No. 18-6137

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

REPLY BRIEF

CARLTON F. GUNN
Attorney at Law
975 East Green Street
Pasadena, California 91106

Attorney for the Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PAGE

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd)

PAGE

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd)

STATUTES

OTHER AUTHORITIES

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

I.

ARGUMENT

A. THE GOVERNMENT'S ARGUMENT THAT REVIEW SHOULD BE DENIED BECAUSE THE PROBATION SEARCH HERE WAS REASONABLE RESTS ON TWO FACTUALLY ERRONEOUS PREMISES.

One major problem with the government's argument that review should be denied because the probation search was reasonable is that it rests on two erroneous factual premises. The first erroneous factual premise is the government's assertion that the lower courts found there was reasonable suspicion for a search of Petitioner's person. *See* Brief in Opposition, at 11, 13, 18. The second erroneous factual premise is the government's assertion that the record establishes Petitioner was subjectively aware of the probation search condition. *See* Brief in Opposition, at 12, 14-15.

1. The Lower Courts Did Not Find There Was Reasonable Suspicion for a Search.

First, it is incorrect that the lower courts found reasonable suspicion for a search of Petitioner's person. The court of appeals clearly did not make such a finding. What it found was reasonable suspicion "that Mr. Burton was reoffending," by driving with a suspended license. App. A002. But reoffending by driving with a suspended license does not provide reasonable suspicion for a *search*. *See Arizona v. Gant*, 556 U.S. 332, 344 (2009) (describing driving with a suspended license as "an offense for which police could not expect to find evidence in the passenger compartment of [the driver's] car").

The district court did find reasonable suspicion for a search, but that appears to have been for the search of Petitioner's *residence*. And that reasonable suspicion was based on the preceding search of Petitioner's person, which makes it a fruit of that preceding search. *See* 6 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 11.4(f) (5th ed. 2012) (search justified by evidence found in prior unlawful search is fruit of poisonous tree). As the court explained it: "A variety of small violations which would have allowed the officers to search the person. And then they find the contraband and move from there to the house, ..." App. A038. To the extent the court was also suggesting the "variety of small violations" – which were the driving with suspended license and possibly the initial traffic violations[1] – provided reasonable suspicion to search

[1] If the court was including the initial traffic violations, it erred, because the initial traffic violations were not a violation of Petitioner's probation. The state court form used to record Petitioner's sentence and probation conditions has a box

Petitioner's person, it overlooked this Court's holding in the *Gant* opinion cited in the preceding paragraph.

Even if the lower court rulings could be read as finding reasonable suspicion for a probation search, those holdings are reviewable de novo, *see Ornelas v. United States*, 517 U.S. 690, 699 (1996), and they would be wrong under *Gant*. The only offense the officers were aware of prior to the search of Petitioner's person was the driving with suspended license offense – and the traffic violations which led to the traffic stop, *but see supra* n.1 (noting compliance with law in general not condition of Petitioner's probation). *Gant* held, inter alia, that driving with a suspended license is "an offense for which police could not expect to find evidence in the passenger compartment of [the driver's] car." *Id.*, 556 U.S. at 344. And it is equally true police could not expect to find evidence of such an offense on the driver's person.

2. The Record Did Not Establish Petitioner Was Subjectively Aware of the Probation Search Condition.

The government also errs in asserting that "[Petitioner's] fact-bound assertion that he was subjectively unaware of [the probation search] conditions cannot be squared with the record," Brief in Opposition, at 12. That an attorney who appears on a defendant's behalf is presumed to be authorized to do so, *see*

---

for a "Violate no laws" condition that is not checked. *See* App. A222. The only condition including law violations which is checked is the box for "Standard Alcohol Conditions," which includes "Violate no laws regarding driving a motor vehicle under the influence or in the possession of alcohol, drugs, or both" and "Not drive without a valid license and liability insurance." App. A222.

Brief in Opposition, at 14-15 (citing *People v. Fedalizo*, 246 Cal. App. 4th 98 (Cal. Ct. App. 2016)), does not show subjective awareness of a probation search condition. And here there was affirmative evidence to the contrary – in the form of the attorney's post-sentencing letter to Petitioner providing a list of conditions that did *not* include the probation search condition. *See* App. A250.

There was also no showing that the "4th waiver compliance check" briefly described in the presentence report, *see* Brief in Opposition, at 15 (quoting PSR, ¶ 49), made Petitioner subjectively aware of the probation search condition. As noted in the Petition, *see* Pet. at 5, there was no indication – in either the presentence report or the police report on which the presentence report was presumably based[2] –of 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.[3] *See* App. A235-36; PSR, ¶ 49. Indeed, there was no indication the officer even told Petitioner there was a court-ordered condition rather than implying his general probation status alone made him subject to search. *See* App. A234-37; PSR, ¶ 49.

---

[2] The presentence report upon which the government relies also was not evidence presented to the district court in connection with the suppression motion; rather, it was a post-conviction report prepared long after the district court had ruled on the motion to suppress. Even the police report on which the presentence report was presumably based was not evidence offered for the suppression motion; rather, it was presented for a motion to admit the prior drug offense as "other bad acts" evidence under Rule 404(b) of the Federal Rules of Evidence. *See* App. A228-47, A305 n.2.

[3] As noted in the Petition, 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).

B. THERE IS DISAGREEMENT IN THE LOWER COURTS WHICH THIS COURT SHOULD RESOLVE.

The government's argument that there is not a sufficient disagreement among the lower courts also lacks merit. It is not just Petitioner that sees disagreement in the lower courts. Appellate judges also see disagreement.

One example is found in an opinion not acknowledged in the Government's opposition – from the Kansas Supreme Court. That court opined, after discussing both *United States v. Knights*, 534 U.S. 112 (2001), and *Samson v. California*, 547 U.S. 843 (2006), that "[b]ecause *Knights* left open whether searches of probationers based on less than reasonable suspicion were constitutional, courts have split over whether probationers can be subjected to suspicionless searches." *State v. Toliver*, 417 P.3d 253, 258 (Kan. 2018). It then compared some of the same cases cited in Petitioner's Petition – *United States v. Tessier*, 814 F.3d 432 (6th Cir.), *cert. denied*, 137 S. Ct. 333 (2016); *Murry v. Commonwealth*, 762 S.E.2d 573 (Va. 2014); and *State v. Ballard*, 874 N.W.2d 61 (N.D. 2016). *See Toliver*, 417 P.3d at 258.

Another example of expressly articulated confusion is found in the dissenting opinion in the *Ballard* case, which the government does acknowledge. That dissenting opinion first states, near its beginning:

> The question of whether a warrantless probationary search may be carried out without a showing of probable cause or reasonable suspicion is one that has divided other courts. *See* Jay M. Zitter, Annotation, *Validity of Requirement That, as Condition of Probation, A Defendant Submit to Warrantless Searches,* 99 A.L.R.5th 557 (2002) (sections 9[a] and 9[b] discuss the division among the nation's courts). Although the United States Supreme Court has taken the opportunity to discuss the constitutional parameters of probation and parole

> searches on various occasions, it has yet to explicitly address the question of whether the Fourth Amendment authorizes a random search of a probationer without any particularized suspicion. *See, e.g., Samson v. California,* 547 U.S. 843, 126 S. Ct. 2193, 165 L. Ed. 2d 250 (2006) (the Fourth Amendment does not prohibit an officer from conducting a suspicionless search of a parolee); *United States v. Knights,* 534 U.S. 112, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001) (question of whether a suspicionless search of a probationer violates the Fourth Amendment left unanswered).

Ballard, 874 N.W.2d at 74 (Sandstrom, J., dissenting). The dissenting opinion then later reiterates this view, stating:

> Despite the guidance granted by *Samson* in regard to suspicionless, warrantless searches of parolees, state and federal courts around the nation have disagreed as to the constitutional parameters of suspicionless probationary searches. *Compare Harrell v. State,* 162 So. 3d 1128, 1132-33 (Fla. Dist. Ct. App. 2015) (warrantless, suspicionless search of probationer was reasonable even though probation order and statute lacked warrantless search probation condition), *State v. Vanderkolk,* 32 N.E.3d 775, 778-79 (Ind. 2015) (a probationer may, by valid advance consent or search term in the conditions of release, authorize a suspicionless, warrantless search), *State v. Bogert,* 197 Vt. 610, 109 A.3d 883, 892 (2014) (because of probationer's weakened expectation of privacy and the state's countervailing interest in promoting rehabilitation, reasonable suspicion was not a prerequisite to search of probationer's home and computer), *State v. Rowan,* 341 Wis. 2d 281, 814 N.W.2d 854, 866 (2012) (condition of extended supervision allowing for suspicionless probationer search was permissible under the Fourth Amendment), *People v. Medina,* 158 Cal. App. 4th 1571, 1578, 70 Cal. Rptr. 3d 413 (Cal. Ct. App. 2007) (suspicionless search conducted according to probation conditions does not violate Fourth Amendment so long as it is not undertaken for harassment, or for arbitrary or capricious reasons, or in an unreasonable manner), and *State v. McAuliffe,* 125 P.3d 276, 282 (Wyo. 2005) (probation conditions requiring probationer to submit to random searches and chemical testing were reasonable under Fourth Amendment), *with Murry v. Com.,* 288 Va. 117, 762 S.E.2d 573, 581 (2014) (condition of probation requiring suspicionless, warrantless searches at any time was not reasonable), *State v. Short,* 851 N.W.2d 474, 506 (Iowa 2014) (absent valid search warrant, search of probationer's apartment violated state constitution), *State v. Bennett,* 288 Kan. 86, 200 P.3d 455, 463 (2009) (under state law, *Samson* was not applicable and probationary searches

> required "a rational, articulable suspicion of a probation violation or other criminal activity"), and *In re J.E.,* 594 Pa. 528, 937 A.2d 421, 422 (2007) (warrantless search of probationer's bedroom must be supported by a reasonable suspicion that the probationer was in violation of his supervision conditions); *compare also United States v. King,* 736 F.3d 805, 810 (9th Cir. 2013) (a suspicionless search conducted pursuant to probation conditions does not violate the Fourth Amendment), *United States v. Warren,* 566 F.3d 1211, 1216 (10th Cir. 2009) ("The second exception to the warrant and probable-cause requirements authorizes warrantless searches without probable cause (or even reasonable suspicion) . . . when the totality of the circumstances renders the search reasonable."), *United States v. Reyes,* 283 F.3d 446, 462 (2d Cir. 2002) ("[P]robation officers conducting a home visit are not subject to the reasonable suspicion standard . . . ."), *and United States v. Vincent,* 167 F.3d 428, 431 (8th Cir. 1999) (a search provision allowing for suspicionless, warrantless probationary searches is permissible if the search authority is narrowly and properly exercised), *with United States v. Freeman,* 479 F.3d 743, 749 (10th Cir. 2007) (Kansas Department of Corrections rules governing warrantless parole searches prohibited parole searches without reasonable suspicion), *United States v. Henry,* 429 F.3d 603, 614 (6th Cir. 2005) (Kentucky Department of Corrections rules require reasonable suspicion to conduct a warrantless probationary search), *and United States v. Hagenow,* 423 F.3d 638, 642 (7th Cir. 2005) (only reasonable suspicion of criminal activity is needed to justify search of probationer's residence).

Ballard, 874 N.W.2d at 76-77 (Sandstrom, J., dissenting). Nowhere does the dissenting opinion in *Ballard* suggest the majority opinion is a single outlier outside a solid wall of contrary authority.

Ballard is not as distinguishable as the government suggests, moreover. The government suggests three distinctions, to wit, that the defendant had served no time in jail after pleading guilty, that the defendant's probation was unsupervised, and that the probation search term did not specifically include the defendant's residence (though it did refer to his "place," *see Ballard*, 874 N.W.2d at 73 (McEvers., J., concurring specially)). *See* Brief in Opposition, at 17. But the first and second of these circumstances, though not the third, are exactly the

circumstances here. Petitioner also served no time in jail after pleading guilty. Petitioner also was placed on unsupervised probation.

These circumstances are another reason Petitioner's case is a good vehicle. It presents not just the basic issue of whether suspicionless probation searches are *ever* permitted, but also the further issue of whether a line must be drawn at unsupervised probation for a minor offense. *See* Petition, at 15.

C. THE GOVERNMENT'S GOOD FAITH ARGUMENT IS NOT A REASON TO DENY REVIEW AND SHOULD BE LEFT FOR THE COURT OF APPEALS TO ADDRESS IN THE FIRST INSTANCE.

The government's alternative good faith argument is also not a basis for denying review. To begin, the general good faith argument the government makes in its brief in opposition is not the argument the government made in the district court. The argument it made in the district court was a much narrower good faith argument about the officers' erroneous reading of a computer record of the particular offense Petitioner was on probation for. *See* App. A449.[4]

Secondly, the court of appeals did not address the government's good faith argument. This Court frequently, if not always, declines to consider arguments not passed on in the first instance by the court of appeals. *McWilliams v. Dunn*, 137 S. Ct. 1790, 1801 (2017). *See, e.g., Byrd v. United States*, 138 S. Ct. 1518, 1530-31 (2018) (declining to consider and leaving for remand alternative argument made

[4] A short supplemental appendix, denominated Appendix 10 and consecutively numbered to the prior appendices as pages A340-51, is attached to this reply brief.

by government in brief in opposition to certiorari which court of appeals did not reach). *See also Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397-98 (1971) (declining to consider argument not passed on by court of appeals even when district court had considered it).

Limiting review in this way is especially appropriate where the issue is partially case-specific. *See, e.g., McWilliams*, 137 S. Ct. at 1801 (explaining court of appeals did not consider way in which error "would have mattered" and noting "[t]here is reason to think that it could have"). Here there are multiple arguments, which Petitioner expressly made in the court of appeals and which in some instances are quite case-specific. Those include (1) that the officers had no information about the scope of Petitioner's probation search condition, which in California can vary quite widely, *see* App. A292-94 (opening brief argument), A315 (reply brief argument); (2) that what the officers actually believed here was that reasonable suspicion was required and the officers did not have reasonable suspicion, *see* App. A294-95 (opening brief argument), A316 (reply brief argument); (3) that there was insufficient evidence to establish the officers' erroneous reading of the computer record was reasonable, *see* App. A291 (opening brief argument); A316-17 (reply brief argument); and (4) that the good faith exception does not apply as a general matter to reliance on an unconstitutional probation search condition, *see* App. A290-92 (opening brief argument); A318-19 (reply brief argument).

The existence of these meritorious arguments against application of a good faith exception in the present case has two implications. First, the government's good faith argument does not even approach being so clearly correct that it should preclude consideration of the serious question about suspicionless probation

searches. Second, the case-specific nature of some of Petitioner's good faith arguments and the court of appeals' failure to address them, make the better course to leave them for the court of appeals on remand.[5]

II.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

DATED: December 3, 2018

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

[5] Alternatively, this Court could add the good faith question to the questions presented and order the merits briefs to address that question. The case-specific nature of some of Petitioner's arguments weighs against this, however.

A P P E N D I X 10

LAURA E DUFFY
United States Attorney
ANDREW R. HADEN
Assistant U.S. Attorney
California Bar No.: 258436
Office of the U.S. Attorney
880 Front Street, Room 6293
San Diego, CA 92101
Tel: (619) 546-6961
Email: andrew.haden@usdoj.gov

Attorneys for the United States

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. STEVEN DOYLE BURTON, Defendant.	Case No.: 15-CR-2443-AJB **UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS EVIDENCE**

COMES NOW the plaintiff, the UNITED STATES OF AMERICA, by and through its counsel, LAURA E. DUFFY, United States Attorney, and Andrew R. Haden, Assistant United States Attorney, and hereby responds to Defendant's above-captioned motion. This response and opposition is based upon the files and records of the case together with the attached statement of facts, memorandum of points and authorities, and attached exhibits.

I

INTRODUCTION

BURTON is a documented gang member and a felon, at least four times over. On November 7, 2014, he was driving a vehicle around San Diego, even though he did not possess a valid driver's license.

After he committed several traffic violations, he was pulled over. A quick records check confirmed that BURTON did not have a license and that he had a Fourth Amendment waiver.

A subsequent search of his residence revealed: approximately 730 dosages of cocaine base; over $35,000 in cash; two different firearms; and associated ammunition.

BURTON does not appear to be deterred by his contacts with the California criminal justice system. As such, his case was referred for federal prosecution via the Project Safe Neighborhoods Program – a federal initiative to combat gun and gang related crime.

Without a supporting declaration, BURTON now claims that the search of his residence was not lawful. He is incorrect.

II

STATEMENT OF FACTS

On November 7, 2014, at approximately 7:25 p.m., San Diego Police Department Officers Williams and Medina were working in southeast San Diego. Specifically, they were travelling eastbound on Skyline Drive near the intersection of Meadowbrook Drive.

Officer Williams observed a white Chevrolet Camaro traveling westbound on Skyline Drive. As the vehicle approached the intersection – but when it was still approximately 240 feet away from the police vehicle – Officer Williams could hear loud music and vibration from excessive bass coming from the vehicle, a violation of California Vehicle Code Section 27007.

The vehicle then made a u-turn and began travelling eastbound on Skyline Drive. The police pulled in behind the Camaro. The

Camaro then made an abrupt right turn towards the south curb line. The Camaro did not activate a turn signal until it had already begun turning, a violation of California Vehicle Code Section 22108. In fact, Officer Medina had to quickly brake to avoid a possible collision with the Camaro. At that point, officers activated their emergency lights and conducted a traffic stop.

Steven Doyle BURTON was the driver and sole occupant of the Camaro. Record checks revealed that BURTON had a suspended license and an active Fourth Amendment waiver until November 11, 2016, based upon a recent conviction for assault with a deadly weapon, in violation of California Penal Code Section 245.

BURTON was handcuffed and then searched. He was in possession of marijuana. No contraband was found in the vehicle. BURTON told the officers that he lived at 7955 Skyline Drive with his grandmother, Marcia Acey. BURTON's ID card and vehicle registration also listed 7955 Skyline Drive as his residence. The officers decided to conduct a Fourth Amendment waiver search at 7955 Skyline.

Marcia Acey answered the front door at 7955 Skyline. She confirmed that BURTON lived at the residence. Specifically, she explained that he slept on the floor in the southwest bedroom. Acey also explained that BURTON kept clothing and other personal items in the garage.

In the garage, Officer Barton located a black and red zip-up hooded sweatshirt. Inside the sweatshirt, he found several pieces of a rock-like substance (believed to be cocaine base) and $6,200 dollars.

In the rafters, Officer Cummings found a black Jansport backpack. The backpack was locked. Officer Cummings was able to unlock the backpack with a key from BURTON's set of keys from the Camaro. Inside the backpack, Cummings found a black Master lock box. The key to the lock box was also on BURTON's key ring. The lock box contained approximately $29,500 dollars. The backpack also contained two firearms and various rounds of ammunition.

Record checks on BURTON confirmed that he was a previously documented gang member. The checks also revealed the following relevant criminal history:

CONVICTION DATE	COURT OF CONVICTION	CHARGE	TERM OF IMPRIOSNMENT
12/30/1998	CASC – San Diego	PC 459 – Burglary (Felony)	180 days jail 3 years prob '99 Prob revoc – 2 years prison
7/13/1999	CASC – San Diego	HS 11350 – Poss Cntrl Sub (Felony)	365 days jail 5 years prob
12/7/1999	CASC – San Diego	HS 11352 – Trans/Sell Cntrl Sub (Felony)	3 years prison
6/2/2005	CASC – San Diego	HS 11351.5 – Poss Cocaine Base 4/ Sale (Felony)	8 years prison

The firearms were seized and inspected. One was determined to be a Springfield XD-40 .40 caliber pistol, bearing serial number XD427363. It had been reported stolen in 2012 in SDPD Case # 12-024255. The other firearm was identified as a Bond Arms .45 caliber two-shot pistol. Preliminary checks also revealed that neither firearm was manufactured in the State of California.

III

STATEMENT OF CASE

BURTON was originally charged in state court. On November 25, 2014, BURTON was charged federally.

On August 24, 2015, BURTON was transferred to federal custody. On September 22, 2015, he waived indictment and was charged via Information.

On November 30, 2015, BURTON filed the instant motion to suppress.

IV

ARGUMENT

BURTON has made three primary assertions in support of his suppression motion: (1) that his traffic stop was unconstitutional because the officers lacked probable cause; (2) that his detention was unlawfully prolonged; (3) that he did not have a Fourth Waiver. As will be seen below, BURTON is mistaken.

There are two preliminary matters, however, that need to be addressed prior to the substantive briefing.

First, although the United States has already agreed that an evidentiary hearing is warranted, BURTON did not submit a declaration in support of his suppression motion to assert that he did not commit the alleged traffic violations.

Without such a dispute, the validity of the traffic stop remains unquestioned and the challenged evidence remains admissible. United States v. Batiste, 868 F.2d 1089, 1093 (9th Cir. 1989) (where "defendant, in his motion to suppress, failed to dispute any material fact in the government's proffer, ... the

district court was not required to hold an evidentiary hearing"); United States v. Moran-Garcia, 783 F. Supp. 1266, 1274 (S.D. Cal. 1991) (boilerplate motion containing indefinite and unsworn allegations was insufficient to require evidentiary hearing on defendant's motion to suppress statements); Crim. L.R. 47.1(g).

Indeed, this requirement is specifically reiterated in the chambers' rules of the instant Court. See Criminal Case Chambers Rules and Trial Procedures for the Honorable Anthony J. Battaglia Section IV (stating "Criminal motions requiring a predicate factual finding must be supported by declaration(s). See Crim. L. R. 47.1.g.1. The Court need not grant an evidentiary hearing where either party fails to properly support its motion or opposition.").

As a second preliminary matter, the United States would join the defense request that the Court rule on the admissibility of all the various contraband seized at 7955 Skyline Drive. Currently, BURTON is only charged as being a felon in possession of a firearm. Prior to trial, it is likely that the charges will expand to encompass all of the criminal conduct. In other words, the cocaine base and money might be proffered as 404(b) evidence, or they might be related to substantive counts. In either event, the United States believes that the questions are ripe for review and respectfully seeks a ruling as to their admissibility.

1. There Was Probable Cause to Stop BURTON

BURTON claims that he made a legal u-turn and did not violate California Vehicle Code Section 22108. Doc. No. 26-1. As such, the officers lacked "objective reasonable suspicion" and should not have been able to stop BURTON's vehicle. BURTON is mistaken.

As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. Whren v. United States, 116 S.Ct. 1769, 1772 (1996); see also United States v. Ramirez, 473 F.3d 1026, 1031 (9th Cir. 2007). The actual motivations of the officers is completely irrelevant as it related to the constitutional reasonableness of the officers. Id.

In this case, Officer Williams observed BURTON violate California Penal Code Sections 27007 (excessively loud music) and 22108, for his failure to signal prior to pulling his car over to the curb. See Gov. Exh. 1. Officer Medina made the same infraction observations. See Gov. Exh. 2.

The stop was valid. BURTON's subsequent brief detention related to the traffic stop was lawful.

2. The Detention of BURTON was Not Unlawfully Prolonged

Next, even though he lacked a valid driver's license, BURTON claims that his detention was unlawfully prolonged. Doc. No. 26 at 6-7. Again, BURTON is mistaken.

BURTON is correct that "a seizure that is justified ***solely*** by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." Illinois v. Caballes, 125 S.Ct. 834, 837 (2004). But BURTON's detention was not based solely on a traffic ticket.

As soon as a records check was conducted, Officer Williams became aware that BURTON did not possess a valid driver's license

and that he had a Fourth Amendment waiver that was valid until November 11, 2016. Gov. Exh. 1 at 3. At that point, the brief detention of BURTON took a dramatic turn.

First, he was ordered to get out of the vehicle. BURTON was then searched. He was carrying marijuana and multiple cell phones. Id. At that point, the officers decided to conduct a Fourth Amendment waiver search at BURTON's residence and conducted an operation plan. Id. The plan was then executed.

In the totality of the circumstances, and based largely upon the shifting focus of their investigation, the detention of BURTON was not unlawfully prolonged. Indeed, as the Court will hear at the evidentiary hearing, it was actually quite efficient.

Suppression is not warranted.

3. BURTON Was Subject to a Valid Fourth Waiver

Again, without a declaration, BURTON seems to assert that he was not on Probation with a valid Fourth Amendment waiver. Doc. No. 26 at 7. BURTON's assertion is incorrect.

While conducting a records check on BURTON, Officer Williams determined that he was subject to a Fourth Amendment waiver that was valid until November 11, 2016. Id.

BURTON'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, 809 (9th Cir. 2013); citing United States v. Knights, 534 U.S. 112, 114 (2001). "Probation, like incarceration, is a form of criminal sanction imposed by a court upon an offender after

verdict, finding, or plea of guilty.... Inherent in the very nature of probation is that probationers do not enjoy the absolute liberty to which every citizen is entitled." Id. (internal quotation marks omitted).

The California Fourth Waiver condition typically states "Defendant waives Fourth Amendment rights and agrees to 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."[1]

The imposition of this condition makes sense. The State of California has "an interest in a probationer's successful completion of probation and in his or her reintegration into society." United States v. King, 736 F.3d 805, 809 (9th Cir. 2013). That interest includes "a significant need to promote those interests through ***suspicionless*** searches of probationers." Id. (emphasis added).

As such, the search of Burton's residence did not violate the Fourth Amendment. The motion should be denied.

4. The Evidence Should Not Be Suppressed

In sum, BURTON claims that the various violations warrant the suppression of the drugs, firearms, and cash. Doc. No. 26. Again, BURTON is mistaken.

[1] The United States is currently investigating the identity of Burton's specific Probation officer, who would be able to confirm the details of the waiver condition.

At the evidentiary hearing, the Court will have the opportunity to hear from the officers that detained BURTON. Even if there was a technical error, relating perhaps to exact penal code section of BURTON's prior conviction, suppression would not be warranted. The officers acted in good faith and BURTON has a Fourth Amendment waiver. The good faith exception applies in a variety of contexts, including one similar to this.

In Evans, a police officer conducting a traffic stop discovered an outstanding arrest warrant through a computer check of the defendant's name. Ariz. v. Evans, 514 U.S. 1, 14-16 (1995). The officer arrested the defendant, performed a search of his vehicle incident to arrest, and discovered a bag of marijuana. Id. The defendant moved to suppress the marijuana as the fruit of an unlawful search because the warrant had been previously quashed but not removed from law enforcement databases. The United States Supreme Court refused to exclude the evidence, finding that there was no evidence that the officer did not act in an objectively reasonable manner when he relied on the computer record, and that suppressing the evidence would not deter police misconduct. Id.

Thus, even if there was a technical error in some of the police record – although that has not been established yet – the evidence should not be suppressed.

5. And Evidentiary Hearing has been Scheduled'

BURTON has requested an evidentiary hearing. The United States has previously agreed that such a hearing would be prudent. It is now calendared for January 12, 2016. Doc. No. 31.

6. BURTON's Request for Leave to File Further Motions

BURTON has also requested leave to file further motions. The United States does not oppose this request as long as the motions are based upon evidence not previously available to BURTON.

V

CONCLUSION

For the above stated reasons, the United States respectfully requests that BURTON's motions be denied.

DATED: December 22, 2015

Respectfully submitted,

LAURA E. DUFFY
United States Attorney

/s/Andrew Haden
Andrew R. Haden
Assistant United States Attorney

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. STEVEN DOYLE BURTON, Defendant	Case No.: 15-CR-2443-AJB CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, ANDREW HADEN, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of United States' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTIONS SUPPRESS EVIDENCE together with memorandum of points and authorities on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

John Cotsirilos, Esq.

I hereby certify that I have caused to be mailed the foregoing, by the United States Postal Service, to the following non-ECF participants on this case:

None

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 22, 2015.

s/Andrew Haden
ANDREW R. HADEN

No. 18-6137

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 3rd day of December, 2018, a copy of Petitioner's Reply Brief 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,

December 3, 2018

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