

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: PENNSYLVANIA BOARD OF PROBATION AND
PAROLE, Petitioner v. KEITH M. SCOTT

CASE NO: 97-581 c. |

PLACE: Washington, D.C.

DATE: Monday, March 30, 1998

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 PENNSYLVANIA BOARD OF :

4 PROBATION AND PAROLE, :

5 Petitioner :

6 v. : No. 97-581

7 KEITH M. SCOTT :

8 - - - - -X

9 Washington, D.C.

10 Monday, March 30, 1998

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 11:05 a.m.

14 APPEARANCES:

15 D. MICHAEL FISHER, ESQ., Attorney General of Pennsylvania,
16 Harrisburg, Pennsylvania, on behalf of the
17 Petitioner.

18 MALCOLM L. STEWART, ESQ., Assistant to the Solicitor
19 General, Department of Justice, Washington, D.C.; on
20 behalf of the United States, as amicus curiae,
21 supporting the Petitioner.

22 LEONARD N. SOSNOV, ESQ., Philadelphia, Pennsylvania; on
23 behalf of the Respondent.

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1 PROCEEDINGS

2 (11:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 97-581, Pennsylvania Board of Probation and
5 Parole v. Scott.

6 General Fisher.

7 ORAL ARGUMENT OF MICHAEL FISHER

8 ON BEHALF OF THE PETITIONER

9 GENERAL FISHER: Mr. Chief Justice and may it
10 please the Court:

11 This case is about Pennsylvania's ability to
12 properly supervise the 21,000 prisoners who have been
13 released from jail into the community on parole. In this
14 case, Keith Scott, the respondent, was a convicted
15 murderer given a 20-year prison sentence and was released
16 on parole in his eleventh -- during his eleventh year.

17 That release was subject to a number of
18 conditions, among them that he not possess or use
19 firearms, that he not possess or use drugs or alcohol,
20 that he reside in an approved residence, and the condition
21 most important for the consideration of this case was a
22 requirement that he consent to a search of his person.

23 QUESTION: Now, let me ask you a question or
24 two, if I may, General Fisher. I take it the Pennsylvania
25 courts have determined that the consent provision that was

1 signed simply did not go beyond consent to search without
2 a warrant and determined that that did not mean that
3 consent was given to a search without reasonable
4 suspicion. I take it that's the thrust of what the courts
5 below found.

6 GENERAL FISHER: That's correct.

7 QUESTION: And presumably Pennsylvania can
8 redraft its consent form to cover that, I suppose.

9 GENERAL FISHER: Justice O'Connor, Pennsylvania
10 supreme court interpreted the consent provision to mean
11 that, in this case, that Scott agreed to reasonable
12 searches within the meaning of the Fourth Amendment, and
13 to be reasonable the Pennsylvania supreme court said that
14 the search required reasonable suspicion. That is the
15 issue with which we are --

16 QUESTION: Well, I -- to get back to my
17 question, I take it they just said that this form that was
18 signed didn't cover the issue of reasonable suspicion,
19 that all it covered was whether it could be without a
20 warrant, and in the absence of a consent, then, they said
21 reasonable suspicion is still required.

22 GENERAL FISHER: They said that the -- their
23 interpretation was that -- their reading of the Fourth
24 Amendment was that the -- that Scott consented to a
25 reasonable search, and that a reasonable search required

1 reasonable suspicion. We believe --

2 QUESTION: I'm not sure you're right in saying
3 that the Pennsylvania supreme court based its
4 interpretation of the consent form on its reading of the
5 Fourth Amendment. I thought they might have just based it
6 on an interpretation of Pennsylvania law.

7 GENERAL FISHER: Mr. Chief Justice, we argue
8 very strongly that they did, in fact, interpret it based
9 on their reading of the Fourth Amendment, and that is
10 where we disagree. We believe that a search of a
11 parolee's residence may be without suspicion, or a
12 suspicionless search.

13 QUESTION: Well, you -- suppose this consent
14 form were redrafted to make clear that the person paroled
15 is consenting to a search without a warrant and to a
16 search without any suspicion whatever. Suppose it were
17 drafted that way. Now, what do you think the Pennsylvania
18 courts would say to that?

19 GENERAL FISHER: It's -- we believe that the
20 Pennsylvania courts would say, based on what they said in
21 this case, that we could not have that kind of consent
22 form, because we believe they have --

23 QUESTION: -- the Fourth Amendment?

24 GENERAL FISHER: Because the Fourth Amendment
25 requires reasonable suspicion.

1 QUESTION: It just wasn't clear to me whether
2 that's what they said, because they could have meant the
3 consent form just didn't cover it.

4 GENERAL FISHER: No, Justice O'Connor, we think
5 they said very clearly that the Fourth Amendment requires
6 reasonable suspicion.

7 QUESTION: Where do they say that? Do you want
8 to gives us the --

9 QUESTION: Don't they say that in the earlier
10 Williams case is where they said it?

11 GENERAL FISHER: Well, they said it --

12 QUESTION: It's not in this case. It's in --

13 GENERAL FISHER: They said it both in the
14 Williams case, but in this case at the -- in our petition
15 for certiorari, which contains the opinion of the
16 Pennsylvania supreme court at page 10a, about half-way
17 down that page, the second paragraph. It says applying
18 Williams to the instant case we hold that appellee has a
19 Fourth Amendment right against unreasonable searches and
20 seizures that is unaffected by his signing of the consent
21 to search provision.

22 QUESTION: Because the consent provision did
23 not -- did not purport to waive it. I mean, isn't that --

24 GENERAL FISHER: Going back to Williams, the
25 Court then said in Williams that you had to have as a

1 matter of Fourth Amendment rights reasonable suspicion.

2 QUESTION: Williams really isn't all that clear,
3 because Williams relied on the Arkansas Williams case,
4 which is also ambiguous. I think it's really hard to get
5 at a clear bright line answer from the Williams opinion.

6 GENERAL FISHER: Well, we argue, Justice
7 Stevens, that the issue before this Court is whether or
8 not the consent in this case, and whether or not the law
9 of the Fourth Amendment gives parole boards and parole
10 agents such as ours the right to conduct these searches
11 without --

12 QUESTION: There are two questions --

13 GENERAL FISHER: Without suspicion.

14 QUESTION: There are two questions here really,
15 are there not? The first is the Fourth Amendment
16 question, and the second is whether the exclusionary rule
17 applies to probation revocation --

18 GENERAL FISHER: That's correct, Your Honor,
19 and --

20 QUESTION: Now, what if we thought the
21 exclusionary rule didn't apply?

22 GENERAL FISHER: Well --

23 QUESTION: Didn't apply. Then do we reach the
24 first question or not? What difference does it make --

25 GENERAL FISHER: Mr. Chief Justice --

1 QUESTION: -- if it doesn't apply?

2 GENERAL FISHER: -- and Justice O'Connor, I
3 think that there are two separate questions here.

4 We believe, as we have argued, that you do not --
5 that you -- that parole agents in our State can conduct
6 suspicionless searches of parolees, but in the event this
7 Court does not agree with our opinion on that, we believe
8 very clearly that the exclusionary rule should not apply.

9 In fact, the Court has always recognized that the
10 exclusionary rule imposes substantial costs on society, as
11 it withholds trustworthy evidence and impedes the search
12 for the truth and, in fact, this Court has never extended
13 the exclusionary rule beyond criminal trials or criminal
14 appeals, and there -- we think that the -- in fact the
15 Court has ruled that the exclusionary rule is not
16 applicable to civil proceedings, that the exclusionary
17 rule is not applicable to grand jury proceedings, nor is
18 it applicable to civil deportation proceedings.

19 The exclusionary rule -- parole revocation
20 proceedings are informal, flexible administrative
21 proceedings, as a contrast to a formal criminal trial.
22 That is why we believe this Court has never extended other
23 rights, such as the right to counsel, the right to a jury
24 trial, the right to confront witnesses, or the right to
25 object to hearsay testimony.

1 QUESTION: One of our concerns with the
2 exclusionary rule in the case of police investigations of
3 crime is that the police have an interest in trying to get
4 a conviction. Will the respondents tell us in this case
5 that parole officers have an equivalent interest in
6 showing that there's been a violation of parole, or is the
7 dynamic, the incentive, the motivation of the parole
8 officer somehow different than the police officer?

9 GENERAL FISHER: We think the motives, and we
10 think the role of parole agents is different than police
11 officers.

12 So the police officer's primary job is to
13 investigate crime, make cases, get convictions, which has
14 been recognized in cases by this Court, but parole
15 officers, their job is a two-part role. It is protecting
16 the community from people like Scott, convicted murderers
17 who have been put back in the community, but also to
18 rehabilitate the individual.

19 Parole officers who returned all of their
20 parolees to jail would be failures, so we think that --

21 QUESTION: But you don't think the police
22 officer wants to put somebody in jail unless he thinks
23 he's guilty, do you?

24 GENERAL FISHER: Certainly he wouldn't, but
25 still there's a different standard, and I believe that

1 this Court has recognized that the principal role of a
2 police officer is to enforce the law, to carry out the
3 law, but the parole agent's job is significantly different
4 from a police officer.

5 QUESTION: Yes, but doesn't the parole agent
6 have a slightly different motivation in this respect. If
7 the parolee whom he is supervising goes berserk, or just
8 returns to criminal activity, the -- you know, the outcry
9 is going to be, where was the parole supervision? Why
10 didn't they catch this?

11 Isn't there therefore a sort of built-in
12 motivation on the part of a parole officer to be very
13 cautious, to be careful, and to be looking for signs of
14 trouble, which puts him pretty much in the same position
15 that the police officer is in in looking for signs of
16 trouble, and taking action to cover himself as well as to
17 protect the community if he sees signs of risk?

18 GENERAL FISHER: Yes, Your Honor. Certainly the
19 parole officer has a dual role. As you have said, they
20 have to be concerned about the community. When people
21 like Scott, convicted murderers, are placed back in that
22 community they obviously have a responsibility to try to
23 protect the community, but just as important to that
24 parole officer is rehabilitation.

25 But obviously, one of the reasons why we

1 believe --

2 QUESTION: Well, he wants to rehabilitate those
3 who are not violating conditions, but I -- it seems to me
4 he has just as much motivation to recommit those who are
5 violating conditions as the police officer does to arrest
6 and see to the conviction of somebody who is violating a
7 statute in the street.

8 GENERAL FISHER: But so, too, we think that the
9 difference between a formal criminal trial and of
10 revocation proceeding is important in looking at the
11 question of the exclusionary rule.

12 One who stands trial stands before that Court
13 cloaked with the presumption of innocence. What you have
14 here when you're dealing with a convicted murderer who is
15 out on parole is someone who has been convicted, so that I
16 think that the important thing for the parole --

17 QUESTION: Which means that the significance of
18 illegally seized evidence is more damning in the parole
19 case than it is, perhaps, in the trial case.

20 GENERAL FISHER: I don't --

21 QUESTION: Because as you say, there's no such
22 presumption that the evidence has to overcome.

23 GENERAL FISHER: But the issue before the parole
24 board at a revocation proceeding is whether or not in fact
25 the parolee has conducted himself pursuant to the

1 conditions upon which he was released, and I think the
2 parole board has the right to know all of the reliable
3 evidence which if, in fact, the exclusionary rule were
4 applied would deny that --

5 QUESTION: General Fisher, are other rules of
6 evidence relaxed or foregone in a parole revocation
7 hearing as compared with a criminal trial?

8 I mean, here you're asking -- we're discussing a
9 rule of evidence that applies sometimes in criminal
10 proceedings. In what other respects, if any, are rules of
11 evidence different in parole hearings?

12 GENERAL FISHER: Well, yes, Your Honor, the
13 rules of evidence are relaxed in parole revocation
14 proceedings. For instance, the -- hearsay evidence is
15 readily admitted in parole revocation proceedings. There
16 is a -- it's an informal process.

17 Normally, the case for the parole board would be
18 presented by a parole agent, not an attorney, not an
19 attorney representing the parole board, but a parole agent
20 who would give his version of the facts, his version of
21 what the parolee has done while out on parole, and there's
22 a vastly different give-and-take in the process of the
23 parole hearing.

24 For instance, parolees generally testify, give
25 testimony as to what they have done, and so it is a very

1 informal, flexible proceeding, and that is why I believe
2 it is important for a parole board to be able to get the
3 benefit of all relevant evidence which goes to the
4 question of whether or not that parolee should be allowed
5 to stay in the community subject to the conditions or to
6 be turned -- to be sent back to jail, so that's why we
7 would ask that the exclusionary rule not be extended to
8 parole revocation proceedings.

9 I would like to get back to the issue involving
10 the validity of the search.

11 QUESTION: In respect to that, could I ask you,
12 the part that I found most difficult in respect to the
13 question Justice O'Connor asked is on page 9a, in talking
14 about the question of consent, the court cites a -- an
15 earlier case and says that there, I guess, if I'm reading
16 it correctly, we concluded that the parolee's signing of a
17 parole agreement giving the officer permission to conduct
18 a warrantless search does not mean -- and here they say
19 two things.

20 And the first, it's either-or, and the either
21 says, either that the parole officer can conduct a search
22 at any time and for any reason, i.e., it does not consent
23 to random searches, or that he relinquish his Fourth
24 Amendment rights, so it sounds because of that either-or
25 that the Court in Pennsylvania is holding that this

1 consent is not a consent to random searches, and if that
2 is so, how could we reach the issue of whether it is
3 constitutionally permissible for a State to do what you
4 want to do, which is to conduct random searches?

5 GENERAL FISHER: Justice Breyer, in the court's
6 opinion in the Scott case, from which you read, we believe
7 that a full reading of that opinion, and particularly
8 their holding, makes it clear that they were interpreting
9 what they believed to be a reasonable search, which was
10 that a reasonable search required reasonable suspicion.

11 That goes back to the Williams case, but an
12 analysis of the Williams case, Williams -- Commonwealth v.
13 Williams in Pennsylvania, as opposed to the other case
14 which Justice Stevens referred to, an analysis of that
15 Williams case goes in quite at length as an analysis of
16 what is required under both the Fourth Amendment of the
17 United States Constitution and what is required under
18 article I, section 8 of the Pennsylvania constitution, and
19 we believe very strongly that the Court couched their
20 opinion in both Williams and in Scott on what they
21 interpreted the requirements of the Fourth Amendment to
22 do, and that is where we disagree.

23 QUESTION: So in your view if Pennsylvania
24 corrections officials recast this consent and said, I
25 consent to the search not only without a warrant but

1 without reasonable suspicion, the supreme court of
2 Pennsylvania would say, under the Fourth Amendment you
3 can't do that?

4 GENERAL FISHER: That is correct, Mr. Chief
5 Justice, and that is where we find the major disagreement,
6 and we think that the suspicionless search which we
7 believe is permissible under the Fourth Amendment dealing
8 with parolees is very similar to the kinds of searches
9 that this Court has approved before, in the past.

10 The analysis to look at is whether or not the
11 individual had a diminished expectation of privacy and
12 whether there were special needs. Clearly, we think that
13 a parolee who was released --

14 QUESTION: To be more precise, you think the
15 suspicionless search would not violate the Fourth
16 Amendment if the parolee has consented to it, and that if
17 the Pennsylvania supreme court were free to adopt what it
18 thought the right reading of that consent form was, it
19 would so interpret it?

20 GENERAL FISHER: That's correct. That's
21 correct. But in the prior cases, where this Court has
22 approved suspicionless searches involving drug tests of
23 student athletes, sobriety checkpoints, the searches of
24 firearm dealers border stops, we think this case -- we
25 think this case involving parolees fits right within those

1 exceptions which the Court has properly made in the past,
2 approving suspicionless searches.

3 Mr. Chief Justice, if there are no further
4 questions, I will reserve the balance of my time for --

5 QUESTION: Very well, General Fisher.

6 Mr. Stewart, we'll hear from you.

7 ORAL ARGUMENT OF MALCOLM L. STEWART

8 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

9 SUPPORTING THE PETITIONER

10 MR. STEWART: Mr. Chief Justice, and may it
11 please the Court:

12 Although the United States believes that parole
13 may validly be conditioned on the parolee's consent to
14 search, we also believe that this case can be decided on
15 the alternative ground that the Fourth Amendment
16 exclusionary rule should not apply to parole revocation
17 proceedings.

18 This Court, when deciding whether the
19 exclusionary rule should be extended to procedural
20 settings other than the criminal trial, has recognized
21 that that determination turns on a balance of the public
22 and governmental interests at stake against the likely
23 determination of exclusion of unlawfully acquired
24 evidence, and in our view there are two distinct
25 governmental interests that militate against application

1 of the exclusionary rule.

2 First, and I think the nub of our argument is
3 that where an individual has already been convicted of a
4 crime and has been released in the community based upon
5 the condition that he abide by specified terms of release,
6 there is an overriding public and governmental interest in
7 accurate and complete information regarding the question
8 of whether the parolee has, in fact, complied with those
9 terms.

10 At the very premise of parole is that parolees,
11 persons previously convicted of crimes, pose a greater
12 risk of committing further unlawful acts than does the
13 average citizen, and the purpose of the revocation hearing
14 is not simply to punish the parolee for violation of the
15 conditions of his release but rather to determine whether
16 the parolee can safely be left in the community.

17 QUESTION: Yes, but is that realistic, because I
18 don't know how much longer this individual is going to be
19 put away as a result of the revocation here, but I assume
20 that in most States a parole revocation can result in a
21 very substantial incarceration.

22 And I am assuming the second thing that you may
23 want to comment on, and that is that if there is a
24 substantial period of reincarceration, the likelihood of
25 an independent criminal prosecution for the acts that led

1 to the commitment, recommitment, is probably very low.

2 The State is probably not going to bother to prosecute if
3 they can put the person away for a substantial period of
4 time on a parole revocation.

5 So my questions are, isn't it in fact a lot like
6 a criminal trial?

7 MR. STEWART: It is certainly -- it has some of
8 the same consequences of a criminal trial, namely that the
9 individual is incarcerated.

10 With respect to Mr. Scott, the State has
11 represented in its reply brief that Scott was up for
12 reparole I believe in 1997 and reparole was denied, and
13 that he is up for reparole again in 1998, so certainly the
14 finding of parole violations may ultimately have the
15 effect of requiring him to serve his whole term.

16 On the other hand, they do not preclude the
17 possibility that he can convince the State parole board
18 that in fact he warrants rerelease notwithstanding both
19 the prior crime and the subsequent violation of the terms
20 of parole.

21 As to your second question, while parole does
22 have some of the same consequences as the initial criminal
23 conviction, the Court has recognized most emphatically in
24 Morrissey v. Brewer that the parole revocation proceeding
25 need not take on the procedural accoutrements of the

1 criminal trial, that because the individual's initial
2 liberty interest has already been extinguished by the fact
3 of the prior crime and the prior conviction, what is at
4 stake is the conditional liberty interest of somebody who
5 has been released as subject both to conditions that
6 wouldn't be imposed on the citizenry at large and closer
7 supervision and monitoring to make sure that those
8 conditions are met.

9 QUESTION: I think what I had in the back of my
10 mind was this argument. The argument is made, and I
11 guess, as I recall, it's made here, that nothing much is
12 to be gained for society at large by applying an
13 exclusionary rule here because it's already gained by
14 applying the exclusionary rule in criminal trials, so that
15 in point of fact, if the officer is not deterred from
16 illegal conduct by knowledge that the evidence so seized
17 cannot be used in a criminal trial, there's not going to
18 be any incremental deterrence by saying well, you can't
19 use it in a parole revocation either.

20 If, on the other hand, the parole revocation is
21 probably going to be the only proceeding in which this
22 evidence is used, if the parole revocation really is
23 functioning like a criminal trial and that's the only
24 trial that there's going to be, then the argument about
25 deterring the police is not a sound -- or the parole

1 officers in this case is not a sound argument.

2 Because in fact the only proceeding in which the
3 evidence is likely to be used to satisfy society's demands
4 is the proceeding for the revocation of parole and
5 therefore it would make sense, if we are going to take the
6 Fourth Amendment to apply here, to say there ought to be
7 an exclusionary rule for the same reason that we do in the
8 case of a normal criminal trial.

9 MR. STEWART: I think the two answers we would
10 say to that are, first, individual cases may arise in
11 which the primary or even the only use of the evidence
12 acquired is for parole revocation proceedings.

13 But an officer certainly wouldn't know that
14 before he or she began to conduct the search, and the
15 possibility that evidence of very serious additional
16 criminal acts might be discovered and might not be usable
17 at a subsequent criminal prosecution for those acts would
18 be expected to amount to a substantial deterrent to the
19 extent that the individual parole officer was looking at
20 things from a law enforcement perspective.

21 The other thing, the point I would like to make,
22 and I think this follows on the heels of the point that
23 General Fisher was making, is that we expect parole
24 officers to operate under a different incentive structure
25 than do police officers.

1 That is not to deny that there is a law
2 enforcement component to what parole officers do.
3 Certainly there is.

4 But the parole officer also develops a
5 continuing relationship with the parolee, thinks of the
6 parolee as a client in some sense, and is expected to
7 balance those two possibly competing obligations.

8 And for instance, this Court has said that
9 magistrates and State legislators don't need the deterrent
10 of the exclusionary rule, because they can be expected to
11 be neutral without it.

12 Presumably the Court didn't mean that
13 magistrates and State legislators have no interest in the
14 apprehension of criminals or the enforcement of the
15 criminal law.

16 Rather, those officials are neutral in the sense
17 that they are institutionally well-positioned to take
18 account both of the societal interest in the enforcement
19 of the law and the individual interest in avoiding
20 unwarranted incursions on personal liberty, and we --

21 QUESTION: Mr. Stewart, can I ask you one
22 question before your time is up?

23 What is the position of the United States on the
24 other issue in the case, whether there was a violation of
25 the Fourth Amendment, and whether Pennsylvania was

1 following Pennsylvania law or Federal law?

2 MR. STEWART: Our position is that if the
3 consent form is construed to authorize searches without
4 individualized suspicion, that that consent form is
5 consistent with the Fourth Amendment.

6 We don't take a position on what the
7 Pennsylvania consent form meant, and we frankly think that
8 the Pennsylvania supreme court's opinion both in this case
9 and in Williams are ambiguous on that score.

10 I think that means on the one hand that there is
11 not the plain statement of independent State law grounds
12 that would preclude this Court's jurisdiction --

13 QUESTION: So --

14 MR. STEWART: -- but I think it also means --

15 QUESTION: -- you would take the view that if
16 it's ambiguous, then, the Michigan v. Long principle
17 applies, and we assume that they were at least pushed in
18 their direction by the Federal Constitution?

19 MR. STEWART: I -- we assume for purposes of
20 determining whether this Court has jurisdiction to reach
21 the issue obviously, when the Court has two alternative
22 grounds on which it could decide the case, the relative
23 certainty that the Pennsylvania supreme court's resolution
24 of exclusionary rule issue was based solely on Federal
25 constitutional grounds might cause the Court as a

1 prudential matter to decide that that's likely to be a
2 cleaner and more final resolution of the case than
3 deciding the case on the consent issue.

4 QUESTION: What would we do if we disagreed with
5 you on that question?

6 MR. STEWART: If you disagreed with us on the
7 exclusionary rule?

8 QUESTION: Yes.

9 MR. STEWART: If you disagreed with us on the
10 exclusionary rule, then I suppose you would have to
11 determine first whether you had jurisdiction to determine
12 the propriety of the search and, second, if you had
13 jurisdiction whether the search was valid.

14 QUESTION: You regard both of those questions to
15 be constitutional questions?

16 MR. STEWART: Well, the Fourth Amendment
17 exclusionary rule question is -- it's a question of
18 Federal law. It is constitutionally grounded. Obviously,
19 the Court has said that the exclusionary rule is not
20 constitutionally compelled.

21 The Court has, however, held that State courts
22 are required to employ the Federal -- the Fourth Amendment
23 exclusionary rule in State criminal proceedings, and to
24 that extent this Court has held it has authority to
25 require that procedure of at least some State officials.

1 Again, going back to what we see as the
2 overriding governmental interest here, this Court in
3 Lopez-Mendoza made clear that the exclusionary rule, at
4 least ordinarily, would not be applicable in situations
5 where the purpose of a proceeding was to determine whether
6 an ongoing violation was being committed, as opposed to
7 proceedings where the purpose was to impose a sanction for
8 a prior violation.

9 I mean, in some sense a parole revocation
10 hearing has attributes of both. On the one hand, we are
11 talking about a violation, possession of firearms, that
12 occurred at a discrete point in time. On the other hand,
13 the point of the proceeding is, again, to determine not
14 simply whether Mr. Scott should be punished for a prior
15 bad act, but whether he can safely be allowed to remain in
16 the community.

17 And the final thing I'd say is, we do think that
18 the nature of parole revocation hearings is such that
19 imposition of the exclusionary rule would substantially
20 change the character of the proceeding.

21 That is, in the Federal system, for instance --
22 I'm sorry.

23 Thank you, Mr. Chief Justice.

24 QUESTION: Thank you, Mr. Stewart.

25 Mr. Sosnov, we'll hear from you.

1 ORAL ARGUMENT OF LEONARD N. SOSNOV

2 ON BEHALF OF THE RESPONDENT

3 MR. SOSNOV: Mr. Chief Justice, and may it
4 please the Court:

5 As an initial matter I think there are two
6 reasons why the Court should not raise -- reach the issue
7 of whether a parolee can voluntarily consent to
8 suspicionless searches. The first one the Court has
9 already mentioned, and that is that there is an
10 independent and adequate State ground here.

11 Unlike Michigan v. Long, this case involves a
12 State regulation, a State parole form to construe.
13 Michigan v. Long just involved a free-floating
14 constitutional analysis.

15 Secondly, this Court said in Griffin that when
16 there is a State regulation involved, as in this case, we
17 take the meaning as fixed by the Supreme Court before we
18 get to any constitutional analysis.

19 Thirdly, if you look at the Pennsylvania supreme
20 court in this case, as far as the opinion, the supreme
21 court opinion refers only to one case, Williams. It says,
22 we rely on Williams, the Pennsylvania supreme court case.
23 It says that twice. If this Court --

24 QUESTION: In regard to your second point, Mr.
25 Sosnov, we do have several cases that say if a State court

1 in deciding a question before it is mistakenly of the view
2 that its conclusion is required by the Fourth Amendment,
3 then we will -- we have jurisdiction to disabuse it of
4 that if we don't think it's required by the Fourth
5 Amendment.

6 MR. SOSNOV: Correct, if the State felt
7 compelled, and what I'm saying is that the evidence here
8 is not that the State felt compelled, because the
9 Pennsylvania supreme court referred only to a Pennsylvania
10 supreme court decision.

11 QUESTION: Yes, but it's true, the portion of
12 the Pennsylvania supreme court in Williams, it's under the
13 subhead Fourth Amendment.

14 MR. SOSNOV: Well, there's another portion of
15 Williams --

16 QUESTION: And then -- I know, later --

17 MR. SOSNOV: There's another portion of
18 Williams.

19 QUESTION: And that's --

20 MR. SOSNOV: The other portion of Williams --

21 QUESTION: And that's still ambiguous because it
22 refers to an Arkansas case that it says it decided, and
23 that's ambiguous, so the whole thing is pretty ambiguous.

24 MR. SOSNOV: Well, there's two things about
25 that. First of all, the last part of Williams

1 independently analyzes the Pennsylvania constitution, and
2 reaches the result of that's how we're going to construe
3 that --

4 QUESTION: And that part of it says that in --
5 lots of times our constitution gives greater protection
6 than the Federal does, but not in this case.

7 MR. SOSNOV: And it cites no Federal
8 constitutional law in making the independent
9 constitutional analysis. Under Pennsylvania
10 constitutional analysis this Court's opinions are not
11 referred to. They look to other States. They look to --

12 QUESTION: Don't they say in the opinion, this
13 very opinion, that they're not relying on the Pennsylvania
14 constitution?

15 MR. SOSNOV: They're not relying on the
16 Pennsylvania constitution in this very case, but in this
17 very case, before they get to the Fourth Amendment issue
18 they're making an independent construction of the State
19 provision.

20 I'd like to point out one other thing, and that
21 is that this Court looks beyond the face of Scott
22 referring to Williams. There's another Pennsylvania
23 supreme court case, Commonwealth v. Gibson, cited in my
24 brief, which says as a matter of State Pennsylvania law
25 consent has to be specific and unequivocal, and now that

1 gets to my second position.

2 When you read the provision, the provision says,
3 I consent to without a warrant. Let's say this Court
4 disagrees with me on the adequate independent State ground
5 issue. Where does that leave us? That leaves us with
6 this Court construing that provision.

7 If you construe that provision without a
8 warrant, certainly in light of this Court's prior
9 jurisprudence without a warrant doesn't mean without any
10 objective level of information. Griffin itself said, you
11 need reasonable suspicion to search a parolee's home. You
12 don't need a warrant. Terry v. Ohio, you need reasonable
13 suspicion. You don't need a warrant.

14 There is nothing on the face of this provision
15 that waives anything, if it's capable of waiving anything,
16 that waives anything except a warrant.

17 QUESTION: But if you did interpret it -- I
18 mean, I'm not -- I know that you think we shouldn't, but
19 if you did reach the following question, is a random gun
20 search consistent with the Fourth Amendment, I take it on
21 the merits the question would be, if the Fourth Amendment
22 permits random drug searches without consent of persons
23 who have never been convicted of a crime, why doesn't it
24 permit random gun searches with consent of persons who
25 have been convicted?

1 MR. SOSNOV: If the --

2 QUESTION: I'm trying to focus directly on the
3 constitutional question there.

4 MR. SOSNOV: Aside from consent.

5 QUESTION: No. I said, assuming that
6 Pennsylvania wrongly thought -- I don't know if we get
7 there.

8 Assuming that Pennsylvania thought that the
9 Constitution, the Fourth Amendment, prohibits a random gun
10 search of a parolee with consent, what's your view on
11 that?

12 The argument against it, if the Constitution
13 permits a random gun search without consent of a person
14 who hasn't been convicted in certain circumstances, why
15 doesn't it permit a random gun search with consent of a
16 person who has been convicted?

17 MR. SOSNOV: I think there --

18 QUESTION: Maybe you'll agree that that is
19 constitutional, or maybe you won't.

20 MR. SOSNOV: I think it would --

21 QUESTION: I don't know.

22 MR. SOSNOV: A two-part answer.

23 QUESTION: Yes.

24 MR. SOSNOV: First of all, a random search of an
25 individual's home would not be permissible under the

1 constitutional normally. Of course, you need -- under
2 Payton you need a -- probably cause and a warrant, so --

3 QUESTION: But they say no probable cause, no
4 warrant, if it's random, done as a law enforcement
5 measure, with consent by the parolee.

6 Now, that's the question. Now, what's the
7 answer?

8 MR. SOSNOV: The answer to that is that this
9 Court should not find voluntary consent, because as this
10 Court has interpreted the term before, it certainly should
11 not abandon that interpretation. What voluntary consent
12 means is a free and unconstrained choice without any
13 coercion, explicit or implied. Now, unless --

14 QUESTION: Are you saying, then, that a parolee
15 can't consent to any of the terms of the parole?

16 MR. SOSNOV: No. That's not my position at all.
17 What I'm saying is, the State cannot impose an
18 unconstitutional condition as a matter of probation or
19 parole and then try to sustain that on a theory, a
20 fictional theory of consent, as in this case.

21 QUESTION: Well, suppose you have somebody like
22 Michael Milliken, who is paroled after having some
23 securities fraud. Do you think the parole authorities can
24 say you can't write any prospectuses while you're on
25 parole?

1 MR. SOSNOV: Of course.

2 QUESTION: That's certainly a violation of the
3 First Amendment.

4 MR. SOSNOV: But it doesn't depend -- the
5 validity of parole conditions and probation conditions
6 don't depend on the consent, or a fictional notion of
7 consent of the probation of parolee.

8 Every day around the country people are put on
9 probation, they're put on parole, and nobody asks the
10 consent of the probationer to particular conditions.

11 QUESTION: Well, then what you're saying is that
12 the Pennsylvania parole authorities without calling this a
13 consent form could simply say, here are the conditions
14 under which you must be -- which you will -- your house
15 will be searched.

16 MR. SOSNOV: That's correct, but as long as they
17 were constitutional they'd be upheld by this Court, but if
18 Pennsylvania, as in this case, touched an unconstitutional
19 search provision, it should be --

20 QUESTION: Mr. Sosnov, aren't you really talking
21 about notice and not consent? I mean, it's the same form
22 that says -- isn't it the same form that says, no drugs,
23 no firearms, and warrantless search? It's all on the same
24 form, and you wouldn't be arguing that the no-firearms-
25 no-drugs -- it's really a notice to the parolee that these

1 are the terms of your release.

2 MR. SOSNOV: That's correct. If you violate
3 them, you go back. So to talk about consent for any of
4 this, it's really -- these are the terms and conditions of
5 your release. It's a true Hobson's choice. You want a
6 horse, this is the horse you get.

7 So I think it would be, I think more honest if
8 we talked in terms of notice. Was there notice when this
9 form says, warrantless search, that there's not going to
10 be a search unless there's reasonable suspicion, or
11 there's -- in other words, is there ambiguity in the
12 terms --

13 MR. SOSNOV: That --

14 QUESTION: -- that he was given.

15 MR. SOSNOV: Excuse me. That's exactly my
16 position, and that was the position of the supreme court,
17 that when you list the conditions of probation and parole,
18 it serves only the function of notice. It doesn't
19 determine the constitutionality.

20 If we use the fiction of consent in this case,
21 Pennsylvania can just simply attach a couple of new
22 conditions the next time. Their form the next time --

23 QUESTION: I still don't see your -- understand
24 your response to the Chief Justice's question. You
25 acknowledge that the conditions of parole for Milliken

1 could be, you will not write any prospectuses, so the
2 condition here is, you will be subject to search in your
3 home.

4 MR. SOSNOV: And --

5 QUESTION: I mean, and the one no more than the
6 other is consonant with the application of the bill of
7 rights to people who were not on parole.

8 MR. SOSNOV: This Court would have to determine
9 that each one, whether it was reasonable or not.

10 Given all the reasoning of Griffin, the one --
11 it could set explicitly, your condition of parole is that
12 you will be subjected to searches of your home without
13 reasonable suspicion.

14 QUESTION: Right.

15 MR. SOSNOV: That would be totally inconsistent
16 with the reasoning of this Court's decision in Griffin.
17 In -- and this Court's decision in many other areas.

18 In other words, this Court has said the proper
19 balance that a parolee certainly has a right to an
20 expectation of privacy in his home and a right to
21 reasonable searches.

22 This Court said in Griffin, we're not going to
23 require probable cause and a warrant. We're not going to
24 require, as if she was a free citizen, the proper balance
25 between the Government's needs and the right of privacy of

1 the parolee. The proper balance is struck with reasonable
2 suspicion, the lowest objective standard known under the
3 law, as this Court emphasized by Richards v. Wisconsin.

4 But it's an objective standard. Pennsylvania's
5 not free to unilaterally get around constitutional
6 restraints.

7 QUESTION: Why is that in the Chief Justice's
8 hypothetical the consent is valid and in the case we have,
9 assuming the consent form is very clear that you consent
10 to searches that are absolutely random and without
11 sufficient -- what is the difference in the two cases? I
12 don't understand your position.

13 MR. SOSNOV: Because in neither case does it
14 depend on consent. In neither case the correct
15 constitutional analysis is to determine, is it reasonable,
16 considering the Government's needs and concerning the
17 rights of the parolee, whether we talk about First
18 Amendment rights, Fourth Amendment rights, so that this
19 Court --

20 QUESTION: Well, but suppose you have consent.

21 MR. SOSNOV: The consent would be involuntary.
22 That's my point. It's -- in other words, if we consider,
23 if I --

24 QUESTION: I don't see why it's any more
25 involuntary than on a guilty plea situation, where someone

1 says, okay, I'm going to agree -- I'm guilty, and I will
2 agree to a prison sentence of 3 years, very coercive.
3 Heavens, look at the power the Government has, and yet I
4 think we would say it's okay to give up your right to a
5 jury trial, your right to remain free, the right to do all
6 those things. You can consent to that.

7 Now, don't look at the clock.

8 MR. SOSNOV: I'm sorry.

9 QUESTION: I want to know why somebody can't
10 consent on parole and say, fine, I would like to be
11 paroled and I will consent to these terms and conditions.
12 Why isn't that perfectly okay? The person can refuse
13 parole and say no, I don't want those terms and
14 conditions. I'll serve my time, thank you.

15 MR. SOSNOV: I think the answer, Justice
16 O'Connor, is that there's nothing -- this is nothing like
17 the free bargaining process. What this Court has
18 emphasized in a number of decisions is the plea-bargaining
19 process is bargaining between two roughly equal parties,
20 and that the defendant has a lot of bargaining chips in
21 that situation, so the process is completely different.

22 The defendant can insist on a trial. The
23 defendant can insist to be put to the proof of beyond a
24 reasonable doubt, so that every day, defendants reject
25 plea bargains that are offered, because defendant

1 calculates, I may make out better at trial, and the
2 Government calculates, we need this plea bargain because
3 we may lose entirely and the defendant will go scott-
4 free.

5 Here, the process itself, the parolee has no
6 bargaining chips whatsoever. The parolee has no
7 constitutional rights that he can bargain with, so the
8 process is different.

9 QUESTION: Well, but the parolee can decline it
10 and say, I'll serve my time and when I get out I am free.

11 MR. SOSNOV: If -- the parolee has the ability
12 to say no, and Schneckloth said everybody always has the
13 ability to say no. In other words, a voluntary, free and
14 unconstrained choice is not the same thing simply as a
15 choice.

16 In other words, every individual can say no
17 unless you're drugged or unconscious. That's what
18 Schneckloth said.

19 I think Minnesota v. Murphy is a good example of
20 coercion, where a person has a right to say no. Minnesota
21 v. Murphy, the police officer was given the choice. You
22 can continue being a police officer, or you can start
23 talking, even though you have Fifth Amendment rights, and
24 the police officer started talking.

25 He had a choice, just like Scott, and this Court

1 said, that was a violation of the Fifth Amendment. That
2 was involuntary. That was the antithesis -- the economic
3 coercion was the antithesis of a free and unconstrained
4 choice.

5 QUESTION: Is there any shortage of parole
6 officers in Pennsylvania? There is in a lot of States. I
7 think there are. What's the circumstance there?

8 MR. SOSNOV: I'm not aware that there's a --

9 QUESTION: I'm just wondering --

10 MR. SOSNOV: I can't address that. I don't
11 know.

12 QUESTION: -- what is in the back of my mind,
13 which is, is whether it might be reasonable for a State to
14 say we don't have that many parole officers, we'll let
15 more people out of prison on parole, but they give up all
16 their privacy in prison, and we want them to give up some
17 of their privacy on parole, and the reason is that random
18 checking can catch those who have guns or drugs.

19 So I mean, suppose they're reasoning that way,
20 and so the object is a system that will actually protect
21 people's privacy in a sense. In other words, you're
22 better off than in prison, but you've got to give up a
23 certain amount of your privacy.

24 MR. SOSNOV: This Court has never accepted that
25 argument. Morrissey v. Brewer, the exact same argument

1 was made. We're going to parole fewer people if you
2 actually make us have a hearing to determine whether we
3 revoke them or not, and this Court said there's no
4 empirical proof that if people have a hearing and have
5 some rights that they're going to stop paroling people.

6 And, in fact, most jurisdictions around the
7 country right now have interpreted Griffin as -- in fact,
8 every court that has interpreted Griffin has interpreted
9 it to require reasonable suspicion. However, you have not
10 seen a drop-off of paroles around the country or any
11 disadvantage to the parole system, so there is no
12 demonstrated need.

13 And getting back to the plea-bargaining question
14 of Justice O'Connor, the other thing that distinguishes
15 this from a plea bargain is that of course the Government
16 doesn't have the power to impose a guilty verdict. The
17 plea bargain --

18 QUESTION: You would think that a defendant
19 could agree in a pre-trial plea bargain to accept parole
20 with the condition of suspicionless search.

21 MR. SOSNOV: Possibly.

22 QUESTION: Release --

23 MR. SOSNOV: That's a difficult question to
24 be --

25 QUESTION: Release, but I agree, suspicionless

1 searches pretrial --

2 MR. SOSNOV: That --

3 QUESTION: Do you think there's a question about
4 that?

5 MR. SOSNOV: That -- there is a question there.

6 QUESTION: Why?

7 MR. SOSNOV: But it's completely different.

8 QUESTION: Well, why? Why is there a question?

9 MR. SOSNOV: Because -- because this Court would
10 have to determine whether, considering the invasion of
11 privacy down the line, which is -- which is all the people
12 that are on parole as far as -- and their families being
13 subjected to unbridled discretion.

14 This Court has to decide whether that is one of
15 those rare, bargained-for, agreed conditions that should
16 be overturned. Most likely --

17 QUESTION: Well, that's very -- very odd. I
18 mean, he can give up his right to a jury, his right to an
19 attorney, his right to everything else.

20 MR. SOSNOV: The key difference -- the key
21 difference there, and maybe that is constitutional. I'm
22 not saying it's not. The key difference there is that it
23 is one of the bargained-for things as part of the plea-
24 bargain process.

25 There is no bargaining process here. There is

1 no deal in the end, and a plea bargain in the end is
2 enforceable by a court. Once you have plea bargain, each
3 side has to abide by the plea bargain.

4 This is nothing like a plea bargain because in
5 the end here Pennsylvania by law, State law, Pennsylvania
6 can impose subsequent conditions after the person is
7 released from parole, so after he signs that form there
8 with all the conditions, they can come 2 days later, oh,
9 by the way, you've got 10 more conditions. They don't
10 have to have him sign a form and agree.

11 The consent is a fictional notion. If this
12 Court would accept the fictional notion of consent,
13 Pennsylvania could have a couple of new provisions, and
14 one of them could say that when you're on probation or
15 parole, you have to tell us everything of any criminal
16 activity you're doing.

17 In other words, despite your Fifth Amendment
18 rights, in return for parole you'd have to tell us
19 everything about your criminal activities. I --

20 QUESTION: Well, don't they do that -- don't
21 they do that now? They require the parolee to come in
22 periodically and report to the officer what he's been
23 doing for the last couple of weeks. Isn't that --

24 MR. SOSNOV: But --

25 QUESTION: That's standard, isn't it?

1 MR. SOSNOV: But there's one restriction, and
2 that's the Fifth Amendment. Under Minnesota v. Murphy
3 this Court said you cannot have a valid condition of
4 parole that requires the parolee or probationer to talk
5 about criminal activity.

6 QUESTION: You mean, he can come in and when his
7 parole officer says, well, you know, what have you been
8 doing the last couple of weeks, he can say, well, you
9 know, I'd like to tell you that, but I have a Fifth
10 Amendment right not to tell you?

11 MR. SOSNOV: No. He can -- no.

12 QUESTION: That's pretty easy. That can't be
13 what it means, can it?

14 MR. SOSNOV: No, that's not what it means. It
15 means he can talk about -- he must talk about everything
16 except activity that is protected by the Fifth
17 Amendment --

18 QUESTION: Well, you mean you can say he
19 could --

20 MR. SOSNOV: -- or new criminal activity.

21 QUESTION: -- incriminate him. I mean --

22 QUESTION: You can say, I went to the movie, and
23 I had dinner at home with the kids, and then I did
24 something else I can't tell you about?

25 (Laughter.)

1 QUESTION: That just can't be the rule. That
2 can't be the rule.

3 MR. SOSNOV: I -- I'm relying on Minnesota v.
4 Murphy. This Court said it would be the classic penalty
5 situation if a probation condition required somebody to
6 talk about criminal activity.

7 Let me mention another one. Morrissey v.
8 Brewer, the rights at a hearing, Pennsylvania under the
9 fiction of consent could say, in return for you getting
10 probation or parole you hereby agree that if we decide to
11 revoke your parole you won't assert your right to try to
12 cross-examine and confront witnesses.

13 In other words, this Court would be ceding its
14 role as being the ultimate determiner of what's reasonable
15 under the Constitution if it accepts the fiction of
16 consent, which it has refused to do in the economic
17 context repeatedly, such as Garrity v. New Jersey.

18 QUESTION: Mr. Sosnov, may I ask if you would
19 get to the second question, because as I understand it all
20 of this is academic if the exclusionary rule doesn't
21 apply. Then we could say, yeah, he didn't get notice, but
22 so what, the evidence comes in anyway.

23 You made the point that most States require
24 suspicion for a search, but isn't it also true that most
25 States say the exclusionary rule does not apply to parole

1 or probation revocation?

2 MR. SOSNOV: The majority of States have ruled,
3 and this Court should rule that the exclusionary rule
4 applies, because it's especially needed in this context.

5 First of all, under Pennsylvania law, what was
6 being performed here was a classic law enforcement
7 function. Pennsylvania's own manual says that the parole
8 officers share with police the primary goal of law
9 enforcement. As matter of State law, parole officers are
10 police officers with police powers.

11 In this very case, the parole agent had arrested
12 Mr. Scott for parole violations. He was in a post arrest
13 situation. He was in cuffs, in custody, when the parole
14 agent goes to his home to conduct a search for any
15 evidence of other violations.

16 The parole agent in Pennsylvania serves as
17 prosecutor at the parole violation hearing, so certainly
18 in the context of this case to start out with, in the
19 context of this case, this was a classic law enforcement-
20 type --

21 QUESTION: Why was the respondent arrested, for
22 what suspected offense?

23 MR. SOSNOV: He was arrested for -- I think it
24 was four violations. Two violations were that on an
25 individual occasion while people were shooting target

1 practice that he held the gun and took a shot, and he's
2 not allowed to possess a gun even momentarily, so back in
3 September when he was first paroled he was alleged to --
4 on two separate occasions to have taken a shot from -- one
5 shot and then two shots on another occasion.

6 QUESTION: Okay, so the arrest was not dependent
7 upon the subsequent search?

8 MR. SOSNOV: No. No. The search followed the
9 arrest. The search followed the arrest. It was to gain
10 evidence of parole violations.

11 QUESTION: Why didn't they have suspicion here?

12 MR. SOSNOV: Because the two incidents that I
13 referred to were 5 or 6 months earlier, and the only
14 information conveyed to the searching officer, at page 92a
15 of the appendix, is that one officer said to the other, he
16 may have firearms, and that's all that was communicated,
17 nothing else about a basis for a search, and Pennsylvania
18 has never claimed that there's reasonable suspicion in
19 this case in the lower courts or here.

20 The primary zone of interest, as this Court has
21 defined, looking at the exclusionary rule, the purpose is
22 deterrence. The question is deterrence.

23 So when the Attorney General talks about the
24 question of we're looking for the truth at a parole
25 revocation hearing, we're looking at the truth in the

1 probation revocation hearing, that's what we seek, that's
2 true, but it's talking about constitutional apples and
3 oranges here.

4 There is a cost whenever you apply the
5 exclusionary rule as far as some evidence that might be
6 helpful to determine the truth if it's going to be
7 excluded from the proceeding. The question is, though, is
8 it necessary to enforce Fourth Amendment values? That's
9 the question.

10 And here, the answer is clear. The parole
11 officer is even more motivated than a police officer
12 looking for a crime to look for evidence of a parole
13 violation. The police officer in the community has many
14 functions besides law enforcement, some general safety in
15 the community, and has no one-on-one responsibility,
16 generally, unless they're in a very small town, has no
17 one-on-one responsibility for any particular individuals.

18 The parole officer deals only with the
19 population of convicted criminals, the pressure, the
20 institutional pressure being responsible for convicted
21 criminals and their supervision, and secondly, one-on-one
22 responsibility.

23 That parole agent was assigned to a particular
24 individual, so if that particular individual violates
25 parole in a serious way, commits a new crime, the

1 responsibility goes right back to the parole agent, so we
2 start out with great institutional pressures on the parole
3 agent, more so than the policeman, to try to detect
4 violations of parole.

5 And Pennsylvania, if you look at are there
6 alternative remedies to the exclusionary rule to try to
7 provide a disincentive for unconstitutional searches,
8 Pennsylvania has no alternative remedies.

9 QUESTION: So a good parole officer has more
10 people reincarcerated than on release. Two parole
11 officers, one has a very high reincarceration rate, the
12 other doesn't, and the first is the better parole officer?

13 MR. SOSNOV: No, I didn't say good or better.
14 What I'm saying is, the institutional pressure, so that
15 a --

16 QUESTION: Well, I -- institutional pressure I
17 assume relates to performance and to merit.

18 MR. SOSNOV: But performance and merit should be
19 constrained by the Fourth Amendment, so I wouldn't call a
20 good parole officer one who, because of institutional
21 pressures and zeal at doing their job and protecting
22 themselves from possible repercussions if somebody messes
23 up on parole, I would say that's not a good parole officer
24 who violates the Constitution. What it shows us, the
25 institutional pressures --

1 QUESTION: But if being a good parole officer,
2 as Justice Kennedy's question -- means keeping your people
3 out on parole rather than reincarcerating them, one would
4 think that the institutional, pressures are in the
5 opposite direction, not to return as many of the people in
6 your charge to prison as possible, but to work with them
7 to keep them out.

8 MR. SOSNOV: Some work to keep them out, but the
9 pressures to make sure that they're complying with parole
10 regulations, we're talking about now the pressures as far
11 as individuals who may go into somebody's home with no
12 reasonable suspicion whatsoever.

13 We're not talking about parole agents who, in
14 accordance with the reasoning of Griffin, only go in the
15 homes where they have that low objective standard of
16 reasonable suspicion. We're talking about parole agents
17 who may go into their home without that objective basis of
18 reasonable suspicion.

19 The institutional pressures might be, I don't
20 want to see my name in the newspaper possibly because my
21 parolee got in some kind of trouble, so therefore -- this
22 is going to be some parole officers -- the institutional
23 pressures are going to cause them to violate the
24 Constitution unless there's some deterrence, and that's
25 the need for the exclusionary rule.

1 Pennsylvania, the amicus of the United States,
2 nor the other four amicus briefs filed against our
3 position, cite a single instance, either under
4 Pennsylvania law or anywhere in the country where there
5 has been any discipline of a parole agent for -- for
6 violation of Fourth Amendment rights, any successful --

7 QUESTION: Who would decide -- supposing -- what
8 does the Pennsylvania parole board -- they have a parole
9 board and they have hearings on revocation. Who would
10 decide whether or not the exclusionary rule would bar a
11 particular witness' testimony, the parole board?

12 MR. SOSNOV: The Fourth Amendment issue, if we
13 had exclusionary rule?

14 QUESTION: Yes.

15 MR. SOSNOV: In many juris -- in Pennsylvania it
16 would be a hearing examiner or the board itself. The
17 hearings are conducted by the parole board or hearings --
18 many jurisdictions it's judges.

19 QUESTION: And are the Pennsylvania examiners
20 all lawyers?

21 MR. SOSNOV: No, they're not all lawyers, but I
22 think that that would not seriously burden the proceedings
23 for -- for two reasons. One is --

24 QUESTION: Have them toss a coin?

25 MR. SOSNOV: I hope not.

1 QUESTION: Well, what is a nonlawyer going to do
2 with some of our rather highly filigreed Fourth Amendment
3 jurisprudence?

4 (Laughter.)

5 MR. SOSNOV: Well, I think fortunately in this
6 context the hearing examiner would not have the learn the
7 highly filigreed Fourth Amendment jurisprudence, because
8 we would have a single standard, which is not a very high
9 standard of reasonable suspicion.

10 In other words, Griffin has set the stage as
11 reasonable suspicion for the entry into a home, so they'd
12 have to understand reasonable suspicion, and this Court in
13 Shadwick v. City of Tampa said that even a court clerk can
14 figure out what probable cause means in determining, for
15 example, when people should be arrested for minor
16 offenses, so I don't think it's going to be beyond the
17 intellectual abilities of hearing examiners --

18 QUESTION: But that was the neutral magistrate
19 to issue a warrant, or -- it wasn't to ultimately decide
20 the question.

21 MR. SOSNOV: Well, but the question had to be
22 decided whether it was probably cause or not to issue a
23 warrant.

24 In other words, every day the court clerk sits
25 there and the applications come in and the court clerk has

1 to say, do I find enough here for probable cause.

2 QUESTION: Yes, but that's -- a neutral
3 magistrate in that sense is not the same as the person who
4 finally disposes of a case, of a question the way you
5 would have under the exclusionary rule.

6 Do you know of any other situations in which
7 nonlawyers decide whether or not evidence should be
8 excluded pursuant to the exclusionary rule?

9 MR. SOSNOV: I know that right now there are
10 about eight States that are applying the exclusionary rule
11 either on State constitutional grounds, where they've
12 interpreted it under the Federal Constitution, and not all
13 of them have judges deciding these issues, and there's
14 been no evidence that they've been incapable of making
15 this reasonable suspicion determination as to whether the
16 Constitution has been complied with as far as reasonable
17 suspicion being required for an entry into the home of a
18 parolee and his family. There have been -- no encountered
19 difficulties have been reported.

20 One of the dangers here, I think, if the
21 exclusionary rule is not recognized in this context, is
22 because the standard is only reasonable suspicion for the
23 intrusion in the first place, if this Court doesn't
24 recognize the exclusionary rule, that means that there's
25 no neutral oversight whatsoever before the parole agents

1 go into the home, nor is there any kind of neutral
2 oversight after the fact.

3 The creation is, as the Pennsylvania supreme
4 court said, I think they got it right as far as concluding
5 there will be nothing else to deter parole agents. You
6 will have no neutral oversight before, because only
7 reasonable suspicion is required, you will have no neutral
8 oversight after the fact, the Pennsylvania parole board
9 has no institutional deterrence mechanisms in force,
10 there's no punishment for violations --

11 QUESTION: No worse than the situation that the
12 individual would have confronted if he were still
13 incarcerated.

14 MR. SOSNOV: That's correct, but this Court
15 had --

16 QUESTION: He would have been subject to
17 invasions upon his privacy without any recourse.

18 MR. SOSNOV: And --

19 QUESTION: And this is -- this goes along with
20 parole.

21 MR. SOSNOV: Well, it hasn't so far, because
22 this Court has never held that a home can be searched on
23 the basis without any reasonable suspicion whatsoever, I
24 think for good reasons. This Court in a whole line of
25 decisions has said the home is sacrosanct as far as -- as

1 far as protecting the privacy of the home.

2 This Court has allowed the closely guarded
3 category of suspicionless minimal intrusions, like drug-
4 testing under some circumstances. This is a maximum
5 intrusion. This is the biggest intrusion, to go into
6 somebody's home --

7 QUESTION: Mr. Sosnov, you don't mean it happens
8 so far in the sense of the real world, because you told me
9 it was correct that most States in their parole revocation
10 hearings do not exclude unlawfully seized evidence, so
11 it's true that right now, that this happens all the time,
12 is that not so?

13 MR. SOSNOV: That this is happening --

14 QUESTION: Yes.

15 MR. SOSNOV: -- in some jurisdictions as far
16 as -- now, as far as -- and that's the -- that's why we
17 need deterrence, because these unconstitutional searches
18 are happening. In other words --

19 QUESTION: I think you've answered the question,
20 Mr. Sosnov.

21 General Fisher, you have --

22 MR. SOSNOV: Thank you.

23 QUESTION: -- 3 minutes remaining.

24 GENERAL FISHER: No rebuttal, Your Honor.

25 CHIEF JUSTICE REHNQUIST: Very well. The case

1 is submitted.

2 (Whereupon, at 12:02 p.m., the case in the
3 above-entitled matter was submitted.)
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CERTIFICATION

Alderson 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:

PENNSYLVANIA BOARD OF PROBATION AND PAROLE, Petitioner v. KEITH M. SCOTT
CASE NO: 97-581

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

BY Don Mari Federico-----

(REPORTER)