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No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

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**STEVEN DOYLE BURTON, PETITIONER,**

**vs.**

**UNITED STATES, RESPONDENT.**

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ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

A. Whether the Fourth Amendment allows probation searches without reasonable suspicion.

B. Whether the Fourth Amendment allows probation searches without reasonable suspicion when the probationer has not been informed of the probation search condition.

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**PETITION FOR A WRIT OF CERTIORARI**
**TO THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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Steven Doyle Burton petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

## I.
## OPINIONS BELOW

The unpublished memorandum opinion of the United States Court of Appeals for the Ninth Circuit is included in the appendix as Appendix 1. An order denying a petition for rehearing en banc is included in the appendix as Appendix 2. The portions of the transcript in which the district court orally denied a motion to suppress evidence and a motion for reconsideration are included in the appendix as Appendix 3 and Appendix 4.

## II.
## JURISDICTION

The judgment of the United States Court of Appeals for the Ninth

Circuit was entered on May 4, 2018, *see* App. A001-04, and a timely petition for rehearing en banc was denied on July 5, 2018, *see* App. A005. The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. § 1254(1).

## III.

## CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides in pertinent part:

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

## IV.

## STATEMENT OF THE CASE

### A. JURISDICTION IN THE COURTS BELOW.

The district court had jurisdiction under 18 U.S.C. § 3231. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

### B. FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED.

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." App. A048-49, A137. A "crime suppression team" is "a proactive unit put together to tackle the gang and narcotic compliance." App. A049. 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." App. A116. One way in which officers do this is what one officer described as "enforce proactive policing through traffic violations, moving violations, pedestrian violations." App. A172.

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. App. A054-55, A138. The officers decided to stop the car and accelerated through the intersection to catch it. App. A058-59, A140. The car made an "abrupt right turn" and pulled to the curb while activating its turn signal at the same time. App. A059, A140-41. Officer Medina had to slam on his brakes to avoid hitting the car. App. A061. The late turn signal violated California Vehicle Code § 22108. *See* App. A220.

The driver was Petitioner. App. A061-062, A141-42. Officer Williams ran a records check while Officer Medina obtained Petitioner's identification and proof of insurance. App. A062-63, A142. The records check revealed Petitioner's license was suspended and also that he had what the officers called a "fourth waiver," meaning a probation condition that allows probation searches. App. A063, A143, A145, A214. 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. App. A143. Officer Williams testified a "fourth waiver" allows officers to search the probationer's person, vehicle, and residence "upon contact." App. A145.

After discovering the "fourth waiver," and that Petitioner resided just one or two houses away, the officers decided to conduct a probation search. *See* App. A063, A147, A150. Officer Williams searched Petitioner's person and found a small personal use quantity of marijuana. App. A148-49. He, Officer Medina, and others from their team then searched the house, where Petitioner lived with his grandmother. *See* App. A215. The officers found approximately 38 grams of rock cocaine, related drug trafficking paraphernalia, $35,700 in currency, and two handguns. *See* App. A270-71.

The government charged Petitioner 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* App. A265-66. Evidence presented in connection with a motion to suppress evidence revealed Petitioner 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* App. A224-26. The probation search condition required Petitioner 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." App. A226. The probation was summary probation with no probation office supervision, *see* App. A222, and a transcript reflected Petitioner was not present and his

attorney was "appearing 977 on [Petitioner's] behalf," App. A225. 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 Petitioner was not present in court to be informed of the search condition, there was no evidence he was informed of the condition at some later time. A letter his attorney sent him after the sentencing listed only other conditions and said nothing about the search condition. *See* App. A250. A police report proffered by the government in connection with a different motion did state that other officers had "contacted [Petitioner] 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. App. A235. But the report did not state what, if anything, Petitioner 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.[1] *See* App. A235-36. Indeed, the report did not even state the officer told Petitioner there was a court-ordered

[1] Both California case law and Ninth Circuit case law recognize that the breadth of probation search conditions in California varies. *See United States v. Rodriguez*, 851 F.3d 931, 940 n.2 (9th Cir. 2017); *People v. Romeo*, 193 Cal. Rptr. 3d 96, 113-14 (Cal. App. 2015). The prior probation search of Mr. Burton was not suspicionless but supported by suspicion which probably rose to the level of probable cause. *See* App. A235.

condition rather than implying his general probation status alone made him subject to search. *See* App. A234-37.

After the motion to suppress and a subsequent motion for reconsideration were denied, Petitioner proceeded to trial. *See* App. A266. He was convicted of all but the 18 U.S.C. § 924(c) count, App. A267, and appealed. Among the issues raised on appeal were multiple challenges to the probation search condition. *See* App. A279-95. Among the arguments made 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* App. A286, A308-10.

A Ninth Circuit panel affirmed. It held the search of the house was justified because the discovery of marijuana on Petitioner's person "provided sufficient suspicion of criminal activity to justify the subsequent search of his home." App. A002. 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); [*United States v.*] *Lara*, 815 F.3d [605,] 612 [(9th Cir. 2016)].

App. A002.

Petitioner thereafter filed a petition for rehearing en banc arguing that the court of appeals, sitting en banc, should resolve a general question it had left open in multiple prior opinions, to wit, "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." App. A324 (quoting *United States v. King*, 736 F.3d 805, 810 (9th Cir. 2013) (emphasis in original)). Petitioner noted the court of appeals had repeatedly avoided resolving those questions in its published opinions and the questions were clearly presented in his case. *See* App. A324-25. The court nonetheless denied the petition without comment. *See* App. A005.

## IV.

## ARGUMENT

### A. THIS COURT'S PRECEDENT LEAVES THE QUESTIONS PRESENTED IN THIS CASE OPEN.

This Court's prior cases, like the Ninth Circuit's published opinions, leave the questions presented in this case open, and it is time for this Court to resolve the questions. The two key cases are *United States v. Knights*, 534 U.S. 112 (2001), and *Samson v. California*, 547 U.S. 843 (2006). 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 a probation search

condition and discovered evidence which was used in a subsequent prosecution. *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. This 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 no such limitation 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 expectation 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 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.

The Court expressly distinguished parolees from probationers, however.

> 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 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.

## B. THE COURT SHOULD GRANT THE PETITION BECAUSE THE LOWER COURTS ARE DIVIDED AND HAVE TAKEN SEVERAL DIFFERENT POSITIONS ON THE QUESTIONS LEFT OPEN BY *KNIGHTS* AND *SAMSON*.

A number of lower federal courts and state courts have recognized the question left open by *Knights* and *Samson* and resolved it in different ways. Several opinions have expressly noted the conflict in the lower courts. *See, e.g., State v. Toliver*, 417 P.3d 253, 258 (Kan. 2018) (collecting cases and noting that "courts have split over whether probationers can be subjected to suspicionless searches"); *State v. Hamm*, No. W2016-01282-CCA-R3-CD, 2017 WL 3447914, at *12 (Williams, J., concurring) (Tenn. Crim. App. Aug. 11, 2017) (unpublished) (noting that "[t]here is a conflict among jurisdictions regarding the constitutionality of a warrantless search absent reasonable

suspicion of a probationer who is subject to warrantless searches as a condition of probation" and collecting cases), *appeal granted* (Tenn. Aug. 13, 2018); *State v. Ballard*, 874 N.W.2d 61, 76-77 (N.D. 2016) (Sandstrom, J., dissenting) (noting that "state and federal courts around the nation have disagreed as to the constitutional parameters of suspicionless probationary searches" and collecting cases).

Some courts have extended *Samson* to suspicionless probation searches because, in their view, "the similarities between parole and probation . . . are far greater than the differences." *State v. Adair*, 383 P.3d 1132, 1137 (Ariz. 2016), *cert. denied*, 138 S. Ct. 62 (2017); *State v. Vanderkolk*, 32 N.E.3d 775, 779 (Ind. 2015). *See also United States v. Williams*, 650 Fed. Appx. 977, 979-80 (11th Cir.) (unpublished), *cert. denied*, 137 S. Ct. 333 (2016); *United States v. Tessier*, 814 F.3d 432, 433 (6th Cir.) (approving and adopting district court reasoning in *United States v. Tessier*, No. 3:13-00077, 2014 WL 4851688 (M.D. Tenn. Sept. 29, 2014) (unpublished)), *cert. denied*, 137 S. Ct. 333 (2016); *State v. McAuliffe*, 125 P.3d 276 (Wyo. 2005). These courts, while recognizing that *Samson* considered just parole searches, concluded it "did not suggest that the difference was so significant as to require a showing of reasonable suspicion to conduct a warrantless probationary search." *Adair*, 383 P.3d at 1137. *See also Tessier*, 2014 WL 4851688, at *7 ("While . . . '[o]n th[e] continuum, parolees have fewer expectations of privacy than probationers,' *Samson*, 585 U.S. at 856, the *point* the language is intended to make cannot be any different for probationers . . . ." (emphasis in original)).

Other courts have declined to follow the courts extending *Samson* to probationers. *See, e.g., State v. Cornell*, 146 A.3d 895, 909 (Vt. 2016). *See*

*also State v. Ballard*, 874 N.W.2d at 72; *Murry v. Commonwealth*, 762 S.E.2d 573, 580 (Va. 2014). These courts have focused on *Samson*'s express recognition of the differences between probationers and parolees. As summarized in the North Dakota Supreme Court's opinion in *Ballard*, where the defendant was on unsupervised probation for two misdemeanor convictions:

> By contrast to *Samson*, Ballard pleaded guilty to two misdemeanor drug crimes. For one he was fined $200 and was sentenced to 180 days in jail with 150 days suspended. He received credit for pretrial time served in jail. Nothing indicates Ballard served time in jail after pleading guilty. He was placed on unsupervised probation, and his conditions while on probation were to undergo a chemical dependency evaluation, to be subject to warrantless searches and chemical testing. For the second crime, Ballard received a 90-day suspended jail sentence, was fined $725 and was placed on unsupervised probation.
>
> Ballard's minimal unsupervised probation conditions stand in stark contrast to Samson's extensive parole restraints, limitations and loss of liberty after prison time. Ballard pleaded guilty to two misdemeanors, as opposed to Samson's felony conviction. Ballard was not incarcerated after his guilty plea; Samson was paroled after time in prison. Ballard was not subject to supervision for either conviction. Samson was heavily supervised and his liberty was severely curtailed in virtually every respect important to a law-abiding person. Samson's associational rights were severely curtailed. Samson's travel rights were similarly limited. Samson was required to report his movements and changes in employment while Ballard had no similar constraints. Samson was subject to onerous and intrusive changes to his parole conditions, including psychiatric treatment or other special conditions. Ballard faced no such uncertainty and suffered no comparable loss of liberty.
>
> . . . [W]e do not equate Samson's extensive parole constraints with Ballard's modest conditions of unsupervised probation. . . .

*Ballard*, 874 N.W.2d at 71-72 (citations omitted).

This opinion's focus on the minor nature of the underlying offense and

unsupervised nature of the probation suggests factors to which Ninth Circuit published case law has looked in developing a third, intermediate approach. That approach is a balancing test looking to multiple factors, under which suspicionless searches of probationers sometimes are permissible and sometimes are not permissible. It led to approval of a suspicionless search in *United States v. King*, 736 F.3d 805 (9th Cir. 2013), *see id.* at 810, and disapproval of a suspicionless search in *United States v. Lara*, 815 F.3d 605 (9th Cir. 2016), *see id.* at 612. The factors to which the Ninth Circuit's published cases look are, on the privacy interest side of the spectrum, the probationer's probationary status, the clarity of the probation search condition, and the nature of what is searched, *see Lara*, 815 F.3d at 610, and, on the governmental interest side of the spectrum, the nature of the suspected probation violation and the nature of the offense for which the offender was on probation, *see Lara*, 815 F.3d at 612 (contrasting probation violation of missing probation officer meeting with violent new criminal activity suspected in *Knights* and *King*); *King*, 736 F.3d at 809 (noting "the serious and intimate nature of [the defendant's] underlying conviction for the willful infliction of corporal injury on a cohabitant").

There are thus *three* different approaches which lower courts have taken. The first approach is extending the reasoning of *Samson* to allow suspicionless searches of probationers just as *Samson* allowed suspicionless searches of parolees. The second approach is rejecting such an extension based on *Samson*'s express distinction between parolees and probationers. The third approach is a balancing test where the validity of a suspicionless search depends on a balancing of multiple factors, including not just the

probationer's probationary status but also the clarity of the conditions of probation, the nature of the search, the nature of the suspected probation violation, and the nature of the offense for which the offender was on probation. The Court should resolve which of these approaches is the correct one.

## C. THE COURT SHOULD GRANT THE PETITION BECAUSE THIS CASE IS A GOOD VEHICLE FOR RESOLVING THE SPLIT IN THE LOWER COURTS.

This case is a good vehicle for resolving the split in the lower courts because it presents the issue of a suspicionless probation search[2] on facts at or very close to the less serious end of the continuum. First, Petitioner, like the defendant in the North Dakota *Ballard* case, was on probation for a minor offense, namely, the offense of reckless driving. Second, Petitioner, once again like the defendant in *Ballard*, was on unsupervised probation, which implicitly recognizes his lesser danger to society. Third, unlike in *Knights* and

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[2] While the court of appeals found there was reasonable suspicion to search Petitioner's home based on the marijuana found on Petitioner's person, it did not find – and could not have found – reasonable suspicion for the initial search of the person. There was reasonable suspicion Petitioner was reoffending by driving with a suspended license, but driving with a suspended license did not establish reasonable suspicion to search Petitioner's person, because driving with a suspended license is not an offense for which officers could expect to find evidence in a search, *see Arizona v. Gant*, 556 U.S. 332, 344 (2009) (explaining that driving with a suspended license is an "offense for which police could not expect to find evidence in the passenger compartment of [a defendant's] car").

*Samson*, the probation search condition was not "clearly expressed" to Petitioner, and he was not "'unambiguously' aware," of it, *Samson*, 547 U.S. at 451 (quoting *Knights*, 534 U.S. at 119).

This will allow the Court to address multiple issues, including the several subissues lower courts have either implicitly or explicitly recognized within the broader issue. First, the Court can address the general issue expressly left open in *Knights* and implicitly left open in *Samson* and on which the lower courts are divided, *viz.*, whether probationers can be subjected to a suspicionless search condition like parolees or whether the "fewer expectations of privacy" that parolees have, *Samson*, 547 U.S. at 850, distinguish suspicionless parole searches from suspicionless probation searches. Second, if the Court decides suspicionless searches of probationers are sometimes permissible, it can address whether they are always permissible regardless of the nature of the underlying offense and/or the nature of the probation, or whether they are not permissible when the probation is unsupervised and for a minor offense like reckless driving, as it is here. Third, if the Court decides suspicionless probation searches are permissible even when the probation is unsupervised and for a minor offense, the Court can clarify whether and when the additional factor on which it relied in *Knights* and *Samson* – that the probationer or parolee was aware of and/or accepted the condition – is a requirement.

* * *

D. THE COURT SHOULD GRANT THE PETITION BECAUSE *KNIGHTS* AND *SAMSON* SHOULD NOT BE EXTENDED TO ALLOW SUSPICIONLESS SEARCHES OF MERE PROBATIONERS, ESPECIALLY WHEN THE PROBATION IS FOR A MINOR OFFENSE, THE PROBATION IS UNSUPERVISED, AND THE PROBATIONER WAS NOT UNAMBIGUOUSLY AWARE OF THE SEARCH CONDITION.

A final reason to grant the petition is that *Knights* and *Samson* should not be extended to allow suspicionless searches of mere probationers, especially in cases like the present one. To begin, *Samson* is appropriately limited to parolees because parolees are different from probationers, especially when the probation is unsupervised and for a minor offense. *Samson* itself suggests this, by stating at the very beginning of its analysis:

> 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 flip side of this, as articulated in a court of appeals concurring opinion cited with approval in *Samson*, is:

> Probationers are close to the other end of the harmfulness scale. The most typical use of probation is as an alternative to jail for minor offenders, most commonly misdemeanants. Sometimes a first offender felon gets the lenience of probation rather than imprisonment. Unlike parolees, who were 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.

*United States v. Crawford*, 372 F.3d 1048, 1077 (9th Cir. 2004) (en banc) (Kleinfeld, J., concurring), *cited with approval in Samson*, 547 U.S. at 854 (footnotes omitted). And this is even more true of a person placed on unsupervised probation for a minor offense. *Accord Ballard*, 874 N.W.2d at 72 (describing "minimal unsupervised probation conditions" in case at bar as "stand[ing] in stark contrast to "extensive parole restraints, limitations and loss of liberty" in *Samson*).

Secondly, the probationer's awareness of the condition – or, in Petitioner's case, lack of awareness of the condition – is important. *Knights* and *Samson* apply a totality of circumstances balancing test "assessing, on the one hand, the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Samson*, 547 U.S. at 848 (quoting *Knights*, 534 U.S. at 118-19). And the fact "[t]he probation order clearly expressed the search condition and Knights was unambiguously informed of it" was one of two factors that "significantly diminished" the probationer's privacy interest. *Knights*, 534 U.S. at 119-20. *See also Samson*, 547 U.S. at 852.

Lower courts extending *Samson* to probation searches have also placed weight on this factor. In *United States v. Tessier*, the court noted the search condition was in a probation order and the defendant had "signed the probation order immediately below the following, bolded language: **'I HAVE RECEIVED A COPY, READ AND UNDERSTAND THE ABOVE TERMS AND CONDITIONS OF PROBATION AND AGREE TO ABIDE BY SAME.'**" *Id.*, 2014 WL 4851688, at *4 (emphasis in original). In *State v. Adair*, the court held *Samson* extended to suspicionless probation

searches, "particularly when the applicable probation conditions specifically and expressly authorize such searches." *Adair*, 383 P.3d at 1137. In *State v. Vanderkolk*, the court expressly limited suspicionless probation searches to such circumstances, stating that probationers "who have consented or been clearly informed that the conditions of their probation . . . unambiguously authorize warrantless and suspicionless searches, may thereafter be subject to such searches," but that such searches were not permissible where the probationer "had agreed to written conditions of his participation that consented only to searches upon probable cause." *Id.*, 32 N.E.3d at 779-80.

It is also eminently logical to place weight on the probationer's awareness or lack of awareness. The other factor relied on in *Knights* and *Samson* – the qualified freedom of probationers and parolees – is a theoretical, albeit legitimate, policy consideration. Actual awareness or lack of awareness, in contrast, goes to the probationer's actual subjective expectation. Indeed, some courts uphold probation searches on a consent theory where probationers have affirmatively accepted a search condition. *See, e.g., United States v. Barnett*, 415 F.3d 690, 692-93 (7th Cir. 2005); *People v. Medina*, 70 Cal. Rptr. 3d 413, 420 (Cal. App. 2007). *But see Tessier*, 2014 WL 4851688, at *5 (noting criticism of this "contract theory" approach).

In sum, *Knights* and *Samson* should be limited. At the very least, they should not extend to probationers like Petitioner who are on unsupervised probation for a minor offense and have not even been made aware of the probation search condition. More generally, the question expressly left open in *Knights* – and still unresolved by *Samson* – should be resolved by a holding

that the Fourth Amendment does not allow suspicionless searches of probationers.

## VI.

## CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

DATED: September 25, 2018

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

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No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

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**STEVEN DOYLE BURTON, PETITIONER,**

**vs.**

**UNITED STATES, RESPONDENT.**

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**CERTIFICATE OF SERVICE**

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I, Carlton F. Gunn, hereby certify that on this 25th day of September, 2018, a copy of the Petitioner's Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were 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
CARLTON F. GUNN
Attorney at Law