**No. _____**

# In the Supreme Court of the United States

**October Term, 2017**

LANDON TREVOR ANDERSON, *PETITIONER*,

V.

UNITED STATES OF AMERICA

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE FIFTH CIRCUIT

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MAUREEN SCOTT FRANCO
Federal Public Defender

DONNA F. COLTHARP
Deputy Federal Public Defender
Western District of Texas
727 E. César E. Chávez Blvd., B-207
San Antonio, Texas 78206-1205
(210) 472-6700
(210) 472-4454 (Fax)

*Counsel of Record for Petitioner*

## QUESTIONS PRESENTED FOR REVIEW

1. Must searches conducted as conditions of federal supervised release be supported by at least reasonable suspicion?
2. Is the Fifth Circuit wrong to hold that, for a decision to be judged "plainly erroneous," there must be a published, on-point, circuit decision finding the same decision to be error under the harmless-error standard of review?

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Petitioner, Landon Trevor Anderson asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on July 26, 2018.

## PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Constitutional Provision**



**Statutes**

**Rules**



**United States Sentencing Guideline**

## OPINION BELOW

On October 29, 2015, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming Anderson's judgment of conviction and sentence. The Fifth Circuit's opinion is attached as an appendix to this petition.

## JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

This petition is filed within 90 days after July 26, 2018, the date the mandate was issued in this case, and thus is timely. *See* SUP. CT. R. 13.1 & 13.3.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment states that the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. . . ."

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[1] The original decision from the court of appeals in this case was entered on October 29, 2015. As the result of a lapse in office procedures, Mr. Anderson's written request for a petition of certiorari following the decision was misdirected and never reached undersigned counsel. The request was discovered in June 2018. Counsel immediately filed a motion in the appeals court asking that the mandate be withdrawn and reissued, under Fifth Circuit Rule 41.2. *See Nnebe v. United States*, 534 F.3d 87, 91 (2d Cir. 2008) (proper remedy for defense counsel's failure to timely file petition for certiorari was to recall the mandate). On July 26, 2018, the court granted the motion.

## FEDERAL STATUTE INVOLVED

Title 18 U.S.C. § 3583(d)(2) states that a condition of supervised release may not result in a deprivation of liberty that is greater than necessary to achieve the permissible sentencing goals of deterrence, protection of the public, and the need for correctional treatment.

## STATEMENT

Between the years of 2007 and 2008, Landon Anderson was an informant for the Joint Terrorism Task Force in South Carolina. Anderson reported conversations in which a cellmate threatened to overthrow the United States government.

According to Anderson, in 2010, while he was serving a sentence for fraud and identity theft at the La Tuna Federal Prison Camp in Anthony, Texas, his mother told him that "associates" of the person he had informed on contacted her and threatened to kill both her and Anderson. Feeling that he needed to protect his mother, Anderson walked away from the camp. Five months later, officers found Anderson living in Denver, Colorado. He was charged with and pleaded guilty to escape.

The district court sentenced Anderson to 30 months' imprisonment and a three-year term of supervised release. As a condition of supervised release, the court ordered that Anderson submit to

searches of his "person, property, house, residence, vehicle, papers, computers and other electronic communication or data storage devices or office." The court did not require that the probation officer have any suspicion to conduct such searches. Failure to permit such a search, the court stated, "will be grounds for revocation of supervised release." Anderson did not object to the condition.

On appeal, Anderson argued that, under this Court's precedent, the suspicionless-search condition violated the Fourth Amendment and was a greater deprivation of liberty than was necessary to achieve permissible goals of sentencing. The court of appeals affirmed. Anderson had not objected to the condition, and the Fifth Circuit had never held that suspicionless search of a person on supervised release violated the Fourth Amendment. App. A. In light of that fact, the court held, "'any error cannot be plain.'" *Id.* (citing *United States v. Fields*, 777 F.3d 788, 805 (5th Cir. 2015)).

## REASONS FOR GRANTING THE WRIT

### I. The Court Should Resolve a Split Among the Circuits Regarding Whether the Fourth Amendment Permits, as a Condition of Supervised Release, Suspicionless Searches.

District courts may craft special supervised-release conditions that are "reasonably related to" the nature and circumstances of the offense and the need to deter the defendant from criminal conduct, to protect the public, and to provide the defendant with needed education or vocational training or medical treatment. *See* 18 U.S.C. § 3583(d)(1)–(3); 18 U.S.C. § 3553(a)(1), (2)(B), (2)(C), (2)(D). Those conditions, however, may involve no greater deprivation of liberty than is reasonably necessary to address those purposes. § 3583(d)(2). In this case, the district court imposed a condition requiring Anderson to submit to searches of his person and home even when there is no suspicion of wrongdoing. The circuit courts are divided regarding whether the Fourth Amendment tolerates such suspicionless searches.

The division arises from the courts' attempts to reconcile two decisions from this Court, *United States v. Knights*, 534 U.S. 112 (2001), which addresses conditions placed on probationers, and *Samson v. California*, 547 U.S. 843 (2006), which addresses conditions placed on parolees. In *Knights,* the Court was asked to decide

whether probable cause was required when searches were conducted as a condition of state probation. The Court answered in the negative, based on a balancing of the rights of the probationer against the government interests involved. *Id.* at 119–21. While a probationer has some expectation of privacy in his person and home, *see Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987), the Court held that that expectation was "significantly diminished" by findings that the condition was necessary and by the notice provided to the probationer of the condition. *Id.* at 119–20. The State's interests in a lesser standard included the desire that the probationer complete his probation successfully and the concern that he is more likely to commit crimes than persons who have not served sentences. *Id.* at 120–21. The "balance of these considerations requires no more than reasonable suspicion to conduct a search of [a] probationer's house." *Id.* at 121.

The Court explicitly refused to address a secondary issue presented in the case—whether a search without any suspicion at all would satisfy the reasonableness requirement of the Fourth Amendment. *Id.* at 120 n.6. However, the Court later held that persons on state parole may be subjected to suspicionless searches. *Samson*, 547 U.S. at 846. In so holding, the Court distinguished the parolee before it in that case from the probationer in *Knights*.

The Court noted that parolees and probationers are on a "continuum" of punishments. *Samson*, 547 U.S. at 851. Parolees, like the defendant in *Samson*, have "fewer expectations of privacy than probationers" because parole is more like imprisonment than probation. *Id.* A parolee is released from prison before his sentence is finished and, thus, is constructively still serving a term of imprisonment. *Id.* Because parole is the "'stronger medicine,'" parolees enjoy less liberty than do probationers. *Id.* (quoting *United States v. Cardona*, 903 F.2d 60, 63 (1st Cir. 1990)).

This Court has not extended *Samson* to cases involving persons on federal supervised release. *See United States v. Taylor*, 482 F.3d 315, 318 n.2 (5th Cir. 2007) (noting possibility that *Samson* extends to persons on supervised release, but not holding so). The circuit courts have diverged on whether it should be so extended. *See, e.g., United States v. Lykins*, 544 F. App'x 642, 648 (6th Cir. 2013) (suggesting probable cause could apply to those on supervised release); *United States v. Rosenthal*, 295 F. App'x 985, 987 (11th Cir. 2008) (applying reasonable-suspicion standard); *United States v. Loftin*, 244 F. App'x 113, 114 (9th Cir. 2007) (same). *But see United States v. Betts*, 511 F.3d 872, 876 (9th Cir. 2007) (affirming suspicionless-search condition on supervised release); *United States v. Hanrahan*, 508 F.3d 962, 971 (10th Cir. 2007)

(same).[2] Given the important interests at stake, the Court should grant certiorari to resolve the division.

The courts applying the reasonable-suspicion standard in cases such as Anderson's have the better argument. While persons on state parole and persons on federal supervised release share some similarities, they differ in significant ways. As this Court recognized in *Samson*, parole is part of a defendant's original term of imprisonment, given back to the defendant by the state. *Samson*, 547 U.S. at 850. In California, for example, parole is an option given to offenders and, in choosing it, they also choose suspicionless searches. *Id*. at 852. Anderson was not given supervised release in lieu of the remainder of his imprisonment term. He did not have the option of choosing it or the conditions that accompanied it.

A person on supervised release has greater liberty interests than a person on parole. While supervised release is part of the sentence imposed on a federal defendant, *United States v. Gonzalez*, 250 F.3d 923, 928 (5th Cir. 2001), it does not take the place of

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[2] As it did in this case, the Fifth Circuit refrained from addressing the issue as recently as 2017, under plain-error review. *United States v. Erwin*, 675 F. App'x 642, 648 (5th Cir. Feb. 1, 2017).

imprisonment. There is no parole in the federal system. *See Johnson v. United States*, 529 U.S. 694, 696–97 (2000). Supervised release is "postconfinement monitoring." *Id*. at 697. Because the defendant has fully completed his imprisonment term, supervised release functions as a reintegration period. *See United States v. Mills*, 959 F.2d 516, 518 (5th Cir. 1992) (one purpose for supervised release is reintegration). Persons in the process of reintegration are learning to be citizens. They have completed their imprisonment terms, and they have a stronger privacy interest in their homes and belongings than those who are still serving their imprisonment terms, even if on parole. Indeed, 18 U.S.C. § 3583 itself suggests that persons on supervised release have constitutionally protected interests, requiring that conditions not overly restrict offenders' "liberty." 18 U.S.C. § 3583(d)(2).[3]

Nothing in the supervised-release condition challenged here protects Anderson's privacy interest in his home, person, or effects. All may be searched randomly, with no suspicion, so long as the search is conducted at a reasonable time. The condition's wholesale affront on Anderson's privacy is improper.

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[3] The United States Sentencing Guidelines suggest, as a condition of supervised release for persons convicted of sex offenses, period unannounced searches. *See* U.S.S.G. §5D1.3(d)(7)(C). Those searches must be supported by reasonable suspicion. *Id*.

## II. The Court Should Grant Certiorari to Determine Whether Un-Objected to Error May Be Plain in the Absence of a Fully On-Point, Published Decision.

In 2007, the Fifth Circuit considered a case involving whether a person on state probation could be subject to suspicionless searches. *See United States v. LeBlanc*, 490 F.3d 361, 365 (5th Cir. 2007). The question to be answered in *LeBlanc* was whether a probation officer went beyond the "home visit" authorized by state policies when he asked, without suspicion, to look around the probationer's home, and was given permission to do so. *LeBlanc*, 490 F.3d at 364–65. In answering that question, the Fifth Circuit stated that "to conduct a nonconsensual search of a probationer's home for ordinary law enforcement purposes," an officer must have "reasonable suspicion that the probationer is engaged in criminal activity." *Id.* at 365 (citing *Knights*, 534 U.S. at 121).

Based on this unequivocal language, and this Court's decisions in *Knights* and *Samson*, Anderson argued on appeal that the district court's error in imposing the suspicionless-search condition on supervised release was plain and "not subject to reasonable dispute." *See Puckett v. United States*, 556 U.S. 129, 135 (2009). He contended that, while a court might speculate whether the Supreme Court will extend the *Samson*'s endorsement of suspicionless searches for parolees to persons on probation or supervised

release, *see Taylor*, 482 F.3d at 318 n.2, only this Court may reverse its own precedent, and it has not done so. Accordingly, *Knights*'s implicit affirmance of the reasonable-suspicion standard limited the district court's sentencing discretion. *LeBlanc*'s bald statement that reasonable-suspicion is required governed the case.

The Fifth Circuit refused to address the merits of Anderson's claims, concluding that any error could not be "plain," because no binding authority from the court of appeals or this Court has specifically condemned as impermissible the particular supervised release condition at issue here. App. A. This reasoning appears to be an improperly narrow interpretation of the "plainness" prong of plain-error review.

In *United States v. Olano*, this Court held that an error is "plain" if it is "'clear'" or, "equivalently, 'obvious'" under "current law." 507 U.S. 725, 733 (1993). As the Tenth Circuit has observed, the "plainness" requirement prevents faulting a district court for "failing to act on its own motion where the law is unsettled." *United States v. Turrietta*, 696 F.3d 972, 982 (10th Cir. 2012). An error can be obvious without a published opinion directly on point saying so, and the law is not necessarily unsettled in the absence of such an opinion. *See United States v. Merlos*, 8 F.3d 48, 51 (D.C.

Cir. 1993) (disclaiming any "[suggestion that] plain error never can be found absent a prior judicial opinion on the issue in dispute").

Even if the Fifth Circuit was correct that *LeBlanc* did not specifically hold that reasonable suspicion was required for searched conducted as a condition of supervised release—which Anderson does not concede—that fact is not a bar to finding the error here to be "plain." The error is obvious from the Fourth Amendment's prohibition against unreasonable searches and from *Knights*'s requirement of reasonable suspicion to search a probationer's home. And, *LeBlanc* made clear that the law was not unsettled in the Fifth Circuit. There, the court of appeals specially stated that reasonable suspicion is required when imposing searches as conditions of supervised release. That this Court has not extended its holding in *Samson* to supervised-release conditions does not make the existing law in the Fifth Circuit "unsettled." It does no more than mean that the existing law (articulated in *LeBlanc*) has not been changed. This Court should grant certiorari to determine whether the Fifth Circuit's interpretation of the "plainness" prong of plain-error review is overly restrictive.

## CONCLUSION

FOR THESE REASONS, this Court should grant certiorari to consider whether, consistent with the Fourth Amendment, a person may be subjected to suspicionless searches as a condition of federal supervised release and whether an unobjected-to error can be "plain" in the absence of binding circuit or Supreme Court precedent that directly addresses the exact same error.

Respectfully submitted.

MAUREEN SCOTT FRANCO
Federal Public Defender
Western District of Texas
727 E. César E. Chávez Blvd., B-207
San Antonio, Texas 78206
Tel.: (210) 472-6700
Fax: (210) 472-4454

s/ Donna F. Coltharp
DONNA F. COLTHARP
Deputy Federal Public Defender

*Attorney for Defendant-Appellant*

DATED: August 8, 2018.