No. 00-1260

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

vs.

MARK JAMES KNIGHTS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER
CHARLES L. HOBSON
Counsel of Record
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816

Phone: (916) 446-0345
Fax: (916) 446-1194
E-mail: cjlf@cjlf.org

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

(Intentionally left blank)

QUESTION PRESENTED

Can a law enforcement officer conduct a warrantless search supported by reasonable suspicion of a probationer's apartment when that probationer has consented to a probation condition authorizing any law enforcement officer to search his person or premises without a warrant or individualized suspicion?

(Intentionally left blank)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Constitution

United States Statutes

State Statute

Treatise

Miscellaneous

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

vs.

MARK JAMES KNIGHTS,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Probation is an important but risky part of the criminal justice system. While society can reap significant economic and rehabilitative gains from probation, allowing convicted criminals to serve their sentence in society instead of prison

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

threatens public safety. Probation search conditions play an important role in limiting probation's danger to society by deterring probationers from committing crimes. The Ninth Circuit's refusal to allow police to conduct such searches threatens the integrity of this key component of many probation systems, contrary to the rights of victims and society which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

Between 1996 and 1998 the facilities of the Pacific Gas and Electric Company (PG & E) in Napa County were vandalized over 30 times. *United States* v. *Knights*, 219 F. 3d 1138, 1140 (CA9 2000). Suspicion centered on Mark James Knights and his friend Steven Simoneau. The vandalism began after Knights' electrical service was discontinued, and the incidents coincided with his court appearances over his theft of power from PG&E. *Ibid.*

The sheriff's department set up surveillance of Knights' apartment on June 3, 1998. About 3:10 a.m., Simoneau was observed leaving the apartment, carrying what appeared to be three pipe bombs. He then crossed the street to the Napa River, where he deposited these objects. See *ibid.* As Simoneau left in his truck, Detective Todd Hancock of the Napa County Sheriff's Department followed him until he stopped in a driveway. *Ibid.* At this point, Hancock was able to examine the truck out of Simoneau's presence. In and around the truck, Detective Hancock found a Molotov cocktail, explosive materials, a gasoline can, and two brass padlocks, which fit the description of the locks removed from the vault of a transformer that was recently vandalized. *Ibid.* "The truck was seized, impounded, and later searched pursuant to a warrant." *Ibid.*

Detective Hancock knew that Knights was on probation for a misdemeanor drug offense and that one condition of the probation was to"[s]ubmit his . . . person, property, place of residence, vehicle, personal effects, to search at any time, with

or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." *Id*., at 1140-1141. After securing permission from his supervisor, Detective Hancock conducted a warrantless search of Knights' apartment. The search "turned up detonation cord, ammunition, unidentified liquid chemicals, instruction manuals on chemistry and electrical circuitry, bolt cutters, telephone pole-climbing spurs, drug paraphernalia, photographs and blueprints stolen from the burglarized building, and a brass padlock stamped PG & E." *Id*., at 1141.

Knights was indicted in federal court "for conspiracy to commit arson, for possession of an unregistered destructive device, and for being a felon in possession of ammunition." *Ibid*. See 18 U. S. C. §§ 371, 922(g); 26 U. S. C. § 5861(g). The District Court suppressed the evidence seized from Knights' apartment, holding that the "probation search was really a subterfuge for an investigative search . . . . " *Knights*, 219 F. 3d, at 1141. The Ninth Circuit upheld the District Court's holding. See *id*., at 1145. Certiorari was granted on May 14, 2001.

SUMMARY OF ARGUMENT

Public safety is the Achilles' heel of any probation system. While society can reap substantial benefits from this less costly and more rehabilitative alternative to prison, having convicted criminals serve their sentence in society gambles with public safety. A probation system that cannot protect the public will lose support.

The threat to public safety from felony and drug using probationers is all too real. Studies of felony probationers show a recidivism rate that is between six to nineteen times the arrest rate for the general population. As of 1991, 23% of all state prisoners were probation violators, and 87% of the probation violators had been arrested for a new offense. Probationers

were thus responsible for at least six thousand murders and tens of thousands of other serious felonies.

Allowing police to conduct probation searches can help deal with this problem. Having more officers available for searching supplements the resources of habitually understaffed probation departments. Police are also better trained and more experienced at conducting searches than probation officers. This will make probation searches both more likely and more effective, which further deters probationer crime. In addition to protecting the public, this will also aid in the probationer's rehabilitation.

The threat to public safety posed by probation creates a special need for extending the authority to conduct probation searches to police officers. Certain threats to public safety create special needs for dispensing with the Fourth Amendment's warrant and probable cause requirements. The fact that the particular public safety interest is related to crime prevention does not disqualify it from special needs status, as is demonstrated by airport checkpoints.

The search in this case compares favorably to airport checkpoints. Both searches involve consent, while there has been far more probationer crime than airplane terrorism. Most airplane passengers are law-abiding citizens, while all probationers are convicted criminals, hence the search in this case stands on at least as good of a footing as these airport searches.

The Ninth Circuit improperly examined the motive of the searching officer in this case. Although it framed the issue in terms of the probationers' consent, striking down a search based on a searching officer's investigatory purpose is an inquiry into his motive. Whether a particular type of search serves a special need is fair game; the motive of the officer conducting the search is not. Since the public safety special need was valid, the fact that the searching officer was not concerned with the probationer's rehabilitation is irrelevant. Any other result

would be impractical, as ascertaining subjective intent is not worth the effort in Fourth Amendment cases.

Allowing police officers to enforce the search condition does not violate the defendant's reasonable expectation of privacy. Unlike the probationer in *Griffin* v. *Wisconsin*, 483 U. S. 868 (1987), Knights consented to his search condition. At the very least, this substantially reduces his already limited expectation of privacy. The fact that prison is the alternative to probation does not eliminate the consent. A difficult choice is still a choice. What matters is not the harshness of the prison sentence, but the comparative lenience of the probation alternative offered by the state.

There is no right to probation. If the state can deprive a defendant of all Fourth Amendment rights through a prison sentence, then the much lesser Fourth Amendment deprivation found in this case must also be reasonable. Balancing the defendant's minimal privacy interests against society's considerable interest in protecting the public from probationers justifies the search in this case.

ARGUMENT

The Ninth Circuit's decision in this case paints the probation search of Knights' apartment as part of modern society's "relentless assault" on privacy. See *United States* v. *Knights*, 219 F. 3d 1138, 1144 (CA9 2000). It condemns this search and the California Supreme Court's decisions upholding such searches in unusually strong language:

> "In making this decision we need not rely on some resident numen or wait for Fulgora to light our way. We can, instead, rely upon the wisdom of the ages and upon the sagacity of the numerous Ninth Circuit judges who have written before us. If we do not heed all of that history and learning, who will?" *Id*., at 1145.

Reality is much more prosaic. The probation search in this case is at most a minor extension of *Griffin* v. *Wisconsin*, 483 U. S. 868 (1987). Since the probationer in this case consented to the search condition, the search here intrudes less upon a probationer's privacy than the unconsented condition upheld in *Griffin*. As the danger to public safety posed by probationers like the defendant creates a special need, a warrantless search by a police officer pursuant to a valid probation condition is reasonable without regard to the search's alleged investigatory purpose.

I. The threat to public safety from probationers creates a special need for extending the authority to conduct probation searches to police officers.

The Ninth Circuit dismissed Detective Hancock's search of Knights' apartment because it was not "conducted for probation purposes" but rather "as a mere subterfuge for the pursuit of [a] criminal investigation[ ]." *United States* v. *Knights*, 219 F. 3d 1138, 1145 (CA9 2000). This holding rests on two mistaken premises. One premise, that a court may examine the individual motivation of an officer conducting a special needs search, is addressed in part II. The other mistake is separating public safety from probation's purpose. Maintaining public safety is an essential part of any probation system. See, *e.g.*, *Griffin* v. *Wisconsin*, 483 U. S. 868, 875 (1987); 18 U. S. C. §§ 3562(a), 3553(a)(2)(C); *People* v. *Carbajal*, 10 Cal. 4th 1114, 1120, 899 P. 2d 67, 70 (1995); Cal. Penal Code § 1202.7. While *Griffin* relied on both public safety and rehabilitation to support a special needs finding, see 483 U. S., at 875, the special threats to public safety posed by probationers is sufficient on its own to justify warrantless searches by police officers under certain circumstances.

Those circumstances were met in this case. Knights, a drug offender with a prior felony conviction, consented to a valid search condition. See *supra*, at 2. As in *Griffin*, the search in

this case was supported by reasonable suspicion. See *supra*, at 2. The only difference between this search and the one in *Griffin* that could favor the defendant's case is that the search was conducted by a police officer rather than a probation officer. Since protecting public safety from probationers is a special need itself, that distinction has no constitutional significance.

A. The Threat.

Probation systems must place public safety before any other interest. While society may benefit from employing the cheaper and potentially more rehabilitative probation instead of prison, probation gambles with public safety. Anyone who is eligible for probation has already demonstrated an unwillingness to conform to the law. See *Griffin*, 483 U. S., at 880. Probationers are thus a far greater threat to commit crime than the law-abiding citizens with whom they share freedom. If probation cannot protect the public, public support for it will erode. See Petersilia, Probation in the United States: Practices and Challenges, National Institute of Justice Journal 2, 2 (Sept. 1997) (cited below as "Probation in the United States").

Unfortunately, the threat to safety is all too real. While probation has not been researched as extensively as it should be, see Mackenzie et al., The Impact of Probation on the Criminal Activities of Offenders, 36 Journal of Research in Crime and Delinquency 423, 424 (1999), studies of probationer recidivism still show that probationers are responsible for a disturbingly large proportion of crimes.

These studies center on felony probationers. Typically, recidivism is calculated by counting the number of these probationers who have been arrested for a felony during the first three years of probation. See Benedict & Huff-Corzine, Return to the Scene of the Punishment: Recidivism of Adult Male Property Offenders on Felony Probation, 1986-1989, 34 Journal of Research in Crime and Delinquency 237, 238-239 (1997); Langan, Between Prison and Probation: Intermediate

Sanctions, 264 Science 791, 792 (May 6, 1994). Estimates of the recidivism rates for felony probationers range from 22% to 65%. See Benedict & Huff-Corzine, *supra*, at 238-239. Although the defendant in this case was on probation for a misdemeanor drug offense, see *supra*, at 2, all drug offenders run a substantial risk of recidivism. Indeed, drug use is the best predictor of whether someone will reoffend while on probation. See Mackenzie, *supra*, 36 Journal of Research in Crime and Delinquency, at 439 (Table); Benedict & Huff-Corzine, *supra*, at 245-246. Knights, who also had a prior felony conviction, see *supra*, at 7, was thus a clear risk to reoffend, as Detective Hancock's investigation confirmed.

Even at the lowest recidivism rate, probationers are much more dangerous to the community than the average citizen. If 22% of the general population were arrested for a felony over a three-year period, this country would be a prison camp. Arrest figures reinforce this common sense conclusion. Since several of the recidivism studies took place in the mid-1980's, see Benedict & Huff-Corzine, *supra*, at 238-239, *amicus* will use the 1986 arrest figures for the general population as a comparison figure. In 1986 the arrest rate for Federal Bureau of Investigation (FBI) "index" crimes (the combined arrest rates for 5 violent crimes and 4 property crimes) was 1,091.8 per 100,000 or 1.0918%. U. S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 1987, p. 368 (1988). Assuming that no person is arrested for more than one index crime during any three-year period at the 1998 rates, the lowest estimated recidivism rate for probationers, 22%, would still be more than six times this hypothetical arrest rate for the general population, while the high rate of 65% recidivism is over nineteen times this arrest rate.

The FBI index is not an ideal for comparison, however, as it both includes nonfelonies and excludes felonies from its total. Thus the larcenies counted in the index include many misdemeanor larcenies such as shoplifting. See *id*., at 563. Similarly, the crime index does not count felonies that do not fall

into the property or violence classifications, primarily drug and weapons offenses. See *id*., at 368, 563. Since the drug and weapons arrest totals also do not distinguish between misdemeanors and felonies, adding drug and weapons offenses to the index crimes would create an excessively conservative figure, but one that is still far below the recidivism rate for felony probationers. The 1982 arrest rate per 100,000 population for drug offenses was 348.6 or 0.3486%, *id*., at 368, and 80.7 per 100,000 or 0.087% for weapons offenses. *Ibid*. When added to the index rate of 1.0918%, this would give an annual arrest rate of 1.5274%. Over a three-year period the maximum arrest rate under this most conservative reasonable estimate would be 4.5822%, which is still less than one quarter of the lowest estimated recidivism rate for probationers, and one-fourteenth of the high rate.

The actual difference is undoubtedly much greater. First, each arrest in the FBI total does not involve a different person; some people will be arrested for more than one index crime during a year or over a three-year span. See *id*., at 338, note. More importantly, the arrest rate for nonprobationers is actually lower than the total crime index because that index includes the arrests of probationers, who have a much higher arrest rate than the civilian population.

Probation's threat to public safety is underscored by the high proportion of state prisoners who were on probation at the time of their offense. As of 1991, 23% of all state prisoners were probation violators, see U. S. Dept. of Justice, Bureau of Justice Statistics, Probation and Parole Violators in State Prison, 1991, p. 3 (1995), and 87% of these probation violators had been arrested for a new offense. See *ibid*. "Based on the offense that brought them to prison, [in 1991] the 162,000 probation violators committed 6,400 murders, 7,400 rapes, 10,400 assaults, and 17,000 robberies, while under supervision in the community an average of 18 months." *Id*., at 1. Because many crimes go unreported, see Mackenzie, *supra*, 36 Journal of Research in Crime and Delinquency, at 427, or unsolved,

these arrest figures understate the costs of probation. A ratio of 10 crimes committed to every arrest is considered "a conservative figure," Petersilia & Turner, Prison Versus Probation in California: Implications for Crime and Offender Recidivism, in Community Corrections: Probation, Parole, and Intermediate Sanctions 61, 65 (Petersilia ed. 1998). Therefore, the real cost of probation is much higher than the arrest records estimate.

This empirical evidence reinforces the common-sense conclusion that placing convicted criminals in society rather than prison is dangerous enough with adequate supervision, and intolerably dangerous without it. While not every probationer is equally dangerous, this defendant, with a prior felony and current drug conviction, posed a real risk of reoffending. This risk forms the basis of a special need that justifies the search in this case.

B. Policing the Bargain.

In California, as elsewhere, probation is "in effect, a bargain made by the People through the Legislature and the courts, with the convicted individual, whereby the latter is in essence told that if he complies with the requirements of probation, he may become reinstated as a law-abiding member of society." *People* v. *Chandler*, 203 Cal. App. 3d 782, 788, 250 Cal. Rptr. 730, 733 (1988). Both sides can benefit from the bargain. The defendant avoids prison and may have a better chance at rehabilitation, see Kim, An Econometric Study on the Deterrent Impact of Probation, 18 Evaluation Rev. 389, 390-391 (1994), while the state gets a less expensive alternative to prison, at least in direct costs. See Petersilia & Turner, *supra*, at 65.

A probationer who commits a crime breaks the bargain. See, *e.g.*, 18 U. S. C. § 3563(a)(1) (not committing crime a mandatory probation condition). Crime is a cost not found in most economic comparisons between probation and prison. While probation is not simply an economic issue, understanding its cost helps to determine whether society is getting the benefit of its bargain with probationers. This hidden cost of proba-

tioner crime makes it likely "that felony probation sentences are more expensive than is commonly assumed, both absolutely and relative to imprisonment . . . ." Petersilia & Turner, *supra*, at 65.

Search conditions can help to control the crime expense. They are "meant to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationers being at large." *Griffin*, 483 U. S., at 875. By dispensing with warrants, search conditions help the authorities respond more "quickly to evidence of misconduct," *id*., at 876, and more importantly, help deter probationers from committing crimes. See *ibid*. Too many restrictions on the probation officer's ability to search the probationer "would reduce the deterrent effect of the supervisory arrangement. The probationer would be assured that so long as his illegal (and perhaps socially dangerous) activities were sufficiently concealed as to give rise to no more than reasonable suspicion, they would go undetected and uncorrected." *Id*., at 875 (discussing probable cause requirement).

Allowing police to rely on search conditions can play an important role in minimizing probation's costs to society. Probation officers are not necessarily the ideal agents for deterring their clients through searches. The resources of probation departments are even more overstretched than other law enforcement agencies, with most probation officers carrying far larger caseloads than the ideal. See Probation in the United States, *supra*, at 3 (caseload of 258 per officer versus ideal of 30). Many probation officers are not well-equipped to conduct searches safely and efficiently. "Probation officers currently lack protective equipment. They have only minimal self-defense training, may not be armed, and are ill-equipped to conduct searches, as they possess little understanding of chain of custody procedures." Rackmill, Community Corrections and the Fourth Amendment, 57 Fed. Probation 40, 44 (Sept. 1993). Unsurprisingly, one survey of probation officers found them

very uncomfortable with the idea of searching their clients. See *ibid*.

Police can fill in these gaps. Their training makes them safer and more efficient at conducting searches. A probationer is less likely to be deterred by a search condition that can only be executed by an overworked probation officer. If this authority is supplemented by the more numerous and better trained police officers, then probationers are more likely to be searched, and therefore more deterred from committing crimes.

> "Being on parole with a consent-to-search condition is akin to sitting under the Sword of Damocles: With knowledge he may be subject to a search by law enforcement officers at any time, [the parolee] will be less inclined to have narcotics or dangerous drugs in his possession. *The purpose of an unexpected, unproved search of defendant is to ascertain whether he is complying with the terms of probation; to determine not only whether he disobeys the law, but also whether he obeys the law.* Information obtained under such circumstances would afford a valuable measure of the effectiveness of the supervision given the defendant and his amenability to rehabilitation." *State* v. *Benton*, 695 N. E. 2d 757, 761 (Ohio 1998) (emphasis in original; internal quotation marks omitted).

While police officers may not share the probation officer's interest in rehabilitation, cf. *Griffin*, *supra*, 483 U. S., at 876, this does not invalidate a search based upon the public safety special interest found in this case. The danger posed by probationer crime creates a special need separate from the rehabilitation aspect of *Griffin*. See part I C, *supra.* In any event, the deterrence and observation advanced by police searches would also help rehabilitate the probationer. Deterring crime can only help the rehabilitation process, as a probationer who commits crime is not rehabilitated.

If society cannot place an effective search condition upon probationers, then "the opportunity to choose probation might

well be denied to many felons by judges whose willingness to offer the defendant probation in lieu of prison is predicated upon knowledge that the defendant will be subject to search at any time for a proper probation or law enforcement purpose." *People* v. *Bravo*, 43 Cal. 3d 600, 609, 738 P. 2d 336, 341 (1987). Both probationers and society should be allowed to continue getting the benefit of the type of bargain found in this case.

C. Public Safety as a Special Need.

While allowing police to rely on probation search conditions certainly promotes public safety, see part I B, *supra*, the question remains as to whether this interest qualifies as a special need under the Fourth Amendment. The special needs that allow law enforcement to dispense with the warrant and lower the necessary suspicion must go beyond society's general interest in law enforcement. See, *e.g.*, *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 619 (1989) (quoting *Griffin*, 483 U. S., at 873). Society's interest in protecting itself from the substantial dangers posed by higher risk probationers, like the defendant, satisfies this standard.

The legitimacy of this interest is found in *Griffin* itself. The *Griffin* Court noted that probation was like incarceration, a form of punishment for convicted criminals. See 483 U. S., at 874. Therefore probationers, like prisoners, "do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions.' " *Ibid.* (quoting *Morrissey* v. *Brewer*, 408 U. S. 471, 480 (1972)). The special needs in *Griffin* were the reasons for the limits on the probationer's liberty, making sure that "probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large." *Id.*, at 875.

Public safety can qualify as a special need without being attached to rehabilitating probationers. In other contexts, a sufficient threat to public safety supports special needs search-

es. Thus, drug testing of railway employees involved in certain train accidents was reasonable.

> "The Government's interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operation of a government office, school, or prison, 'likewise presents "special needs" beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.' " *Skinner*, 489 U. S., at 620 (quoting *Griffin*, 483 U. S., at 873-874).

Since the employees covered by the relevant regulations were "engaged in safety-sensitive tasks," 489 U. S., at 620, the threat to public safety of drug or alcohol impaired railroad employees created a special need for the drug testing requirement.

> "This governmental interest in ensuring the safety of the traveling public and of the employees themselves plainly justifies prohibiting covered employees from using alcohol or drugs on duty, or while subject to being called for duty. This interest also 'require[s] and justif[ies] the exercise of supervision to assure that the restrictions are in fact observed.' " *Skinner*, 489 U. S., at 621 (quoting *Griffin*, *supra*, 483 U. S., at 875).

The public safety interest in *Skinner* was fairly removed from law enforcement interests. Train accidents are not necessarily criminal acts, even if intoxication is involved, and this Court left undecided whether the routine use of the tests results in criminal cases would unconstitutionally subvert "the administrative nature of the FRA's program." 489 U. S., at 621, n. 5. But *Skinner* does not set the boundary of the public safety interest. Special public safety concerns that are much more congruent with law enforcement needs still qualify as special needs.

Griffin is one example. The proceeds of a search substantially justified by public safety were used in a criminal prosecution against the subject of the special needs search. See *Griffin*,

483 U. S., at 870. Indeed, the search condition was justified in part by the fact that sudden searches would deter probationers from committing crimes. See *id*., at 876. Similarly, drunk driving roadblocks were upheld by this Court even though those who failed the sobriety tests would be arrested. See *Michigan Dept. of State Police* v. *Sitz*, 496 U. S. 444, 447 (1990).

Although the *Sitz* opinion did not clearly classify itself as a special needs case, subsequent analysis shows that its public safety rationale is closely allied to law enforcement interests.

> "This checkpoint program [in *Sitz*] was clearly aimed at reducing the immediate hazard posed by the presence of drunk drivers on the highways, and there was an obvious connection between the imperative of highway safety and the law enforcement practice at issue. The gravity of the drunk driving problem and the magnitude of the State's interest in getting drunk drivers off the road weighed heavily in our determination that the program was constitutional." *City of Indianapolis* v. *Edmond*, 531 U. S. 32, 148 L. Ed. 2d 333, 342, 121 S. Ct. 447, 453 (2000).

The roadblock in *Edmond* was struck down because its purpose, narcotics interdiction, was just part of a general interest in crime control. See *id*., 148 L. Ed. 2d, at 344, 121 S. Ct., at 454. While narcotics are undoubtedly dangerous, it is a generalized danger with no particular ties to automobiles. "Only with respect to a smaller class of offenses, however, is society confronted with the type of *immediate vehicle-bound* threat to life and limb that the sobriety checkpoint in *Sitz* was designed to eliminate." *Id*., 148 L. Ed. 2d, at 344, 121 S. Ct., at 455 (emphasis added).

The present case is more closely analogous to *Sitz* than *Edmond*. The search condition is limited to probationers, a group who presents a significant, special threat to public safety. See part I A, *supra*. There was no logical limit to the roadblock in *Edmond*; if it was upheld, "the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of

American life." *Id*., 148 L. Ed. 2d, at 344, 121 S. Ct., at 454. The logic of probation searches is much more limited, extending no further than parolees. The limited, special need in this case is not diminished by *Edmond*.

An interest is not disqualified from being special if it is related to crime prevention. If there is something about a particular situation or relationship that makes it unusually dangerous to public safety, then a special needs search may be justified. "[W]here the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable'—for example, searches now routine at airports, and at entrances to courts and other buildings." *Chandler* v. *Miller*, 520 U. S. 305, 323 (1997).

This is illustrated by the purest public safety special needs search, airport checkpoints. Millions of innocent individuals are subjected to electronic intrusions upon "their persons . . . and effects," cf. U. S. Const., Amdt. 4, simply because the threat to public safety from terrorism in airplanes made any other response unreasonable.

> " 'When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger *alone* meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air.' " *United States* v. *Edwards*, 498 F. 2d 496, 500 (CA2 1974) (emphasis added by *Edwards* Court) (quoting *United States* v. *Bell*, 464 F. 2d 667, 675 (CA2 1972) (Friendly, J., concurring)) (Friendly, J.); accord, *Treasury Employees* v. *Von Raab*, 489 U. S. 656, 675, n. 3 (1989).

The public safety probation search in this case compares favorably to the airport searches. Like the airport searches, the probation search condition is consensual. See *infra*, at 23-26.

Probation also presents an unusual danger to public safety, releasing into society an individual who "is more likely than the ordinary citizen to violate the law." *Griffin*, 483 U. S., at 880. It is a danger that is all too real in comparison to airline terrorism.

While the airline searches have helped to ensure that there have been comparatively few incidents of air piracy, see *Von Raab*, 489 U. S., at 675-676, n. 3, probation-related crime remains a significant blight upon society. The 6,000 or so killed by probationers each year, see *supra*, at 9, easily exceeds all deaths by airline piracy in or against this country. When the hundreds of thousands of other felonies committed by probationers are taken into account, see *supra*, at 9, the threat posed by probationers is at least equal to the threats that have justified billions of searches of innocent travelers at this country's airports. See *ibid*. It is "a concrete danger demanding departure from the Fourth Amendment's main rule." Cf. *Chandler*, 520 U. S., at 319.

The search condition in this case invaded no innocent privacy. Knights, an ex-felon with a drug conviction, consented to the search condition, including the provision that he could be searched by any law enforcement officer. See *supra*, at 2. Given the considerable danger posed by Knights and his ilk, California had a special need to allow Detective Hancock to rely on this probation condition.

II. The searching officer's motive for conducting the search is irrelevant to its constitutionality.

In addition to ignoring the public safety special need, the Ninth Circuit's decision also improperly relied on Detective Hancock's alleged motivation for searching Knights' apartment. The Ninth Circuit asserts that its decision is not based upon the motivation behind the search, but "rather, whether, without another basis for a warrantless home search, there was

consent to search in the first place." *United States* v. *Knights*, 219 F. 3d 1138, 1143 (CA9 2000). This distinction cannot carry the analytical load that the circuit court gives it. Knights did in fact consent to warrantless, suspicionless searches of his "place of residence . . . by any probation officer or law enforcement officer." *Id*., at 1141. The Ninth Circuit limited the scope of Knights' consent, holding that "we have made it clear that his consent must be seen as limited to probation searches, and must stop short of investigative searches. We simply have refused to recognize the viability of a more expansive probationary consent to search term." *Id*., at 1142. This is no more than an inquiry into the motive of the searching officer.

The manner in which the court found the improper investigatory purpose shows that this looks into the searching officer's state of mind:

> "Detective Hancock, and his cohorts, were not a bit *interested* in Knights' rehabilitation. They were *interested* in investigating and ending the string of crimes of which Knights was thought to be the perpetrator. . . . True, a probation officer may also *wish* to end wrongdoing by a probationer, but there was no 'also' about Detective Hancock's purpose." *Id*., at 1143 (emphasis added).

Quoting another Ninth Circuit opinion, the court reiterated, " 'Because the search here clearly was not a genuine attempt to enforce probation but apparently had a *motive* of avoidance of Fourth Amendment requirements, it is the type of law enforcement conduct that ought to be deterred.' " *Id*., at 1142 (emphasis added) (quoting *United States* v. *Merchant*, 760 F. 2d 963, 969 (CA9 1985)).

Motive has little place in Fourth Amendment analysis. This Court has repeatedly declined to invalidate an objectively legal search on the basis of the searching officer's allegedly improper motivations. In *Maryland* v. *Macon*, 472 U. S. 463 (1985), an undercover officer purchased two obscene magazines from an adult bookstore with marked money to facilitate an arrest and

prosecution for selling obscene materials. See *id*., at 465-466. The fact that the officer intended to recover the marked money did not transform the purchase into a warrantless search. "Objectively viewed, the transaction was a sale in the ordinary course of business. The sale is not retrospectively transformed into a warrantless seizure by virtue of the officer's subjective intent to retrieve the purchase money to use as evidence." *Id*., at 471.

As this Court emphasized in a plain view doctrine case,

> "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer. The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by the terms of the warrant or valid exception to the warrant requirement." *Horton* v. *California*, 496 U. S. 128, 138 (1990).

Special needs searches present a more complex version of the general rule. This Court has noted that "an inventory search must not be a ruse for general rummaging in order to discover evidence." *Florida* v. *Wells*, 495 U. S. 1, 4 (1990). Similarly, in upholding a warrantless administrative inspection, this Court observed that the search did not seem to be "a 'pretext' for obtaining evidence of respondent's violation of the penal laws." *New York* v. *Burger*, 482 U. S. 691, 716-717, n. 27 (1987).

These statements do not give courts license to second-guess the motives of officers making special needs searches. Instead, these "quoted statements simply explain that the exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are *not* made for those purposes." *Whren* v. *United States*, 517 U. S. 806, 811 (1996) (emphasis in original). Therefore, "our cases dealing with intrusion that occur pursuant to a general

scheme absent individualized suspicion have often required an inquiry into purpose at the programmatic level." *City of Indianapolis* v. *Edmond*, 531 U. S. 32, 148 L. Ed. 2d 333, 346, 121 S. Ct. 447, 457 (2000).

In other words, the need behind a special needs search must actually be special, and the search must advance those needs. Since the primary purpose of the checkpoint at issue in *Edmond* was interdicting narcotics, which is no more than a " 'general interest in crime control,' " the checkpoint was invalid. See *id*., at 345, 121 S. Ct., at 455 (quoting *Delaware* v. *Prouse*, 440 U. S. 648, 659, n. 19 (1979)). Had the program instead been supported by a special need like deterring drunk driving, or policing the borders on checkpoints, it would have been upheld. See *id*., at 344, 121 S. Ct., at 454-455.

This narrow exception does not allow courts to peer into the minds of the officers executing a special needs search. "Finally, we caution that the purpose inquiry is in this context to be conducted only at the programmatic level and is not an invitation to probe the minds of individual officers acting at the scene." *Id*., at 347, 121 S. Ct., at 457. So long as the "programmatic purpose," or special need, is valid, then search pursuant to that need is legal.

Allowing police officers to execute probation searches advances the public safety special need brought about whenever a felon, drug offender, or other high-risk individual is granted probation. See part I, *supra*. The fact that "Detective Hancock, and his cohorts, were not a bit interested in Knights' rehabilitation," *Knights*, 219 F. 3d, at 1143, has no bearing on the legality of Detective Hancock's search pursuant to a valid probation condition. Since the search condition itself was valid, the reasons for undertaking the search are irrelevant. "We have since held that the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's actions does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Scott* v. *United States*, 436 U. S.

128, 138 (1978). The fact that Detective Hancock was wearing a sheriff's uniform does not allow a court to examine his motivations, or attribute motives to him. Cf. *Knights*, 219 F. 3d, at 1143. ("True, a probation officer may also wish to end wrongdoing by a probationer, but there was no 'also' about Detective Hancock's purpose").

In addition to being contrary to precedent, this approach is too difficult to apply. Even partisans of the probation/investigation distinction appreciate the difficulty in finding an improper investigatory purpose. See 4 W. LaFave, Search and Seizure § 10.10(e), pp. 794-797 (3d ed. 1996). "Moreover, the circumstances surrounding the search are not likely to point inevitably toward one purpose as opposed to the other." *Id*., at 795. Where both police and probation officers are involved in the search, cf. *Griffin* v. *Wisconsin*, 483 U. S. 868, 871 (1987) (police tip), courts would have to untangle the different purposes of the different officers. See *ibid*. The motive issue does not stop at searches involving the police. Probation officers may also conduct searches motivated by public safety concerns. One survey indicates that most searches conducted by probation officers are motivated by public safety concerns. See Rackmill, Community Corrections and the Fourth Amendment, 57 Fed. Probation 40, 44 (Sept. 1993). Logically, every probation search will require an inquiry into the searching officer's motive if the Ninth Circuit's position is upheld.

Inquiries into the subjective intent behind discretionary actions like searches are often far ranging and difficult. Cf. *Harlow* v. *Fitzgerald*, 457 U. S. 800, 816-817 (1982) (subjective good faith standard requires a too-complex inquiry for qualified immunity cases). "[W]e believe that 'sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.' " *United States* v. *Leon*, 468 U. S. 897, 922, n. 23 (1984) (quoting *Massachusetts* v. *Painten*, 389 U. S. 567,

565 (1968) (White, J., dissenting)). Attempts to prevent police pretext are likely to backfire.

As one authority noted in the stop and frisk context, "surely the catch is not worth the trouble of the hunt when courts set out to bag the secret motivations of policemen . . . . A subjective purpose to do something that the applicable legal rules say there is sufficient objective cause to do can be fabricated all too easily and undetectably." Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 436, 436-437 (1974) (footnotes omitted); accord, *People* v. *Woods*, 21 Cal. 4th 668, 681, 981 P. 2d 1019, 1028 (1999).

Neither the public nor the law is served well by complex, arbitrarily subjective standards. "The people in their houses, as well as the police, deserve more precision." *Kyllo* v. *United States*, 533 U. S. __ (No. 99-8508, June 11, 2001) (slip op., at 11-12). This requires a "line" that is "not only firm but also bright." *Id*. (slip op., at 12). Such a line would be formed by a rule that police officers can conduct searches pursuant to valid probation conditions, without regard to any purported motive.

III. Allowing police officers to enforce the search condition did not violate any reasonable expectation of privacy of the defendant.

Following general Fourth Amendment practice, in special needs cases this Court has "not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context." *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 619 (1989). That is, do the special needs justify the search? See *Griffin* v. *Wisconsin*, 483 U. S. 868, 875 (1987). In *Griffin*, this involved justifying a regulatory system that applied a search condition to every grant of probation. See *id*., at 870-871. That inquiry took place in the context of the probationer's very limited privacy interests. See *id*., at 874. This Court then concluded that both the warrant and probable

cause requirements would needlessly interfere with the special needs of the probation system. See *id*., at 876, 878.

This search compares favorably to the one in *Griffin*. The greatest single difference between the two cases is that Knights consented to his probation search condition, while the search condition was imposed retroactively on Griffin. See *id*., at 870-871, and n. 1. This substantially reduces Knights' expectation of privacy, placing his search on an even more solid constitutional footing than the one ratified in *Griffin*.

Consent is a valid exception to the Fourth Amendment's warrant and probable cause requirements. See *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 222 (1973). This Court has even upheld a consent to search that was part of an individual's contract with the federal government. See *Zap* v. *United States*, 328 U. S. 624, 628-629 (1946), vacated, 330 U. S. 800 (1947).[2] While it is not necessary to invoke *Zap* to enforce a contract between the probationer and the state, consent substantially influences the balance between privacy and society's interests.

The most recent example of consent's power over privacy is another special needs case, *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646 (1995), where the drug testing of students who participated in athletic programs was upheld as a legitimate special needs search. See *id*., at 664-665. The students' decreased expectation of privacy was a substantial factor in this conclusion, see *id*., at 664, with consent playing an important role.

> "There is an additional respect in which school athletes have a reduced expectation of privacy. By choosing to 'go out for the team,' they voluntarily subject themselves to a

---

2. Although the *Zap* decision was vacated on jury selection grounds, this Court has since relied on *Zap* for the point that consent is a settled exception to the probable cause and warrant requirements of the Fourth Amendment. See, *e.g.*, *Texas* v. *Brown*, 460 U. S. 730, 736 (1983); *Schneckloth*, 412 U. S., at 219; *Katz* v. *United States*, 389 U. S. 347, 358, n. 22 (1967).

> degree of regulation even higher than that imposed on students generally. . . . Somewhat like adults who choose to participate in a 'closely regulated industry,' students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy." *Id*., at 657.

The defendant entered the probation agreement with open eyes. The search condition specifically extended its authority to police officers. See *supra*, at 2. Had he found this condition too onerous, he could refuse probation and serve his sentence. See *People* v. *Bravo*, 43 Cal. 3d 600, 608-609, 738 P. 2d 336, 341 (1987). Just like "participation in an industry that is regulated pervasively to ensure safety," see *Skinner*, 489 U. S., at 627, Knights chose to participate in probation, which requires substantial regulation of the probationer in order to protect the public, see *Griffin*, 483 U. S., at 874-875, and thus necessarily limits his privacy.

The Ninth Circuit dismissed Knights' consent, claiming that it was "limited to probation searches, and must stop short of investigative searches." *United States* v. *Knights*, 219 F. 3d 1138, 1142 (CA9 2000). This stems from the false distinction between "probation" and "investigation" searches. Since public safety is a special need in the context of probation searches, there are no different types of probation searches; a police officer may rely on a valid search condition in order to further society's interest in deterring probationers from committing crime. See part I C, *supra*. Indeed, most searches initiated by probation officers are motivated by public safety concerns. See Rackmill, Community Corrections and the Fourth Amendment, 57 Fed. Probation 40, 44 (Sept. 1993).

Another criticism of probationer consent is that the probationer has no real choice. It is argued that since prison is so much worse than any type of probation, the defendant will always accept probation no matter how onerous the conditions. See 4 W. LaFave, Search and Seizure § 10.10(b), pp. 763-766 (3d ed. 1996). The premise of this argument is doubtful. See

Petersilia, When Probation Becomes More Dreaded Than Prison, 54 Fed. Probation 23, 24 (Mar. 1990). Even assuming the premise, though, the conclusion does not follow. A difficult choice is still a choice. "Our authorities do not impose a categorical ban on every government action affecting the strategic decisions of the accused, including decisions whether or not to exercise constitutional rights." *United States* v. *Dunnigan*, 507 U. S. 87, 96 (1993). The fact that one of the two alternatives may seem particularly bad does stop it from being an alternative. As Justice Harlan explained:

> "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. *McMann* v. *Richardson*, [397 U. S. 759, 769 (1970)]. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." *McGautha* v. *California*, 402 U. S. 183, 213 (1971).

"In other contexts criminal defendants are required to make difficult choices that effectively waive their constitutional rights." *Newton* v. *Rumery*, 480 U. S. 386, 393 (1987). Thus an individual charged with a crime may obtain immunity from prosecution in exchange for abandoning a civil rights action. See *id*., at 397-398. Plea bargaining provides another example, even though "every such circumstance has a discouraging effect on the defendant's assertion of his trial rights . . . ." *Chaffin* v. *Stynchcombe*, 412 U. S. 17, 31 (1973). A suspect also may be required to choose between submitting to a blood-alcohol test or having his refusal used against him in court. See *South Dakota* v. *Neville*, 459 U. S. 553, 554 (1983). "[B]eing forced to choose between unpleasant alternatives is not unconstitutional." *United States* v. *Kaczynski*, 239 F. 3d 1108, 1115-1116 (CA9 2001) (citing *Brady* v. *United States*, 397 U. S. 742, 750 (1970)).

When an individual is required to make a choice involving a constitutional right "[t]he threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved." See *McGautha*, 402 U. S., at 213. The answer to this question is not found in the relative harshness of the prison sentence; the defendant earned this sentence by committing a crime. What matters is the state's generosity in offering the comparatively lenient alternative of probation with a search condition.

A state does not have to offer probation instead of prison. It is an "act of grace" from the state to the probationer. See *Escoe* v. *Zerbst*, 295 U. S. 490, 492 (1935); *People* v. *Rodriguez*, 51 Cal. 3d 437, 445, 975 P. 2d 783, 788 (1990). While this does not deprive the probationer of other rights such as due process, see *Gagnon* v. *Scarpelli*, 411 U. S. 778, 782, n. 4 (1973) (distinguishing *Escoe*), probation's status as a privilege is relevant to the Fourth Amendment analysis.

The state can deprive a convicted criminal of all of his or her Fourth Amendment rights.

> "Notwithstanding our caution in approaching claims that the Fourth Amendment is inapplicable in a given context, we hold that society is not prepared to recognize as legitimate *any* subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches *does not apply* within the confines of the prison cell." *Hudson* v. *Palmer*, 468 U. S. 517, 525-526 (1984) (emphasis added).

If this complete deprivation of Fourth Amendment rights is constitutional, then it is reasonable for a state to subject a grant of probation to a lesser, albeit broad, deprivation such as the search condition in the present case.

While it requires careful application in constitutional law, "the proposition that greater powers include lesser ones" is still valid as a matter of logic. See *44 Liquormart, Inc.* v. *Rhode*

Island, 517 U. S. 484, 511 (1996) (plurality opinion). The problems with its application to constitutional law have come from improper use in First Amendment cases. In *Posadas de Puerto Rico Associates* v. *Tourism Co. of P. R.*, 478 U. S. 328 (1986), this Court held that the power to ban gambling necessarily included the lesser power to prohibit the advertising of gambling, see *id*., at 345-346. The subsequent disapproval of *Posadas* correctly notes that regulating speech is not a lesser included power of regulating conduct. "The text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct." *44 Liquormart*, at 512.

That has not happened in this Fourth Amendment case. Probation is not qualitatively different from incarceration the way speech is qualitatively different from conduct. "Probation is simply one point (or, more accurately one set of points) on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service." *Griffin*, 483 U. S., at 875. Knights had notice of the search condition, including the authorization of searches by the police, and consented to it when he chose probation over prison. The search was supported by reasonable suspicion. The coincidence between the vandalism and Knights' problems with PG & E, the contents of Simoneau's truck, and Simoneau's close association with Knights, see *supra*, at 2, at least supported a reasonable suspicion to search Knights' apartment. As the Ninth Circuit noted, Detective Hancock "had drawn some very good inferences from the facts . . . ." *Knights*, 219 F. 3d, at 1143.[3] What happened to Knights was much less intrusive to his privacy interests than what the state could have done had it chosen to

3. While California does not require any level of suspicion to support probation searches, see *Bravo*, 43 Cal. 3d, at 610-611, 738 P. 2d, at 342-343, it is unnecessary to decide the constitutionality of that practice in this case, since this search was amply supported by much more than reasonable suspicion.

withdraw probation as an alternative to prison. This lesser deprivation must also be deemed reasonable in light of what Knights could have faced in prison.

An individual's home is not a prison cell, but see M. Nieto, Probation for Adult and Juvenile Offenders: Options for Improved Accountability 8 (Cal. Research Bureau 1998) (house arrest for high-risk probationers), but the defendant was not an average resident. He was a convicted criminal who was serving his sentence in the community. In order to protect the community, Knights first had to consent to warrantless, suspicionless searches by any law enforcement officer before being given the relative freedom of probation. This case is not about protecting the sanctity of the home, cf. *Knights*, 219 F. 3d, at 1144-1145, but about giving the state and criminal defendants the freedom to craft alternative punishments to imprisonment.

The balance of society's interests and the defendant's privacy expectations favors the search. The threat to public safety posed by probationers creates a special interest in deterring probationer's criminal tendencies through the prospect of warrantless searches by police officers without regard to the searching officer's motive. See part I, *supra*. As demonstrated above, defendant's expectation of privacy "that society recognizes as 'legitimate,' " *Vernonia*, 515 U. S., at 654, is small.

Upholding this search would encourage creative alternatives to prison. Both society and those probationers who genuinely wish to reform would benefit by holding Knights to his end of the bargain.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

July, 2001

Respectfully submitted,

CHARLES L. HOBSON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation