtful that the program could function without the participation of police officers. As stated earlier, more than 130,000 parolees—equivalent to the population of a city—are released in California at any given time. It is unrealistic to expect parole officers to surveil the streets 24 hours a day in search of parolees who may violate the conditions of their paroles. Given the number and potential mobility of parolees, the statute wisely deploys all available personnel in the supervision of those parolees.

That this necessary use of law enforcement officers is permissible under the Fourth Amendment is illustrated by *Griffin v. Wisconsin*, 483 U.S. 868. In *Griffin*, to repeat, police initiated contact with the probation office, encouraged the probation officers to conduct the search, were present during the search, processed the evidence and used it in the probationer's criminal prosecution. This active participation did not invalidate the application of the "special needs" doctrine for reasons equally applicable to this case: the reduced expectation of privacy of parolees and the overwhelming need to supervise their activities closely.

Second, petitioner erroneously submits that the officer's purpose—to ascertain whether petitioner was obeying the laws—removes the search from justification under the "special needs" doctrine. One condition of parole, of course, is that the parolee obey all laws, Cal. Code Regs. tit. 15, § 2512(4). And here the officer did no more than determine whether petitioner was complying with the conditions of parole. *Griffin* again serves as a suitable benchmark. In that case, the police officer requested the probation officers to search the probationer's home for guns, the possession of which was both a crime and a violation of the terms of probation. All parolees and probationers are required to obey the law as a requirement of their conditional release. *Griffin* teaches that a search for evidence relevant both to criminal activity and a violation of the terms of conditional release nevertheless falls within the "special needs" doctrine.

Petitioner also suggests that the search was not a "special needs" inspection because the evidence was used in a subsequent criminal prosecution. It is apparently his position that the product of a "special needs" search can be used only for the administrative purpose of parole revocation (or, as here, potential administrative placement in a drug treatment program, California Penal Code section 3063.1(a)). Just as a search cannot be justified by what it produces, *United States v. DiRe*, 332 U.S. 581, 595 (1948), so it cannot be invalidated by the ultimate use of its fruits. "In law it is good or bad when it starts

. . . ." *Id.* The officer's conduct of the search conformed to the Fourth Amendment. Its product therefore could be used for all purposes, including a criminal prosecution.

For these reasons, the search of a parolee by a parole agent or any law enforcement officer to supervise that parolee is a "special needs" search within the meaning of this Court's Fourth Amendment jurisprudence. To determine the reasonableness of the search, this Court must consider the nature of the privacy interest affected by the search, the character of the intrusion, the nature and immediacy of the State's concerns, and the efficacy of the means for meeting them. *See Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. at 830-38; *Vernonia Sch. Dist.* 47J *v. Acton*, 515 U.S. at 654-65.

B. The California Parole Search Condition Satisfies This Court's "Special Needs" Doctrine

A balance of the relevant concerns establishes that the California parole search condition is reasonable under the Fourth Amendment. That balance was extensively discussed in Argument II, *ante*, and requires only a brief review.

1. The Parolee's Interest

A California parolee is subject to numerous conditions that greatly limit his or her freedom in order to ensure adequate supervision. In California, the parolee is expressly informed that he or she may be searched by a parole agent or law enforcement officer at any time with or without cause. Taken together, these conditions, particularly the search condition, have "significantly diminished [a parolee's] reasonable expectation of privacy." *United States v. Knights*, 534 U.S. at 120.

2. Degree Of Intrusion

In this connection, it must be emphasized that parolees are protected by statute and decisional law from searches that

are conducted solely for the purposes of harassment, Cal. Penal Code § 3067(d); *People v. Reyes*, 19 Cal. 4th at 753-54, 968 P.2d at 451, 80 Cal. Rptr. 2d at 740, and those that are unreasonable by virtue of their intensity. Argument I-B, *ante*.

3. The State's Interest

It bears repeating that this Court has described a state's interest in the management of its parole system as "overwhelming." *Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. at 365. The need to supervise parolees in general is sufficiently compelling that this Court has said (in connection with the supervision of probationers) that it "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. at 875. California's need is greater than that of any other State. During 2000 in California, over 126,000 inmates were paroled and 90,000 were returned to prison following a new crime or a violation of parole conditions. Argument I-C, *ante*.

4. Efficacy Of Search Condition

As explained in Argument I-D, *ante*, a suspicionless search condition is more efficacious than one requiring reasonable suspicion. If parole agents and law enforcement officers can search a parolee without acquiring reasonable suspicion, they will not need to corroborate tips. Consequently, they can act quickly, a circumstance which will deter parolees from violating the terms of their paroles.

C. Conclusion

In light of petitioner's—and all California parolees'—greatly diminished expectation of privacy and the State's overwhelming need to supervise parolees effectively, a suspicionless search in a public place does not violate the Fourth Amendment. The *de minimis* expectation of privacy possessed by parolees is adequately protected by the State's prohibition of searches conducted solely for the purpose of harassment.

III.

PETITIONER VALIDLY CONSENTED TO THE PAROLE SEARCH CONDITION

Finally, petitioner claims that his consent cannot justify the search in this case, arguing: (1) an inmate must accept parole and its attendant conditions, including the search condition; (2) California did not seek to justify the search under a consent rationale in the State courts; and (3) in any event, the consent rationale is inapplicable as a matter of law. Petitioner is incorrect.

A. A California Inmate May Reject Parole By Refusing The Search Condition

California Penal Code section 3067(a) 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 . . . ." Under section 3067(b), "any inmate who does not comply with the provisions of subdivision (a) shall lose worktime credit earned . . . 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, which ever occurs earlier." *See also* Cal. Penal Code § 3060.5 ("the parole authority shall revoke the parole of any prisoner who refuses to sign a parole agreement . . . .")

People v. Reyes, 19 Cal. 4th 743, 968 P.2d 445, 80 Cal. Rptr. 2d 734, cited by petitioner for the proposition that parole must be granted by the State and accepted by the inmate upon the service of a defined period and the accrual of credits, is not applicable to the present circumstances. As explained in Argument I-B at 9 n.6, *ante*, the search at issue in *Reyes* was conducted before 1997; section 3067 applies only to parole conditions of inmates who committed their offenses after January 1, 1997. § 3067(a).

In *People v. Willis*, 28 Cal. 4th 22, 46 P.3d 898, 120 Cal.

Rptr. 2d 105, the California Supreme Court correctly stated that "[u]nder section 3067, a California *parolee* must agree 'to be subject to search or seizure by a parole or other peace officer . . . ." *Id.* at 39, 46 P.3d at 908-09, 120 Cal. Rptr. 2d at 118 (emphasis added). The critical word is "parolee." If the inmate has been granted parole, he has agreed to the condition; if he has not accepted the condition, he is not a parolee. In 1999, when petitioner complied with section 3067(a), he had a choice. He could have refused to comply with that provision, in which event he would not have been released. Petitioner's submission that a California parolee may not consent to parole and the search condition is untenable.

B. This Issue Is Properly Before This Court

Petitioner next submits that the Court should not consider the consent rationale because respondent did not seek to justify the search on that basis in State court. In fact, at the suppression hearing, the State introduced the search condition, signed by petitioner, in which he "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 contents of petitioner's agreement were before the State courts.

This issue is properly before this Court. This Court may consider "the questions set out in the petition, or fairly included therein . . . ." Sup. Ct. R. 14.1(a). Petitioner has challenged the constitutionality of a California's parole search condition, which permits suspicionless searches. The suspicionless search of a citizen, even a nonparolee, is valid if conducted pursuant to that person's consent. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Consequently, this Court may determine whether petitioner consented and, if so, whether that consent validated the search.

C. The Consent Of A Parolee Is Valid

Although the validity of consent to search is usually a question of fact, *Schneckloth v. Bustamonte*, 412 U.S. 218,

petitioner contends that the consent of a parolee is invalid as a matter of law. He argues that any inmate has "little genuine option to refuse." Br. of Petitioner 41. The import of his argument, it may be inferred, is that an inmate who refuses to consent to search will be denied parole and remain in prison. This argument is without merit.

Although the Fourth Amendment generally requires that a search be authorized by a judicial warrant based upon probable cause, it is "well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *Schneckloth v. Bustamonte*, 412 U.S. at 219; *accord Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990); *Washington v. Chrisman*, 455 U.S. 1, 9-10 (1982). That principle is consistent with the general rule, articulated "in the context of a broad array of constitutional and statutory provisions," that "presumes the availability of waiver." *New York v. Hill*, 528 U.S. 110, 114 (2000) (internal quotation marks omitted); *see also United States v. Mezzanatto*, 513 U.S. 196, 201 (1995) ("[a] criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution"); *Peretz v. United States*, 501 U.S. 923, 936 (1991) ("The most basic rights of criminal defendants are . . . subject to waiver."). Consent must be voluntary to be constitutionally valid, *Schneckloth*, 412 U.S. at 222; *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968), but an individual's consent to search may be deemed voluntary, for Fourth Amendment purposes, even if it is motivated by the subject's belief that refusal to consent will result in concrete disadvantages. In describing the benefits of consent searches, the Court in *Schneckloth* observed that "[i]f the [consent] search is conducted and proves fruitless, that in itself may convince the police that an arrest with its possible stigma and embarrassment is unnecessary, or that a far more extensive search pursuant to a warrant is not justified. In short, a search pursuant to consent may result in considerably less inconvenience for the subject of the search." 412 U.S. at 228. Plainly, then, a consent search cannot be found involuntary

simply because an individual consents out of a desire to avoid a greater intrusion.

This Court's decision in *Zap v. United States*, 328 U.S. 624 (1946), reflects the view that an individual's consent to search may be deemed voluntary even when that consent is a required condition for receipt of a valuable government benefit. The petitioner in *Zap* "entered into contracts with the Navy Department under which he was to do experimental work on airplane wings and to conduct test flights." *Id.* at 626. Pursuant to statutory requirement, *id.*, the contract between the parties stated that "[t]he accounts and records of the contractor shall be open at all times to the Government and its representatives, and such statements and returns relative to costs shall be made as may be directed by the Government." *Id.* at 627. Government agents subsequently inspected petitioner's business books and records over his objection. *Id.* This Court held that the search was lawful, explaining that "when petitioner, in order to obtain the Government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts." *Id.* at 628.

Zap further establishes the proposition—central to this case—that a consent to search may be granted in advance, and without specific restrictions. The defendant in *Zap* did not give consent at the time the search was conducted; to the contrary, he attempted (unsuccessfully) to prevent the search from occurring. 328 U.S. at 627. The Court nevertheless found that the defendant was bound by his prior contractual commitment to permit inspection of his books and records. *Zap* makes clear that an individual may give valid and binding prospective consent to a category of searches to be performed at unspecified times in the future.[13/]

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13. The judgment in *Zap* was subsequently vacated on other grounds. *See Zap v. United States*, 330 U.S. 800 (1947). This Court has continued to treat *Zap* as good law, however, and has cited it as authority for

A parolee's consent to search given as a condition of release is not rendered involuntary by the fact that the alternative is continued incarceration. Petitioner appears to suggest that a potential parolee has no choice but to accept a consent to search provision. That suggestion appears to rest on one of two propositions. First is the notion that an individual would not, under any circumstances, make a voluntary decision to accept a prison term. That proposition is demonstrably false: criminal defendants can and often do enter pleas of guilty (with or without plea agreements) that they know will result in substantial periods of incarceration, generally because they regard their alternatives as even more unattractive. This Court has repeatedly recognized that a guilty plea is not rendered involuntary simply because it is motivated by a desire to avoid greater punishment. *See Corbitt v. New Jersey*, 439 U.S. 212, 218-23 (1978); *North Carolina v. Alford*, 400 U.S. 25, 31 (1970); *Brady v. United States*, 397 U.S. 742, 755 (1970).

Alternatively, the view that a parolee lacks any true choice in the matter may rest instead on the perception that no one would choose to spend time in prison in preference to release on parole because parole, even with a consent-to-search condition, is substantially less onerous than incarceration. That reasoning is also flawed. The government cannot be said to coerce an individual simply by presenting him with a choice in which one of the alternatives is plainly more attractive than the other. No one would suggest, for example, that a defendant's guilty plea is involuntary if the government offers him a particularly favorable plea agreement. In short, no legal principle supports the view that an individual's waiver of constitutional rights is rendered unenforceable whenever the benefits of that waiver substantially outweigh its costs.

California parolees in general, and petitioner in

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the proposition that a search based on consent is lawful notwithstanding the absence of a judicial warrant and/or probable cause. *See Schneckloth*, 412 U.S. at 219; *Katz v. United States*, 389 U.S. 347, 358 n.22 (1967); *Texas v. Brown*, 460 U.S. 730, 736 (1983) (plurality opinion).

particular, are given a meaningful choice: conditional liberty with reduced Fourth Amendment protection or continued incarceration with no expectation of privacy. *Hudson v. Palmer*, 468 U.S. 517. "Nothing is more common than an individual's consenting to a search that would otherwise violate the Fourth Amendment, thinking that he will be better off than he would be standing on his rights." *United States v. Barnett*, 415 F.3d 690, 692 (7th Cir. 2005). Confronted with the alternative of continued incarceration, petitioner "gave up nothing." *Id.*

D. Conclusion

For these reasons, the question of the validity of petitioner's consent is properly before this Court and must be resolved in respondent's favor.

CONCLUSION

The judgment of the California Court of Appeal should be affirmed.

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Respectfully submitted,

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