

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   DONALD CURTIS SAMSON,                   :

4                   Petitioner,                   :

5                   v.                   :   No. 04-9728

6   CALIFORNIA.                   :

7   - - - - - x

8                                   Washington, D.C.

9                                   Wednesday, February 22, 2006

10                   The above-entitled matter came on for oral

11   argument before the Supreme Court of the United States

12   at 10:16 a.m.

13   APPEARANCES:

14   ROBERT A. LONG, JR., ESQ., Washington, D.C.; on behalf

15       of the Petitioner.

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17       behalf of the Respondent.

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21       Respondent.

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P R O C E E D I N G S

[10:16 a.m.]

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

Mr. Long.

ORAL ARGUMENT OF ROBERT A. LONG, JR.,  
ON BEHALF OF PETITIONER

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

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

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

1 petty officer.

2 JUSTICE GINSBURG: Mr. Long --

3 CHIEF JUSTICE ROBERTS: Mr. Long --

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

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

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

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

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

1 MR. LONG: I --

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

4 MR. LONG: I --

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

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

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

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

22 JUSTICE KENNEDY: I --

23 MR. LONG: But if --

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

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

3           JUSTICE KENNEDY: When you see the --

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

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

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

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

24           MR. LONG: Well --

25           JUSTICE SCALIA: -- and suffer the reduction

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

5 MR. LONG: Well --

6 JUSTICE SCALIA: -- that he --

7 MR. LONG: I mean --

8 JUSTICE SCALIA: -- he can --

9 MR. LONG: I --

10 JUSTICE SCALIA: -- be searched.

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

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

18 MR. LONG: -- in California.

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

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

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

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

6 MR. LONG: Yes, in section 3067.

7 JUSTICE SCALIA: It does.

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

12 JUSTICE SCALIA: Even if the --

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

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

17 MR. LONG: Well --

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

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

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



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

3             MR. LONG: Well, it's --

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

6             MR. LONG: Well --

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

8             MR. LONG: That --

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

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

13            JUSTICE SCALIA: Oh, I --

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

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

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

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

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

2 CHIEF JUSTICE ROBERTS: Well, but --

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

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

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

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

25 MR. LONG: Well, that --

1 CHIEF JUSTICE ROBERTS: Do you --

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

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

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

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

11 MR. LONG: Yes. And --

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

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

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

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

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

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

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

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

12 JUSTICE KENNEDY: Well, so that a --

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

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

16 MR. LONG: Well --

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

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

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

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

8 MR. LONG: Well, in all --

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

11 MR. LONG: Well, in --

12 CHIEF JUSTICE ROBERTS: -- scheduled.

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

24 JUSTICE GINSBURG: Are you relying --

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

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

4 MR. LONG: Well, I think --

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

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

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

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

1 JUSTICE SCALIA: I mean, walking --

2 MR. LONG: -- holding --

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

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

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

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

19 JUSTICE SCALIA: Are --

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

22 JUSTICE SOUTER: What --

23 MR. LONG: -- against Scarpelli.

24 JUSTICE SCALIA: Not --

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

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

2 MR. LONG: It's --

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

10 MR. LONG: Well --

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

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

19 JUSTICE SOUTER: Apart from --

20 MR. LONG: So --

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

23 MR. LONG: Well --

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



1 argument?

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

5 JUSTICE SOUTER: No, I --

6 MR. LONG: -- with recidivism.

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

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

16 JUSTICE SOUTER: I take it --

17 MR. LONG: -- as they --

18 JUSTICE SOUTER: -- the answer is --

19 MR. LONG: -- did before.

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

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

1 mind, but --

2 JUSTICE SOUTER: No, I --

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

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

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

19 JUSTICE BREYER: Why --

20 CHIEF JUSTICE ROBERTS: Well --

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

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

8 MR. LONG: Well --

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

11 MR. LONG: Well --

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

14 MR. LONG: Because --

15 JUSTICE BREYER: -- says the Legislature.

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

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

20 MR. LONG: Well --

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

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

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

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

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

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

20 MR. LONG: Yes.

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

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

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

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

18 CHIEF JUSTICE ROBERTS: Well, the --

19 MR. LONG: -- framers of --

20 CHIEF JUSTICE ROBERTS: -- California --

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

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

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

4 MR. LONG: Yes, but --

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

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

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

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

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

1 harassment, and it's not --

2 MR. LONG: Well --

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

5 MR. LONG: Well, and --

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

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

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

25 MR. LONG: Well --

1 CHIEF JUSTICE ROBERTS: -- capricious  
2 searches.

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

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

15 MR. LONG: It --

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

18 MR. LONG: I --

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

21 MR. LONG: I --

22 CHIEF JUSTICE ROBERTS: -- in --

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



1 JUSTICE GINSBURG: Why?

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

3 JUSTICE GINSBURG: Why? If it -- if it -- if

4 it -- it doesn't go to the suspicionless character of

5 the search, but it does say it has to be reasonable in

6 time, place, or manner.

7 MR. LONG: Yes.

8 JUSTICE GINSBURG: And maybe the --

9 MR. LONG: Yes.

10 JUSTICE GINSBURG: -- officers are reasonable

11 in time, place --

12 MR. LONG: Yes.

13 JUSTICE GINSBURG: -- or manner.

14 MR. LONG: And -- but it's -- it had -- there

15 has never been a case in which a court has rejected a

16 parolee search as unreasonable in time, place, or

17 manner. And you could --

18 JUSTICE GINSBURG: How many times has it been

19 challenged --

20 MR. LONG: As --

21 JUSTICE GINSBURG: -- on the --

22 MR. LONG: -- we said -- we found over a hundred

23 cases in which it's been challenged in the California

24 courts. And it --

25 JUSTICE ALITO: Well --

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

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

14           MR. LONG: No. Let --

15           JUSTICE SCALIA: -- a cavity search --

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

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

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

8             MR. LONG: Well --

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

12            MR. LONG: But --

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

15            MR. LONG: They might, and --

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

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

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

7             JUSTICE BREYER: But the reason ---

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

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

17            MR. LONG: They --

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

24            MR. LONG: Yes.

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

1 question is, what's unreasonable about that?

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

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

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

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

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

20 MR. LONG: Well --

21 JUSTICE STEVENS: -- be permissible?

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

25 JUSTICE STEVENS: But I wonder whether --

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

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

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

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

8 MR. LONG: -- category by --

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

14 MR. LONG: Right.

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

17 MR. LONG: Well --

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

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

25 JUSTICE STEVENS: Say you were a --

1 MR. LONG: -- suspicionless --

2 JUSTICE STEVENS: -- terrorist, for example.

3 MR. LONG: And --

4 JUSTICE STEVENS: It's just limited to

5 terrorists, convicted terrorists.

6 MR. LONG: Yes, perhaps convicted terrorists.

7 You know, that -- and it -- that's very different from

8 what we have here, because --

9 JUSTICE GINSBURG: What about drug offenders,

10 given the high rate of recidivism?

11 MR. LONG: Well, I -- you know, we -- I think

12 you would have to see the facts of that case, but if

13 they made a finding that, "Because of the nature of

14 drug offenses, we need suspicionless searches rather

15 than simply reasonable suspicion, and we need police

16 officers, not parole officers" -- and there could be

17 other regulations. The Federal regulations, we think,

18 are a model, really. They have lots of limitations on

19 --

20 JUSTICE SCALIA: Mr. Long, is it -- is it

21 fair to compare California to other States? The

22 assumption would have to be that other States grant

23 parole as liberally as California does. Maybe

24 California has made the decision, "We have too many

25 people in prison. We're going to let a lot of them

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

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

10 JUSTICE SCALIA: But my only --

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

13 JUSTICE SCALIA: -- point is --

14 MR. LONG: -- of parole.

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

18 MR. LONG: Well --

19 JUSTICE SCALIA: -- may not be --

20 MR. LONG: Well --

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

23 MR. LONG: I mean --

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

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



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

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

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

19            JUSTICE GINSBURG: This person goes --

20            MR. LONG: -- which --

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

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

25            JUSTICE GINSBURG: Yes, while the --

1 MR. LONG: -- police officers --

2 JUSTICE GINSBURG: -- while the --

3 MR. LONG: -- at work?

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

8 MR. LONG: It's --

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

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

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

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

19 ORAL ARGUMENT OF RONALD E. NIVER

20 ON BEHALF OF RESPONDENT

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

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

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

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

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

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

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

22 CHIEF JUSTICE ROBERTS: You say he doesn't  
23 have an expectation of privacy, so it's not protected.  
24 Well, if we say he does have a -- if we say it is  
25 protected, then he does have an expectation of privacy.

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

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

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

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

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

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

8 MR. NIVER: Well, yes.

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

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

25 CHIEF JUSTICE ROBERTS: Was that a yes, you

1 can have them --

2 MR. NIVER: Yes, Your Honor.

3 CHIEF JUSTICE ROBERTS: You can.

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

5 JUSTICE SCALIA: Is --

6 CHIEF JUSTICE ROBERTS: What about --

7 JUSTICE SCALIA: Is --

8 CHIEF JUSTICE ROBERTS: What about --

9 JUSTICE SCALIA: Is that right? I mean, even

10 in prison, I -- what -- I'm not sure you could even do

11 that if they were still in prison. Can you subject

12 people in prison --

13 MR. NIVER: Well, of course, that would not

14 be a Fourth Amendment claim.

15 JUSTICE SCALIA: No. No, I --

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

17 JUSTICE SCALIA: The Chief Justice was trying

18 to get out of the Fourth Amendment into the Fifth.

19 MR. NIVER: That failing -- well, in terms of

20 the lack of a precedent from this Court, you know, at

21 this point we can only speculate, but it seems to me

22 that if a person can be required to submit to a drug

23 test by virtue of the status as a parolee or

24 probationer, I don't think that it is an extravagant

25 step to say that they could be required to submit to an

1 interview.

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

8 MR. NIVER: Suspicionless search?

9 JUSTICE STEVENS: Well --

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

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

13 MR. NIVER: Yes.

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

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

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

21 MR. NIVER: -- released on parole.

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

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

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

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

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

9 MR. NIVER: Oh --

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

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

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

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



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

2 JUSTICE SCALIA: Most --

3 JUSTICE STEVENS: -- rely on --

4 JUSTICE SCALIA: Most States --

5 JUSTICE STEVENS: -- the fact that --

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

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

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

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

25 JUSTICE SCALIA: It seems to me that the

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

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

19 JUSTICE GINSBURG: Mr. Niver --

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

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

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

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

12                MR. NIVER: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

12 JUSTICE SOUTER: Uh-huh.

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

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

20 MR. NIVER: There is no --

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

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

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

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

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

20 JUSTICE SOUTER: No, I realize --

21 MR. NIVER: -- recommend --

22 JUSTICE SOUTER: -- but do you --

23 MR. NIVER: But --

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

1 harassment limitation?

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

5 JUSTICE SOUTER: Well, maybe --

6 MR. NIVER: -- of --

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

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

12 JUSTICE SOUTER: Okay.

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

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

19 JUSTICE SCALIA: Yes --

20 MR. NIVER: There's an --

21 JUSTICE SCALIA: I mean --

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

25 JUSTICE SCALIA: Okay.

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

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

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

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

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

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

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



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

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

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

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

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

19 JUSTICE KENNEDY: I have one --

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

22 JUSTICE KENNEDY: I have one --

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

24 JUSTICE KENNEDY: I have --

25 JUSTICE SCALIA: -- conduct cavity searches

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

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

8 JUSTICE SOUTER: Well, I --

9 MR. NIVER: -- in --

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

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

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

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

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

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

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

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

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

21 JUSTICE SCALIA: Do we --

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

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

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

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

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

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

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

10 ORAL ARGUMENT OF JONATHAN L. MARCUS

11 FOR THE UNITED STATES, AS AMICUS CURIAE,

12 IN SUPPORT OF RESPONDENT

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

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

24 JUSTICE ALITO: Do we have --

25 JUSTICE KENNEDY: But not the consent --

1 CHIEF JUSTICE ROBERTS: -- to decide --

2 JUSTICE KENNEDY: -- not the consent

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

4 ask the counsel who argued just previously. Seemed to

5 me that he argued consent when he answered Justice

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

7 the overwhelming practical needs when he argued the

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

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

10 not embrace the consent argument?

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

12 we briefed --

13 JUSTICE KENNEDY: But you --

14 MR. MARCUS: -- the --

15 JUSTICE KENNEDY: -- just --

16 MR. MARCUS: It --

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

18 MR. MARCUS: We --

19 JUSTICE KENNEDY: -- you put it --

20 MR. MARCUS: We --

21 JUSTICE KENNEDY: -- in number three?

22 MR. MARCUS: Right. It --

23 JUSTICE KENNEDY: In --

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

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

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

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

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

17 MR. MARCUS: Well, I think --

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

20 MR. MARCUS: We --

21 JUSTICE KENNEDY: -- argument --

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

23 JUSTICE KENNEDY: -- you can take.

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

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

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

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

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



1 screaming.

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

7 JUSTICE GINSBURG: But it really --

8 MR. MARCUS: -- sign the --

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

10 MR. MARCUS: -- agreement.

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

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

17 JUSTICE GINSBURG: You can't --

18 MR. MARCUS: -- there --

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

20 MR. MARCUS: There --

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

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

24 CHIEF JUSTICE ROBERTS: Could you --

25 MR. MARCUS: But --

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

3 MR. MARCUS: But --

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

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

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

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

24 MR. MARCUS: But --

25 JUSTICE ALITO: -- that this program would

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

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

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

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

6               JUSTICE STEVENS:  But following --

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

8               JUSTICE STEVENS:  -- up on Justice --

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

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

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

18              JUSTICE SCALIA:  No.

19              MR. MARCUS:  And so, that --

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

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

1 I mean, I --

2 JUSTICE STEVENS: And it --

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

4 JUSTICE STEVENS: -- it was assumed

5 California --

6 MR. MARCUS: Right.

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

8 protection against harassment and so forth. Suppose

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

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

11 whether this search was reasonable.

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

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

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

15 Amendment standard to determine whether this search was

16 objectively reasonable. And you would look at factors

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

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

19 JUSTICE STEVENS: So, it would uphold this.

20 MR. MARCUS: -- and objective --

21 JUSTICE STEVENS: There's --

22 MR. MARCUS: -- objective --

23 JUSTICE STEVENS: -- no matter now

24 unreasonable the California statute might be in other

25 applications.

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

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

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

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

17 JUSTICE GINSBURG: Has --

18 MR. MARCUS: But --

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

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

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

12 JUSTICE SOUTER: Do --

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

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

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

22 CHIEF JUSTICE ROBERTS: Go ahead.

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



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

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

14 Mr. Long, you have 2 minutes remaining.

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

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

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

4 JUSTICE SCALIA: But we --

5 MR. LONG: -- consent --

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

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

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

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

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

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

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

16 Thank you.

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

18 The case is submitted.

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

21

22

23

24

25