

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 86-5324

TITLE JOSEPH G. GRIFFIN, Petitioner V. WISCONSIN

PLACE Washington, D. C.

DATE April 20, 1987

PAGES 1 thru 58

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPREME COURT OF THE UNITED STATES

-----x  
JOSEPH G. GRIFFIN, :  
Petitioner :  
v. : No. 86-5324  
WISCONSIN :  
-----x

Washington, D.C.  
Monday, April 20, 1987

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 12:59 o'clock p.m.

APPEARANCES:

ALAN G. HABERMEHL, ESQ., Madison, Wisc.;  
on behalf of Petitioner  
BARRY M. LEVENSON, ESQ., Madison, Wisc.;  
on behalf of Respondent

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C O N T E N T S

ORAL ARGUMENT OF	PAGE
ALAN G. HABERMEHL, ESQ.,	
on behalf of the Petitioner	3
BARRY M. LEVENSON, ESQ.,	
on behalf of the Respondent	34

1 P R O C E E D I N G S

2 CHIEF JUSTICE REHNQUIST: We'll hear argument  
3 first this afternoon in No. 86-5323, Joseph Griffin  
4 versus Wisconsin. Mr. Habermehl, you may proceed  
5 whenever you're ready.

6 ORAL ARGUMENT OF

7 ALAN G. HABERMEHL, ESQ.

8 ON BEHALF OF PETITIONER

9 MR. HABERMEHL: Mr. Chief Justice and may it  
10 please the Court:

11 If there is any principle which is at the very  
12 bedrock of this Court's Fourth Amendment jurisprudence,  
13 it has to be that, in the absence of consent or exigent  
14 circumstances, the warrantless search of a person's own  
15 home is always and at every time and place unreasonable,  
16 it is always a violation of the Fourth Amendment, and  
17 that's all there is to it.

18 This Court has consistently taken that  
19 position, no matter what alternative positions have been  
20 urged to it by the Government in a variety of factual  
21 situations.

22 The case before this Court involves exactly  
23 that kind of search. Joseph Griffin, although he was on  
24 probation, was nonetheless in his own home when the  
25 search occurred. There was no warrant obtained, there



1 was not even an attempt to get a warrant. There was no  
2 consent obtained to the search. There were no exigent  
3 circumstances to justify the search.

4 In short --

5 QUESTION: Mr. Habermehl, was there some kind  
6 of consent expressed in the probation terms and  
7 conditions?

8 MR. HABERMEHL: The record in this case is  
9 devoid of any evidence that Mr. Griffin was ever  
10 presented with or agreed to any terms or conditions  
11 whatsoever of probation. The state has made allegations  
12 as to what the general practice is with the government.

13 And if the question goes to whether or not a  
14 rule were to, say, require that as a condition of  
15 probation a person consent to the search, my response to  
16 that would be that that is not consent within the  
17 meaning of the term as it's been used by this Court in  
18 allowing exceptions to the warrant.

19 That kind of consent is, I think, patently and  
20 clearly on its face coerced. It is a question of  
21 holding out to the probationer: You either agree to  
22 give up your otherwise existing constitutional right to  
23 be free of warrantless searches or you get to go to  
24 prison instead of being on probation.

25 QUESTION: Are you suggesting that the

1 Government can't impose any conditions on a probationer  
2 that might affect, that might treat the probationer  
3 differently for constitutional purposes than someone who  
4 had never been convicted of a crime?

5 MR. HABERMEHL: Certainly not. I am  
6 suggesting that at a minimum one thing they cannot do is  
7 require the probationer to give up his right to be free  
8 of warrantless searches of his own home.

9 QUESTION: Well, do you think they can require  
10 a probationer to associate only with law-abiding  
11 people?

12 MR. HABERMEHL: That is commonly done. I  
13 think it could be challenged on a case by case basis as  
14 being unreasonable and perhaps even impossible, given  
15 the number of people in our society who are obviously  
16 not law-abiding.

17 But I think that could be done if there were  
18 some particular reason to do so, yes.

19 QUESTION: So the probation-imposing judge  
20 could limit a person's constitutional right of  
21 association in that situation?

22 MR. HABERMEHL: I think so. But again, I --

23 QUESTION: And his right to travel?

24 MR. HABERMEHL: Again, another constitutional  
25 right that I think could be limited if there were some

1 particularized reason for it, as opposed to a simple  
2 blanket prohibition across the board for no reason  
3 whatsoever.

4 QUESTION: You mean they have to have a  
5 special reason to say, remain within the state?

6 MR. HABERMEHL: I think as a matter of  
7 constitutional law, if they're going to take away  
8 fundamental freedoms, which I believe the right to  
9 travel is recognized as being, that yes.

10 QUESTION: What if you're wrong on that? Are  
11 you also wrong on your present submission?

12 MR. HABERMEHL: No. I think that we're  
13 talking about a Fourth Amendment issue here and I think  
14 we can limit it to the Fourth Amendment issue.

15 QUESTION: How? On what basis? Is the right  
16 to travel less fundamental, or the right to associate?

17 MR. HABERMEHL: I think there are indeed few,  
18 if any, rights more basic, individual citizenship  
19 rights.

20 QUESTION: Are there any?

21 MR. HABERMEHL: The right to vote, I suppose,  
22 is equally basic. I don't think a judge could take away  
23 that right from a probationer just because he's on  
24 probation, either.

25 Yes, at a minimum those. The right to travel

1 could, I think, more readily be tied into the legitimate  
2 purposes of probation. It's difficult to supervise a  
3 person if they can go too far away without you having  
4 some control.

5 QUESTION: You say that they're taking  
6 something away from. They're not really taking  
7 something away from him. In the travel situation,  
8 they're giving him something. I mean, before he  
9 couldn't travel outside of the cell. Now they're saying  
10 you can travel anywhere in the state.

11 It seems to me rather perverse to say they're  
12 taking away his right to travel. They're giving him the  
13 right to travel. What you're saying is they have to  
14 give him the right to travel throughout the United  
15 States, or the world, for that matter, I presume,  
16 right?

17 MR. HABERMEHL: No, I did not say they have  
18 to. And your argument presumes that in fact they had  
19 been released from a cell, that is to say that the fact  
20 of criminal conviction took away all their rights and  
21 it's up to the Government to give back just as many as  
22 it pleases.

23 I believe this Court has in fact rejected that  
24 argument. In Morrissey versus Brewer, this Court stated  
25 that probationers do retain fundamental freedoms.



1 QUESTION: But not the right to travel  
2 anywhere they want. I mean, if incarceration means  
3 anything it means you can't travel anywhere you want.

4 MR. HABERMEHL: Probation is the antithesis of  
5 incarceration.

6 QUESTION: That's right.

7 MR. HABERMEHL: And is not incarceration.

8 QUESTION: I understand that. But what you're  
9 saying is you have to go all the way or you can't go at  
10 all. You have to either leave him in the cell or else  
11 let him travel throughout the United States.

12 MR. HABERMEHL: I did not say that. I believe  
13 a legitimate -- particularly with travel, that a  
14 legitimate concern of probation is to be able to  
15 maintain contact with the probationer, and in that  
16 regard I think a legitimate and reasonably framed  
17 restriction on a person's right to travel could indeed  
18 be imposed.

19 If a person were restricted to travel, for  
20 instance, to the point of not traveling outside their  
21 bedroom, we would probably have done it to the point of  
22 incarcerating them, and I don't think that's  
23 reasonable.

24 QUESTION: They're allowed to incarcerate  
25 him. He's been duly convicted and adjudged incarcerable

1 for a period of time. So why can't the state say,  
2 instead of letting you stay in your cell, we're going to  
3 let you stay in your room at home?

4 The state couldn't do that? That would be  
5 unconstitutional?

6 MR. HABERMEHL: I did not say that. It  
7 obviously would be constitutional to let them stay in  
8 their room at home. What is unconstitutional --

9 QUESTION: So why can't they say, we'll let  
10 you stay anywhere in this state, but not outside of this  
11 state?

12 MR. HABERMEHL: They could if it had a  
13 legitimate relationship to the purposes of probation.

14 QUESTION: No, no legitimate. That they just  
15 said, we're going to let you do it.

16 MR. HABERMEHL: The mere fact of being  
17 criminally convicted does not permit the state to take  
18 away all of one's constitutional rights.

19 QUESTION: But they can keep you in a cell;  
20 they just can't keep you in the state?

21 MR. HABERMEHL: They could do both, either.  
22 When they have chosen not to keep you in a cell, they  
23 have made that choice. Having made that choice, there  
24 is then no reason to allow them to tell you you have to  
25 subject your house to a warrantless search.

1 QUESTION: But that's only because you say  
2 so.

3 QUESTION: What case are you relying on?

4 MR. HABERMEHL: This Court has repeatedly  
5 stated --

6 QUESTION: In what cases?

7 MR. HABERMEHL: There is no case before this  
8 Court. This Court has never decided the issue before.  
9 There is no precedent one way or the other.

10 QUESTION: Well, if it's repeatedly stated, I  
11 take it those statements have occurred in written  
12 opinions of the Court?

13 MR. HABERMEHL: This Court has repeatedly  
14 stated that a person has the right in a person's own  
15 home to be free of warrantless searches and seizures.

16 QUESTION: But they weren't talking about  
17 probationers.

18 MR. HABERMEHL: They were not talking about  
19 probationers.

20 QUESTION: How about the right to vote? Do  
21 you think all -- how many states forbid felons to vote?

22 MR. HABERMEHL: My understanding -- I don't  
23 know how many states.

24 QUESTION: They used to quite frequently. Do  
25 they still?

1 MR. HABERMEHL: In Wisconsin, it's my  
2 understanding that felons are prohibited from voting  
3 during the period of their actual incarceration, while  
4 they're serving their sentence, and that subsequent to  
5 that they regain their civil rights.

6 QUESTION: When they're on probation, they  
7 are?

8 MR. HABERMEHL: Pardon me?

9 QUESTION: When they're on probation, they  
10 have regained their civil rights?

11 MR. HABERMEHL: It's my understanding that  
12 when they're on probation they do not vote.

13 QUESTION: And so you think that's  
14 unconstitutional, too? That's taking away a rather  
15 fundamental right, you say.

16 MR. HABERMEHL: I don't have an opinion. It's  
17 not a fact at issue in this case.

18 What we have at issue, again, in this --

19 QUESTION: If you are correct that the state  
20 is so limited in what terms and conditions it can impose  
21 on probation, it seems to me it would be a major  
22 disincentive for states to ever put someone on probation  
23 at all. The whole idea of probation is to release  
24 someone under enough restrictions in the terms and  
25 conditions that it becomes possible to let them have



1 some limited freedom in society.

2 But if your view of this matter is to prevail,  
3 why wouldn't judges prefer to incarcerate someone?

4 MR. HABERMEHL: The state has made the  
5 argument in this case that in fact by letting the  
6 government do warrantless searches they're doing  
7 defendants a favor, because that will encourage them  
8 putting them on probation.

9 The state has advanced no facts. That's a  
10 factual assertion and there's no evidence in the record  
11 to support it. Furthermore --

12 QUESTION: Well, I've been a trial judge and  
13 it certainly would have influenced me. It's just a  
14 matter of common sense. If I had thought as a trial  
15 judge that I couldn't place someone on probation with  
16 some meaningful terms and conditions and restrictions, I  
17 think there are many times when I would have had to  
18 rethink the desirability of extending probation.

19 Why isn't probation jail without walls, in  
20 effect?

21 MR. HABERMEHL: The specific condition of  
22 probation that's at issue in this case is the specific  
23 issue of warrantless searches of a person's own home.  
24 It has been my experience in dealing with judges as to  
25 when they do and do not put people on probation that the

1 question of whether or not someone's going to be allowed  
2 to warrantlessly search their home does not arise and  
3 has not been a factor, as opposed to the more likely  
4 factor of has this person got a good record or a bad  
5 record, are they likely to commit further crimes, or are  
6 they not, is this a serious offense or a minor offense,  
7 do we have room in our overcrowded jails or prisons for  
8 this person, or is it more rational to put them on  
9 probation.

10 None of those issues and concerns implicate  
11 whether or not their house can be subject to a  
12 warrantless search. The government states in its brief,  
13 and I think it's probably true, that in fact these  
14 search cases with probationers are not all that  
15 incredibly common, that issues arising out of searches,  
16 as opposed to the more common ways people get in trouble  
17 on probation, simply for committing new offenses, for  
18 failing to report or whatever, that these search issues  
19 are not that common that it is statistically that  
20 significant that it's going to result in a large change  
21 in the way judges view putting people on probation.

22 And frankly, I think the government's concern  
23 for defendants to the extent of saying that they're  
24 doing them a favor by denying them a constitutional  
25 right strikes me as self-contradictory.

1           QUESTION: Can I come back to your assertion  
2 that consent is not at all in this case. Can't we take  
3 judicial notice of a statute and of administrative code  
4 provisions?

5           I mean, we do know that the administrative  
6 code here explicitly says that a search of a client's  
7 living quarters or property may be conducted by field  
8 staff if there are reasonable grounds to believe that  
9 the quarters or property contain contraband.

10          MR. HABERMEHL: The administrative code  
11 clearly purports to allow such searches. It doesn't say  
12 anything about obtaining consent from probationers, nor  
13 does it say anything about whether or not probationers  
14 are going to be asked first whether they consent to the  
15 search.

16          QUESTION: Probationers consented to  
17 probation, didn't they?

18          MR. HABERMEHL: They did indeed.

19          QUESTION: Well, let's say someone consents to  
20 being convicted of a lesser included offense by a plea  
21 bargain. Doesn't he take everything that goes with that  
22 conviction? He may not know what the prison rules that  
23 guilty plea is going to subject him to. But by  
24 consenting to the law, he consents to everything that  
25 goes with the law.

1                   Why isn't that the same thing here?

2                   MR. HABERMEHL:  What happens specifically with  
3 the search issue is that this Court has defined consent  
4 in such a way as to require it to be freely and  
5 knowingly and voluntarily given.  And when the consent  
6 is going to be conditioned upon the alternative is to go  
7 to prison, you can't have probation unless you give up  
8 your other constitutional right, you are telling people  
9 they have to trade these rights.

10                  QUESTION:  Well, the plea bargain is bad then,  
11 too?

12                  MR. HABERMEHL:  No, the plea bargain is not  
13 bad.

14                  QUESTION:  Well, it's the same thing there.  
15 You're trading.  You know, the alternative is something  
16 else that's nasty that's going to happen to you.

17                  MR. HABERMEHL:  This Court has stated that, in  
18 the context of plea bargaining, it is not a violation of  
19 due process to give people that choice.  Subsequent to  
20 the conviction coming down, it becomes, for instance, a  
21 violation of due process.  It is not consent to up  
22 penalties in return for them exercising constitutional  
23 rights.

24                  And I believe in the context, finally, of  
25 search and seizure, which is occurring after conviction



1 and has nothing to do with the conviction, that at that  
2 point you no longer can trade one right for the other.

3 QUESTION: Your supreme court did not rely on  
4 consent at all, did it?

5 MR. HABERMEHL: No, the Wisconsin Supreme  
6 Court specifically did not rely on consent. Consent has  
7 never been argued by the state at any one of the three  
8 levels in the state court in which this case has been  
9 litigated and has not been established in the record.

10 QUESTION: It depends on what you mean by  
11 consent. In the Wisconsin Supreme Court's opinion, that  
12 could be interpreted to say it wasn't relying on the  
13 fact that at the time of the entry your client  
14 consented.

15 MR. HABERMEHL: And that is exactly the kind  
16 of consent this Court has consistently talked about when  
17 it talks about consent to a search.

18 QUESTION: I think we all agree that that  
19 consent is not in the case. But that still leaves the  
20 question of whether, in agreeing to accept probation,  
21 your client agrees to accept the rules that go with  
22 probation.

23 What about the other rules? Can none of the  
24 probationary rules be enforced because your client was  
25 not specifically advised about them? They were coerced

1 also, I presume, right?

2 MR. HABERMEHL: As a matter of fact, the law  
3 in Wisconsin is indeed that you cannot enforce  
4 probationary conditions unless you advise the client of  
5 them, with the general exception of the one condition  
6 that states that you shall not commit a further crime.  
7 And as to that condition, they assume that everyone  
8 knows that one.

9 QUESTION: But you say your client wasn't  
10 advised of any of these?

11 MR. HABERMEHL: The record is silent.

12 QUESTION: But Wisconsin law requires --

13 MR. HABERMEHL: It was the government's burden  
14 to demonstrate it and they did not.

15 QUESTION: So you say that if a probationer --  
16 if one of the conditions is that he not travel more than  
17 100 miles from his home, that unless he has expressly  
18 consented to that that can't be enforced as a term of  
19 probation?

20 MR. HABERMEHL: That is exactly correct, and  
21 exactly what happens is --

22 QUESTION: What case is it of ours that  
23 supports that proposition?

24 MR. HABERMEHL: I was referring to Wisconsin  
25 law and what happens in Wisconsin.

1 QUESTION: No, I meant as a matter of federal  
2 constitutional law, or weren't you talking about federal  
3 constitutional law?

4 MR. HABERMEHL: I was not. I didn't  
5 understand that to be the question.

6 QUESTION: You don't say that as a matter of  
7 federal constitutional law these conditions of probation  
8 may not be enforced unless there is consent, even though  
9 the conditions may affect constitutional rights?

10 MR. HABERMEHL: What needs to be shown is  
11 knowledge of them. I think consent of probation  
12 conditions quite frankly --

13 QUESTION: Is that a federal constitutional  
14 requirement?

15 MR. HABERMEHL: I believe it is a  
16 constitutional requirement of due process that a person  
17 be advised of what conduct will constitute a violation  
18 before that violation occurs, or else you can't punish  
19 them for it.

20 QUESTION: But I mean, that is far different  
21 from consent. A probationer could simply be served with  
22 a copy of the probation conditions and that would be  
23 notice, I take it.

24 MR. HABERMEHL: Exactly, and I don't think the  
25 issue of consent in that case, frankly, has any

1 meaning.

2 QUESTION: And you don't contend here that the  
3 probationer didn't have notice of the conditions of  
4 probation?

5 MR. HABERMEHL: The record is silent, but that  
6 is not my contention. I don't think that's the issue in  
7 this case, although the record is silent.

8 QUESTION: You take the case as though he knew  
9 what the conditions of probation were. He may not have  
10 consented to them, but he knew. And you say that that  
11 is not enough to permit a search without a warrant?

12 MR. HABERMEHL: On the contrary, to the extent  
13 that the issue matters, the record is silent and it is  
14 the government's burden to show knowledge, and they have  
15 failed to do so. It is not my burden to show that it  
16 didn't exist.

17 QUESTION: Why is it the government's burden?  
18 Why is it the government's burden?

19 MR. HABERMEHL: Because it is the government's  
20 burden to justify the warrantless search. That is this  
21 Court's rule.

22 QUESTION: You say then as a matter of Fourth  
23 Amendment law it's the government's burden to show  
24 knowledge of the probation conditions?

25 MR. HABERMEHL: If they are going to seek an



1 exception to the Fourth Amendment based upon the  
2 probation conditions, yes.

3 QUESTION: If the state shows that the  
4 following rules control all probationers and your client  
5 accepts probation, does he not accept the rules, without  
6 more?

7 MR. HABERMEHL: No, I do not believe he  
8 accepts them.

9 QUESTION: (Inaudible) apply to?

10 MR. HABERMEHL: I do not believe we are  
11 talking about a contract. What we are doing is  
12 challenging the constitutionality of a statute, or in  
13 this case --

14 QUESTION: But you didn't challenge it when  
15 you took probation.

16 MR. HABERMEHL: What I am saying in that  
17 regard --

18 QUESTION: Did you challenge it?

19 MR. HABERMEHL: Me personally, no.

20 QUESTION: Your client.

21 MR. HABERMEHL: Did Mr. Griffin challenge it?

22 QUESTION: Did your client challenge it?

23 MR. HABERMEHL: To my knowledge, no, I don't  
24 know one way or the other whether he did or not.

25 QUESTION: Well, if he didn't challenge it

1 then he accepted it.

2 MR. HABERMEHL: I don't know whether he  
3 challenged it or not. I did not represent him at the  
4 time and the record is silent.

5 QUESTION: Well, if the rules are and the law  
6 is that if you accept probation you accept these rules  
7 without more, and you accept probation, don't you accept  
8 the rules?

9 MR. HABERMEHL: That isn't the issue by this  
10 Court to be decided. The issue here is whether the  
11 government can constitutionally make people accept.

12 QUESTION: But can't you decide it right now  
13 yes or no?

14 MR. HABERMEHL: No, I do not believe that  
15 indicates that you have accepted the rules. You have  
16 acquiesced in being put on probation.

17 QUESTION: Acquiesce is the same as  
18 acceptance.

19 MR. HABERMEHL: Not in the sense that you  
20 agree to it.

21 QUESTION: Well, what do you mean? He has to  
22 come out and give an affidavit?

23 MR. HABERMEHL: If a person is going to  
24 consent, I believe the consent or acceptance, to be  
25 meaningful in a constitutional sense, has to be free and

1 voluntary. And when a person is not given the choice,  
2 then I do not believe he has consented.

3 And I believe the issue in this case is  
4 whether the government can indeed put the person to that  
5 choice constitutionally, and if so why they should be  
6 allowed to do so.

7 QUESTION: Well, why didn't you do that at the  
8 time probation was given?

9 MR. HABERMEHL: I was not representing him at  
10 that time and I do not know why he did or did not do  
11 it.

12 QUESTION: Well, again, why didn't your client  
13 do it?

14 MR. HABERMEHL: I don't know. I don't even  
15 know that he was aware of its existence.

16 QUESTION: Well, is there anything in the  
17 record that shows he objected to the rules of  
18 probation?

19 MR. HABERMEHL: There's nothing in the record  
20 to show anything about the rules one way or the other.

21 QUESTION: Is there anything in the record to  
22 show that he objected to it?

23 MR. HABERMEHL: No.

24 QUESTION: Mr. Habermehl, do you acknowledge  
25 that this case would be a different case if we were

1 dealing with a state that did not have any rules  
2 governing probation that set forth explicitly at the  
3 time the individual accepted probation that he would be  
4 subject to warrantless searches?

5 As far as you're concerned, there's no  
6 difference in the two cases? State A that has no such  
7 rules and right out of nowhere a probationer is  
8 confronted with a parole officer who crashes into his  
9 house and says, I'm searching your room, surely that's a  
10 different case from one where, when your client accepts  
11 probation, the probation rules say all probationers are  
12 subject to warrantless searches.

13 MR. HABERMEHL: It is my position that, to the  
14 extent that we're talking about whether or not the  
15 search itself can be permitted, that the knowledge of  
16 the existence of the rule is not the same as  
17 constitutionally satisfactory consent, and therefore it  
18 doesn't matter whether the rule exists.

19 On the other hand, I could make a stronger  
20 case saying that also, without prior knowledge of the  
21 rule, that in fact it was obvious there was no consent  
22 or even knowledge. You could find, I think, a due  
23 process violation there as well.

24 As to the Fourth Amendment issue, though,  
25 simply promulgating the rule and thereby saying, now



1 we've issued the rule and therefore you've no longer got  
2 a privacy right, begs the question. The question is  
3 whether the state can be allowed to issue the rule in  
4 the first place.

5 QUESTION: Wasn't this search pursuant to a  
6 regulation?

7 MR. HABERMEHL: There is no evidence in the  
8 record as to whether it was or was not.

9 QUESTION: Well, was there a regulation in  
10 existence?

11 MR. HABERMEHL: I believe there was.

12 QUESTION: Saying when you may conduct  
13 searches of probationers?

14 MR. HABERMEHL: I believe there was.

15 QUESTION: What did it say, or do you know?

16 MR. HABERMEHL: The current rule has a very  
17 explicit list of regulations, which is set forth  
18 verbatim in the Wisconsin Supreme Court decision. The  
19 rule in 1983 I believe was the same.

20 QUESTION: Well, it didn't authorize just  
21 searches for anything or just any time somebody wanted  
22 to search. There had to be reasonable suspicion. And  
23 what kind of a search was authorized by the  
24 regulations? For what?

25 MR. HABERMEHL: Contraband, among other

1 things, contraband being defined as --

2 QUESTION: What are the other things?

3 MR. HABERMEHL: I suspect for violations, for  
4 evidence of any violation.

5 QUESTION: You don't have to suspect. You  
6 ought to say what the rule is.

7 MR. HABERMEHL: I'm sorry. I have the rule in  
8 front of me.

9 QUESTION: That's the only one, I think, isn't  
10 it?

11 MR. HABERMEHL: The rule in particular is with  
12 specific regard to searching for contraband. Contraband  
13 in that sense I believe --

14 QUESTION: Is that what this search was for?

15 MR. HABERMEHL: Clearly.

16 QUESTION: Yes?

17 MR. HABERMEHL: Yes, it clearly was, yes.

18 Mr. Lew's understanding of the rule -- and if  
19 we're going to get into the issue of reliance on these  
20 rules, according to the record Mr. Lew's understanding  
21 of the rule was that he either had to have probable  
22 cause or authority of the supervisor.

23 That was his answer to the question of what  
24 did he have to have under this administrative  
25 regulation. And since he was the supervisor, he

1 authorized himself to search.

2 That was a completely incorrect understanding  
3 of the rule, and so the answer to whether the --

4 QUESTION: You're not contesting it on the  
5 basis that there was no reasonable grounds to believe  
6 that the quarters or property contained contraband?  
7 That hasn't been the basis of your attack.

8 MR. HABERMEHL: On the contrary, it is. It is  
9 one of the three things I have raised in the petition  
10 for certiorari.

11 QUESTION: That there was no reasonable cause  
12 to believe?

13 MR. HABERMEHL: That is correct, neither  
14 probable cause nor reasonable cause.

15 The reason warrants are required is not just  
16 because this Court thinks it's a good idea. It's in the  
17 Constitution and it's in the Constitution because the  
18 founding fathers of this country thought it was a good  
19 idea, and they thought it was a good idea to prevent  
20 general searches by government agents.

21 The Constitution says the people shall be  
22 secure in, among other things, their houses from  
23 unreasonable searches, and that no warrant shall issue  
24 --

25 QUESTION: The issue is the unreasonableness?

1 MR. HABERMEHL: Certainly, and this Court has  
2 said --

3 QUESTION: And the Constitution doesn't say  
4 this kind of a search is unreasonable.

5 MR. HABERMEHL: It certainly does not. It  
6 doesn't say anything about what kind of search is or is  
7 not unreasonable, other than that warrants must issue  
8 upon probable cause and can't be just general warrants,  
9 they have to be specific.

10 This Court has consistently interpreted those  
11 words in the Constitution in an ironclad fashion to say  
12 exactly the following: that absent a consent or exigent  
13 circumstances, a warrantless search of a house is per se  
14 unconstitutional.

15 QUESTION: Well, who said that you could get  
16 into a house without a warrant in exigent  
17 circumstances? A court did, didn't it?

18 MR. HABERMEHL: This Court did.

19 QUESTION: A court decided it was reasonable  
20 to get into a house when exigent circumstances exist.

21 MR. HABERMEHL: That's right, and the Court  
22 has decided that because the exigent circumstances  
23 exception takes as a given that in fact there is no time  
24 to obtain a warrant. We're not dealing with exigent  
25 circumstances in this case. No one in the court below



1 claimed or demonstrated exigent circumstances.

2 The only exception this Court has recognized  
3 to the warrant requirement for homes is either true  
4 consent, in the sense of a knowing and voluntary,  
5 they're at the door, you agree to let them come in  
6 consent, or exigent circumstances, and that's where the  
7 warrant is impractical to obtain.

8 QUESTION: Mr. Habermehl, what about an  
9 exception for -- say that the parole officer did not  
10 want to rummage through desk drawers and open drawers  
11 and look, but just wanted to come in and look around and  
12 talk to the probationer in his home. Would the Fourth  
13 Amendment preclude the probation officer from insisting  
14 on making a visit?

15 MR. HABERMEHL: I believe it would not.  
16 That's the Wyman versus James situation, and I think  
17 what distinguishes that sort of home visit from a search  
18 is twofold:

19 First of all, it's obviously and directly  
20 related to the supervisory and rehabilitative functions  
21 of probation.

22 But second and more important, its purpose is  
23 not to find evidence of wrongdoing. Its purpose is to  
24 maintain contact with the probationer, to just go there,  
25 see him, speak with him in his surroundings. And

1 indeed, that may be better than hauling him down to the  
2 office.

3 But its purpose isn't to find things.

4 QUESTION: Would you agree that the parole  
5 officer could -- say he answered the door and he said:  
6 I'd rather you come back tomorrow; the house is a little  
7 messy. And the parole officer said: No, I want to come  
8 in right now and just sit down and talk to you.

9 MR. HABERMEHL: I believe a parole officer or  
10 a probation officer could do that. And again, the  
11 reason I say that and why it does not implicate the  
12 Fourth Amendment is that in fact it is not a search, and  
13 not being a search it is not a violation of the Fourth  
14 Amendment's proscription against unreasonable searches.

15 QUESTION: It is an entry to the home,  
16 though.

17 MR. HABERMEHL: It certainly is an entry to  
18 the home. What makes a thing a search is looking for  
19 something. At that point, the probation officer is not  
20 in fact looking for any evidence of wrongdoing.

21 QUESTION: What if the probation officer walks  
22 in during one of these visits, finds a BAR on the  
23 table? Can he have that seized?

24 MR. HABERMEHL: Yes, I'm perfectly willing to  
25 accept that, if the initial entry is legitimate, that is

1 to say it is a non-search, a simple visit of the home

2 --

3 QUESTION: So long as he didn't intend to look  
4 for that?

5 MR. HABERMEHL: Exactly, and I think that's an  
6 essential element of the plain view exception to needing  
7 a warrant, that in fact a discovery be inadvertent. And  
8 that would fit perfectly. I don't have any problem with  
9 that. I think that fits just fine within the  
10 constitutional framework.

11 QUESTION: If the problem had been that the  
12 defendant was an abuser of alcohol and the probation  
13 officer suspected he was going home every day and  
14 getting drunk, I suppose under your view the probation  
15 officer couldn't make a home visit?

16 MR. HABERMEHL: Depending on the purpose of  
17 it, if it was only to --

18 QUESTION: To see if he was in fact coming  
19 home every day and getting drunk.

20 MR. HABERMEHL: He could go visit to talk with  
21 him. I don't think he could go visit to rummage around  
22 the house and look for the empty bottles.

23 QUESTION: To see if he had alcohol on his  
24 breath.

25 MR. HABERMEHL: I think he could go that far,

1 because I do not believe that's a search, talking to  
2 someone and smelling their breath. Your breath is  
3 something you exhibit to the public, and I do not  
4 believe that constitutes a search.

5 I have no problem with that, either, as  
6 opposed to, for instance, taking a blood sample, which I  
7 think clearly would be a search and would require more.

8 QUESTION: Mr. Habermehl, I apologize for not  
9 realizing that you were not just challenging the lack of  
10 probable cause, but also whether even reasonable grounds  
11 to believe existed here.

12 MR. HABERMEHL: I believe I made that clear.

13 QUESTION: It is clear.

14 Why is it you say that there were no -- not  
15 even reasonable grounds to believe? There was a tip  
16 from another police officer.

17 MR. HABERMEHL: The tip specifically -- and it  
18 was from some informant, who no one knows who it is, who  
19 gave information to a police officer, who no one knows  
20 who it is, who then apparently relayed it on to the  
21 probation officer.

22 The tip consisted of nothing more than --

23 QUESTION: But Mr. Habermehl, is it even clear  
24 that any informant ever talked to a police officer? No  
25 police officer ever testified that he talked to any



1 informant, did he?

2 The probation officer said some unnamed police  
3 officer told him he'd been talked to.

4 MR. HABERMEHL: At the trial, Truit Pitner,  
5 the officer, testified that -- and this is at appendix  
6 pge 39 -- that although he was not the person, to the  
7 best of his recollection, that nonetheless he had  
8 received -- that it was his understanding that the  
9 police department had "received reliable information"  
10 about the gun.

11 QUESTION: It was his understanding.

12 MR. HABERMEHL: That's correct.

13 QUESTION: But no police officer testified  
14 that he received any tip from any informant.

15 MR. HABERMEHL: That's correct, mainly because  
16 no one could ever find out who the police officer was  
17 who spoke to Mr. Lew in the first place. But your point  
18 is correct.

19 QUESTION: So there is no testimony that any  
20 informant actually talked to any police officer.

21 MR. HABERMEHL: That's correct. There is  
22 absolutely no information in the record whatsoever as to  
23 the source of this tip, nor is there any internal  
24 corroboration to it or external corroboration, nor any  
25 attempt made to corroborate it.

1 Reasonable grounds, as this Court has defined  
2 it, to my understanding in making even a traffic stop  
3 requires a specific and articulable set of facts from  
4 which an objective person could make inferences. And it  
5 has to have some sort of reliability, not just a little  
6 birdie whispered in my ear. And all we have here is, a  
7 little birdie whispered in my ear, and there's no way to  
8 tell how reasonable the basis of that information is.

9 QUESTION: May I ask, do we even know that the  
10 person who talked to the parole officer and said he was  
11 a police officer, that he was really a police officer?

12 MR. HABERMEHL: No, there's no way to tell  
13 that from the record, because he's unidentifiable.

14 QUESTION: So it could have been a third party  
15 who just called him up and said: I'm a police officer  
16 and I think there's something in that house.

17 MR. HABERMEHL: It's perfectly possible.

18 The one last point I wanted to make, as long  
19 as I had a minute, that I think the Wisconsin court  
20 ignored and I think can deal with some of the other  
21 issues that have been raised is that --

22 QUESTION: Excuse me. Before you get off on  
23 that, because this is an important point to me, is this  
24 a question of state law or federal law? If they fail to  
25 comply with the reasonable grounds to believe provision,

1 they are failing to comply with a state statute. Is  
2 that a question of federal law?

3 MR. HABERMEHL: It's my understanding that the  
4 reasonable grounds which would justify this Fourth  
5 Amendment search would be a federal as well as state  
6 constitutional requirement.

7 It is a lesser standard than probable cause,  
8 but nonetheless some standard is required by the federal  
9 Constitution, as well as the state constitution in  
10 Wisconsin, to justify the search. And you may call it  
11 reasonable grounds, but it's still some required quantum  
12 of evidence under the Constitution. It is not just a  
13 question of a violation of a regulation.

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
15 Habermehl.

16 Mr. Levenson, we'll hear now from you.

17 ORAL ARGUMENT OF  
18 BARRY M. LEVENSON, ESQ.  
19 ON BEHALF OF RESPONDENT

20 MR. LEVENSON: Mr. Chief Justice and may it  
21 please the Court:

22 The word "probation" comes from the Latin  
23 "probare," meaning to prove, because the probationer  
24 must prove himself. He has broken the law, broken our  
25 criminal code, and must prove that he is deserving of

1 continued liberty.

2 The usual penalty, in fact the expected  
3 penalty, is incarceration, which is of course a loss of  
4 liberty. And yet, we authorize sentencing judges to  
5 exercise discretion and withhold this awesome power of  
6 the state to take away completely the offender's  
7 liberty, and instead probation is granted.

8 The offender remains in the community, subject  
9 to restrictions. This is a risk, and all statistics  
10 have demonstrated this. It is a risk that is a  
11 substantial risk, but it is one worth taking.

12 And it is made acceptable because of these  
13 restrictions and because of the supervision of the  
14 community corrections professionals that guide and  
15 monitor the probationer. Therefore, we see that the  
16 probationer's liberty and expectation of privacy is  
17 certainly greater than that of the prisoner in the cell,  
18 where such expectation of privacy is virtually none, but  
19 it is less than the unconvicted member of society.

20 The liberty then is both reduced and  
21 conditional. Typical restrictions which this Court has  
22 already reviewed this afternoon include restrictions on  
23 freedom of movement, restrictions and limits on  
24 associations, limits on various activities -- typically  
25 restrictions that individuals on probation may not



1 lawfully possess firearms, a restriction in Wisconsin  
2 that applies both to individuals who are on probation  
3 for felonies as well as on misdemeanors.

4 Other substantive restrictions involve  
5 requirements that probationers undergo treatment or seek  
6 counseling.

7 QUESTION: Mr. Levenson, does the record in  
8 this case tell us what the terms and conditions of  
9 probation were?

10 MR. LEVENSON: The record itself does not, in  
11 the sense that there was no testimony by any probation  
12 officer or anyone present at the time probation was  
13 extended that these conditions were explained to Mr.  
14 Griffin, that he signed the agreement.

15 QUESTION: Is there anything that tells us  
16 what the terms and conditions were?

17 MR. LEVENSON: Yes, the administrative code.  
18 And I think there is a presumption of regularity that  
19 should attach to that. The code provides not only what  
20 the various restrictions are, but explains quite clearly  
21 that as a matter of state law the probationer must be  
22 told of these conditions.

23 In terms of the various conditions and  
24 restrictions, there are also a category of restrictions  
25 that I would call control restrictions -- conditions

1 that facilitate the probation officer's ability and duty  
2 --

3 QUESTION: Mr. Levenson, can I interrupt you  
4 for just a second and follow up on Justice O'Connor's  
5 question.

6 The general rules, are they incorporated in  
7 every probation?

8 MR. LEVENSON: Yes.

9 QUESTION: Is there any deviation? Does a  
10 judge ever impose an additional term or condition?

11 MR. LEVENSON: Yes, the judge may do that and  
12 there may be additional. For example, what is or is not  
13 contraband may be subject to modification.

14 QUESTION: And may the judge also say, the  
15 condition on say traveling outside the state, for  
16 example, I'll release you from that because you're a  
17 traveling salesman?

18 MR. LEVENSON: That certainly can happen.

19 QUESTION: So is it not possible that this  
20 probationer's conditions deviated in some respects from  
21 the general rule? We don't know, do we?

22 MR. LEVENSON: We don't know that. That would  
23 certainly be an irregularity. And certainly a  
24 probationer may petition the court for modification of a  
25 probation condition.

1 QUESTION: Did the probation officer testify  
2 that he told him that?

3 MR. LEVENSON: No, he did not.

4 QUESTION: Would that have been too difficult  
5 to put on, that proof? To get the probation officer in  
6 to say, I told him that?

7 MR. LEVENSON: I don't know that it would have  
8 been difficult. I'm sure the records would have  
9 indicated who the original probation officer was, and it  
10 certainly could have been done.

11 QUESTION: Well, why wasn't it done?

12 MR. LEVENSON: Apparently it was not done  
13 because there was either a reliance on the presumption  
14 of regularity or just felt that it was not necessary.  
15 It had never been contested in the lower courts that Mr.  
16 Griffin was not advised of these conditions, and this is  
17 frankly something that is being raised, to my knowledge,  
18 for the first time at oral argument before the United  
19 States Supreme Court.

20 Before the state court of appeals, before the  
21 state supreme court, that was not an issue. It was  
22 never raised.

23 QUESTION: What was the issue?

24 MR. LEVENSON: The issue was whether,  
25 specifically, whether or not this search was reasonable

1 under the Fourth Amendment. In so doing, there was  
2 never a challenge to the presumption of regularity, and  
3 this specific provision in the administrative code that  
4 calls for an explanation and a review to the probationer  
5 was never challenged, even though that was part of the  
6 appellate record.

7 QUESTION: (Inaudible) the Miranda rule, that  
8 you gave the man his rights? Don't you always do that?

9 MR. LEVENSON: Yes.

10 QUESTION: Well, why didn't you tell him here,  
11 that you gave him his parole rights?

12 MR. LEVENSON: Justice Marshall, frankly, I  
13 think the reason is that there has never been a ruling  
14 by this Court or any other court that has required the  
15 giving of such information in a suppression hearing.  
16 That certainly may well be an issue for the Court.

17 The reporting requirements that are embodied  
18 in the various control restrictions include: general  
19 reporting requirements, that I think the Court is well  
20 aware of -- a probationer must regularly report to his  
21 or her agent -- and then there are conditions regarding  
22 control, monitoring, and supervision that may implicate  
23 the Fourth Amendment.

24 For example, the routine home visit may  
25 implicate the Fourth Amendment. It is an entry into the



1 home. It's not at issue here and Petitioner agrees that  
2 that is valid.

3 Another very common restriction that may raise  
4 Fourth Amendment questions is a requirement that the  
5 probationer submit to chemical tests, blood or urine  
6 tests, to detect drugs or alcohol.

7 At issue here, the condition that permits a  
8 search of the probationer's residence without a warrant  
9 on less than probable cause.

10 We should not, however, ignore other functions  
11 of the probation officer and the probation authorities.  
12 It's very easy, in getting caught up in this case, to  
13 see the probation officer as one whose duty is solely to  
14 go around snooping and looking for violations, trying to  
15 monitor, supervise in a negative way.

16 But there's so much more involved in the  
17 scheme of probation, and the Court must be aware of  
18 that.

19 QUESTION: Mr. Levenson, what did the  
20 administrative regulation require the probation officer  
21 to have by way of suspicion to justify a search in the  
22 home?

23 MR. LEVENSON: Reasonable grounds to believe  
24 that contraband was contained in the home, and that's  
25 the only condition.

1 QUESTION: Do you think -- do you take the  
2 position that it was certainly reasonable simply on the  
3 basis of an unidentified tip, not knowing the source?

4 MR. LEVENSON: Yes, it was, and I'll explain  
5 why I think it was reasonable.

6 QUESTION: Yes, please.

7 MR. LEVENSON: In considering the  
8 reasonableness of the tip, first of all, the state  
9 courts found that, even though there was a problem in  
10 identifying the identity of the police officer, that it  
11 was a detective from the Beloit police department.  
12 Considering also Mr. Griffin --

13 QUESTION: It was a detective that did what?  
14 It was a detective from Beloit that did what?

15 MR. LEVENSON: Who informed the probation  
16 officer, Mr. Lew, the probation supervisor, that Mr.  
17 Griffin may have guns in his apartment.

18 QUESTION: All they said -- I thought the  
19 court said that the detective said he had information  
20 leading him to believe that the gun was in that house.

21 MR. LEVENSON: He had grounds to believe that  
22 Mr. Griffin may have guns, I believe that was the  
23 testimony at both the suppression hearing and the  
24 trial.

25 QUESTION: Well, I know. But how did the

1 courts -- that may have been the testimony, but what was  
2 the finding of the court?

3 MR. LEVENSON: The court had findings of fact  
4 to make, and that is where did this information come  
5 from? Did it in fact come from a police officer? The  
6 court had the credibility of Mr. Lew, the supervisor --

7 QUESTION: Is this wrong? The supreme court,  
8 your supreme court, said at the trial the supervisor  
9 testified the detective who called him said: "They had  
10 information that Mr. Griffin had a gun in his possession  
11 in his residence."

12 Is that an accurate quote from the record?

13 MR. LEVENSON: I believe that's an accurate  
14 quote from the supreme court's decision. I think the  
15 record --

16 QUESTION: They purport to be quoting.

17 MR. LEVENSON: Yes, I believe -- and I'm not  
18 sure if they're quoting from the suppression hearing or  
19 from the trial. I'm not sure if it's a major  
20 distinction.

21 QUESTION: They judged the case on the basis  
22 that there was a report like this.

23 MR. LEVENSON: Yes.

24 QUESTION: And that a search based on that  
25 report was enough, I mean was legal.

1 MR. LEVENSON: That's correct. And what was  
2 also involved here, Justice White, was the fact that the  
3 probation authorities have more information, information  
4 that does not come directly from the police. They have  
5 information with respect to the client.

6 They know about the client's previous history  
7 with the criminal justice system.

8 QUESTION: When you say "the client," you're  
9 referring to the probationer?

10 MR. LEVENSON: That's correct, right. That's  
11 typical jargon, if you will, in the state of Wisconsin,  
12 I think across the country. They're regarded as  
13 clients. They're not regarded as the defendants or as  
14 the offender.

15 It's the clients, in part because of the  
16 helping nature of probation in terms of assisting with  
17 jobs, counseling, all kinds of other things. They did  
18 have Mr. Griffin's extensive prior record and his  
19 history with the corrections process.

20 And the question then for the courts of course  
21 was whether it was reasonable --

22 QUESTION: Mr. Levenson, is that a question  
23 for the state courts or is it a question for this  
24 Court?

25 MR. LEVENSON: I think it's a question for the



1 state courts as to assessing what information was  
2 available and --

3 QUESTION: I mean, what they think is  
4 reasonable could -- it depends on how broadly you're  
5 framing your argument here. If you're trying to  
6 persuade us only that the federal Constitution permits  
7 searches of probationers' homes on reasonable cause,  
8 then I guess we're going to have to decide whether there  
9 was reasonable cause here.

10 MR. LEVENSON: That's correct.

11 QUESTION: But you might argue that the  
12 Constitution permits searches of probationers' homes at  
13 any time, or at least at any reasonable time, with or  
14 without cause. And if that's the constitutional law,  
15 then whether this particular search was in compliance  
16 with the Wisconsin reasonable cause provision is solely  
17 a question of Wisconsin law, isn't it?

18 MR. LEVENSON: That's correct.

19 QUESTION: And we would be bound by the  
20 supreme court of Wisconsin's finding on it.

21 MR. LEVENSON: Wisconsin has decided that  
22 under its rules it will permit warrantless searches of  
23 probationers' residences only upon reasonable  
24 suspicion. That does not mean that under the federal  
25 Constitution searches can be more extensive than that.

1           As a matter of state law, a search that did  
2 not meet that standard, even though it might meet the  
3 federal standard, would not be permitted.

4           QUESTION: May I just follow that up with your  
5 understanding of your argument. Supposing we disagree.  
6 If the words "reasonable cause" may mean one thing in  
7 the Wisconsin rules and another thing when you're  
8 looking at Terry stops and the like, and supposing we  
9 thought that they had gone so far in Wisconsin to in  
10 effect say, we'll call anything reasonable in Wisconsin  
11 and therefore even an arbitrary search will satisfy this  
12 rule, because reasonable to us means we want to know  
13 what the probationer is up to.

14           In other words, we're going to say a random  
15 search is okay in Wisconsin. Would that be okay as a  
16 matter of federal constitutional law in your view?

17           MR. LEVENSON: That a random search?

18           QUESTION: Yes, and not only a random search  
19 by a probation officer, but supposing they said all  
20 probation officers in Wisconsin have to be aware of the  
21 fact that any time the police feel they'd like to search  
22 their house they can go ahead and do it.

23           Would that comply with the Fourth Amendment in  
24 your view?

25           MR. LEVENSON: I don't believe -- I think

1       there would be real problems with that.

2               QUESTION: And what would be the problem?

3               MR. LEVENSON: Certainly under the theory that  
4       Wisconsin has consistently advanced in terms of the  
5       nature of probation, those things would not be  
6       applicable if you're talking about a police search. And  
7       there have been a few jurisdictions that have in fact  
8       authorized any search of a probationer's residence, even  
9       by the police.

10              QUESTION: Right.

11              MR. LEVENSON: Just by virtue of the fact that  
12       the individual is a probationer. Of course, that's not  
13       the case we have before the Court today, because that  
14       kind of a search would not be permissible.

15              An issue that did come up at --

16              QUESTION: Well, it might be if we disagreed  
17       with you on -- if we thought that you'd gone so far in  
18       Wisconsin on interpreting reasonable cause to say any  
19       anonymous tip is enough, and one police officer calls  
20       another up and says, I think this fellow has a gun in  
21       his house or might have had one last month, that's  
22       enough, let's go search.

23              MR. LEVENSON: Perhaps what we are then  
24       getting into is a question of ultimately a question of  
25       fact that was resolved against Mr. Griffin below, and

1 that is was this a probation search was it a police  
2 search.

3 That was a question that was litigated below.  
4 That's a finding of fact and it's well supported by the  
5 record.

6 QUESTION: Do you think it makes a difference  
7 as a matter of federal constitutional law? That's what  
8 I'm really asking you.

9 MR. LEVENSON: I think it conceivably makes a  
10 difference, and the reason is it lies in the nature of  
11 probation. If we are in fact relying on the unique  
12 nature of probation to justify this kind of search, what  
13 we're talking about then is the special relationship  
14 between the probationer and the probation authorities.  
15 That would not then give license to anyone to go in and  
16 make the search.

17 Just as in New Jersey versus T.L.O., even  
18 though the Court said a reduced level of suspicion  
19 without a warrant would justify the search of a student  
20 by the police authorities, I don't think it could be  
21 fairly read into that that, because of that individual's  
22 status as a student, that any other official could go in  
23 and search that student.

24 QUESTION: Counsel, just so I'm sure what your  
25 argument is now, your argument is not that the federal



1 Constitution permits searches of probationers' homes for  
2 reasonable cause. It's rather that it permits searches  
3 by probation officers?

4 MR. LEVENSON: That's correct.

5 QUESTION: Even without reasonable cause? You  
6 can't have it both ways. Either we're going to look  
7 into whether there was reasonable cause or we're not.  
8 If we're not, then it seems to me you have to bite off a  
9 bigger chunk of federal constitutional law, right?

10 MR. LEVENSON: Justice Scalia, my argument is  
11 that the federal Constitution permits searches of a  
12 probationer's residence by a probation officer on less  
13 than probable cause, on what we would call reasonable  
14 cause or reasonable suspicion.

15 It may also, in a case that's certainly not  
16 before the Court now, permit it on something less than  
17 reasonable cause.

18 QUESTION: (Inaudible) answer to that last  
19 question, which apparently you don't want to answer,  
20 then I am going to have to investigate as a federal  
21 judge whether there was reasonable cause here. You  
22 can't both tell me that that's a matter of state law and  
23 yet reserve the question of whether you need reasonable  
24 cause or not.

25 MR. LEVENSON: Perhaps then I misspoke to say

1 that it's a matter of state law. What I was getting at,  
2 Justice Scalia, was the findings, the findings of fact,  
3 should be regarded as matters of state law, state  
4 findings.

5 QUESTION: (Inaudible.)

6 MR. LEVENSON: Yes, that a detective, a  
7 detective -- and apparently there was a problem at the  
8 suppression hearing in identifying who it was. Mr.  
9 Lew's credibility obviously was on the line here. Is he  
10 just making it up or was it a detective that he just  
11 didn't write the name down, or he couldn't recall?

12 QUESTION: (Inaudible) that a detective did  
13 call and did give this information.

14 MR. LEVENSON: And he got this information.  
15 The reasonableness then of acting on that information,  
16 perhaps without remembering his name or further  
17 investigation, is certainly a matter of federal  
18 constitutional law. I have no problem with that at  
19 all.

20 QUESTION: But then does it follow that if we  
21 think that it was not reasonable to rely on the  
22 anonymous tip that he "may have had guns" in the  
23 apartment, if we think that's not enough reasonable  
24 cause then you lose?

25 MR. LEVENSON: Not necessarily. For one

1 thing, it depends on how we regard winning and losing.

2 To the extent of --

3 QUESTION: Well, the judgment's reversed.

4 MR. LEVENSON: The judgment may be reversed.  
5 The judgment may be reversed, but still it's a question  
6 of, I think, of greater consequence, not whether or not  
7 this particular conviction stands. Of greater  
8 consequence to the state of Wisconsin is whether or not  
9 this kind of administrative scheme will be allowed to  
10 stand.

11 It is certainly possible that a court might  
12 say the rule is fine, but you didn't comply with it  
13 because there wasn't reasonable grounds.

14 QUESTION: Somebody later may be more  
15 courageous than you and want to argue before us that you  
16 don't even need reasonable cause, that perhaps the  
17 searches must be limited to reasonable times, but if  
18 you're a probationer the state probation officials can  
19 come in just for a spot check, have no reason to believe  
20 you have guns, but you're on probation instead of in a  
21 cell, and we're just checking up on you.

22 Now, somebody should be free to argue that at  
23 some future time, even if you're not willing to, don't  
24 you think?

25 MR. LEVENSON: Certainly someone should be

1 free to argue that.

2 QUESTION: But you're not arguing it here.

3 MR. LEVENSON: Wisconsin has decided that it  
4 does not want to take that approach, that it wants to  
5 --

6 QUESTION: And you don't even want to argue  
7 that as a matter of federal constitutional law that  
8 would be okay, even though Wisconsin doesn't want to go  
9 down to the constitutional minimum? You just don't want  
10 to have any part of that argument?

11 MR. LEVENSON: Not at this time.

12 QUESTION: In other words, you're not going to  
13 say to us that what we should do is apply a  
14 reasonableness standard as a matter of federal  
15 constitutional law, such as in T.L.O.?

16 MR. LEVENSON: Quite the contrary. No, quite  
17 the contrary, I think that the ultimate question is was  
18 this search reasonable under the Fourth Amendment.

19 QUESTION: Is that the standard we should  
20 employ for federal constitutional --

21 MR. LEVENSON: Absolutely.

22 QUESTION: -- standards? The T.L.O.  
23 standard?

24 MR. LEVENSON: Yes, was it reasonable under  
25 all the circumstances.



1 QUESTION: That doesn't answer the question of  
2 whether there should be a warrant.

3 MR. LEVENSON: No, it certainly doesn't.

4 QUESTION: What about that requirement? Is it  
5 any great burden for the state to obtain a warrant on  
6 the basis of a reasonable cause standard?

7 MR. LEVENSON: I think there is a problem,  
8 because --

9 QUESTION: Why?

10 MR. LEVENSON: -- the warrant requirement says  
11 no warrant shall issue but on probable cause.

12 QUESTION: Well, but hasn't this Court looked  
13 separately at the inquiry of what the standard should be  
14 and whether there should be a warrant required?

15 MR. LEVENSON: I think there, Justice  
16 O'Connor, that it's helpful to look to other  
17 administrative search cases where this has come up,  
18 where the Court did not require a warrant. And I'll try  
19 and first answer the question --

20 QUESTION: At least the Court has inquired  
21 separately about those two questions.

22 MR. LEVENSON: Yes. Yes, they have, and in  
23 fact --

24 QUESTION: What should the standard be and  
25 whether there should be a warrant.

1 MR. LEVENSON: Yes. And in fact, I believe  
2 the Court addressed this very directly in the Camara  
3 decision, as to the functions of the warrant. And what  
4 we're talking about here, of course, is the  
5 administrative search context.

6 QUESTION: Camara was also a home search,  
7 wasn't it?

8 MR. LEVENSON: Yes, Camara was a home search.

9 QUESTION: Incidentally, Mr. Lew waited  
10 several hours before --

11 MR. LEVENSON: Yes, he did, from two to  
12 three.

13 QUESTION: Can you tell me, does the record  
14 show why he waited that long?

15 MR. LEVENSON: Yes.

16 QUESTION: He could have obtained a warrant if  
17 one were desired during that period.

18 MR. LEVENSON: Well, he could have tried to  
19 get a warrant. He could not himself have applied  
20 directly for a warrant. In Wisconsin, the probation  
21 officer cannot do that in the usual circumstance.

22 As to why he waited, the reason he waited was  
23 to contact the primary or principal probation officer,  
24 because as a matter of practice it's considered best to  
25 have the primary officer that Mr. Griffin is going to be

1 familiar with.

2 He was unavailable. It then became a  
3 balancing act for the probation officer. He waited some  
4 time to try and contact the officer, couldn't do that,  
5 and then had the hard decision himself to make, because  
6 he had a report that Mr. Griffin, a convicted felon,  
7 someone who had an extensive record, might have a gun.  
8 That's something he had to weigh.

9 QUESTION: I thought he went into the home  
10 with police officers.

11 MR. LEVENSON: Yes, he requested police  
12 protection.

13 QUESTION: And so why couldn't he have  
14 obtained a warrant on reasonable cause, if that's the  
15 correct standard?

16 MR. LEVENSON: If that's the correct standard,  
17 I suppose he could have. The reason why he didn't --

18 QUESTION: And why would that be difficult?

19 MR. LEVENSON: The reason why he didn't do it  
20 was simply that --

21 QUESTION: But why would that be difficult?

22 MR. LEVENSON: It may not -- if in fact,  
23 Justice O'Connor, that it is possible to get a warrant  
24 on less than probable cause or some other definition of  
25 probable cause that comes up with something that's less

1 than traditional probable cause, it perhaps would not  
2 have been difficult or so difficult to foreclose that  
3 opportunity.

4 But one must also consider the fact that in  
5 other administrative search cases --

6 QUESTION: Well, on the other hand, it's just  
7 easier to go ahead in. He's worried about everybody  
8 else's rights, his boss, his judges, everybody else. So  
9 then he doesn't want to contact any of them, so he takes  
10 the easy way out and goes to the guy that has no  
11 defense.

12 MR. LEVENSON: I don't know if he's taking the  
13 easy way out, Justice Marshall. I think what he's doing  
14 is --

15 QUESTION: Well, what easier way could he do  
16 it? What easier way could he search the house?

17 MR. LEVENSON: This was certainly the most  
18 direct way to find out --

19 QUESTION: You raised the word "easy." What  
20 easier way was there?

21 MR. LEVENSON: There may not have been an  
22 easier way. But certainly the most direct way to find  
23 out if there is contraband in the house, and especially  
24 this most dangerous kind of contraband in the hands of a  
25 convicted felon, a firearm, which he cannot have -- and



1 the courts have all too often seen instances of people  
2 on probation and parole committing further and more  
3 aggravated offenses.

4 Certainly the need to check that out, to get  
5 that over with, so that the business of rehabilitation  
6 and further supervision could go on, was extremely  
7 important.

8 In terms of getting a warrant, the Court in  
9 Camara discussed the purposes of a warrant. That's why  
10 I think the administrative search area is very important  
11 just to look at. And although for the most part prior  
12 administrative search cases have not extended into  
13 warrantless searches of a home, there is nothing in  
14 these cases that necessarily precludes a warrantless  
15 administrative search from meeting the ultimate test of  
16 reasonableness.

17 And if we look at the administrative search  
18 cases, they can be divided into several categories. You  
19 have, for example, the periodic inspection versus the  
20 non-periodic inspection. Then you also have those cases  
21 that have been held to require warrants, those cases  
22 that have been held not to require warrants.

23 It bears examination as to what factors have  
24 convinced the Court that a warrant is not required to  
25 satisfy the command of reasonableness. One is the area

1 of regulation: Is it pervasive? Is public safety  
2 implicated? Is the object of inspection difficult to  
3 conceal?

4 A second factor that the Court has found  
5 important is deterrence: Is there a legitimate  
6 deterrent effect served by warrantless searches?  
7 Without question, as can be seen from the comments to  
8 the administrative code, that's a major consideration in  
9 adopting this kind of search, which is not used that  
10 often.

11 Mr. Habermehl was correct in stating that  
12 these are not used very often. Very few of them are  
13 used. It's on a need-to-do basis.

14 Although the record does not indicate this, to  
15 the best of my knowledge in terms of what I can find  
16 out, maybe 200 or 300 a year. And we're talking about  
17 over 20,000, nearly 25,000 people in Wisconsin who are  
18 under probation supervision or parole supervision.

19 Finally, I think the third test that the Court  
20 has considered most important in terms of authorizing  
21 warrantless entries and warrantless searches or  
22 inspections in the administrative area is this: Are  
23 there standards or rules that govern these searches, not  
24 for their own sake, but to ensure that the decision to  
25 search and the method of searching is not left to the

1 unbridled discretion of the officer in the field?

2 And although comprehensive rules are not  
3 absolutely required in every warrantless administrative  
4 search -- for example, New Jersey versus T.L.O. was an  
5 administrative search in the sense that this was not a  
6 police search -- they may provide the same protections  
7 that a warrant usually provides.

8 And in that context, Donovan versus Dewey  
9 asked the question: What additional protections could a  
10 warrant possibly provide? Camara discussed the various  
11 purposes of a warrant: essentially to guarantee that  
12 the search is not left to the unreviewed discretion of  
13 the officer in the field.

14 And I say to this Court that a comprehensive  
15 administrative scheme such as Wisconsin's, that does  
16 these things, does all that a warrant could possibly  
17 hope to do, is reasonable under the Fourth Amendment.

18 If there are no other questions, I will  
19 conclude my argument.

20 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
21 Levenson.

22 The case is submitted.

23 (Whereupon, at 1:58 p.m., the above-entitled  
24 case was submitted.)  
25

# CERTIFICATION

Anderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#86-5324 - JOSEPH G. GRIFFIN, Petitioner V. WISCONSIN

---

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)



RECEIVED  
SUPREME COURT, U.S.  
MARSHAL'S OFFICE

'87 ABR 28 P4:22