No. 18-6137

IN THE SUPREME COURT OF THE UNITED STATES

STEVEN DOYLE BURTON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

DAVID M. LIEBERMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in determining that the Fourth Amendment permitted a warrantless search of petitioner's person and residence, based on reasonable suspicion of criminal activity, when petitioner was subject to such searches as a condition of his probation.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is not published in the Federal Reporter but is reprinted at 722 Fed. Appx. 677.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 2018. A petition for rehearing was denied on July 5, 2018 (Pet. App. A5). The petition for a writ of certiorari was filed on September 25, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on one count of possession of cocaine base with intent to distribute, in violation of 21 U.S.C. 841(a)(1); one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1); and one count of possession of ammunition by a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1. He was sentenced to 180 months of imprisonment, to be followed by four years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A4.

1. In 2013, while driving recklessly, petitioner struck another vehicle on the road. Presentence Investigation Report (PSR) ¶ 47. After the cars stopped, petitioner exited his vehicle in the middle of the road and punched the other driver in the face. Ibid. Officers responding to the scene smelled a strong odor of alcohol on petitioner. Ibid. Petitioner subsequently pleaded guilty in state court to assault with a deadly weapon and reckless driving, admitting that he had "unlawfully consume[d] an alcoholic beverage while operating a motor vehicle in a reckless manner." Ibid. The court sentenced petitioner to time served on the assault count and three years of probation on the reckless driving count. Ibid.; Pet. App. A225-A226. As a condition of his probation, petitioner was required to "submit to a Fourth waiver," meaning he

would "submit his person, place of residence, [and] vehicle to search at any time with or without warrant, with or without probable cause when requested by any law enforcement officer." Pet. App. A226.

In April 2014, while petitioner was serving his term of probation, law enforcement officers learned that he was selling cocaine base out of his house. PSR ¶ 49. Officers responded by conducting a "4th waiver compliance check," during which they found "a bag of rock cocaine between [petitioner's] buttocks." Ibid. Petitioner pleaded guilty in state court to possessing cocaine base for sale. Ibid.

2. In November 2014, after petitioner pleaded guilty to the state drug charge, but before sentencing, San Diego police officers stopped his car for blaring loud music and activating the turn signal only after beginning to make an abrupt right turn. Pet. App. A54-A55, A58-A59, A140-A141; PSR ¶ 5. Officers then ran a records check, determined that petitioner had a suspended driver's license, and learned that he was on probation with an "active 4th amendment waiver." PSR ¶ 5. Officers searched petitioner and discovered a plastic bag containing marijuana, $202 in cash, and a cell phone in his pocket. Ibid. They then visited petitioner's home, which he shared with his grandmother. PSR ¶ 6. Petitioner's grandmother confirmed that petitioner lived in the home and "informed officers that [petitioner] slept on the floor of the

southwest bedroom," but "kept his clothing and other personal items in the garage." Ibid.

Officers searched the garage and located a bag inside a sweatshirt containing several pieces of cocaine base (amounting to 31 grams) and $6200 in cash. PSR ¶¶ 7, 13. They also found a backpack locked with a small gold lock. PSR ¶ 7. Officers located a key on petitioner's key ring that opened the lock. Ibid. Inside the backpack were two firearms, two loaded magazines, and other ammunition. Ibid. The backpack also held a lockbox containing $29,500 in cash. Ibid. Another officer discovered two clear plastic bags in a planter box on the side of the driveway. PSR ¶ 8. The bags contained nine grams of powder cocaine base and drug paraphernalia. PSR ¶¶ 8, 13.

3. A grand jury in the Southern District of California returned an indictment charging petitioner with one count of possession of cocaine base with intent to distribute, in violation of 21 U.S.C. 841(a)(1); one count of possession of a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c); one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1); and one count of possession of ammunition by a felon, in violation of 18 U.S.C. 922(g)(1). PSR ¶ 1.

Before trial, petitioner moved to suppress the evidence discovered in the search of his home. The district court denied

the motion. Pet. App. A17-A21. The court first determined that officers had probable cause to conduct the initial traffic stop based on the "loud noise violating a section of the vehicle code," the "very quick turn across what would have been the inside lane to the outside and over to the curb," and "the late signal." Id. at A18. The court then found that the officers' actions from there forward "all would be reasonable." Id. at A20. In particular, the court emphasized that petitioner was driving without a license and "on search of [petitioner], they f[ound] marijuana [and] * * * cash of a couple hundred bucks" -- evidence showing that petitioner was violating the terms of his probation. Id. at A19. The court also observed that the officers further "determine[d], through their investigation, that the records reflect he [wa]s subject to a Fourth Amendment waiver." Ibid. And the court moreover found that "the officers acted in good faith [reliance] on the official records of the court transmitted to law enforcement." Id. at A21.

Several weeks later, the Ninth Circuit concluded in United States v. Lara, 815 F.3d 605 (2016), that a suspicionless search of a cell phone pursuant to a probation waiver violated the Fourth Amendment. Lara emphasized that the search condition at issue did not clearly cover cellphone data. Id. at 610-612. Following Lara, the district court in this case reviewed that decision and reaffirmed its earlier ruling. Pet. App. A38-A40. The court reasoned that Lara was not controlling and that officers in this

case had reasonable suspicion to search petitioner's house, noting that "[petitioner] [wa]s driving, and shouldn't be on a suspended license and with contraband in his possession approaching his house," "[a]nd officers kn[e]w, from experience, [petitioner's] involvement with narcotics." Id. at A38-A39. The court determined that those factors "weigh in favor of the suspicionless search," but would also "support a search on a reasonable suspicion." Id. at A39. In addition, the court found that even if the probation search condition was unlawful, "suppression for a violation of [the] Fourth Amendment" would be inappropriate because "the good-faith exception" applied "as to all of the contraband found that day." Ibid.

The case proceeded to a jury trial. Petitioner was convicted of the drug and felon-in-possession charges, and acquitted of the Section 924(c) charge. PSR ¶ 2.

4. The court of appeals affirmed in an unpublished memorandum opinion. Pet. App. A1-A4. The court found that "the probation search of [petitioner's] residence * * * was reasonable under the circumstances." Id. at A2. The court noted that officers "observed [petitioner] commit two traffic violations, giving them probable cause to initiate a traffic stop and investigate the violations." Ibid. The court also noted that a "routine records check * * * revealed [petitioner] was driving with a suspended license and was subject to an active Fourth

Amendment waiver." Ibid. And the court determined that the "officers possessed a reasonable suspicion that [petitioner] was reoffending, and their interests in searching his person outweighed his already diminished expectation of privacy." Ibid. (citing United States v. Knights, 534 U.S. 112, 118-119 (2001), and Lara, 815 F.3d at 612). The court additionally found that "[t]he discovery of marijuana on [petitioner's] person provided sufficient suspicion of criminal activity to justify the subsequent search of his home, which was located approximately a house length away from where [petitioner] and the officers were stopped." Ibid.

ARGUMENT

Petitioner contends (Pet. 7-19) that this Court should grant certiorari to decide whether the Fourth Amendment permits a suspicionless search of a probationer's person and residence conducted pursuant to a condition of probation authorizing such searches. That question is not implicated here, because the lower courts determined that the searches of petitioner's person and residence were supported by reasonable suspicion. In any event, this Court has repeatedly denied petitions for writs of certiorari raising the question whether suspicionless probation searches violate the Fourth Amendment,[1] and the same result is warranted

[1] See Williams v. United States, 137 S. Ct. 333 (2016) (No. 16-5142); Tessier v. United States, 137 S. Ct. 333 (2016)

here. Every court of appeals to consider the question has determined that suspicionless probation searches are consistent with the Fourth Amendment. Petitioner correctly notes (Pet. 10-14) that two state courts of last resort have rejected suspicionless searches of probationers' residences. But this case does not present an appropriate vehicle to review that shallow disagreement. Not only did the lower courts determine that the searches in this case were supported by reasonable suspicion, but the district court found that, even if the searches did in fact violate the Fourth Amendment, the searching officers acted in good faith reliance on the probation search order.

1. The court of appeals correctly determined that the searches of petitioner's person and residence complied with the Fourth Amendment.

a. In United States v. Knights, 534 U.S. 112 (2001), this Court upheld a warrantless search of a probationer's home. The Court explained that "[t]he touchstone of the Fourth Amendment is reasonableness" and that "the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" Id. at 118-119 (citation omitted). On the privacy

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(No. 15-9414); King v. United States, 134 S. Ct. 1492 (2014) (No. 13-7556).

side of the balance, the Court emphasized that probationers "do not enjoy 'the absolute liberty to which every citizen is entitled.'" Id. at 119 (quoting Griffin v. Wisconsin, 483 U.S. 868, 874 (1987)). That was especially true for the probationer in Knights, the Court reasoned, because his probation order included an express condition that permitted warrantless searches and thereby "significantly diminished [his] reasonable expectation of privacy." Id. at 120.

The Court concluded that the privacy interests of the probationer in Knights were outweighed by the government's "interest in apprehending violators of the criminal law." 534 U.S. at 121. The Court noted that a probationer "'is more likely than the ordinary citizen to violate the law'" and that "probationers have even more of an incentive to conceal their criminal activities and quickly dispose of incriminating evidence." Id. at 120 (citation omitted). The Court therefore held that "no more than reasonable suspicion [was needed] to conduct a search of th[e] probationer's house" and that "a warrant requirement [was] unnecessary." Id. at 121. Because the search in Knights was supported by reasonable suspicion, the Court did not decide whether it would have been valid in the absence of such suspicion. Id. at 120 n.6, 122.

In Samson v. California, 547 U.S. 843 (2006), this Court resolved "a variation of the question [it] left open in [Knights]"

by holding that the Fourth Amendment permitted a suspicionless search of a parolee's person conducted pursuant to a state law requiring consent to such searches as a condition of parole. Id. at 847; see id. at 848-857. The Court observed that parolees "have severely diminished expectations of privacy by virtue of their status alone," and added that "parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment." Id. at 850, 852. In light of that status and the parole condition's express authorization of suspicionless searches, the Court held that the parolee in Samson "did not have an expectation of privacy that society would recognize as legitimate." Id. at 852.

Turning to the other side of the ledger, the Court emphasized the "substantial" government interests served by the search. Samson, 547 U.S. at 853. The Court explained that "a State has an overwhelming interest in supervising parolees because parolees . . . are more likely to commit future criminal offenses." Ibid. (citation and internal quotation marks omitted). The Court also noted the "State's interests in reducing recidivism and thereby promoting reintegration and positive citizenship among probationers and parolees." Ibid. And the Court concluded that "California's ability to conduct suspicionless searches of parolees serves its interest in reducing recidivism, in a manner that aids * * * the reintegration of parolees into productive

society." Id. at 854. The Court therefore held that "the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee." Id. at 857. As in Knights, however, the Court in Samson had no occasion to address a suspicionless search of a probationer.

b. The searches of petitioner's person and residence were constitutionally reasonable under the framework applied in Knights and Samson because the government's strong interests in preventing crime and reintegrating offenders into the community outweighed the intrusion on petitioner's diminished expectation of privacy. Indeed, as in Knights, the lower courts here held that the probation searches were supported by reasonable suspicion. See Pet. App. A2, A39.

Petitioner's "status as a probationer" means that he "begins with a lower expectation of privacy than is enjoyed by a citizen who is not subject to a criminal sanction." United States v. King, 736 F.3d 805, 808 (9th Cir. 2013), cert. denied, 134 S. Ct. 1492 (2014). As this Court has made clear, "[i]nherent in the very nature of probation is that probationers do not enjoy the absolute liberty to which every citizen is entitled." Knights, 534 U.S. at 119 (citation and internal quotation marks omitted). And petitioner's already-limited expectation of privacy was "significantly diminished" because his conditions of probation "clearly expressed" that he was subject to warrantless searches of

his person and residence. Id. at 119-120; see Pet. App. A226; see also Samson, 547 U.S. at 848-849. Petitioner does not dispute that the searches of his person and residence complied with the express and unambiguous conditions of his probation, and his fact-bound assertion that he was subjectively unaware of those conditions cannot be squared with the record, see pp. 14-15, infra. The search therefore "intruded on [his] legitimate expectation of privacy only slightly." King, 736 F.3d at 809.

On the other side of the balance, the searches served the State's substantial interests in reducing recidivism, preventing the destruction of evidence, and promoting the reintegration of probationers into society. See Samson, 547 U.S. at 853; Knights, 534 U.S. at 120-121. Petitioner's status as an offender on probation -- and his lengthy record of drug and property crimes, see PSR ¶¶ 36, 39-42, 49 -- made those interests all the more acute. Accordingly, the searches of petitioner's person and residence were reasonable under the Fourth Amendment because the substantial government interests at stake more than justified the "the slight intrusion" on his legitimate expectation of privacy. King, 736 F.3d at 810; accord United States v. Williams, 650 Fed. Appx. 977, 979-980 (11th Cir.) (per curiam), cert. denied, 137 S. Ct. 333 (2016); United States v. Tessier, 814 F.3d 432, 433 (6th Cir.), cert. denied, 137 S. Ct. 333 (2016).

c. Petitioner asserts (Pet. 10-14) that the courts of appeals have erred in applying the framework set forth in Knights and Samson to permit suspicionless searches of probationers as well as parolees. That question is not implicated here, because the lower courts found that the searches in question were justified by reasonable suspicion. Pet. App. A2-A3, A38-A39.

Even without such a finding, however, petitioner's argument would fail. Petitioner does not dispute that, as this Court recognized in Knights, probationers have diminished expectations of privacy. Nor does petitioner dispute that suspicionless searches of probationers serve the same strong government interests in preventing recidivism and reintegrating offenders into society that this Court identified in Samson.

Indeed, the government's interest in protecting the public was acute in this case. The state court imposed the search condition on petitioner after his guilty plea to reckless driving and assault with a deadly weapon. Moreover, the state court also had before it petitioner's lengthy and substantial criminal history that included repeated convictions for narcotics trafficking, PSR ¶¶ 41, 42, numerous parole violations and remands, PSR ¶¶ 39-46, and at least one prior incident in which petitioner "charged at" an officer attempting to detain him, PSR ¶ 41. As in Knights, "[t]he judge who sentenced [petitioner] to probation determined that it was necessary to condition the

probation on" the search provision. 534 U.S. at 119. And as in that case, it was reasonable for the judge to conclude -- in light of petitioner's criminal record and his conduct that led to the convictions for the assault and reckless driving offenses -- "that the search condition would further the two primary goals of probation -- rehabilitation and protecting society from future criminal violations." Ibid.

Thus, even had the searches in this case been suspicionless, they would be valid. Weighing the societal interests in addressing recidivism and promoting reintegration against the diminished expectations of privacy of a probationer whose sentence includes a warrantless search term yields the conclusion that a search without particularized suspicion is reasonable.

d. Petitioner further objects to the searches on the ground that he was "not present in court to be informed of the search condition," and "there was no evidence he was informed of the condition at some later time." Pet. 5; see id. at 15. That objection lacks merit. Petitioner was represented at the state-court hearing by an attorney, who appeared on his behalf in accordance with California Penal Code § 977 (West Supp. 2013). Under California law, an attorney who appears on a defendant's behalf under Section 977(a) is presumed to be authorized by the defendant to do so -- a presumption that "may be overcome only by a strong showing that the attorney had no authority." People v.

Fedalizo, 246 Cal. App. 4th 98, 106 (Cal. Ct. App. 2016) (citation omitted). Petitioner does not assert that his attorney lacked authority to represent him or accept the condition on his behalf.

Instead, petitioner asserts (Pet. 5) that the government presented "no evidence he was informed of the [search] condition." But even assuming representation by an attorney at his hearing entitles him to a presumption that he was not then informed of the terms of his sentence, petitioner was plainly aware of the search condition by the time the searches at issue in this case occurred in November 2014. Months earlier, petitioner was subject to a "4th waiver compliance check" leading to the discovery of "a bag of rock cocaine between his buttocks." PSR ¶ 49. And following that check, petitioner pleaded guilty in state court to a drug offense based on the evidence that was discovered during the probation search. Ibid.

2. Petitioner errs in asserting (Pet. 10-14) that the decision below implicates a disagreement among lower federal and state courts that warrants this Court's review.

Even assuming that the searches in this case were suspicionless, but see pp. 18-19, infra, the court of appeals' nonprecedential decision would be consistent with decisions of other courts of appeals. In Tessier, the Sixth Circuit held that "a probationer whose probation order contains a search condition may be subjected to a search in the absence of reasonable

suspicion." 814 F.3d at 433. The Eleventh Circuit's unpublished decision in Williams likewise affirmed a suspicionless search conducted pursuant to a condition of probation. See 650 Fed. Appx. at 979-980. And the Seventh Circuit has upheld a suspicionless search conducted pursuant to a condition of probation, although on a consent theory rather than under the balancing approach applied in Knights and Samson. See United States v. Barnett, 415 F.3d 690, 691-692 (2005). No federal court of appeals has reached a contrary result.[2]

Petitioner is correct that two decisions of state courts of last resort have rejected suspicionless searches of probationers.[3] But those decisions do not present a conflict warranting this Court's review. In State v. Cornell, 146 A.3d 895, 909 (2016),

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[2] Petitioner notes (Pet. 13) that in United States v. Lara, 815 F.3d 605 (2016), the Ninth Circuit held that the suspicionless search of a probationer's cellphone was not reasonable where the search condition in the probation agreement did not clearly cover a cellphone and its data. See id. at 610-612. Petitioner's search condition, by contrast, unambiguously permitted searches of his person and residence. Pet. App. A2. Moreover, any intra-circuit tension between the Ninth Circuit's decisions in Lara and this case would not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).

[3] Petitioner acknowledges (Pet. 11) other state court decisions rejecting Fourth Amendment challenges to suspicionless probation searches. See, e.g., 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); State v. McAuliffe, 125 P.3d 276, 282 (Wyo. 2005).

the Supreme Court of Vermont invalidated a suspicionless search condition imposed on a probationer. Although Cornell relied in part on the Fourth Amendment, the Supreme Court of Vermont also made clear that the Vermont Constitution independently requires individualized suspicion for probationer searches. See id. at 907, 909. The Supreme Court of Vermont's interpretation of the Fourth Amendment thus had no practical effect on its holding.

In State v. Ballard, 874 N.W.2d 61 (2016), the Supreme Court of North Dakota emphasized that the defendant, whose person and home were searched without suspicion, had "served [no] time in jail after pleading guilty" and had been sentenced to a term of "unsupervised probation," id. at 72, a sanction that state law reserved for misdemeanor offenders who pose a "low risk to society," id. at 73 (McEvers, J., concurring specially). The court reasoned that Ballard's status as "an unsupervised probationer" "inform[ed] both sides of the Fourth Amendment balancing test," id. at 70, preserving more of his "liberty" than the "extensive[ly]" supervised parolee in Samson and diminishing "the state's interest in restraining [his] liberty," id. at 71-72. And the concurrence in Ballard -- joined by two of the three Justices in the majority -- explained that "[t]he search term did not specifically include [the defendant's] 'place of residence.'" Id. at 73 (McEvers, J., concurring specially). To the extent that the Supreme Court of North Dakota's fact-specific resolution of that

case may reflect a difference in approach that would be implicated by this case, any shallow disagreement between Ballard and the unpublished decision here does not warrant this Court's review.[4]

3. In any event, even if the question presented otherwise warranted this Court's review, this case would be an unsuitable vehicle in which to address the permissibility of suspicionless searches of probationers.

First, as the lower courts recognized, these searches were not suspicionless. When officers conducted the traffic stop of petitioner, they had just witnessed his erratic driving, Pet. App. A18, they were aware of his "involvement with narcotics," id. at A39, and they learned he was subject to an active Fourth Amendment waiver, PSR ¶ 5. The court of appeals correctly determined, based on that information, that "officers possessed a reasonable suspicion that [petitioner] was reoffending, and their interests in searching his person outweighed his already diminished expectation of privacy." Pet. App. A2 (emphasis added); see id. at A39 (district court stated that search would have satisfied a

[4] Petitioner also cites (Pet. 12) Murry v. Commonwealth, 762 S.E.2d 573 (Va. 2014). But the court there explained that, while "Fourth Amendment principles" were relevant, the court did "not need to specifically address whether the probation condition violates Murry's Fourth Amendment rights." Id. at 577 n.3, 581.

reasonable-suspicion condition).[5] Officers then discovered marijuana and cash on petitioner's person, PSR ¶ 5, giving rise to "sufficient suspicion of criminal activity to justify the subsequent search of his home," which was "a house length away from where [petitioner] and the officers were stopped." Pet. App. A2.

Second, even if the search in this case were deemed to violate the Fourth Amendment, suppression would be unwarranted because the district court also found that the searching officers acted in good faith reliance on petitioner's probation order. See Pet. App. A20-A21, A39. The exclusionary rule is a "'judicially created remedy'" for Fourth Amendment violations that is "designed to deter police misconduct rather than to punish the errors of judges and magistrates." United States v. Leon, 468 U.S. 897, 906, 916 (1984) (citation omitted). The exclusionary rule "applies only where it 'result[s] in appreciable deterrence,'" Herring v. United States, 555 U.S. 135, 141 (2009) (quoting Leon, 468 U.S. at 909) (brackets in original), and therefore permits "the harsh sanction of exclusion only when [police practices] are deliberate enough to yield 'meaningfu[l]' deterrence, and culpable enough to be 'worth the price paid by the justice system.'" Davis v. United States,

[5] Petitioner is thus wrong to suggest (Pet. 14 n.2) that the court of appeals did not find reasonable suspicion for the search of petitioner's person.

564 U.S. 229, 240 (2011) (quoting Herring, 555 U.S. at 144) (second set of brackets in original). As a result, suppression is warranted "only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." Leon, 468 U.S. at 919 (citation omitted). If "law enforcement officers have acted in objective good faith," the exclusionary rule does not apply because suppression "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." Id. at 908, 919-920; accord Davis, 564 U.S. at 237-241.

Here, the searching officers acted in objectively reasonable reliance on the probation order authorizing searches of petitioner's person and residence without a warrant or probable cause. And the fact that all of the courts of appeals to consider the question have upheld similar searches as consistent with the Fourth Amendment confirms that the officers' reliance on the probation order's authorization was (at a minimum) not objectively unreasonable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

DAVID M. LIEBERMAN
Attorney

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