
No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

STEVEN DOYLE BURTON, PETITIONER,

vs.

UNITED STATES, RESPONDENT.

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

APPENDIX
[Volume 3 of 3]

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CA No. 16-50451

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. STEVEN DOYLE BURTON, Defendant-Appellant.	)	(D.Ct. #3:16-cr-00746-AJB)

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

HONORABLE ANTHONY J. BATTAGLIA
United States District Judge

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UNITED STATES OF AMERICA, Plaintiff-Appellee, v. STEVEN DOYLE BURTON, Defendant-Appellant.	)	(D.Ct. #3:16-cr-00746-AJB)

I.

STATEMENT OF ISSUES PRESENTED

A. WAS A PROBATION SEARCH OF MR. BURTON'S HOME UNLAWFUL?

1. Was the Search Unlawful Because a Probation Search Must Comply with State Law, and the Search Here Did Not Comply with State Law Because California Law Gives a Defendant the Right to Refuse Probation and Authorizes Probation Searches Based on a Theory of Consent, and Mr. Burton Could Not Accept and Consent to the Search Condition Here Because He Was Not Present When It Was Imposed?

2. Was the Search Unlawful Because It Exceeded Fourth Amendment Limits Under the Balancing Test Established by *United States v. King*, 736 F.3d 805 (9th Cir. 2013), and *United States v. Lara*, 815 F.3d 605 (9th Cir. 2016).

3. Does a Good Faith Theory the Government Advanced Based on Police Officer Reliance on Computer Records Fail?

a. Does the good faith theory fail because the information officers relied on was the fact Mr. Burton had a probation search condition, that information was accurate, and an officer's good faith reliance on accurate information does not preclude an attack on the validity of the underlying order?

b. Does the good faith theory fail because the scope of California probation search conditions varies widely and the officers had no information about the scope of Mr. Burton's probation search condition?

c. Does the good faith theory fail because the officers' belief here was that reasonable suspicion was required, and the officers did not have reasonable suspicion?

B. DID MR. BURTON'S ATTORNEY PROVIDE INEFFECTIVE ASSISTANCE WHEN HE ASSERTED IN HIS OPENING STATEMENT THAT "NOT A SINGLE WITNESS" WOULD SAY "I SAW HIM WITH GUNS, I SAW HIM WITH DRUGS, I SAW HIM WITH THAT MONEY," AND THEREBY OPENED THE DOOR TO PREVIOUSLY EXCLUDED EVIDENCE OF A PRIOR COCAINE BASE OFFENSE?

C. WAS THE EVIDENCE INSUFFICIENT TO SUPPORT FELON IN POSSESSION OF FIREARMS AND FELON IN POSSESSION OF AMMUNITION CONVICTIONS BECAUSE THE ONLY EVIDENCE OF A PRIOR FELONY CONVICTION WAS CONVICTION RECORDS WITH THE SAME NAME?

D. WAS THE EVIDENCE INSUFFICIENT TO SUPPORT FORFEITURE OF $35,700 BECAUSE 21 U.S.C. § 853 REQUIRES PROOF THE PROPERTY IS PROCEEDS FROM OR INTENDED TO BE USED TO COMMIT OR FACILITATE THE SPECIFIC OFFENSE THE DEFENDANT IS CONVICTED OF, AND HERE THAT OFFENSE WAS POSSESSION WITH INTENT TO DISTRIBUTE COCAINE BASE WHICH HAD ALREADY BEEN PURCHASED AND NOT YET BEEN SOLD?

II.

STATEMENT OF THE CASE

A. STATEMENT OF JURISDICTION.

This appeal is from a conviction for possession with intent to distribute more than 28 grams of cocaine base, in violation of 21 U.S.C. § 841(a)(1); convictions for felon in possession of firearms and felon in possession of ammunition, in violation of 18 U.S.C. § 922(g)(1); and forfeiture of property including, inter alia, $35,700 in United States Currency, under 21 U.S.C. § 853.

The district court had jurisdiction pursuant to 18 U.S.C. § 3231, and this Court has jurisdiction pursuant to 28 U.S.C. § 1291. Judgment was entered on November 22, 2016, ER 42-45, and a timely notice of appeal was filed on November 28, 2016, ER 41.

B. COURSE OF PROCEEDINGS.

On September 22, 2015, the government filed an information, with an accompanying waiver of indictment, charging Mr. Burton with felon in possession of firearms and felon in possession of ammunition. CR(15-2443) 13, 14.[1] On the same day, Mr. Burton was arraigned on the information and pled not guilty. CR(15-2443) 15.

On November 30, 2015, the defense filed a motion to suppress evidence. CR(15-2443) 26. On December 22, 2015, the government filed a response. CR(15-2443) 33. On January 13, 2016, the defense filed a supplemental declaration in support of the motion. CR 38. On January 20, 2016, the court held a hearing and denied the motion. *See* ER 25-40, 118-287.

On April 7, 2016, the government filed an indictment under a different case number, adding charges of possession with intent to distribute more than 28 grams

[1] There were two case numbers under which Mr. Burton was charged. CR(15-2443) refers to the docket for the first case, No. 3:15-cr-02443-AJB, and CR(16-746) refers to the docket for the second case, No. 3:16-cr-00746-AJB. RT([date]) shall refer to the reporter's transcript for the date indicated. There are two July 19, 2016 transcripts with duplicative paging – one of the voir dire proceedings and one of testimony – but only the transcript with testimony is cited, so RT(7/19/16) refers to that July 19, 2016 transcript.

of cocaine base and possession of the firearms in furtherance of that drug offense, in violation of 18 U.S.C. § 924(c), and seeking forfeiture of the guns, ammunition, and United States currency. ER 305-09. On April 14, 2016, Mr. Burton was arraigned on the indictment and pled not guilty, CR(16-746) 5, and the information under the other case number was dismissed, CR(15-2443) 51.

On June 27, 2016, the government filed multiple combined motions, including a motion for the court to "reconsider its ruling on the suppression motion in light of new Ninth Circuit precedent" and a motion to admit evidence of a prior possession of cocaine base under Rule 404(b) of the Federal Rules of Evidence. CR(16-746) 10, at 5-8, 13-15. On July 4, 2016, the defense filed responses to the government's motions, which included additional arguments in support of the suppression motion. CR(16-746) 12, 14. On July 6, 2016, the court denied the government's Rule 404(b) motion, *see* ER 115-17, and scheduled another hearing for the motion to reconsider the suppression ruling, *see* RT(7/6/16) 4-5. On July 15, 2016, the government filed a response to the additional defense suppression arguments. CR(16-746) 20. On July 18, 2016, the defense filed a "supplemental document in support of suppression motion." ER 106-09. Later that day, the court granted the motion to reconsider but adhered to its ultimate ruling denying suppression. *See* ER 23-24.

On July 19, 2016, trial commenced. CR 25. During trial, the government sought reconsideration of the court's ruling excluding the evidence of Mr. Burton's prior possession of cocaine base. *See* ER 65, 86. The court ultimately granted reconsideration and ruled the government would be allowed to introduce the evidence. *See* ER 79-82.

On July 21, 2016, the jury returned verdicts in three stages, because the trial had been bifurcated, *see* RT(7/6/16) 34-40. First, it returned a verdict of guilty on the possession with intent to distribute cocaine base counts but not guilty on the 18 U.S.C. § 924(c) count. *See* RT(7/21/16) 493-497. Next, it returned verdicts of guilty on both felon in possession counts. *See* RT(7/21/16) 516-24. Last, it returned a verdict forfeiting the guns, ammunition, and United States currency *See* RT(7/21/16) 533-41.

On November 4, 2016, the defense filed a motion arguing the evidence was insufficient to support forfeiture of the United States currency and was also insufficient to establish the prior felony conviction element of the felon in possession counts. CR(16-746) 48. On November 13, 2016, the government filed an opposition to the motion. CR(16-746) 51. On November 15, 2016, the district court denied the motion. *See* ER 3, 5.

C. BAIL STATUS OF DEFENDANT.

Mr. Burton is presently in custody serving the 180-month sentence imposed by the district court. His projected release date is June 5, 2029.

* * *

III.

STATEMENT OF FACTS

A. TRAFFIC STOP AND PROBATION SEARCH.

On November 7, 2014, two San Diego police officers named Rogelio Medina and Blake Williams were deployed on a "saturation patrol" as part of the Southeastern Division "crime suppression team." ER 125-26, 214. The "crime suppression team" is "a proactive unit put together to tackle the gang and narcotic compliance in the southeastern neighborhoods." ER 126. A "saturation patrol" is "a policing strategy where the group of officers that are working that particular team just basically saturate a particular neighborhood within the Southeastern Division," intended to create "visibility" and "find the criminal element." ER 193. Part of what officers do to "find the criminal element" and "tackle the gang and narcotic compliance" during a "saturation patrol" is what one officer on the team described as "enforce proactive policing through traffic violations, moving violations, pedestrian violations." ER 249.

Officers Medina and Williams testified they were stopped at an intersection during this "saturation patrol" and heard loud music coming from a white Camaro about 200 feet away, which is a violation of California Vehicle Code § 27007. *See* ER 131-32, 215. The Camaro was driving toward the officers and made a legal U-turn at the intersection. ER 132-33, 217. The officers decided to stop the Camaro, and Officer Medina, who was driving, accelerated through the intersection to catch it. ER 135-36, 217. The Camaro made what Officer Medina described as an

"abrupt right turn" and pulled to the curb while activating its turn signal at the same time. ER 136, 217-18. Officer Medina claimed he had to slam on his brakes to avoid colliding with the Camaro. ER 138. In his subsequent report, he described the late turn signal as a violation of California Vehicle Code § 22108. *See* ER 297.

Officer Medina stopped behind the Camaro, and made contact with the driver, who was Mr. Burton. ER 138-39, 218-19. Officer Medina asked Mr. Burton for identification and proof of insurance, and Officer Williams ran a records check. ER 139-40, 219. The records check revealed Mr. Burton's license was suspended and also that he had what the officers called a "fourth waiver," meaning a probation condition that allows probation searches. ER 140, 220, 222, 291. Officer Williams recalled "the most significant charge during [the] records check" being assault with a deadly weapon, ER 220, which is what he wrote down in his report, *see* ER 291. Officer Williams testified at the suppression hearing that a "fourth waiver" allows officers to search the probationer's person, vehicle, and residence "upon contact," without saying what, if any, suspicion was required. ER 222. Officer Medina, who was the only officer asked, testified he understood the suspicion required to be "reasonable suspicion." ER 140.

After discovering the "fourth waiver," and that Mr. Burton resided just one or two houses down the street, the officers decided to conduct a probation search. *See* ER 140, 224, 227. They contacted their sergeant to obtain authorization, ER 227, and the sergeant and other members of the "crime suppression team" out on the "saturation patrol" came to the scene, *see* ER 196-97, 257, 271. Officer Williams had Mr. Burton get out of the car, handcuffed him, and searched his

person. ER 225. The officer found a cell phone, some money, and a plastic bag containing a small personal use quantity of marijuana. ER 225-26; RT(7/19/16) 43, 57. The officer also searched Mr. Burton's car, but found nothing in it. ER 226.

When the other officers arrived, they went to the house, where Mr. Burton said he lived with his grandmother. *See* ER 292. The grandmother told the officers Mr. Burton kept his belongings in the garage. RT(7/19/16) 93-94. The first officer to search the garage found a sweatshirt with approximately 31 grams of rock cocaine in one pocket and $6,200 in $100 bills in another pocket. RT(7/19/16) 96-98; RT(7/20/16) 220. A second officer conducting a follow-up search of the garage saw a backpack up in the rafters, which he pulled down with a broomstick. RT(7/19/16) 126. The backpack had a lock on it which a key from Mr. Burton's key ring opened. RT(7/19/16) 111. Inside the backpack were a gun case and a metal lockbox, which another of the keys on Mr. Burton's key ring opened. RT(7/19/16) 111-12. Inside the lockbox was $29,500 in $100 bills, and inside the gun case were a gun and two magazines which were loaded, but with the bullets loaded backwards. RT(7/19/16) 112-14. Also found in the backpack was a black zippered pouch with a second handgun and loose ammunition. RT(7/19/16) 114-15. A manual with the gun in the lockbox had a "yellow sticky note" with "Steves" written on it. RT(7/19/16) 120.

In addition to the officers who searched the house and the garage, there was an officer outside watching Mr. Burton. RT(7/19/16) 143. After this officer was relieved, he walked up the driveway to a small retaining wall. RT(7/19/16) 143-44. Just behind a bush, he found two plastic bags. RT(7/19/16) 144. In one of the

bags, there were multiple bags containing an "off-white rock-like substance," RT(7/19/16) 145-46, which turned out to be approximately seven grams of rock cocaine, *see* RT(7/19/16) 220. In the second bag were a scale, a credit card, a razor, and a knife and spoon, all with white residue on them, and a glass jar and alcohol container. RT(7/19/16) 146-47.

B. CHARGES AND PRETRIAL HEARINGS.

Mr. Burton was eventually charged in federal court. He was initially charged in an information with just felon in possession of firearms and felon in possession of ammunition. CR(15-2443) 13. When he refused to plead guilty, the government obtained an indictment including the felon in possession charges and adding charges of possession with intent to distribute more than 28 grams of cocaine base and possession of the firearms in furtherance of that crime, in violation of 18 U.S.C. § 924(c). ER 305-07. The indictment also sought forfeiture of the guns and ammunition, as well as the money found in the garage. ER 307-09.

In the pretrial hearing on the motion to suppress, it was established Mr. Burton was not on probation for assault with a deadly weapon as Officer Williams had thought but had received a one-day time served sentence for that offense and been placed on probation for a different offense – reckless driving. *See* ER 301-03. The probation search condition as articulated orally by the court at the state sentencing hearing required Mr. Burton to "submit his person, place of residence, vehicle to search at any time with or without warrant, with or without probable

cause when requested by any law enforcement officer." ER 303.[2] The probation was summary probation with no probation office supervision, *see* ER 299, and a transcript reflected Mr. Burton was not present and his attorney was "appearing 977 on [Mr. Burton's] behalf," ER 302. This was an apparent reference to California Penal Code § 977, which allows most misdemeanor defendants to "appear by counsel only." Cal. Penal Code § 977. There was also nothing to suggest Mr. Burton was informed of the probation search condition at some later time. A letter from his attorney offered as evidence with the defense motion for reconsideration listed only other conditions and said nothing about the search condition, ER 108.

In another pretrial motion, the government revealed Mr. Burton had been arrested at his grandmother's house several months earlier with rock cocaine hidden in his buttocks. *See* CR(16-746) 10, at 13-15. The government sought to introduce this evidence under Rule 404(b) of the Federal Rules of Evidence. *See* CR(16-746) 10, at 13-15. The defense objected, *see* CR(16-746) 12, at 6-9, and the court excluded the evidence under Rule 403 of the Federal Rules of Evidence, *see* ER 116-17.

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[2] The clerk's minutes for the proceedings had a box checked beside a condition which read, "**FOURTH AMENDMENT WAIVER:** Submit person, vehicle, place of residence, property, personal effects to search at any time with or without a warrant, and with or without reasonable cause, when required by a Probation Officer or other law enforcement officer," ER 299, but it is the oral pronouncement which controls under California law, *People v. Mesa*, 535 P.2d 337, 340 (Cal. 1975).

C. TRIAL.

The first witnesses the government called at trial were several of the police officers, who described the traffic stop, the searches, and what was found. See RT(7/19/16) 32-61, 80-82, 90-105, 106-31, 132-40, 141-56. The government also called Mr. Burton's grandmother and an uncle who also lived with her, to testify that the sweatshirt in which the drugs and $6,200 had been found and the backpack in which the guns, ammunition, and $29,500 had been found did not belong to them, that Mr. Burton lived at the house, and that Mr. Burton kept his things in the garage. *See* RT(7/20/16) 181-83, 186-87, 190, 201-03. The uncle claimed he had seen the sweatshirt in the garage, *see* RT(7/20/16) 210, but he was impeached by a defense investigator who testified the uncle had previously said he had never seen the sweatshirt before, *see* RT(7/21/16) 409. The grandmother denied having seen the sweatshirt before, *see* RT(7/20/16) 186-87, but the government called an officer who claimed the grandmother said she had seen Mr. Burton washing the sweatshirt three times, *see* RT(7/20/16) 331. The grandmother testified she owned the house, RT(7/20/16) 180, and that her children and grandchildren visited frequently and some of them had their own keys to the house, *see* RT(7/20/16) 192-94. The grandmother also testified the garage door was often left open during the day. *See* RT(7/20/16) 195.

In addition to the officers who participated in the stop and search, the government also called expert witnesses to testify about (1) testing of the drugs, *see* RT(7/20/16) 213-24; (2) unsuccessful DNA and fingerprint testing of the guns and ammunition, *see* RT(7/20/16) 274-94, 316-29; (3) the guns and ammunition

having traveled in interstate commerce, *see* RT(7/21/16) 374-93; and (4) the extraction of texts and other information from Mr. Burton's cell phone and another cell phone in the garage, which turned out to have a substantially overlapping contact list, *see* RT(7/20/16) 234-47. A police detective the government qualified as a narcotics expert testified certain of the texts were in his opinion consistent with drug trafficking. *See* RT(7/20/16) 257-58. This detective also testified the drugs and other items found near the driveway retaining wall were drug trafficking paraphernalia and what he called a "working sack." *See* RT(7/20/16) 258-60.

The government also convinced the court to change its ruling excluding the evidence of Mr. Burton's prior possession of cocaine base. In his opening statement, defense counsel had told the jury:

> There will not be a single witness who will come into court who will say "That man, right there, I saw him, I saw him with guns, I saw him with drugs, I saw him with that money." It will not happen."

ER 103. The prosecutor complained this was unfair to the government and argued it opened the door. *See* ER 86. The court ultimately agreed and ruled the government would be allowed to present some evidence of the prior incident. *See* ER 79-82. The government then called a retired detective who had searched Mr. Burton at his grandmother's house on April 25, 2014 and found a bag with approximately 14 grams of rock cocaine. *See* ER 58-60.

After this evidence was presented, the parties argued to the jury in stages, because the court had agreed to bifurcate the charges, as noted *supra* p. 6. After hearing the first stage of argument, the jury returned a verdict of guilty on the drug charge but not guilty on the § 924(c) charge. *See* RT(7/21/16) 493-497. The government then called a state probation officer to identify court records of two

prior felony convictions in the name of Steven Doyle Burton and/or Steven Burton. *See* ER 46-52; RT(7/21/16) 506-08. The parties presented brief additional argument, the jury retired again, and the jury returned verdicts of guilty on both felon in possession counts. *See* RT(7/21/16) 516-24. The parties then presented argument on the forfeiture allegation, the jury retired a third time, and the jury returned a verdict forfeiting the guns, ammunition, and money. *See* RT(7/21/16) 533-41.

IV.

SUMMARY OF ARGUMENT

In order to be constitutional, a probation search must both comply with the state law governing probation searches and satisfy a Fourth Amendment balancing test recognized and developed in *United States v. King*, 736 F.3d 805 (9th Cir. 2013), and *United States v. Lara*, 815 F.3d 605 (9th Cir. 2016). The probation search here did neither.

The probation search condition and thus the probation search did not comply with state law because California law authorizes probation searches only on a consent theory, which requires that the defendant specifically agree to the probation search condition, and allows a defendant to refuse probation if he chooses. It follows that a defendant must be present when a probation search condition is imposed, for only then can he specifically agree to the probation search condition and only then can he make the choice of either refusing or accepting the probation and its conditions. Mr. Burton was not present when the

probation search condition was imposed – indeed, he was not even told about it later – so the condition did not comply with state law.

The probation search condition and probation search also did not satisfy the Fourth Amendment balancing test recognized and developed in *King* and *Lara*. That balancing test requires the probationer's privacy interests to be balanced against government interests such as preventing violation of the criminal law, preventing recidivism, protecting potential victims, and reintegrating the probationer into society. The government interests vary in strength depending on the seriousness of the offense for which the probationer is on probation and the seriousness of the suspected probation violations. As for the probationer's privacy interest, it is less than that of an ordinary citizen, but it is still substantial, and it is even greater when the probationer has not been convicted of a particularly serious offense. Also relevant in evaluating the probationer's privacy interest is whether the probation search condition was clear, whether the probationer was unambiguously informed of it, and whether the probationer accepted the condition. The nature of the location searched is also pertinent; the cell phone searched in *Lara* triggered a much greater privacy interest than, as an example at the other end of the spectrum, a motor vehicle.

The balance of these interests weighs heavily against the probation search here. Mr. Burton's privacy interest is greater because he was on probation for the minor offense of reckless driving; in fact, this Court's recent opinion in *United States v. Job*, No. 14-50472, 2017 WL 971803 (9th Cir. Mar. 14, 2017), absolutely bars suspicionless probation search conditions for nonviolent offenses. The location searched was also highly private; though it was not a cell phone, it was

what is probably the next most private thing, namely, the home. The considerations of clarity, unambiguous advice of the condition, and acceptance of the condition weigh heavily against the government because Mr. Burton was never even informed of the condition, let alone given a chance to accept or reject it. This is particularly important for a California probationer because of a California defendant's absolute right to reject the probation and its conditions if he wishes.

On the other side of the scale, the government interests were less strong here. Mr. Burton was on probation for one of the most minor criminal offenses there is – reckless driving – which, as noted in the preceding paragraph, is dispositive under the recent *Job* opinion. Mr. Burton's violations – failing to properly use his turn signal, playing music too loudly in his car, and driving with a suspended license – were also minor. The marijuana should not be considered because it was a product of the initial probation search of Mr. Burton's person, but even if it could be considered, possession of a personal use amount of marijuana is also a minor violation. The government interests were therefore about as minimal as they could be.

Finally, a good faith theory the government advanced based on *Arizona v. Evans*, 514 U.S. 1 (1995), and the officers' reliance on computer records fails. First, the good faith theory fails because the information the officers relied on was the fact Mr. Burton had a probation search condition, that information was accurate, and an officer's good faith reliance on *accurate* information does not preclude an attack on the validity of the underlying order. Second, the good faith theory fails because the scope of California probation search conditions varies widely, and the officers had no information about the scope of Mr. Burton's

probation search condition. Third, the good faith theory fails because the officers' belief here was that reasonable suspicion was required, and the officers did not have that reasonable suspicion.

Reversal would be required even if the probation search was lawful because Mr. Burton's attorney provided ineffective assistance when he asserted in his opening statement that "not a single witness" would say "I saw him with guns, I saw him with drugs, I saw him with that money." This was representation which fell below an objective standard of reasonableness because it opened the door to the previously excluded evidence of Mr. Burton's prior cocaine base offense. While ineffective assistance claims normally are not addressed on direct appeal, they can be addressed when the record on appeal is sufficiently developed to permit determination of the issue. The record here contains both admissions by the defense attorney that the wording of his assertion was a mistake rather than the product of some strategic or tactical decision, and findings by the district court it was unintentional. The Court can also find prejudice on the record here because (1) no eyewitness saw Mr. Burton with the drugs and guns and each of the witnesses the government used to try to tie him to the sweatshirt with the drugs made inconsistent statements and (2) the evidence there was also an uncle living in the house and other children and grandchildren who had keys allowed an argument there were other possible culprits. Such an argument was grossly undercut, if not absolutely destroyed, by evidence Mr. Burton had been caught with a similar quantity of the same drug at the same location just a few months earlier.

Last, the forfeiture of the $35,700 which was found in the garage should be vacated. 21 U.S.C. § 853 makes property subject to forfeiture only if it is proceeds

from or intended to be used to commit or facilitate the specific criminal offense charged in the indictment. Here that was possession with intent to distribute cocaine base already possessed and not yet sold. The money could not be proceeds of the cocaine base still possessed at the house because proceeds are received *after* something is sold, not before it is sold. The money could not be intended to facilitate possession of that cocaine base because it had already been purchased. The most that could be inferred is that the money came from the prior sale of *other* cocaine base and might be intended to purchase *other* cocaine base. That is not sufficient under 21 U.S.C. § 853.

V.

ARGUMENT

A. THE SEARCH OF MR. BURTON'S HOME WAS AN UNLAWFUL PROBATION SEARCH.

1. Reviewability and Standard of Review.

The defense filed an initial motion to suppress evidence in which it challenged both the traffic stop and the subsequent probation search. CR(15-2443) 26. The district court denied that motion in an oral ruling after an evidentiary hearing. *See* ER 36-40. The government subsequently filed what it called a "motion in limine" "to reconsider [the court's] ruling on the suppression motion in light of new Ninth Circuit precedent," in which it cited this Court's

decision in *United States v. Lara*, 815 F.3d 605 (9th Cir. 2016), and suggested the district court apply *Lara*'s "updated balancing test" to reach the same result it had reached previously. CR(16-746) 10, at 5-8. The defense filed what it called, "Defendant's renewed suppression motion partially based on *United States v. Lara,*" in which it raised several new arguments about the invalidity of the probation search and argued *Lara* should lead to a different result. CR(16-746) 14. The district court did agree to reconsider its ruling and the new arguments, but still found the probation search lawful. *See* ER 23-24.

Rulings on the validity of probation searches are reviewed de novo. *See, e.g., Lara*, 815 F.3d at 609.

2. The Search Was Unlawful Because a Probation Search Must Comply with State Law, and the Search Here Did Not Comply with State Law Because California Law Gives a Defendant the Right to Refuse Probation and Authorizes Probation Searches Based on a Theory of Consent, and Mr. Burton Could Not Accept and Consent to a Search Condition When He Was Not Present at the Time It Was Imposed.

A court must undertake a two-step inquiry when the government claims a search comes within the probation search exception. Eventually, the court must undertake a Fourth Amendment analysis. But the court is to undertake that analysis "[o]nly after the meaning and scope of the search clause are determined, under state law." *United States v. King*, 736 F.3d 805, 807 n.3 (9th Cir. 2013). The first requirement is that the probation search be valid under state law. *See,*

e.g., United States v. Wyrn, 952 F.2d 1122, 1124 (9th Cir. 1991) (finding warrantless search of probationer's home unreasonable under Fourth Amendment because search did not comply with state regulation); *United States v. Johnson*, 722 F.2d 525, 527 (9th Cir. 1983) ("First, we look to whether the search condition itself was valid under California law."). *See also Motley v. Parks*, 432 F.3d 1072, 1084-85 (9th Cir. 2005) (en banc) (collecting and discussing cases).

In the present case, the government cannot satisfy even this first requirement. That is because the state of California has a unique – or at least unusual – law of probation. It allows a defendant who is dissatisfied with the conditions of probation selected by the sentencing court to simply "refuse probation and choose to serve the sentence." *People v. Olguin*, 198 P.3d 1, 4 (Cal. 2008). This is not just a technical right to which the courts give mere lip service; it is a right "of which [the defendant] cannot lightly be deprived." *In re Osslo*, 334 P.2d 1, 5 (Cal. 1958). A defendant may not only refuse to accept the conditions but may challenge their legality on appeal from the judgment or in habeas corpus. *In re Bushman*, 463 P.2d 727, 733 (Cal. 1970). "Additionally, at the sentencing hearing, a defendant can seek clarification or modification of a condition of probation." *Olguin*, 198 P.3d at 5.

Consistent with the right to refuse probation is the California courts' rationale for probation searches; it is purely one of consent. As explained in *People v. Bravo*, 738 P.2d 336 (Cal. 1987):

> No . . . balancing is necessary . . . . A probationer, unlike a parolee, consents to the waiver of his Fourth Amendment rights in exchange for the opportunity to avoid service of his state prison term. Probation is not a right, but a privilege. If the defendant considers the conditions of probation more harsh than the sentence the court would otherwise impose, he has the

> right to refuse probation and undergo the sentence. A probationer's waiver of his Fourth Amendment rights is no less voluntary than the waiver of rights by a defendant who pleads guilty to gain the benefits of a plea bargain.

Id. at 341 (citations and internal quotation omitted). This voluntary waiver requires that the defendant "specifically agree[ ]" to permit the searches provided for in the probation condition. *People v. Ramos*, 101 P.3d 478, 488 (Cal. 2004) (quoting *People v. Mason*, 488 P.2d 630, 634 (Cal. 1971)). Without such "specific agreement," there can be no voluntary waiver and hence no consent.

It follows the defendant must be present when the search condition is imposed. Only then can the defendant make an intelligent choice of either accepting the condition or refusing probation and only then can the court assure he "specifically agree[s]" to the search condition. Only then can the defendant seek clarification or modification of the condition. Only then can the defendant decide whether he wishes to challenge the condition on appeal.[3]

Mr. Burton, without being present, was able to do none of these things. He

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[3] A concern expressed by the government in its opposition in the district court that defendants could use the right to waive presence at sentencing, *see* Cal. Penal Code § 977, *cited supra* p. 11, to defeat probation search conditions is misplaced for at least two reasons. First, Penal Code § 977 allows sentencing without a defendant's appearance only in misdemeanor cases, in which search conditions are relatively rare. *See* CR(15-2443) 26-1, at 7 (defense motion noting search condition is not typically condition of probation for reckless driving). Second, even misdemeanor defendants do not have an absolute right to forgo appearance at sentencing; rather, courts have the authority to order the defendant to appear in situations "where defendant's presence would be necessary to properly conduct sentencing." *Bracher v. Superior Court*, 141 Cal. Rptr. 3d 316, 325 (Cal. App. 2012) (quoting *Olney v. Municipal Court*, 184 Cal. Rptr. 78, 81 (Cal. App. 1982)). Requiring an appearance for "specific agreement" to a search condition would be one such situation.

was not able to choose between accepting the condition or refusing probation. He was not able to seek clarification or modification of the condition. He lost the opportunity to challenge the condition by appealing. He did not even have these opportunities after the fact, because his lawyer's letter said nothing about the search condition and his probation was summary probation with no supervising probation officer to inform him of the condition. He would have first found out about the condition when a police officer told him the officer was deciding to use the condition to conduct a search. The requirements for a California probation search condition were thus not satisfied.

3. The Search Was Unlawful Because It Exceeded Fourth Amendment Limits Under the Balancing Test Established by *United States v. King*, 736 F.3d 805 (9th Cir. 2013), and *United States v. Lara*, 815 F.3d 605 (9th Cir. 2016).

It is established after the Supreme Court's decision in *United States v. Knights*, 534 U.S. 112 (2001), that the Fourth Amendment imposes limitations on what states can allow with probation search conditions. *See Motley v. Parks*, 432 F.3d at 1085. The ultimate question is whether a search is "reasonable" under the Fourth Amendment. *United States v. Lara*, 815 F.3d at 609; *United States v. King*, 736 F.3d at 808. A court making this determination must "balance 'on the one hand, the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which [the search] is needed for the promotion of legitimate government interests.'" *Lara*, 815 F.3d at 610 (quoting *Knights*, 534 U.S. at 119, and *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

Lara and the earlier opinion in *King* which *Lara*, in the government's words, "updated," CR(16-746) 10, at 6, identify multiple factors to be considered in applying the balancing test required by the Fourth Amendment. Initially, there is the defendant's status as a probationer, which "means he begins with a lower expectation of privacy than is enjoyed by a citizen who is not subject to a criminal sanction." *King*, 736 F.3d at 808. Still, "while the privacy interest of a probationer has been 'significantly diminished,' [*Knights*, 534 U.S. at 120], it is still substantial"; for example, it is greater than that of a parolee. *Lara*, 815 F.3d at 610. The probationer's privacy interest is also greater when the probationer has not been convicted of a "particularly 'serious and intimate' offense." *Id.* (quoting *King*, 736 F.3d at 809).

Also relevant on the probationer privacy interest side of the scale is the probation search condition. This includes whether the probation order "clearly expressed the search condition," whether the defendant "was unambiguously informed of it," and whether the probationer accepted the condition. *King*, 736 F.3d at 808-09 (quoting *Knights*, 534 U.S. at 118). *See also Lara*, 815 F.3d at 610 (listing "clarity of the conditions of probation" as a factor and noting cell phone search condition in case at bar was not clear). These factors are so important that *King* expressly left open the possibility that suspicionless searches may be absolutely barred when the probationer has not affirmatively accepted the condition. *See id.*, 736 F.3d at 810 ("We need not decide whether the Fourth Amendment permits suspicionless searches of probationers who have *not* accepted a suspicionless-search condition, ..." (Emphasis in original.)).

Finally, the nature of the item or place being searched is a factor to be

considered. A strong consideration weighing in favor of the probationer's privacy interest and against extending the probation search condition in *Lara* was the fact that the item searched there was a cell phone, which "would typically expose to the government far *more* than the most exhaustive search of a house." *Lara*, 815 F.3d at 611 (quoting *Riley v. California*, 134 S. Ct. 2473, 2491 (2014) (emphasis in original)). At the other end of the spectrum is the motor vehicle searched in *United States v. Baron*, 650 Fed. Appx. 424 (9th Cir. 2016) (unpublished), which the Court noted "was subject to 'a reduced expectation of privacy.'" *Id.* at 425 (quoting *California v. Carney*, 471 U.S. 386, 393 (1985)).

King and *Lara* also identified several factors to consider on the government interest side of the scale. As summarized very generally in *King*, those interests are (1) the interest in apprehending violators of the criminal law and protecting victims from probationers' recidivism, (2) an interest in discovering criminal activity and preventing destruction of evidence, and (3) an interest in the probationer's successful completion of probation and reintegration into society. *King*, 736 F.3d at 809. What *Lara* added to this list of interests was the caveat that their "strength in a particular case varies." *Lara*, 815 F.3d at 612. One consideration is the nature of the violation or suspected violation; in *King*, it was substantial evidence the probationer "had vandalized and set fire to an electrical facility and an adjoining telecommunications vault, causing an estimated $1.5 million in damages," while in *Lara* it was merely missing a meeting with the probation officer, which the Court described as "worlds away" from the suspected violation in *King*. *Lara*, 815 F.3d at 612. Also pertinent is the offense for which the probationer has been placed on probation; in *King*, it was the "serious and

intimate offense" of "willful infliction of corporal injury on a cohabitant," *King*, 736 F.3d at 809; *see also Lara*, 815 F.3d at 610, while in *Lara* it was a possession for a sale and transportation drug offense, *see Lara*, 815 F.3d at 607.

The Court can actually stop here in the present case, based on its recent holding in *United States v. Job*, No. 14-50472, 2017 WL 971803 (9th Cir. Mar. 14, 2017). *Job* held that a search waiver can *never* justify a suspicionless search when the defendant is on probation for a nonviolent offense. *See id.*, 2017 WL 971803, at *4. And this absolute bar to suspicionless search conditions for nonviolent offenses recognized by *Job* is especially appropriate in the case of a probationer like Mr. Burton who neither was informed of nor accepted the condition. The lack of acceptance of the condition may invalidate a suspicionless search condition even in the case of a violent offense, *see supra* p. 23 (noting *King* left this question open), and it certainly should do so in the case of a nonviolent offense.

The balance of the factors set forth in *King* and *Lara* weigh heavily against the probation search and the probation search condition here even without the dispositive holding in *Job*, moreover. To begin, the interests on the probationer privacy interest side of the scale weigh heavily against the government and in favor of Mr. Burton. Mr. Burton's privacy interest is greater under *Lara* because he was on probation for the minor offense of reckless driving (which is actually dispositive under *Job*).[4] And the considerations of clarity, unambiguous advice of

[4] That the officers believed Mr. Burton was on probation for assault with a deadly weapon is not relevant to the balancing under *King* and *Lara*. Because it is general societal interests which are being balanced, it is what the probationer is *actually* on probation for that is relevant, not what some law enforcement officer

the condition, and acceptance of the condition also weigh against the government. Initially, the condition was not particularly clear, because it spoke of "with or without probable cause," not with or without any suspicion at all. *See King*, 736 F.3d at 810-11 (Berzon, J., dissenting) (disputing meaning of "with or without probable cause" and arguing it did not mean with no suspicion at all).[5] Worst of all, Mr. Burton was not only not "unambiguously informed" of the condition; he was never informed of it at all, even by his lawyer after the fact. That in turn means Mr. Burton also never accepted the condition, since one cannot accept or agree to something one does not even know about.

This failure to advise and absence of acceptance is particularly significant in the case of a California probationer, moreover. As discussed *supra* pp. 20-21, a California probationer has choices. First, he can request clarification or modification of the condition. Second, he can appeal to a higher court if a request for modification is denied. Third, he has the ultimate control over whether to be subject to the condition, for he can simply refuse probation. Ambiguity and an absence of acceptance are particularly important where the defendant can do something about the condition.

Finally, the nature of the place searched weighs against the government here. While it was not a cell phone as in *Lara*, it was Mr. Burton's home, which is

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may believe he is on probation for.

[5] The majority in *King* did reject Judge Berzon's view about the meaning of "with or without probable cause," *see id.* at 806-07 n.3, but the majority's focus – and, for that matter, Judge Berzon's focus – was not on whether the language creates ambiguity, but on resolving the ambiguity it creates. This ambiguity is evidenced by the judges' disagreement about its meaning.

probably the next most private space. The Supreme Court has described the home as "[a]t the very core" of the Fourth Amendment. *Payton v. New York*, 445 U.S. 573, 589-90 (1980) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). This Court recognized the core nature of the home – in discussing the Fourth Amendment exception for consent searches, which, especially in California, are somewhat analogous to probation searches, *see supra* pp. 20-21 (discussing California probation search rationale of consent) – in *United States v. Shaibu*, 920 F.2d 1423 (9th Cir. 1990).

> That burden [of establishing effective consent] is heaviest when consent would be inferred to enter and search a home, for protection of the privacy of the home
>
> > finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 [81 S. Ct. 679, 682]. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house.
>
> *Payton v. New York*, 445 U.S. at 589-90, 100 S. Ct. at 1381-82.

Shaibu, 920 F.2d at 1426. *See also Lalonde v. County of Riverside*, 204 F.3d 947, 954 (9th Cir. 2000) (describing home as "perhaps the most sacrosanct domain").

On the other side of the scale, the government interests identified in *King* and *Lara* are not weighty here. Mr. Burton was on probation for one of the most minor criminal offenses – reckless driving – which, as noted *supra* p. 25, is actually dispositive under *Job*. His violations – failing to properly use his turn signal, playing music too loudly in his car, and driving with a suspended license – were also minor. Mr. Burton's possession of marijuana cannot be considered in

the calculus, because it was discovered only through the initial probation search of Mr. Burton's person. *Cf. Sibron v. New York*, 392 U.S. 40, 63 (1968) (describing as "axiomatic" that search could not be justified as search incident to arrest where arrest was based on evidence found in search). Even if the marijuana could be considered, the possession of a personal use amount of marijuana is also a minor violation; after the November 2016 election, it is not even a crime in California, and it was penalized by just a fine even at the time of the search here.

In sum, the probationer privacy interest factors here weigh heavily against the government and in favor of Mr. Burton, and the government interest factors are nowhere near weighty enough to offset the probationer privacy interest factors. In fact, a recent opinion of this Court – *Job* – actually makes the nature of the offense for which Mr. Burton was on probation dispositive. The probation search violated the Fourth Amendment even if it could be found to be valid under California law.

4. A Good Faith Theory Which the Government Advanced Based on Police Officer Reliance on Computer Records Fails.

One of the arguments the government made in the district court, citing *Arizona v. Evans*, 514 U.S. 1 (1995), is that the officers acted in good faith even if the probation search condition was invalid, because they relied on the computer record. *See* ER 30, 33-34, 39; CR(16-746) 20, at 7-9; CR(15-2443) 33, at 10. This argument fails for at least three reasons.

a. The good faith theory fails because the information officers relied on was the fact Mr. Burton had a probation search condition, that information was accurate, and an officer's good faith reliance on accurate information about a court order does not preclude an attack on the validity of the underlying order.

Initially, *Evans* is inapposite. What the Supreme Court held in *Evans* was that the exclusionary rule did not apply when an officer relied upon a computer record reflecting an active arrest warrant but the warrant had actually been quashed 17 days earlier. *See id.* at 4, 15-16. The principle established by *Evans* is that an officer is entitled to rely upon erroneous records which are the product of mistakes by court personnel, there, the failure to remove the arrest warrant from the computer database once it had been quashed. *See also Herring v. United States*, 555 U.S. 135 (2009) (applying same principle to arrest based on mistake by police department clerical employee). *Evans* did not address reliance on *accurate* entries reflecting warrants or other orders where the actual warrant or order is constitutionally infirm.

Where officers rely on an *accurate* entry, officers may rely on the entry, but courts still inquire into whether the underlying law enforcement request, warrant, or court order is valid. *See, e.g., United States v. Noster*, 590 F.3d 624, 630 (9th Cir. 2009); *United States v. Ramirez*, 473 F.3d 1026, 1033-34 (9th Cir. 2007); *United States v. Thomas*, 211 F.3d 1186, 1189 (9th Cir. 2000). Here, that is the probation search order discussed above. That order is constitutionally infirm for the reasons discussed.

There was some suggestion in the district court proceedings that the record reflecting Mr. Burton's probation search condition was in error in one respect, namely, that it showed the probation was for an assault with a deadly weapon conviction rather than a reckless driving conviction. This does not make *Evans* applicable for two reasons, however. To begin, it is unclear whether the mistake was in the computer record or in the officer's interpretation of the record. The officer who conducted the record check testified the record check showed Mr. Burton "was on probation and had a valid fourth waiver status until sometime in 2016" and "the most significant charge during [the] records check" was "245 PC, which is assault with a deadly weapon." ER 220. The officer did not testify the record said the probation was based on the assault charge rather than another charge in the same case, which was of course the reality, and the government never produced the actual computer record. It is possible the officer simply misinterpreted or misread a completely accurate or ambiguous entry which showed (1) a prior case with charges for both assault with a deadly weapon and reckless driving, (2) a probation search condition, and (3) either an indication which the officer overlooked that the probation was for the reckless driving or no indication at all about which charge the probation was for.

More important, it was not what Mr. Burton was on probation for that mattered. What offense the probation was for matters only in the balancing of Fourth Amendment interests discussed above, which is not a decision for the officers but a decision for the courts in evaluating whether the probation search condition was justified. *See supra* pp. 25-26, 27 & n.4. What mattered for the officers was whether there was a valid probation search condition for some offense

and what the condition authorized. What the officers therefore relied on in conducting a probation search was the *accurate* entry that Mr. Burton had a probation search condition.

In sum, this is not an *Evans* good faith case about police officer reliance on an inaccurate entry in computer records. It is a case about police officer reliance on an *accurate* entry and whether that *accurate* entry reflected a constitutionally infirm court order.

b. The good faith theory fails because the scope of California probation search conditions varies widely and the officers had no information about the scope of Mr. Burton's probation search condition.

There is a second problem with the government's good faith argument. The good faith exception requires the officers' reliance on the record to be reasonable. *See Evans*, 514 U.S. at 15-16. While the officers here acted reasonably in assuming from the computer entry there was *some* probation search condition, they did not act reasonably in simply assuming it allowed a search like the one they conducted.

This is made clear by the discussion of probation search conditions in *People v. Romeo*, 193 Cal. Rptr. 3d 96 (Cal. App. 2015). The court there found an officer acted unreasonably in assuming he could conduct a particular search based on a probation search condition entry in a computer record very similar to that here, *see id.* at 101 (describing "countywide computer system" which provided

information defendant had probation search condition). The court explained:

> Unlike the parole context where the scope of permissible search is imposed by law (footnote omitted) – and deemed known to the searching officer from nothing more than the fact that someone is on parole – a probationer's expectation of privacy, and hence the reasonableness of a warrantless search may vary depending on the scope of advance consent.

Id. at 113. The court then explained further:

> Unlike parole searches – where a searching officer's knowledge of a person's parole status *alone* is enough to justify a search of the parolee's person or any property under his control, including his residence – the permissible scope of a probation search is circumscribed by the terms of the search clause, and the scope may vary. Conditions of probation may be imposed so long as they are "fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer." [Cal. Penal Code § 1203.1(j).] Courts therefore attempt to individualize the terms and conditions of probation to fit the offender. (Citations omitted.) A search condition is not mandated by statute for every probationer, and probation search clauses are not worded uniformly. (*See United States v. King* (9th Cir. 2013) 736 F.3d 805, 811 & fn. 1 (dis. opn. of Berzon, J.).) On occasion, judges may limit the scope of the defendant's consent to searches for particular contraband, such as drugs or stolen property, or place spatial limits on where searches may take place. Some judges have "standard" probation terms for particular crimes in particular circumstances . . . , but practices vary by county all over the state.

Romeo, 193 Cal. Rptr. 3d at 114 (emphasis in original). *See also United States v. Rodriguez*, No. 15-50096, 2017 WL 971809, at *6 n.2 (9th Cir. Mar. 14, 2017) (recognizing that "the exact language used in search waivers is not uniform and varies depending on the probation condition).

Indeed, in this very case, the officers were unaware of the scope of the probation search condition. While Mr. Burton's actual condition allowed a search

"with or without probable cause," which this Court interpreted in *King* to mean no suspicion at all, *see id.*, 736 F.3d at 806-07 n.3, the only officer who was asked thought reasonable suspicion was required, *see* ER 140. This drives home the point that the officers knew – or at least should have known – that they had no information about the *scope* of the probation search condition. The officers thus lacked a good faith belief about what they could do even if the good faith exception could theoretically apply.

c. The good faith theory fails because the officers' belief here was that reasonable suspicion was required, and the officers did not have reasonable suspicion.

The basic premise of the good faith exception is that officers are acting on what they honestly and reasonably, but mistakenly, believe. It follows the officers must act consistently with their belief. Here, that belief included a belief – at least according to the one officer who was asked – that reasonable suspicion was required. This means the officers had to have reasonable suspicion in order to claim good faith.

The officers did not have reasonable suspicion, however. It has been recognized by the Supreme Court itself that traffic infractions and even driving with a suspended license do not establish suspicion for a search. In *Arizona v. Gant*, 556 U.S. 332 (2009), the defendant had been arrested for driving with a suspended license, and the Court recognized that was "an offense for which police could not expect to find evidence in the passenger compartment of [the

defendant's] car." *Id.* at 344. In the case cited in *Gant* – *Knowles v. Iowa*, 525 U.S. 113 (1998) – where the defendant had been stopped for speeding, the court recognized "[n]o further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car." *Id.* at 118. While *Gant* and *Knowles* did not consider the search of a home, there would be even less reason to expect to find evidence in a driver's home.

There is thus this third reason the good faith exception does not apply here. The officers cannot claim good faith because what they believed did not justify what they did.

B. MR. BURTON'S ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE WHEN HE ASSERTED IN HIS OPENING STATEMENT THAT "NOT A SINGLE WITNESS" WOULD SAY "I SAW HIM WITH GUNS, I SAW HIM WITH DRUGS, I SAW HIM WITH THAT MONEY," BECAUSE THIS OPENED THE DOOR TO EVIDENCE OF MR. BURTON'S PRIOR COCAINE BASE OFFENSE.

1. Reviewability and Standard of Review.

While there is a general rule that courts do not review ineffective assistance of counsel claims on direct appeal, there is an exception "where the record on appeal is sufficiently developed to permit determination of the issue." *United States v. Alferahin*, 433 F.3d 1148, 1160-61 n.6 (9th Cir. 2006) (quoting *United States v. Jeronimo*, 398 F.3d 1149, 1156 (9th Cir. 2005)). This Court applied the

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CA No. 16-50451

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. STEVEN DOYLE BURTON, Defendant-Appellant.	)	(D.Ct. #3:16-cr-00746-AJB)

APPELLANT'S REPLY BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

HONORABLE ANTHONY J. BATTAGLIA
United States District Judge

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CA No. 16-50451

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. STEVEN DOYLE BURTON, Defendant-Appellant.	(D.Ct. #3:16-cr-00746-AJB)

I.

ARGUMENT

A. THE SEARCH OF MR. BURTON'S HOME WAS NOT A LAWFUL PROBATION SEARCH.

1. The Search Was Not a Lawful Probation Search Because the Probation Search Condition Was Not Valid Under State Law.

The government ignores – or certainly fails to address directly – the first requirement for a lawful state probation search – that the search condition comply with state law. *See* Appellant's Opening Brief, at 19-20 (citing *United States v. Wryn*, 952 F.2d 1122, 1124 (9th Cir. 1991); *United States v. Johnson*, 722 F.2d

525, 527 (9th Cir. 1983); and *Motley v. Parks*, 432 F.3d 1072, 1084-85 (9th Cir. 2005) (en banc)). Under California law, a defendant must consent to a probation search condition by "specifically agree[ing]" to the condition. *People v. Ramos*, 101 P.3d 478, 488 (Cal. 2004) (quoting *People v. Mason*, 488 P.2d 630, 634 (Cal. 1971)). This is because the defendant has the absolute right to simply "refuse probation and choose to serve the sentence." *People v. Olguin*, 198 P.3d 1, 4 (Cal. 2008). He also has a right to seek clarification of the condition if he is uncertain about what he wants to do and appeal if he thinks the condition is unlawful. *See Olguin*, 198 P.3d at 5; *In re Bushman*, 463 P.2d 727, 733 (Cal. 1970).

The one state probation search case cited by the government – *People v. Chardon*, 91 Cal. Rptr. 2d 438 (Cal. App. 1999) – does not even suggest the contrary. The defendant there was present, was informed of the condition, and accepted it. *Id.* at 442. She then exercised her alternative right of appealing the condition. *See id.* at 442, 447. *Chardon* is thus nothing more than an illustration of the California procedures for imposition, acceptance, and appeal of a probation search condition.[1]

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[1] The other state case cited by the government – *People v. Fedalizo*, 200 Cal. Rptr. 3d 653 (Cal. App. 2016) – is even less on point. The two issues presented there were whether a deputy public defender's statement that the defendant had waived his presence was sufficient to waive the defendant's right of self-representation, *see id.* at 657-61, and whether the defendant could be sentenced without being present after his conviction had been reduced to a misdemeanor pursuant to California's Proposition 47, *see id.* at 661-62. The court did hold Penal Code § 977 applied and the court could rely on the deputy public defender's representation that the defendant was "knowingly absent." *Id.* at 663. But there was no probation search condition at issue in *Fedalizo*. And the "knowing" requirement of *Fedalizo* would require "knowing" acceptance of a

The government's suggestion the probation search condition was rendered lawful after the fact by the subsequent April 2014 probation search in which rock cocaine was found between Mr. Burton's buttocks fails for two reasons. First, this argument relies on the federal presentence report and a police report, *see* Government's Brief, at 24 (citing PSR, ¶ 49, and SER 30-48), which (a) were not evidence at the suppression hearing and (b) are hearsay to which the defense could have objected if they had been offered as evidence at the suppression hearing.[2] The reports also do not establish what the government suggests. All the police report states is that the officers "contacted [Mr. Burton] and explained to him we were there to conduct a probation search." SER 36. It does not state what, if anything, Mr. Burton was told about the terms and scope of a probation condition – such as what level of suspicion was required and whether it was just his person or also his property and residence which were subject to search[3] – and certainly does not suggest he was informed he could reject the condition and/or appeal or

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probation search condition if one were imposed.

[2] The police report was attached as an exhibit to a combined set of "motions in limine" filed shortly before trial that included a government motion for the court to modify its reasoning about the suppression motion in light of the intervening opinion in *United States v. Lara*, 815 F.3d 605 (9th Cir. 2016). *See* ER 1-48. The report was not offered in support of that motion, however, but was offered as a summary of evidence the government wanted to introduce at trial under Rule 404(b) of the Federal Rules of Evidence. *See* SER 13-15. The report was not cited in support of the motion for modification of the suppression ruling, *see* SER 5-8, and was not cited in an opposition to a subsequently filed defense motion for reconsideration, *see* CR 20.

[3] The April 2014 search was of Mr. Burton's person and was supported by suspicion which probably rose to the level of probable cause. *See* SER 36.

seek modification of the condition. The report does not even state the officer told Mr. Burton there was a court-ordered condition rather than implying just his general probation status made him subject to search.

The second reason the April 2014 probation search does not save the government is that informing a state probationer of a search condition months after the fact cannot be sufficient under California law. This is because of the rights discussed *supra* p. 2. First, the defendant has a right to stay free of conditions he believes to be overly intrusive by completely rejecting probation and accepting some other sentence. *See People v. Bravo*, 738 P.2d 336, 341 (Cal. 1987) ("If the defendant considers the conditions of probation more harsh than the sentence the court would otherwise impose, he has the right to refuse probation and undergo the sentence." (Quoting *Bushman*, 463 P.2d at 733.)). Second, the defendant has a right to appeal the conditions imposed. A defendant can exercise these rights only if he is informed of the condition at the time it is imposed.

2. The Search Was Not a Lawful Probation Search Because the Probation Search Condition Did Not Satisfy the Balancing Test Established by *United States v. King*, 736 F.3d 805 (9th Cir. 2013), and *United States v. Lara*, 815 F.3d 605 (9th Cir. 2016).

The government does address the second requirement for a lawful probation search – that it satisfy the balancing test established by *United States v. King*, 736 F.3d 805 (9th Cir. 2013), and *United States v. Lara*, 815 F.3d 605 (9th Cir. 2016). Its analysis is faulty in several respects, however.

a. The search was a suspicionless probation search.

To begin, the government's claim the search was not actually a suspicionless search because it was supported by reasonable suspicion is wrong. The one probation violation the officers knew about at the time they decided to conduct the probation search was that Mr. Burton was driving without a license. That offense did not justify a search of even Mr. Burton's car, let alone his house. *See Arizona v. Gant*, 556 U. S. 332, 344 (2009) (recognizing driving with suspended license "offense for which police could not expect to find evidence in the passenger compartment of [the defendant's] car").

The personal use quantity of marijuana found on Mr. Burton's person cannot be used to justify the probation search because the search of Mr. Burton's person was part of the probation search. *See Sibron v. New York*, 392 U.S. 40, 63 (1968) (describing as "axiomatic" that search could not be justified as search incident to arrest where arrest based on evidence found in search). The government's suggestion the search of Mr. Burton's person was a search incident to arrest, *see* Government's Brief, at 25-26 n.4, ignores the fact Mr. Burton was arrested only after the drugs and guns were found in the house. The officers who made the stop testified Mr. Burton was initially only "detained," ER 167, and was arrested only at "the time that we had recovered the substance from inside the house – or the contraband from inside the house." ER 232. Officers cannot conduct a "search incident to arrest" when there is not an actual arrest. *See*

Knowles v. Iowa, 525 U.S. 113 (1998).[4]

b. The Court can hold the probation search unlawful on the ground suspicionless searches of probationers on probation for nonviolent misdemeanor offenses are never permissible.

The opinion cited in Appellant's Opening Brief which held suspicionless searches of probationers on probation for nonviolent offenses are never permissible – *United States v. Job*, 851 F.3d 889 (9th Cir. 2017) – has since been amended to remove the language relied upon in the opening brief, *see United States v. Job*, No. 14-50472, 2017 WL 3588250 (9th Cir. Aug. 21, 2017). This means the issue stands as it did before *Job* – as a question expressly left open in *King*. *King* expressly declined to "decide whether the Fourth Amendment permits suspicionless searches of . . . lower level offenders who have accepted a suspicionless-search condition." *Id.*, 736 F.3d at 810.[5]

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[4] The government asserts at two points in its brief that the defense has not challenged the search of Mr. Burton's person, *see* Government's Brief, at 25 n.4, 30, but this is not true. In the district court, the defense argued that, "as the officers testified, the marijuana was discovered *as part of* the probation search itself, so it cannot justify the probation search." CR 14, at 11 (emphasis in original). In Appellant's Opening Brief, the defense argues, "Mr. Burton's possession of marijuana cannot be considered in the calculus, because it was discovered only through the initial probation search of Mr. Burton's person." Appellant's Opening Brief, at 27-28.

[5] In conjunction with a footnote about its petition for rehearing in *Job*, the government quotes *Lara* in support of an assertion that the fact Mr. Burton was on probation for a nonviolent offense "is not in itself dispositive." Government's

If the Court considers this question, *cf. infra* p. 8 (noting court may continue to leave question open), the Court should adopt reasoning from Judge Berzon's dissenting opinion in *King*. While that reasoning was necessarily rejected by the *King* majority for defendants such as the one before it who are on probation for violent offenses, it was not necessarily rejected for defendants such as Mr. Burton who are on probation for nonviolent offenses. As to defendants in that category, the majority left the question of suspicionless searches open, as noted in the preceding paragraph.

Judge Berzon made two points about probationers which suggest *King*'s holding for probationers on probation for violent offenses should not be extended to probationers on probation for nonviolent offenses. First, she noted the Supreme Court has never held a suspicionless search of a probationer would pass Fourth Amendment muster" and "has instead emphasized that probationers have greater Fourth Amendment interests than parolees." *King*, 736 F.3d at 814 (Berzon, J., dissenting). She noted that parolees in California have necessarily been sentenced to prison for felonies, while probationers in California may have been convicted of either a felony or an infraction or misdemeanor, like Mr. Burton. *Id.* at 814-15 (Berzon, J., dissenting). She also quoted a concurring opinion by Judge Kleinfeld

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Brief, at 21 (quoting *Lara*, 815 F.3d at 609). If the government is suggesting this language in *Lara* resolved the question left open in *King*, it is taking the language grossly out of context. This language was not stating being on probation for a nonviolent offense is not dispositive but was stating the defendant's acceptance of the probation search condition is not dispositive. *See id.*, 815 F.3d at 609 ("*Lara's acceptance of the terms of probation*, including suspicionless searches of his person and property, is one factor that bears on the reasonableness of the search, but it is not in itself dispositive." (Emphasis added.)).

in *United States v. Crawford*, 372 F.3d 1048 (9th Cir. 2004) (en banc), recognizing that "[u]nlike parolees, who have been sent to prison for substantial terms, probationers attain that status from a judicial determination that their conduct and records do not suggest so much harmfulness or danger that substantial imprisonment is justified." *King*, 736 F.3d at 815 (Berzon, J., dissenting) (quoting *Crawford*, 372 F.3d at 1077 (Kleinfeld, J., concurring)).

These observations are particularly weighty in the case of a probationer who is on probation for a nonviolent misdemeanor. First, misdemeanors – especially traffic misdemeanors such as Mr. Burton was on probation for – are at the least serious end of the spectrum of offenses. Second, a nonviolent offense suggests the sort of lesser "harmfulness or danger" which Judge Kleinfeld spoke about. At least for nonviolent misdemeanors, the considerations noted by Judge Berzon weigh against permitting suspicionless probation searches. The question left open in *King* should be resolved against allowing such searches.

c. The Court can hold the probation search unlawful on the ground the Fourth Amendment balancing test for such searches is not satisfied here even if suspicionless searches of probationers on probation for nonviolent misdemeanors are sometimes permissible.

The Court can continue to leave the broader question discussed in the preceding subsection open if it chooses. Even if there are some cases in which suspicionless probation search conditions and probation searches might be permissible for nonviolent misdemeanors, this is not such a case. The opening

brief applies the balancing test established by *King* and *Lara* for suspicionless probation searches, and the defense stands by that analysis. The government's contrary analysis is faulty in several respects.

First, the government errs in suggesting Mr. Burton's "lengthy and substantial criminal history" tilts the balance in the government's favor. As an initial matter, it is questionable whether a court can look beyond the offense for which the defendant is placed on probation. In both *King* and *Lara*, the court focused on the offense for which the defendant was on probation, and the question left open in *King* seemed to have a similar focus – "whether the Fourth Amendment permits suspicionless searches of . . . lower level offenders who have accepted a suspicionless-search condition," *King*, 736 F.3d at 810.

Further, Mr. Burton's criminal history did not include any seriously violent criminal convictions even if it could be considered. The assault with a deadly weapon conviction – which involved just punching someone – was charged as a misdemeanor and disposed of by a sentence of one day of time served in jail. *See* ER 303.[6] The other prior convictions were drug convictions similar to the one labeled nonviolent in *Lara*. Finally, there was nothing suggesting Mr. Burton's parole violations were violent. The government also presented no evidence at the suppression hearing of which, if any, aspects of Mr. Burton's record the state court which imposed the probation condition considered or even knew about. *See infra*

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[6] The only authority the government cites for its characterization of the assault as "aggravated," Government's Brief, at 14, is the federal presentence report, which, like the police report of the prior probation search discussed *supra* p. 3, was (a) hearsay and (b) not presented as evidence at the suppression hearing. It is doubtful a truly serious assault would have been prosecuted as a misdemeanor and punished by just a day in jail.

p. 10 n.7.[7]

The government also errs in discounting the failure to inform Mr. Burton of the probation search condition at the time of sentencing because, according to the government, he was made aware of the condition at the time of the earlier April 2014 probation search. To begin, the government never presented any admissible evidence of this at the suppression hearing. All it cites in support of this claim is hearsay in, first, the federal presentence report prepared after the trial, and, second, a police report offered in conjunction with a different pretrial motion in limine filed just before trial, as noted *supra* p. 3 & n.2. That precludes the evidence from being considered on the suppression issue.

In any event, all the police report says is that the officer told Mr. Burton the officers were "there to conduct a probation search." SER 36. The report says nothing about Mr. Burton being told about the existence or scope of a court-ordered probation search condition, as opposed to simply being told there was

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[7] All the government cites in support of its description of Mr. Burton's criminal history is the federal presentence report, *see* Government's Brief, at 22, which was the federal probation officer's independent investigation of criminal history long after the state court's imposition of the probation search condition – and also long after the suppression hearing. *Compare* Government's Brief, at 10-16 (supporting other facts with citations to reporter's transcript and/or suppression hearing exhibits in excerpt of record). All the evidence offered at the suppression hearing showed about the criminal history the state court "had before it," Government's Brief, at 22, was the assault with a deadly weapon and "wet reckless" charges in the case in which Mr. Burton was placed on probation. The government presented no evidence the state court had before it a complete summary of Mr. Burton's criminal record, let alone hearsay allegations about uncharged conduct such as the allegation in the federal presentence report that Mr. Burton in one instance "'charged at' an officer attempting to detain him," Government's Brief, at 22 (quoting PSR, ¶ 41).

going to be a search based on his probation. And no matter what the officer said, his statements could not ex post validate the condition under state law, for the reasons discussed *supra* p. 4.

Finally, the government errs in suggesting the nature of Mr. Burton's probation violation weighs in its favor. It is true "[t]his is not a case in which [Mr.] Burton 'merely missed a meeting with his probation officer.'" Government's Brief, at 25 (quoting *Lara*, 815 F.3d at 612). But it is also not a case like *King*, where the defendant was suspected of being involved in a homicide, *see id.*, 736 F.3d at 806. It is a case in which Mr. Burton was just driving without a license.[8] This falls far closer to the violation in *Lara* than the violation in *King*.[9]

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[8] As noted *supra* p. 5, the marijuana cannot be used to justify the search because the search of Mr. Burton's person was part of the probation search. Even if the marijuana could be considered, possession of marijuana is also a minor violation.

[9] Reasonable suspicion of a probation violation does not automatically allow a probation search. The Court's statement in *United States v. Franklin*, 603 F.3d 652 (9th Cir. 2010), that "[t]he Fourth Amendment allows officers to search the residence of a probationer . . . without a warrant upon reasonable suspicion of a probation violation," *id.* at 655, *quoted in* Government's Brief, at 26-27, was in the context of a probation violation for which evidence would be found in the premises being searched, *see id.* at 654 (describing informant tip that defendant was staying in motel with other man and had handgun and ten rounds of ammunition). The Washington "community custody" search condition being applied in *Franklin*, *see id.*, incorporates precisely this requirement. *See State v. Jardinez*, 338 P.3d 292, 295 (Wash. App. 2014) (construing Washington statute allowing "community custody" search when officer has "reasonable cause to believe that an offender has violated a condition or requirement of the sentence" to require "reasonable cause [the search] will provide incriminating evidence"). *See also State v. Livingston*, 389 P.3d 753 (Wash. App. 2017) (following *Jardinez*).

3. The Search Is Not Saved by the Officers' Alleged Good Faith Belief that Mr. Burton Was on Probation for the Assault with a Deadly Weapon Conviction Rather than the Reckless Driving Conviction.

Much of the government's good faith argument simply recites general good faith principles. Most are entirely inapposite to the case at bar. *Arizona v. Evans*, 514 U.S. 1 (1995), and *Herring v. United States*, 555 U.S. 135 (2009), are inapposite for reasons set forth in Appellant's Opening Brief. Additional examples of inapposite cases are those allowing good faith reliance on existing appellate precedent and interpretation of statutes not yet construed by the courts, *see Davis v. United States*, 564 U. S. 229, 238 (2011), *and United States v. Lustig*, 830 F.3d 1075, 1079 (9th Cir. 2016), *cited in* Government's Brief, at 28-29; *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014), *cited in* Government's Brief, at 33, since there is no issue in this case of reliance on existing precedent or a previously unconstrued statute. *Cf. Beier v. City of Lewiston*, 354 F.3d 1058, 1066 n.6 (9th Cir. 2004) (distinguishing good faith reliance upon presumptively valid law from "unsubstantiated understanding of the terms of a protection order").

The good faith principles that are apposite to this case – and their application to this case – require rejection of the government's good faith argument – for multiple reasons.

a. The good faith theory fails because the officers had no information about the scope of Mr. Burton's probation search condition.

The government does not even attempt to address the fact that the officers had no information about the scope of Mr. Burton's probation search condition. *See* Appellant's Opening Brief, at 31-33. On this point, *United States v. Job*, even as amended, remains controlling. *Job* held officers could not rely on a probation search condition there because "even if the officers knew of the existence of [the defendant's] Fourth Amendment search waiver, they did not know the terms of the waiver." *Id.*, 2017 WL 3588250, at *7 n.4. This tracks the California Court of Appeals holding in *People v. Romeo*, 193 Cal. Rptr. 3d 96 (Cal. App. 2015), quoted at length in Appellant's Opening Brief. *Romeo* held it was unreasonable for an officer to conduct a particular search based on just a general probation search computer entry because probation search conditions vary widely. *See* Appellant's Opening Brief, at 31-32 (quoting *Romeo*, 193 Cal. Rptr. 3d at 113, 114).

The officers here, like the officers in *Job* and *Romeo*, had no information about the terms and scope of Mr. Burton's probation search condition. That precludes them from claiming good faith reliance upon the condition just like the officers in *Job* and *Romeo* were precluded from relying on the conditions there.

b. The good faith theory fails because the officers' belief here was that reasonable suspicion was required, and the officers did not have reasonable suspicion.

The government does not contest the defense argument that the mistaken belief reasonable suspicion was required means the officers had to have reasonable suspicion to be acting in good faith. All the government argues is that the officers had reasonable suspicion and that justified the search. *See* Government's Brief, at 35-36.

This is incorrect for reasons discussed above. First, the search of Mr. Burton's person that revealed marijuana was part of the probation search, the only violation the officers knew about prior to the search of Mr. Burton's person was that he was driving without a license, and driving without a license did not create reasonable suspicion to believe evidence of a probation violation would be found in the house. *See supra* pp. 5-6. Second, the reasonable suspicion required for a probation search is not just reasonable suspicion of some probation violation, but reasonable suspicion that evidence of a probation violation will be found in the search. *See supra* p. 11 n.9.

c. The good faith theory fails because there is insufficient evidence to establish the officers' reading of the computer record was reasonable.

There is another, even more basic problem with the government's good faith

argument. When the government seeks to rely on the good faith exception, the government bears the burden of showing the officers' mistaken belief was reasonable. *See United States v. Hendricks*, 743 F.2d 653, 656 (9th Cir. 1984) (noting the good faith standard "is an objective one and the prosecution bears the burden of proof"). As applied here, the government would need to show the misreading of the computer record was reasonable and/or that the computer record itself was in error.

The government made no such showing here, however. It did not produce the computer record, and without the record, there was no way for the district court to judge whether the officer's reading of the record was reasonable. The officer's reading might have been reasonable; for example, if the record said something like, "Convicted of assault with a deadly weapon and reckless driving, sentenced to time served and three years probation, with probation search condition." But the officer's reading might have been unreasonable; for example, if the record said something like, "Convicted of assault with a deadly weapon and reckless driving, sentenced to time served on assault with a deadly weapon count and sentenced to three years probation with probation search condition on reckless driving count." Which of these ways the computer record read – or whatever different way it read – was critical to establishing the *reasonableness* of the officers' mistaken belief.

d. The good faith theory fails because it does not matter what the officers thought Mr. Burton was on probation for.

There is then one last reason the govt's good faith theory fails. That is that it does not matter what the officers thought Mr. Burton was on probation for. To begin, the offense for which the defendant is on probation matters in a probation search case only for purposes of applying the Fourth Amendment balancing test of *King* and *Lara*. And that constitutional balancing test is for the courts to perform, not the officer in the field.

Secondly, the Fourth Amendment balance would not tilt toward justifying a suspicionless probation search even if the officer had been correct that the probation was for the assault with a deadly weapon. A misdemeanor assault with a deadly weapon involving just punching someone after a traffic accident[10] is a far cry from something like "the serious and intimate nature of . . . willful infliction of corporal injury on a cohabitant" in *King*, *see id.*, 736 F.3d at 809. Given the other factors – the minor nature of the probation violation; the greater privacy interest in the premises searched, i.e., Mr. Burton's home, *see* Appellant's Opening Brief, at 26-27; and the absence of evidence Mr. Burton was informed of and given the chance to reject the probation search condition – being on probation for a minor assault instead of reckless driving would not sufficiently change the balance.

Finally, the balancing test does not need to be applied at all – even by this Court – when the probation search condition was invalid under state law, as

[10] The officer may not have known this was the nature of the assault with a deadly weapon, but he had no basis for thinking it was something more violent.

explained *supra* pp. 1-4. As noted there, and in Appellant's Opening Brief, the validity of the probation search condition under state law is a prerequisite to its validity under the Fourth Amendment. The invalidity of the probation search condition under state law is therefore dispositive regardless of the officers' alleged good faith and regardless of any Fourth Amendment balancing under *King* and *Lara*.

B. MR. BURTON'S ATTORNEY'S INEFFECTIVE ASSISTANCE OF COUNSEL SHOULD BE CONSIDERED ON DIRECT APPEAL AND REQUIRES REVERSAL OF AT LEAST THE DRUG CONVICTIONS.

1. The Court Can and Should Consider the Ineffective Assistance of Counsel Claim on Direct Appeal.

The government is correct that there is a general rule that ineffective assistance of counsel claims are not reviewed on direct appeal. The Court has made exceptions to that rule in numerous cases, however. Those cases include not only the cases cited in Appellant's Opening Brief, but also one of the cases the government cites – *United States v. Molina*, 934 F.2d 1440 (9th Cir. 1991). Of four different ineffective assistance of counsel claims made in *Molina*, the Court considered all but one in the direct appeal, the exception being the adequacy of the trial attorney's pretrial investigation. *See id.* at 1446-49.

Whether to vary from the general rule in this way depends on whether "the record on appeal is sufficiently developed to permit determination of the issue."

A P P E N D I X 9

CA No. 16-50451

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. STEVEN DOYLE BURTON, Defendant-Appellant.	(D.Ct. #3:16-cr-00746-AJB)

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

HONORABLE ANTHONY J. BATTAGLIA
United States District Judge

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. STEVEN DOYLE BURTON, Defendant-Appellant	(D.Ct. #3:16-cr-00746-AJB)

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Defendant-appellant, Steven Doyle Burton, hereby petitions for rehearing en banc. In multiple opinions over the last five years, this Court has recognized there is an open question about "whether the Fourth Amendment permits suspicionless searches of probationers who have *not* accepted a suspicionless-search condition, or of lower level offenders who have accepted a suspicionless-search condition." *United States v. King*, 736 F.3d 805, 810 (9th Cir. 2013) (emphasis in original). *See also Smith v. City of Santa Clara*, 876 F.3d 987, 993 n.6 (9th Cir. 2017); *United States v. Cervantes*, 859 F.3d 1175, 1180 (9th Cir. 2017); *United States v. Lara*, 815 F.3d 605, 610 (9th Cir. 2016). The Court has avoided resolving these questions by either finding the probationer accepted the condition and was on

probation for a serious offense, *see King*, 736 F.3d at 806, 808-09; finding the probation search condition violated the Fourth Amendment based on case-specific balancing, *see Lara*, 815 F.3d at 609-12; or finding the officers could not rely on the search condition because they were unaware of the condition or the terms of the condition, *see United States v. Job*, 871 F.3d 852, 859-60, 863 n.4 (9th Cir. 2017).

The present case squarely presents both of the questions the Court has left open,[1] because Mr. Burton was both on probation for a low level offense *and* never accepted – indeed, was never even informed of – the probation search condition. The Court should grant rehearing en banc to resolve the open questions, because they are important and it is time to resolve them.

Respectfully submitted,

DATED: June 11, 2018

By s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

[1] The case presents those questions only because the panel rejected the other defense arguments, including a case-specific argument based on the probation search balancing test refined in *King* and *Lara*. Accepting that as the law of the case, the more general, "pure" questions left open in *King* and *Lara* must be addressed.

I.

STATEMENT OF FACTS

On November 7, 2014, Officers Rogelio Medina and Blake Williams of the San Diego Police Department were deployed on a "saturation patrol" as part of a "crime suppression team." ER 125-26, 214. A "crime suppression team" is "a proactive unit put together to tackle the gang and narcotic compliance." ER 126. A "saturation patrol" is "a policing strategy where the group of officers that are working that particular team just basically saturate a particular neighborhood," to create "visibility" and "find the criminal element." ER 193. One way in which officers do this is what one officer described as "enforce proactive policing through traffic violations, moving violations, pedestrian violations." ER 249.

Officers Medina and Williams were stopped at an intersection during this "saturation patrol" and heard loud music coming from a car about 200 feet away, which violated California Vehicle Code § 27007. ER 131-32, 215. The officers decided to stop the car and accelerated through the intersection to catch it. ER 135-36, 217. The car made an "abrupt right turn" and pulled to the curb while activating its turn signal at the same time. ER 136, 217-18. Officer Medina had to slam on his brakes to avoid hitting the car. ER 138. The late turn signal violated California Vehicle Code § 22108. *See* ER 297.

The driver was Mr. Burton. ER 138-39, 218-19. Officer Williams ran a records check while Officer Medina obtained Mr. Burton's identification and proof of insurance. ER 139-40, 219. The records check revealed Mr. Burton's license was suspended and also that he had what the officers called a "fourth

waiver," meaning a probation condition that allows probation searches. ER 140, 220, 222, 291. There was no testimony about how the records check described the "fourth waiver," though Officer Williams recalled "the most significant charge during [the] records check" being assault with a deadly weapon. ER 220. Officer Williams testified a "fourth waiver" allows officers to search the probationer's person, vehicle, and residence "upon contact," without saying what, if any, suspicion was required. ER 222. Officer Medina testified he understood "reasonable suspicion" to be required. ER 140.

After discovering the "fourth waiver," and that Mr. Burton resided just one or two houses away, the officers decided to conduct a probation search. *See* ER 140, 224, 227. Officer Williams searched Mr. Burton's person and found a small personal use quantity of marijuana. ER 225-26; RT(7/19/16) 43, 57. He, Officer Medina, and others from their team then searched the house, where Mr. Burton lived with his grandmother, *see* ER 292. The officers found approximately 38 grams of rock cocaine, related drug trafficking paraphernalia, $35,700, and two handguns. *See* RT(7/19/16) 96-98, 111-14, 144-47; RT(7/20/16) 220.

The government charged Mr. Burton with felon in possession of firearms and ammunition, possession with intent to distribute more than 28 grams of cocaine base, and possession of the firearms in furtherance of the drug offense, in violation of 18 U.S.C. § 924(c). *See* ER 305-07. Evidence presented in connection with a motion to suppress evidence revealed Mr. Burton was not on probation for assault with a deadly weapon as Officer Williams had thought but had received a one-day time served sentence for that offense and been placed on probation for reckless driving. *See* ER 301-03. The probation search condition

required Mr. Burton to "submit his person, place of residence, vehicle to search at any time with or without warrant, with or without probable cause when requested by any law enforcement officer." ER 303. The probation was summary probation with no probation office supervision, *see* ER 299, and a transcript reflected Mr. Burton was not present and his attorney was "appearing 977 on [Mr. Burton's] behalf," ER 302. This was an apparent reference to California Penal Code § 977, which allows most misdemeanor defendants to "appear by counsel only," Cal. Penal Code § 977, except "where defendant's presence would be necessary to properly conduct sentencing." *Bracher v. Superior Court*, 141 Cal. Rptr. 3d 316, 325 (Cal. App. 2012) (quoting *Olney v. Municipal Court*, 184 Cal. Rptr. 78, 81 (Cal. App. 1982)).

In addition to the evidence showing Mr. Burton was not present in court to be informed of and accept the search condition, there was no evidence suggesting he was informed of the condition at some later time. In fact, a letter his attorney sent him after the sentencing listed only other conditions and said nothing about the search condition. *See* ER 108. A police report proffered by the government with a motion in limine did state that other officers had "contacted [Mr. Burton] and explained to him we were there to conduct a probation search" on one occasion some months prior to the search at issue in the present case. SER 36. But the report did not state what, if anything, Mr. Burton was told about the terms and scope of a probation condition, such as what level of suspicion was required, what could be searched, and/or under what circumstances there could be a search.[2]

[2] This prior search was of Mr. Burton's person and was supported by suspicion which probably rose to the level of probable cause. *See* SER 36.

See SER 36-37. Indeed, the report did not even state the officer told Mr. Burton there was a court-ordered condition rather than implying his general probation status alone made him subject to search, as is the case for parolees in California, *see* Cal. Penal Code § 3067(a), *cited in Samson v. California*, 547 U.S. 843 (2006). This matters because probationers in California can reject probation if they do not wish to accept the conditions of probation. *See People v. Olguin*, 198 P.3d 1, 4 (Cal. 2008); *People v. Bravo*, 738 P.2d 336, 341 (Cal. 1987).

After the motion to suppress and a subsequent motion for reconsideration were denied, Mr. Burton proceeded to trial. He was convicted of all but the 18 U.S.C. § 924(c) count and appealed. Among the issues raised on appeal were multiple challenges to the probation search condition. *See* Appellant's Opening Brief, at 18-34. Initially, the defense argued the search was invalid because it did not comply with state law, as required by *United States v. Wyrn*, 952 F.2d 1122, 1124 (9th Cir. 1991), and *United States v. Johnson*, 722 F.2d 525, 527 (9th Cir. 1983). *See* Appellant's Opening Brief, at 19-22. Secondly, the defense argued the search violated the Fourth Amendment even if it did comply with state law – for two reasons. One reason was that suspicionless searches based on probation search conditions imposed on low-level offenders and/or probationers who have not affirmatively accepted the condition violate the Fourth Amendment as a matter of law. *See* Appellant's Opening Brief, at 25; Appellant's Reply Brief, at 6-8. The second reason was that the probation search condition and probation search here failed to satisfy the balancing test applied and refined in *United States v. King*, 736 F.3d 805 (9th Cir. 2013), and *United States v. Lara*, 815 F.3d 605 (9th Cir. 2016). *See* Appellant's Opening Brief, at 22-28.

The panel assigned to the case affirmed. It held the search of the house justified because the discovery of marijuana on Mr. Burton's person "provided sufficient suspicion of criminal activity to justify the subsequent search of his home." Memorandum, at 2. As to why the initial search of the person which produced the marijuana was justified, the panel held:

> A routine records check conducted during the stop revealed that Mr. Burton was driving with a suspended license and was subject to an active Fourth Amendment waiver. (Citation omitted.) The officers possessed a reasonable suspicion that Mr. Burton was reoffending, and their interests in searching his person outweighed his already diminished expectation of privacy. *See United States v. Knights*, 534 U.S. 112, 118-19 (2001); *Lara*, 815 F.3d at 612.

Memorandum, at 2.

II.

ARGUMENT

The question of what, if any, suspicion is required for probation and parole searches has been the subject of multiple Supreme Court and Ninth Circuit opinions over the last two decades. Initially, there are the Supreme Court opinions of *Knights* and *Samson*. In *Knights*, the defendant was on probation for a drug offense with a search condition requiring that he submit his person and property to a search "with or without a search warrant . . . or reasonable cause." *Id.*, 534 U.S. at 114. He was suspected of setting a fire that caused $1.5 million in damage to an electric transformer and adjacent telecommunications vault. *See id.* at 114-15. Investigating officers conducted a search based on the probation search condition and discovered evidence which was used in a subsequent prosecution for arson,

possession of an unregistered destructive device, and felon in possession of ammunition. *See id.* at 115-16.

The lower courts held there was reasonable suspicion of a probation violation but invalidated the search because it had an investigatory purpose. *See id.* at 116. The Supreme Court granted certiorari on the question of "whether the Fourth Amendment limits searches pursuant to this probation condition to those with a 'probationary' purpose." *Id.* at 116. It held there was not such a limitation on probation searches and applied a balancing test weighing the intrusion on the probationer's privacy against governmental interests. *See id.* at 118-19. The governmental interests the Court recognized were the "dual concern[s]" of integrating the probationer back into society while at the same time protecting society from recidivism. *Id.* at 120-21. On the privacy side of the scale, the Court recognized two considerations. First, it recognized the general consideration that probation "is one point . . . on a continuum of punishments" and "probationers do not enjoy the absolute liberty to which every citizen is entitled." *Id.* at 119 (internal quotations omitted). Second, it recognized a specific consideration in that defendant's case, namely:

> The probation order clearly expressed the search condition and Knights was unambiguously informed of it. The probation condition thus significantly diminished Knights's reasonable suspicion of privacy.

Id. The Court then concluded: "We hold that the balance of these considerations requires no more than reasonable suspicion to conduct a search of this probationer's house." *Id.* at 121. But the Court did not decide and expressly left open the question of whether a completely suspicionless probation search would have been permissible:

> We do not decide whether the probation search condition so diminished, or completely eliminated, Knights's reasonable expectation of privacy . . . that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment. The terms of the probation condition permit such a search, but we need not address the constitutionality of a suspicionless search because the search in this case was supported by reasonable suspicion.

Id. at 120.

Five years later, in *Samson*, the Supreme Court again considered the question of a suspicionless search, but in the case of a parolee rather than a probationer. The Court described the question presented as "a variation of the question this Court left open in *United States v. Knights*, 534 U.S. 112, 120, n.6, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001) – whether a condition of release can so diminish or eliminate a released prisoner's reasonable expectation of privacy that a suspicionless search by a law enforcement officer would not offend the Fourth Amendment." *Samson*, 547 U.S. at 847. It quoted *Knight*s's balancing test, *see Samson*, 547 U.S. at 848, and went on to conclude the Fourth Amendment did permit suspicionless searches of parolees, *see id.* at 856.

But in so holding, the Court expressly distinguished parolees from probationers.

> As we noted in *Knights*, parolees are on the "continuum" of state-imposed punishments. *Id.* at 119, 122 S. Ct. 587, 151 L. Ed. 2d 497 (internal quotation marks omitted). On this continuum, parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment.

Samson, 547 U.S. at 850. The Court also relied, as it had in *Knights*, on the fact that the defendant had been aware of the search condition.

> Additionally, as we found "salient" in *Knights* with

> respect to the probation search condition, the parole search condition . . . was "clearly expressed" to petitioner. *Knights*, 534 U.S. at 119, 122 S. Ct. 587, 151 L. Ed. 2d 497. He signed an order submitting to the condition and thus was "unambiguously" aware of it. *Ibid.* In *Knights*, we found that acceptance of a clear and unambiguous search condition "significantly diminished Knights's reasonable expectation of privacy." *Id.* at 520, 122 S. Ct. 587, 151 L. Ed. 2d 497. Examining the totality of the circumstances pertaining to petitioner's status as a parolee, "an established variation on imprisonment," *Morrissey* [*v. Brewer*], 408 U.S. [471,] 92 S. Ct. 2593, 33 L. Ed. 2d 484 [(1972)], including the plain terms of the parole search condition, we conclude that petitioner did not have an expectation of privacy that society would recognize as reasonable. (Footnote omitted.)

Samson, 547 U.S. at 852.

Subsequent to *Knights*, this Court – in *King* – narrowed somewhat, but not did not completely answer, the question left open in *Knights*. After the en banc Court held *Samson* had overruled the Court's precedent holding there is no difference, for Fourth Amendment purposes, between probationers and parolees, a panel considered the probation search question presented – "whether the [probation] search of Defendant's residence satisfied the Fourth Amendment even though police lacked reasonable suspicion." *Id.*, 736 F.3d at 807. Two members of the panel held in a majority opinion that the search did satisfy the Fourth Amendment. *See id.* at 810. The majority noted *Knights* had left open the question of suspicionless probation searches, noted *Knights*'s balancing approach, and then applied the balancing test to the case before it. Among the factors the majority relied upon was that, "[a]s in *Knights*, . . . '[t]he probation order clearly expressed the search condition[,] . . . [Defendant] was unambiguously informed of it[,]' and he accepted it." *King*, 736 F.3d at 808-09 (quoting *Knights*, 534 U.S. at 119). The majority also noted a factor not present in *Knights*, namely, the serious

nature of the offense for which the defendant was on probation, which it described as "the serious and intimate [offense] of . . . willful infliction of corporal injury on a cohabitant." *Id.*, 736 F.3d at 809; *see also id.* at 806. A different panel in *Lara* later emphasized the importance of both this and another "seriousness" consideration present in both *King* and *Knights*, to wit, the seriousness of the alleged violation. *See Lara*, 815 F.3d at 610 (comparing "violent crime of willfully inflicting corporal injury on a cohabitant" in *King* with "nonviolent drug crime" in *Lara*); *Lara*, 815 F.3d at 612 (describing probation violation of missing meeting with probation officer as "worlds away" from $1.5 million arson in *Knights* and suspected homicide in *King*).

Judge Berzon dissented in *King* and argued that the suspicionless search was not permissible under the Fourth Amendment. She made two points. First, she noted the Supreme Court has never held a suspicionless search of a probationer would pass Fourth Amendment muster" and "has instead emphasized that probationers have greater Fourth Amendment interests than parolees." *King*, 736 F.3d at 814 (Berzon, J., dissenting). She noted that parolees in California have necessarily been sentenced to prison for felonies, while probationers in California may have been convicted of either a felony or, like Mr. Burton, an infraction or misdemeanor. *Id.* at 814-15 (Berzon, J., dissenting). She also quoted a concurring opinion by Judge Kleinfeld in *United States v. Crawford*, 372 F.3d 1048 (9th Cir. 2004) (en banc), recognizing that "[u]nlike parolees, who have been sent to prison for substantial terms, probationers attain that status from a judicial determination that their conduct and records do not suggest so much harmfulness or danger that substantial imprisonment is justified." *King*, 736 F.3d at 815

(Berzon, J., dissenting) (quoting *Crawford*, 372 F.3d at 1077 (Kleinfeld, J., concurring)). *See also Samson*, 547 U.S. at 855 (also quoting Judge Kleinfeld's *Crawford* concurrence).

In addition to being divided on the case before it, the *King* panel expressly left open the permissibility of suspicionless searches in other circumstances. First, recognizing the importance of the probationer's awareness and acceptance of the condition in the case before it and in *Knights*, the *King* majority stated, "We need not decide whether the Fourth Amendment permits suspicionless searches of probationers who have *not* accepted a suspicionless-search condition." *Id.*, 736 F.3d at 810 (emphasis in original). It then added a second category of cases it was not deciding, that of suspicionless searches "of lower level offenders who have accepted a suspicionless-search condition." *Id.* And subsequent opinions continue to leave these questions open. *See, e.g., Smith v. City of Santa Clara*, 876 F.3d 987, 993 n.6 (9th Cir. 2017); *United States v. Cervantes*, 859 F.3d 1175, 1180 (9th Cir. 2017); *Lara*, 815 F.3d at 610.

Mr. Burton's case presents both of these undecided questions. Preliminarily, the search of Mr. Burton's person, which was what produced the marijuana that the memorandum opinion concluded created suspicion to search the house, *see* Memorandum, at 2, was a completely suspicionless search. The Supreme Court recognized in *Arizona v. Gant*, 556 U.S. 332 (2009), that driving with a suspended license – which is the only probation violation offense the officers knew of at the time Mr. Burton was committing – is an "offense for which police could not expect to find evidence in the passenger compartment of [a defendant's] car." *Id.* at 344. And it is equally true officers could not expect to

find evidence of driving with a suspended license on a driver's person.[3]

Secondly, as noted above, both of the suspicionless search circumstances left open in *King* are present here. First, Mr. Burton did not accept the probation search condition; indeed, he was never even informed of it. Second, the offense for which Mr. Burton was on probation was a low level offense, namely, reckless driving. There was a dispute about whether the officers reasonably believed the probation was for assault with a deadly weapon and what the implications of that belief might be, *see* Appellant's Opening Brief, at 28-34; Answering Brief for the United States, at 28-36; Appellant's Reply Brief, at 12-17, but the assault with a deadly weapon was so minor that Mr. Burton was given no probation on that

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[3] The reasonable suspicion required for a probation search must be reasonable suspicion there will be evidence of a probation violation found in the search, not just reasonable suspicion of violation conduct. Loose language in *United States v. Franklin*, 603 F.3d 652 (9th Cir. 2010), which the government quoted in its brief – that "[t]he Fourth Amendment allows officers to search the residence of a probationer . . . without a warrant upon reasonable suspicion of a probation violation," *id.* at 655 – must be read in context. There was no dispute the suspicion of the violation in *Franklin* corresponded to suspicion evidence of the violation would be found, *see id.* at 654 (describing informant tip that defendant was staying in motel and had handgun and ten rounds of ammunition), and the Washington "community custody" search condition being applied in *Franklin*, *see id.*, in fact requires suspicion evidence will be found, *see State v. Jardinez*, 338 P.3d 292, 295 (Wash. App. 2014) (construing Washington statute allowing "community custody" search when officer has "reasonable cause to believe that an offender has violated a condition or requirement of the sentence" to require "reasonable cause [the search] will provide incriminating evidence"). The same requirement is implicit in *Lara*, for the only suspicion lacking in *Lara* was suspicion that evidence would be found; that there had been a violation, in the form of missing the meeting with the probation officer, was clear, *see id.*, 815 F.3d at 607.

To the extent *Franklin*'s loose language suggests a broader sweep, that is one more reason for en banc review.

charge and a jail sentence of just one day of time served. *See supra* p. 4. It was not the sort of "serious and intimate [offense]," *supra* p. 11, there was in *King*.

Judge Berzon's view should prevail in these circumstances even though it did not prevail in *King*. Her observations are far more weighty in the case of a probationer who is on probation for a minor misdemeanor. First, misdemeanors are at the least serious end of the spectrum of offenses. Second, a minor misdemeanor offense suggests the sort of lesser "harmfulness or danger" which Judge Kleinfeld spoke about in his concurring opinion in *Crawford*.

These concerns are then accentuated when the probationer has not affirmatively accepted the probation search condition – or even been informed of it – as was the case here. The probationer's acceptance of the probation search condition was a "salient circumstance," *King*, 736 F.3d at 808 (quoting *Knights*, 534 U.S. at 119), in both *King* and *Lara*. In *King*, the Court reasoned, as noted *supra* pp. 9-10, that the probation order clearly expressed the search condition, the defendant was unambiguously informed of it, and the defendant accepted it, and that such acceptance of a clear and unambiguous search condition "significantly diminishe[s] [a defendant's] reasonable expectation of privacy." *Samson*, 547 U.S. at 852 (quoting *Knights*, 534 U.S. at 120). *See King*, 736 F.3d at 808-09. In *Lara*, in contrast, this consideration weighed against the probation search.

> [T]he cell-phone search condition of Lara's probation was not clear. The Supreme Court in *Knights* explained that a probationer's reasonable expectation of privacy is "significantly diminished" when the defendant's probation order "clearly expressed the search condition" of which the probationer "was unambiguously informed." 534 U.S. at 119-20. But the search term in *Knights* expressly authorized searches of the probationer's "place of residence," which was precisely what the officers searched. *See id.* at 114-15. That is not true here.

Lara, 815 F.3d at 610.

The questions left open in *King* should now be resolved – in favor of citizens' constitutional rights. The Fourth Amendment does not allow suspicionless probation searches for low-level offenders and/or probationers who have not affirmatively accepted the condition, especially when there is both a low-level offense and no affirmative acceptance of the condition.

III.

CONCLUSION

The Court should rehear the case en banc to resolve the questions the Court has been leaving open – whether the Fourth Amendment permits suspicionless searches of probationers who have not accepted a suspicionless-search condition, or of lower level offenders who have accepted a suspicionless-search condition.

Respectfully submitted,

DATED: June 11, 2018

By s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Rule 32 of the Federal Rules of Appellate Procedure, Circuit Rule 32-1, and Circuit Rule 40-1, that this petition is proportionally spaced, has a typeface of 14 points or less, and does not exceed 15 pages in length.

DATED: June 11 , 2018

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

STEVEN DOYLE BURTON, PETITIONER,

vs.

UNITED STATES, RESPONDENT.

CERTIFICATE OF SERVICE

I, Carlton F. Gunn, hereby certify that on this 25th day of September, 2018, a copy of the Petitioner's Joint Appendix, Volume 3 of 3, was mailed postage prepaid, to the Solicitor General of the United States, Department of Justice, Room 5614, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, counsel for the Respondent.

Respectfully submitted,

September 25, 2018

s/ Carlton F. Gunn
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