No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA - RESPONDENT

VS

CHARLES RAMON III, a/k/a CHARLES ROGER RAMON - PETITIONER

ON PETITION FOR WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

/s/ Kari S. Schmidt
Kari S. Schmidt, #11524
Counsel of Record for Petitioner
Conlee Schmidt & Emerson LLP
200 W. Douglas, Suite 300
Wichita, Kansas 67202
Phone: (316) 264-3300
Fax: (316) 264-3423
Email: karis@fcse.net

QUESTIONS PRESENTED

This Court's prior precedent in *Griffin v. Wisconsin*, 483 U.S. 868 (1987) and its progeny hold that a person's status as a supervised releasee, such as a probationer or parolee, justifies imposing conditions upon them that reduce their expectation of privacy, and thus their Fourth Amendment protections; but that the extent to which such privacy expectations is reduced depends on the conditions themselves. In this case, a supervising court imposed a release condition on Petitioner that permitted United States Probation to conduct a warrantless search of his residence "only when reasonable suspicion exists that the defendant has violated a condition of his supervision and that the areas to be searched contain evidence of this violation."

The questions to be presented to this Court are:

1. Whether under these circumstances the Fourth Amendment required U.S. Probation to conform its conduct to the text of the condition imposed on Petitioner.

2. Whether under these circumstances the Fourth Amendment required proof of likelihood that evidence of a violation existed at the residence to sustain findings of reasonable suspicion permitting U.S. Probation to search Petitioner's residence.

PARTIES TO THE PROCEEDINGS

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED PROCEEDINGS

United States District Court for the District of Colorado:

United States v. Charles Ramon III, a/k/a Charles Roger Ramon, No. 1:20-CR-00327-PAB-1 (June 10, 2021)

Tenth Circuit Court of Appeals:

United States v. Charles Ramon III, a/k/a Charles Roger Ramon, No. 22-1249 (October 20, 2023)

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IN THE

SUPREME COURT FOR THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit appears at Appendix A to the petition and is reported at 2023 U.S. App. LEXIS 27898, 2023 WL 6939693.

The United States District Court for the District of Colorado issued its ruling from the bench. The United States District Court for the District of Colorado issued no memorandum or written order memorializing its bench order. The minute order and the portion of the transcript reflecting the United States District Court for the District of Colorado's rulings, holdings and findings of fact appears at Appendix B to the petition, and are set forth in the Tenth Circuit Record on Appeal at Record Vol. 1, page 140, and Record Vol. IV, pages 67 through 81, respectively.

JURISDICTION

On October 20, 2023, the United States Court of Appeals for the Tenth Circuit decided the case below.

Petitioner did not file a petition for rehearing with the United States Court of Appeals for the Tenth Circuit.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The Solicitor General of the United States has been served with notice of this petition in accordance with Supreme Court Rule 29.4(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fourth Amendment, U.S. Constitution.

STATEMENT OF THE CASE[1]

A. Factual Background.

In 2009, Petitioner was convicted by a federal district court for possessing a firearm in violation of 18 U.S.C. § 922(g)(1)(felon in possession of a firearm). [R1.45]. That court sentenced Petitioner to a term of imprisonment, to be followed by three years of supervised release. [R1.45, 56]. In August 2016, Petitioner was released from prison and began his supervised release under the supervision of United States Probation (U.S. Probation), and more specifically, U.S. Probation Officer (U.S.P.O.) Jordan Buescher. [R4.11].

Petitioner's initial supervised release conditions in August 2016 only "prohibited him from committing a federal, state, or local crime; unlawfully possessing or using controlled substances; and possessing a firearm or ammunition." [R1.57]. But no condition imposed on him an obligation to submit to a search of his person or his residence. No condition notified him of U.S. Probation's authority to conduct a warrantless search. Prior to December 2016,: (i) no Congressional enactment constituted such obligation or notification, (ii) no federal court decision or order constituted such obligation or notification, (iii) no U.S. Probation rule or regulation constituted such obligation or notification, and (iv) no condition imposed on Petitioner individually, in this case, constituted such

[1] Petitioner cites to the Tenth Circuit Record on Appeal using the following citation format: "R1.230." The "R1" heading refers to the record volume, such that R1 refers to volume 1, and R6 refers to volume 6. Numbers following the period, such as ".230," refer to the record page number, such that R1.230 refers to page 230 of volume 1 of the Tenth Circuit's consolidated record.

obligation or notification. [*Generally* ROA; R1.56-65] (Government's response to Petitioner's motion to suppress limiting its claim to "the modification" and "the court-imposed search condition"); [R4.16-17] (by negative inference from U.S.P.O.'s characterization of such a condition as "that new condition" as of November 2017).

U.S. Probation petitioned the District Court to modify and add a search condition to Petitioner's supervised release conditions. [R4.16]. In December 2016, the District Court granted U.S. Probation's petition. [R1.46, 58; R4.16]. The plain language of the search condition stated:

> The [Petitioner] shall submit his person, property, house, residence, papers, computers, or office, to a search conducted by a United States probation officer. Failure to submit to search may be grounds for revocation of release,

however,

> [a]n officer may conduct a search pursuant to this condition ***only*** when [i] reasonable suspicion exists [ii] that the [Petitioner] has violated a condition of his supervision and [iii] that the areas to be searched contain evidence of ***this*** violation.

[R1.46, 58; R4.16, 33].

After the modification, Petitioner was implicated in several instances of non-compliance with the prohibitive conditions of his release. In March 2018, Petitioner produced a drug-positive urine sample. [R1.64]. In April 2018, U.S. Probation received a second-hand tip from the Drug Enforcement Agency (DEA) that a confidential informant represented to DEA that there was generally drug activity at Petitioner's place of employment. [R1.64; R4.44]. The DEA also represented to U.S. Probation that (i) Petitioner possessed a key, (ii) the key resembled the type of keys

used with safes, (iii) the DEA believed there were firearms in a safe at Petitioner's work, (iv) despite the fact the DEA never observed a safe at Petitioner's work. [R4.43]. In July 2018, U.S. Probation received a tip from an anonymous informant that Petitioner generally possessed firearms "on his person." [R1.64; R4.44]. In January 2019, Petitioner produced a second drug-positive urine sample. [R1.64].

Only two incidents arguably involved or implicated Petitioner's residence. In December 2017, U.S. Probation conducted a home visit at Petitioner's residence during which U.S. Probation found "small plastic baggies" in Petitioner's bedroom. [R4.17]. None of "those small bags contained any observable residue of any controlled substance." [R4.35]. No evidence suggests they were ever tested for non-observable residues. U.S.P.O. Buescher did not recall Petitioner's reason for possessing those baggies. But he was quite certain "[i]t didn't make any sense at all to [him] at the time." [R4.17]. According to U.S.P.O. Buescher, such "small plastic baggies" are "commonly associated with possession or distribution of controlled substances." [R4.17, 35]. But he offered no opinion whether *these* "small plastic baggies" were factually associated with possession or distribution of narcotics. In November 2018, U.S. Probation conducted a second home visit at Petitioner's residence. [R4.41]. During that search, U.S.P.O. Buescher noticed Petitioner was speaking quickly and "breathing a little heavier than normal." [R4.41].

In other words, the only direct evidence tying Petitioner's residence to any alleged probation violation at any time were "small plastic baggies" containing no incriminating materials, and Petitioner's generalized anxiety. Regarding the

indirect evidence, U.S.P.O. Buescher later testified that "[DEA] did not supply [him] any direct information regarding narcotic distribution" at Petitioner's residence. [R4.38-39]. U.S.P.O. Buescher later testified that the only information he received from the DEA about weapons is "that [Petitioner] has . . . a firearm on his person," and "that he has firearms . . . ***potentially*** at" his place of employment. [R4.44]. Based on his receipt of "information that [Petitioner] was known to carry weapons on his person," U.S.P.O. Buescher speculated "that a weapon . . . on his person ***could*** easily be transported into his vehicle or his home." [R4.44].

In March 2019, based on the above-referenced evidence, as well as Petitioner's criminal history (over a decade old by then), U.S. Probation conducted a warrantless search of Petitioner's residence pursuant to the December 2016 search condition. [R1.64, 138; R4.29, 31]. During that search, U.S. Probation officers recovered a handgun which also contained Petitioner's "touch DNA." [R1.46, 59; R4.210, 225, 229, 260-261, 275-282].

B. Proceedings Below.

On April 27, 2021, Petitioner filed his motion to suppress the gun and DNA evidence seized from the warrantless search of his residence in March 2019. [R1.45-50]. Petitioner expressly challenged whether "reasonable suspicion exist[ed] . . . that the areas to be searched," *i.e.* Petitioner's residence, "contain[ed] evidence of" either a drug or firearm-related violation of his probation conditions. [R1.47-49]. On April 30, 2021, the Government filed its response. [R1.56-66]. The Government asserted evidence existed sufficient to find that reasonable suspicion existed "to search

[Petitioner]'s home." [R1.62-65]. In support of its assertion, it offered only four pieces of evidence to establish an evidentiary link between Petitioner's violation of a supervisory condition and Petitioner's residence: (1) Petitioner's criminal history from twelve years earlier, (2) two positive urinalyses from five and fifteen months earlier, (3) the DEA's mere opening of an investigation of Petitioner, and (4) the July 18 anonymous informant's allegation that Petitioner generally carried firearms on his person. [R1.64].

On June 10, 2021, the District Court held an evidentiary hearing. [R4.5-83]. The District Court did not memorialize its ruling in a written order or memorandum. Instead, it ruled from the bench. [R4.67-81]. The District Court ultimately denied Petitioner's motion. [R4.81]. The District Court relied on possibilities – not probabilities – that the evidentiary link existed. Regarding the urine samples, the District Court held that the mere fact of personal use made Petitioner's residence "a ***possible*** location where the narcotics were being stored." [R4.78]. Regarding the information from the DEA, the District Court twisted itself through a chain of speculation that the DEA's investigation into narcotics at Petitioner's workplace meant "Petitioner *had access*" to narcotics, but never found the evidence suggested Petitioner actually *possessed* narcotics. [R4.78]. Following therefrom, the District Court determined that evidence existed he may have "had access" to narcotics "suggested that the [Petitioner] ***may have been*** possessing firearms." [R4.78]. And because he might have had access, and might have possessed firearms, Petitioner "***could possibly*** have cause to arm himself" because

"*many* drug dealers do, for purposes of protecting himself . . . ***who knows***." [R4.78]. And then all of those mere possibilities together "would suggest reasonable suspicion to believe that the [Petitioner] ***could be*** possessing firearms or narcotics within his residence." [R4.78]. Both the gun and the DNA evidence recovered from Petitioner's residence were admitted against him at trial. [R4.139, 167, 169, 172, 174, 175, 198, 199, 200, 225, 229, 275-282]. The jury found Petitioner guilty. [R1.374].

The Tenth Circuit affirmed the District Court's denial of Petitioner's motion to suppress. [Appx. A]. In support, the Tenth Circuit relied exclusively on two factual claims. The Tenth Circuit ruled "[f]irst, the positive urinalyses strongly suggest that [Petitioner] violated the supervised release condition," but never actually ties the use to Petitioner's residence. [Appx. A at 6]. The Tenth Circuit ruled "[s]econd, the DEA's open investigation into [Petitioner]'s involvement in a drug conspiracy suggested that searching his residence would reveal contraband related to drug possession, drug use, or evidence showing [Petitioner]'s associations with persons engaged in criminal activity." [Appx. A at 8]. The Tenth Circuit suggested that under this Court's precedent in *Griffin v. Wisconsin*, *infra*, the mere fact "that the DEA had begun to investigate [Petitioner], suspecting his involvement in a large-scale drug operation . . . contribute[d] to reasonable suspicion justifying the officers' search of [his] residence." [Appx. A at 8-9]. Despite the search condition in this case explicitly imposing a limitation on U.S. Probation's authority to search Petitioner's residence absent "reasonable suspicion . . . that the areas to be searched

contain[ed] evidence of [a particular] violation," *supra*, the Tenth Circuit, relying on its own prior precedent, held that "'[o]nce there was reason to believe that [Petitioner] violated his [supervised release] agreement, there [was], by definition, reasonable suspicion to support a search of his residence." [Appx. A at 10]. This Petition follows.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The question presented to this Court is whether when a supervising court imposes search conditions on a supervised releasee that purportedly allow a search that would otherwise infringe on the releasee's Fourth Amendment rights

, but those conditions impose limitations on the supervising agency before

I. The Court of Appeals' decision directly conflicts with this Court's well-established precedent.

A. This Court's precedents clearly and unequivocally stand for the proposition that the reasonableness of a probationer's[2] expectation of privacy, and thus the scope of their Fourth Amendment protections, is condition-dependent and subject to case-by-case analysis; not status-dependent or subject to a categorical approach.

The plain language of the Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const., amt. iv. Since 1967, this Court has interpreted the amendment to hold "the Fourth Amendment protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). The *Katz* Court further clarified, holding that "[w]hat a person . . . seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. *Id.* Following therefrom, this Court routinely holds that the Fourth Amendment forbids warrantless government intrusion into those places in which, first, "a person [has] exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361 (Harlan, J., concurring); *also California v. Greenwood*, 486 U.S. 35, 39 (1988). As to Petitioner's home, this

[2] For purposes of brevity, all persons serving a sentence through some form of community supervision, *e.g.* probation, parole, early release, community supervision, etc., whether under the supervision of a federal agency or a state agency, are herein referred to collectively as "probationers."

Court has long held "the Fourth Amendment draws 'a firm line at the entrance to the house.'" *Kyllo v. United States*, 533 U.S. 27, 40 (2001)(quoting *Payton v. New York*, 445 U.S. 574, 590 (1980)).

The Fourth Amendment's plain language also presumes that only searches conducted pursuant to warrants "issue[d] . . . upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized" are reasonable. *See* U.S. Const., amt. iv. This Court has long held that the warrant requirement is neither merely technical nor indispensable. The *Katz* Court noted that "[s]earches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable case,' for the Constitution requires 'that the deliberate impartial judgment of a judicial officer . . . be interposed between the citizen and the police.'" 389 U.S. at 356-357 (internal citations omitted). In light of this plain language, this Court routinely holds that a warrantless search is *per se* unreasonable. *Id.* at 357; *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971); *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *Illinois v. Gates*, 462 U.S. 213, 289 n. 9 (1983); *Groh v. Ramirez*, 540 U.S. 551, 572 (2004); *Arizona v. Gant*, 556 U.S. 332, 338 (2009); *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2543 (2019). Warrantless searches of the home are particularly egregious. *See Kyllo*, 533 U.S. at 40; *Payton*, 445 U.S. at 590.

However, the warrant requirement further limits government invasions into the private sphere by limiting the scope of a search. The plain language of the

amendment expressly states that "no Warrants shall issue, but upon . . . particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., amt. iv. This plain language has long been denominated the "particularity requirement," and is intended to prevent "police officers unbridled discretion to rummage at will among a person's private effects." *See Riley v. California*, 573 U.S. 373, 398-99, 403 (2014)("Our cases have recognized that the Fourth Amendment was the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity"). At its heart, the Fourth Amendment's particularity requirement permits a warrant to be issued, and thus a search of a place to be conducted, only if the nexus of three facts exists, to be determined by a "detached and neutral magistrate:" (i) reasonable belief that an offense has been committed, *i.e.* probable cause, (ii) reasonable belief that evidence of such offense exists, and (iii) reasonable belief that such evidence will be located in a specific place. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 555 (1978)("in criminal investigations a warrant to search for recoverable items is reasonable 'only when there is 'probable cause' to believe that they will be uncovered in a particular dwelling'").

This Court interprets the Fourth Amendment's plain language to permit the Government to invade those private spheres when only two circumstances exist. First, subjectively, if a person personally intends or believes those places are private. Second, objectively, if society shares or is prepared to share the first

person's intent or belief that those places are or ought to be private. If society does not share a suspect's individualized belief, then Government conduct invading that sphere does not rise to the level of a Fourth Amendment search in the first place, because "[a] 'search' occurs [only] when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). In such cases, the Fourth Amendment does not protect the suspect at all. The Government needs neither probable cause nor a warrant to invade purely subjectively private recesses. *Kyllo*, 533 U.S. at 33. But if "society is prepared to consider reasonable" a suspect's individualized belief, then Government intrusion constitutes a Fourth Amendment "search." *Jacobsen*, 466 U.S. at 113. In such cases, the Government may invade such objectively private areas *only* pursuant to a warrant which particularly describes both the place to be searched and the evidence to be searched for, and which is issued only upon a finding by a detached and neutral magistrate that evidence rises to the level of probable cause (i) that an offense occurred, (ii) that evidence of the offense exists, and (iii) that evidence of the offense will be found in the place to be searched. U.S. Const., amt. iv. Only in those two circumstances are Government invasions into the subjectively private sphere presumptively reasonable on the face of the amendment.

However, this Court "has also found a plethora of exceptions to presumptive unreasonableness" based on a balancing of substantial government interests against an individual's privacy rights. *Groh*, 540 U.S. at 572 (Thomas, J., dissenting in part). One of these exceptions broadly permits warrantless searches when

"'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)(quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985)(Blackmun, J., concurring)). This Court recognized in *Griffin* that "[a] State's operation of a probation system . . . presents 'special needs' beyond normal law enforcement that *may* justify departures from the usual warrant and probable-cause requirements." *Id.* at 873-74 (emphasis added). Five decisions of this Court have most significantly developed the Fourth Amendment's protections as applied to probationers: first, *Morrissey v. Brewer*, 408 U.S. 471 (1972); second, *Griffin v. Wisconsin*, *supra*, 483 U.S. 868; third, *United States v. Knights*, 534 U.S. 112 (2001); fourth, *Samson v. California*, 547 U.S. 843 (2006); and fifth, *Maryland v. King*, 569 U.S. 435 (2013).

In *Morrissey*, this Court did not consider a probationer's Fourth Amendment rights, but more generally "whether [Fourteenth Amendment] due process applies to the parole system." 408 U.S. at 477. Broadly, though, the *Morrissey* Court addressed the relationship between the American citizen and the Government's "special need" in the context of community supervision's purpose. As this Court found therein, "[i]ts purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined;" and it is "the administrative system designed to assist parolees and to offer them guidance." *Id.* at 478. But "[i]mplicit in the system's concern with parole violations is the notion that the parolee is entitled to retain his liberty *as long as he substantially abides by the conditions* of his parole." *Id.* at 479 (emphasis added). More fully considered:

> The liberty of a [probationer] enables him to do a wide range of things open to persons who have never been convicted of any crime. . . . *Subject to the conditions* of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. . . . The parolee has relied on at least an implicit promise that parole will be revoked *only* if he fails to live up to the parole conditions.

Id. at 482 (emphasis added). In other words, community supervision embodies the ancient precept: "trust, but verify." Thus, this Court in *Morrissey* implicitly laid the groundwork by negative inference: the probationer is entitled to the full scope of liberty interests and rights as the average citizen *except*, and only to the extent, the enjoyment and exercise of those rights and interests are curtailed by conditions of his supervision. It is from this precept that the latter four cases arise.

The *Griffin* Court noted that community supervision exists on "a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community services." 483 U.S. at 873-74. Noting a wide variety of punitive options, "release programs" can be "more or less confining depending upon the number and severity of restrictions imposed." *Id.* at 874. Thus, the *Griffin* Court held that while, as a matter of convention and to varying degrees, probationers "do not enjoy 'the absolute liberty to which every citizen is entitled," they are entitled to "conditional liberty properly dependent on observance of special [probation] restrictions.'" *Id.* at 874 (internal citations omitted). In this way, the *Griffin* Court expressly linked probationers' liberty interests, *i.e.* privacy expectations, not to their mere status, but only to conditions imposed on them as punishment for their crimes of conviction.

Following *Griffin*, the *Knights* Court sums up its holding: "[j]ust as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." 534 U.S. at 119. The *Knights* Court's use of the word "may" is instructive. It acknowledges that while governmental institutions (*i.e.* legislatures, executive agencies, courts) commonly impose conditions on probationers' release, they are not required by law to do so. Second, *Knights* expands on that proposition and *Griffin*'s announced rule by expressly stating that it is "the probation condition" that "significantly diminishe[s] [the defendant]'s reasonable expectation of privacy" – not the defendant's probation status. *Id.*

Samson tends to be the most problematic of the *Griffin* Cases for lower courts to apply due to (i) instances of poor draftsmanship in *Samson*, but also (ii) lower courts' failure to consider the language of *Samson* in the context of the case's two distinguishing features of *Samson*. First, *Samson* did not involve a "special needs" search by a supervisory officer (like a probation officer or parole officer) for a supervisory purpose. Instead, it involved a search by police for a law enforcement purpose, *i.e.* detecting crime. 547 U.S. at 846-847. Second, *Samson* implicated a California statutory scheme imposing conditions only on California probationers. *Id.* at 851-852. *Griffin* contrasts with *Samson* because the condition at issue in that case was a Wisconsin statute. 483 U.S. at 871. It is axiomatic that the State of Wisconsin is free to impose on Wisconsin probationers less onerous supervised

release conditions than the State of California imposes on California probationers. Accordingly, the analysis differed because Wisconsin's statutorily-imposed conditions at issue in *Griffin* permitted a probation search only if "'reasonable grounds' exist[ed]," *id.* at 871, whereas California's statutorily-imposed conditions at issue in *Samson* resulted in a much more expansive reduction of privacy expectations permitting "a suspicionless search by a law enforcement officer." 547 U.S. at 847.

The *Samson* Court explicitly noted the difference as a reason for granting *certiorari* in the first place. *Id.* at 846 ("We granted certiorari to decide whether a suspicionless search, conducted under the authority of this statute, violates the Constitution"). The *Samson* Court did not rollback *Griffin*'s or *Knights*' holdings that probationers are entitled to expectations of privacy, but instead merely answered the question in the affirmative "whether *a condition of release* can so diminish or eliminate a released prisoner's reasonable expectation of privacy that a [warrantless] suspicionless search by a law enforcement officer would not offend the Fourth Amendment, *id.* at 846, 847 (emphasis added).[3]

The *Samson* Court's textual language is easily confused, if not manipulated. For instance, the *Samson* Court found that "[t]he extent and reach of these [statutory] conditions clearly demonstrate that parolees like petitioner have

[3] Though not at issue here or in *Samson*, the *Samson* Court did not address whether such onerous conditions would survive constitutional scrutiny under either a Fifth Amendment or Fourteenth Amendment due process challenge, even though they did not offend the Fourth Amendment.

severely diminished expectations of privacy by virtue of their status alone." *Id.* at 852 (emphasis added). The *Samson* Court forgot one important qualifier at the end of that sentence: "in California." Quoting *Knights*, which also considered California's probation and parole statutory schema, the *Samson* Court elsewhere "observed that, by virtue of their status alone, probationers 'do not enjoy 'the absolute liberty to which every citizen is entitled.'" *Id.* at 848-49 (quoting 534 U.S. at 119). Again, the *Samson* Court forgot to include the qualifier "in California" between the phrases "observed that" and "by virtue of their status alone." Elsewhere, *Samson*'s inartful draftsmanship facially appears to dispense with specific release conditions as the point of analysis, and instead appears to adopt a status-only approach to find that all probationers, nationwide, regardless of express conditions, are subject to suspicionless, warrantless searches. At a certain point, the *Samson* Court avers the *Knights* Court "found [the defendant's] probationary *status* 'salient.'" 547 U.S. at 848 (emphasis added)(quoting *Knights*, 534 U.S. at 119). However, this is a malappropriation of *Knights* because it was "the probation *search condition*" that was the "salient circumstance" to the *Knights* Court. 534 U.S. at 118 (emphasis added).

The *Samson* Court's analysis is sound and tied to *Morrissey*, *Griffin* and *Knights*. And *Samson*'s plain language is responsive to the specific question asked of this Court. But, due to its plain text, *Samson*'s holding is dangerously capable of being misinterpreted. Even Justice Stevens' dissent in *Samson*, joined by Justice Breyer and Justice Souter, illustrates the likelihood of misinterpretation. He avers

the *Samson* majority "concludes that [probationers] have no more legitimate an expectation of privacy . . . than do prisoners," and that such "parity in treatment . . . runs roughshod over [this Court's] precedent" in *Morrissey*, *Griffin* and *Knights*. 547 U.S. at 857-58 (Stevens, J., dissenting). Meanwhile, clearly not realizing he has misinterpreted *Samson*, he ironically notes the importance of ensuring *Samson* falls in line with those three prior precedents: "[o]nce one acknowledges that [probationers] do have legitimate expectations of privacy beyond those of prisoners, our Fourth Amendment jurisprudence does not permit the conclusion, reached by the Court here for the first time." 547 U.S. at 857-58 (Stevens, J., dissenting).

In *King*, this Court reconciled *Samson*'s text with the *Samson* Court's actual intent. Importantly, the *King* Court felt compelled to begin its analysis by stating: "To say that the Fourth Amendment applies here is the beginning point, not the end of the analysis. '[T]he Fourth Amendment's proper function is to constrain'" the Government. 569 U.S. at 446-47 (quoting *Schmerber v. California*, 384 U.S. 757, 768 (1966)). From that maxim, and specifically citing to *Samson*, the *King* Court held "that certain general, or individual circumstances *may* . . . diminish the need for a warrant." 569 U.S. at 447 (emphasis added). This simply reconfirms the broad holding of *Morrissey*, *Griffin* and *Knights*, and re-states the slightly hidden text of *Samson*, that a probationer's *status* as a probationer merely *justifies* the imposition of conditions that diminish their privacy expectations.

Instead, the *King* Court found two sets of circumstances in which Fourth Amendment protections, such as a warrant, are dispensed with in connection with

probationers. Citing this Court's decision in *Illinois v. McArthur*, the first are circumstances in which "'the public interest is such that neither a warrant nor probable cause is required.'" 569 U.S. at 447 (quoting 531 U.S. 326, 330 (2001)). However, the *King* Court's reliance on *McArthur* relates to the section that broadly "[makes] it clear there are exceptions to the warrant requirement," which includes but is not limited to the "special needs" exception at issue in this case. 531 U.S. at 330. This simply echoes Justice Thomas' musing that this Court's "cases stand for the illuminating proposition that warrantless searches are *per se* unreasonable, except, of course, when they are not." *Groh*, 540 U.S. at 572-73 (Thomas, J., dissenting in part). The *King* Court's second set, quoting *Samson* specifically, are circumstances in which "an individual is already on notice" that their expectation of privacy is diminished, "for instance because of . . . the conditions of his release from government custody.'" 569 U.S. at 447 (quoting *generally* 547 U.S. 843).

Most recently, as if to punctuate the notion, this Court later held in *Riley v. California*, citing specifically to *King*, that "[t]he fact that [a person] has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely. 573 U.S. at 392. In *Riley*, this Court noted that "a search of [an] arrestee's entire house was a substantial invasion" requiring a warrant, notwithstanding the defendant's diminished expectation of privacy as an arrestee, *i.e.* a person in government custody. *Id.*

All of the above tends to relate to circumstances which would alter a probationer's subjective expectations of privacy. This is logical, since a probationer

in one jurisdiction may be subject to legal conditions not imposed on probationers in other jurisdictions. Similarly, to the extent courts and supervising agencies have discretion to add to, depart from, or modify conditions of release and supervision, one probationer's expectation of privacy cannot be said to be coextensive with every other probationer's expectations of privacy even within the same jurisdiction.

Without regard to the idiosyncrasies of each jurisdiction and each case, this Court implicitly treats as objectively reasonable, and thus an expectation of privacy society is willing to recognize, the expectation that a probationer is entitled to rely on those conditions when forming their subjective expectation of privacy. In other words, to the extent a court, legislature or government agency does *not* impose conditions, or to the extent a court, legislature or government agency modifies conditions restricting the government's power (thus increasing the probationer's liberty), the probationer is entitled to rely on the Government's plain language.

This Court has already addressed the question implicitly. The *Morrissey* Court found, first, that "[t]he liberty of a [probationer] enables him to do [the] wide range of things open to persons who have never been convicted of any crime . . . [s]ubject to the conditions of his parole." 408 U.S. at 482. Second, the very nature of community supervision is one in which "[t]he [probationer] has relied on at least an implicit promise that parole will be revoked *only* if he fails to live up to the parole conditions." *Id.* at 471 (emphasis added). It follows that probationers are reasonably entitled to rely on the plain, express language governmental institutions use to define those conditions, even and – perhaps – especially when those plain terms

restrict the Government itself and create a *greater* expectation of privacy. *See c.f. United States v. Avila*, 733 F.3d 1258, 1263 (10th Cir. 2013)(defendant was entitled to rely on statements of the federal district court to expand his right to appeal even when the Government intended the defendant to have no right to appeal).

Simply stated, this Court has never held that a probationer's mere status as a probationer diminishes or eliminates a person's expectations of privacy, and thus their Fourth Amendment protections. This Court has only held that such status may justify the imposition of conditions which diminish somewhat or entirely a person's expectations of privacy. This Court has never required the imposition of such conditions. This Court has never defined what those conditions are or must be as a matter of law. This Court's prior precedent has only ever held that whether, and to what extent, a probationer's expectation of privacy is modified is a function purely of the specific conditions imposed on him, either as a matter of the law of the sovereignty the law of which he has been convicted of breaching; and/or individually, as a matter of discretion by any court, legislature or executive agency of any state or federal government. Furthermore, this Court has only ever treated the question whether such conditions reduce an expectation of privacy, and, if so, to what degree, as necessarily a fact-intensive inquiry to be determined by examining the totality-of-circumstances on a case-by-case basis.

B. The Tenth Circuit paid lip service to the *Griffin* Cases' condition-dependent analysis, but then disregarded the plain language of the conditions imposed on Petition, relying purely on Petitioner's status as a probationer, in other words, applying a status-dependent analysis.

In this case, the supervising court imposed a condition of release on Petitioner requiring him to submit to a warrantless search by U.S. Probation, but only if there existed "reasonable suspicion . . . [i] that the [Petitioner] has violated a condition of his supervision and [ii] that the areas to be searched contain evidence of this [particular] violation." The negative implication, of course, is that the condition also imposed a restriction on U.S. Probation, *i.e.* that it was not allowed to search if there was no reasonably suspicious nexus tying evidence of a particular violation to the place to be searched. The Tenth Circuit ignored this nexus requirement.

The lower court quoted its precedent in *Leatherwood v. Welker*, which textually embodies the *Griffin* Cases' proposition, that "[w]hile '[a] probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be reasonable,' probation search conditions – almost by definition and design – 'considerably diminish the probationer's reasonable expectation of privacy." (Appx. A at 9)(quoting 757 F.3d 1115, 1120 (10th Cir. 2014)). But then, in the very next sentence, the Tenth Circuit treated as a nullity the condition explicitly requiring a showing of reasonable suspicion in connection with Petitioner's residence specifically: "'Once there was reason to believe that [Petitioner] violated his [supervised release] agreement, there is, by definition, reasonable suspicion to support a search of his residence to ensure compliance with the conditions of his [supervised release]." (Appx. A at 10)(quoting *United States v. Trujillo*, 404 F.3d 1238, 1242 (10th Cir. 2005)).

The supervising court's use of the word "and" indicates a conjunctive intent closely resembling, if not mirroring, the Fourth Amendment's particularity requirement. The plain text of the condition proposed by U.S. Probation expressly required a finding "that [Petitioner] has violated a condition of his supervision," and "that [Petitioner's residence] contain evidence of " that particular release violation. The only substantive difference between the plain text of the Fourth Amendment and the search condition in this case is that no warrant is required, and the search was permitted, *i.e.* reasonable, so long as the predicate particularity findings were made to a "reasonable suspicion" degree as opposed to a "probable cause" degree.

Importantly, because these are conjunctive, the supervising court intended the reasonable suspicion findings to be not just discrete and non-conclusory, but also independent; *i.e.* reasonable suspicion of a violation does not automatically indicate reasonable suspicion that evidence of that violation will be found at Petitioner's residence. Thus, the Tenth Circuit ignored the supervising court's location-focused condition. By doing so, the Tenth Circuit subverts the supervising court's condition, violating the Fourth Amendment protections ensured to him by that condition, and in violation of this Court's precedent holding that it is the conditions of release – not the mere fact of supervisory release – that minimize *or expand* Petitioner's expectation of privacy. Thus, the Tenth Circuit's decision in this case conflicts with this Court's prior precedent.

II. The federal courts of appeals are divided on the question presented.

A. At least two lower courts correctly apply the condition-dependent case-by-case approach prescribed by this Court in the *Griffin* Cases.

In *United States v. Hill*, the Fourth Circuit gave weighty significance to *Griffin*, *Knights* and *Samson* to hold a warrantless probation search unlawful because "law enforcement officers generally may not search the home of an individual on supervised release who is not subject to a warrantless search condition unless they have a warrant supported by probable cause." 776 F.3d 243, 248-249 (4th Cir. 2015). The *Hill* Court, noting *Samson* and *Knights* specifically, "emphasized the parolees' notice of an express warrantless search condition." *Id.* at 249. The *Hill* Court also relied heavily on its own precedent in *United States v. Bradley*. *Id.* (citing 571 F.2d 787 (4th Cir. 1978)). In *Bradley*, the Fourth Circuit expressly rejected the Ninth Circuit majority's categorical-approach in *Latta v. Fitzharris* by expressly adopting "Judge Hufstedler's well-reasoned dissent" in that case as "the preferable approach." 571 F.2d at 789 (citing 521 F.2d 246, 254-259 (9th Cir. 1975)(Hufstedler, J., dissenting)). In *United States v. Henley*, the Third Circuit roundly rejected the Government's argument "that under the Supreme Court's decision in *Samson*, the Fourth Amendment requires no suspicion to justify a warrantless parole search, even if Pennsylvania law would." 941 F.3d 646, 650-651 (3d Cir. 2019). Instead, the *Henley* Court considered "whether a *condition of release* [*sic*] 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." *Id.* at 651. The *Henley* Court found "reasonable suspicion

is required under Pennsylvania law," and thus the "search required reasonable suspicion because neither a statute nor a condition of parole provides that [defendant] was subject to search without suspicion." *Id.* (denying the motion to suppress on other grounds).

B. But most lower courts routinely misinterpret *Samson* and apply the status-dependent categorical approach.

The Tenth Circuit's decision in this case is illustrative of lower courts' misinterpretation and misapplication of *Morrissey*, *Griffin*, *Knights*, *Samson* and *King*, *infra*. But this case does not represent the first such misapplication by the Tenth Circuit. For instance, in *United States v. Trujillo*, the precedent relied on by the court below in this case, the Tenth Circuit held, categorically, that "*Griffin* and *Knights* establish that probationers and parolees do not [*i.e.* as opposed to 'may not'] enjoy the full suite of rights provided by the Fourth Amendment." 404 F.3d at 1242. Citing to the Seventh Circuit's decision in *United States v. Jones* and the Sixth Circuit's decision in *United States v. Martin*, the *Trujillo* Court focused not on any conditions imposed on the probationer in that case, but upon the more broad "special need" to supervise the probationer. *Id.* at 1242-1243 (citing 152 F.3d 680 (7th Cir. 1998), and 25 F.3d 293, 296 (6th Cir. 1994)).

Other courts have followed suit. In *United States v. Graham*, the First Circuit noted that "[a]s a conditional releasee, a probationer has a substantially diminished expectation of privacy," and that this expectation of privacy can merely "be *further* shaped by search conditions." 553 F.3d 6, 15-16 (1st Cir. 2009)(emphasis

added). The *Graham* Court denied to suppress. *Id.* at 18. In *United States v. Braggs*, the Second Circuit cited *Griffin*'s rule "that a parolee's home, 'like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.'" 5 F.4th 183, 187 (2d Cir. 2021). Almost immediately thereupon, the Second Circuit held that the mere fact the defendant's house was searched by parole officers, and not police officers, the "special needs" exception applied because a parole officer's search is related to their duties. *See id.* In other words, the mere fact that the defendant was a probationer was enough to justify the search. In *United States v. Lenhart*, the Sixth Circuit, citing *Samson* for the proposition "that parolees have a 'substantially diminished expectation of privacy,'" held "that [defendant]'s *status* as a parolee reduced his expectation of privacy." 2023 U.S. App. LEXIS 22269 at *5 (6th Cir. 2023)(emphasis added).

III. The case presents an issue of national importance on a matter of constitutional law.

In 2023, the United States Department of Justice reported that "[a]t year end 2021, an estimated 5,444,900 persons were under the supervision of adult correctional systems in the United States."[4] Of that number, both the Department of Justice and Pew Charitable Trusts report that 3,745,000 of those people, "or 1 in 69 adults," was serving a sentence through some form of community supervision in

[4] E. Ann Carson and Rich Kluckow, *Correctional Populations in the United States, 2021 – Statistical Tables*. U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, NCJ 305542, February 2023 (last accessed: January 15, 2024) (available at: <https://bjs.ojp.gov/document/cpus21st.pdf>).

either a federal or state system.[5] (*i.e.* "probation or parole," early release, community corrections, etc.). These numbers have not significantly declined. Therefore, beyond being purely an intellectual exercise, the case presents an issue of national importance because answers to the questions presented have an actual and substantial impact on a significant number of people's day-to-day lives who are or will be probationers in the federal system or one of the 50 state systems' varying levels of supervised release.

IV. The Tenth Circuit's decision is incorrect.

Although reasonable suspicion is a considerably lower evidentiary standard than preponderance or probable cause, it still requires more than a "hunch." *Kansas v. Glover*, 140 S. Ct. 1183, 1188 (2020). Reasonable suspicion "can be established with information that is different in quantity or content than that required to establish probable cause," but it still must be reliable to a reasonable degree. *Alabama v. White*, 496 U.S. 325, 329-30 (1990)("assumed that the unverified tip from the known informant might not have been reliable enough"). Because it is always the Government's burden to prove that a search is reasonable, *Coolidge*, 403 U.S. at 445, it was the Government's burden to prove not that evidence *could have been* at Petitioner's residence, but that reliable information would have led a

[5] *Id.*, *supra* Note 4; *also Number of U.S. Adults on Probation or Parole Continues to Decline*. Pew Research Trusts [Web Page], February 7, 2023 (last accessed: January 15, 2024) (available at: <https://www.pewtrusts.org/en/research-and-analysis/articles/2023/12/14/number-of-us-adults-on-probation-or-parole-continues-to-decline#:~:text=Nationwide%2C%20nearly%203.7%20million%20people,at%20the%20end%20of%202021.>).

reasonably prudent person to be warranted in their belief that evidence of a specific violation "was in" Petitioner's residence. *See Terry v. Ohio*, 392 U.S. 1, 27 (1968).

In this case, the District Court's finding that evidence of a release condition violation *would be* found at Petitioner's home was based entirely on "arguably stale" evidence, and inferred from testimony that only expressed could-bes, it's-possible-thats, might've-beens, and who-knowses, *see supra* at p. 7-9. The Tenth Circuit expressly acknowledged that "the DEA 'did not supply [U.S.P.O. Buescher with] any direct information regarding narcotic distribution" at Petitioner's residence, and that "the district court found that there is 'no information from the DEA that [Petitioner's residence] was being used by [him] for drug dealing." (Appx. A at 9). Despite these findings, the Tenth Circuit nevertheless validated the District Court's method of determining reasonable suspicion existed to search the residence simply because the DEA had opened an investigation at all. (Appx. A at 8).

The lower court had ample opportunity to expand on what, exactly, about the investigation established reasonable suspicion linking the DEA's investigation to Petitioner's residence. But the Tenth Circuit ignored that opportunity. Instead, it engaged in broad generalizations and conclusory statements this Court has historically cautioned against when determining whether an evidentiary standard in a particular case was met. *See Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 523, 543 (1981)(this Court will intervene "'when the [evidentiary] standard appears to have been misapprehended or grossly misapplied' by the court below"); *see United States v. Ventresca*, 380 U.S. 102, 108-109 (1965)("This is not to say that

probable cause can be made out by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the 'underlying circumstances' upon which that belief is based"). As Justice Stewart once noted, "broad generalizations about the meaning of 'substantial evidence,'" or reasonable suspicion in this case, "have limited value in deciding particular cases." *Id.* at 543 (Stewart, J., dissenting); *see also Aguilar v. Texas*, 378 U.S. 108, 111-112 (1964)(quoting *Nathanson v. United States*, 290 U.S. 41, 47 (1933)("'Under the Fourth Amendment, [a judicial] officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from *facts or circumstances* [*sic*] presented to him'").

The lower court relied on *Trujillo* and its interpretation of *Griffin* to state merely that police may reasonably rely on non-firsthand information to determine whether a probationer search is authorized. (Appx. A at 8). But the Tenth Circuit's reliance on *Griffin* is misplaced because it is distinguishable. First, the *Griffin* informant was neither confidential nor anonymous to the supervisory agency; they were identified as a "detective on the Beloit Police Department." Second, the *Griffin* informant spoke directly to the defendant's supervisory agency; the information did not come second-hand through another agency. Third, the *Griffin* informant represented to the supervisory agency "that there were . . . guns in [defendant]'s apartment;" the link to the residence did not rely on a series of possibilities. 483 U.S. at 871. In this case, the Tenth Circuit relied only on the fact a DEA investigation had been opened, but does not provide underlying reasons why that –

alone – was sufficient for its finding that reasonable suspicion existed specifically to search Petitioner's residence.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

/s/ Kari S. Schmidt
Kari S. Schmidt, Kan. Sup. Ct. No. 11524
Counsel of Record for Petitioner
Conlee Schmidt & Emerson LLP
200 W. Douglas, Suite 300
Wichita, Kansas 67202
Phone: (316) 264-3300
Fax: (316) 264-3423
Email: karis@fcse.net

CERTIFICATE OF COMPLIANCE

As required by Rule 33 of the Rules of the Supreme Court of the United States, I certify that this petition is proportionally spaced and contains 7,678 words, which includes footnotes. I relied on my word processor to obtain the count, and it is Microsoft Word 10. My petition was prepared in Century, a proportional typeface, and contains 32 pages of text.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s/ Kari S. Schmidt
Kari S. Schmidt
Counsel of Record for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that this document, with any attachments, was electronically filed on the 19th day of January, 2024, with the Clerk of the Court using the Supreme Court of the United States Electronic Filing System in accordance with Rule 29 of the Rules of the Supreme Court of the United States. I additionally certify that paper copies of this original Petition for Writ of Certiorari were forwarded by third-party commercial carrier this 19th day of January, 2024, in accordance with Rule 29 of the Rules of the Supreme Court of the United States. I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope with the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days:

Original with 10 copies to:

Clerk of the Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

And 3 copies to:

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

And 1 copy to:

Charles Ramon III
Reg. No. 35302-013
Englewood FCI
Federal Correctional Institution
9595 West Quincy Avenue
Littleton, Colorado 80123

/s/ Kari S. Schmidt
Kari S. Schmidt
Counsel of Record for Petitioner

United States of America

v.

Charles Ramon III, a/k/a/ Charles Roger Ramon

Charles Ramon's Petition for Writ of Certiorari

APPENDIX A

Decision of U.S. Court of Appeals for the Tenth Circuit

FILED
United States Court of Appeals
Tenth Circuit

October 20, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CHARLES RAMON, III, a/k/a Charles Roger Ramon,

Defendant - Appellant.

No. 22-1249
(D.C. No. 1:20-CR-00327-PAB-1)
(D. Colo.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **BRISCOE**, and **MORITZ**, Circuit Judges.

Charles Ramon's supervised release conditions authorized parole officers to search his residence when reasonable suspicion existed that Mr. Ramon violated a condition of his supervision and that the areas to be searched might contain evidence of this violation. After a series of violations of Mr. Ramon's conditions, parole officers searched his residence—a home he shared with his mother. They discovered a loaded handgun in his mother's closet.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Mr. Ramon was convicted of possessing a firearm as a felon under 18 U.S.C. § 922(g)(1). He challenges the search of his residence and the sufficiency of evidence to convict him of possession of a firearm. We affirm. The parole officers had reasonable suspicion to search Mr. Ramon's residence. And at trial, the government presented sufficient evidence to permit a jury to find that Mr. Ramon constructively possessed the firearm that was found in his mother's closet.

I. Background

Following a conviction for possessing a firearm as a felon and identification as an armed career criminal, Mr. Ramon was sentenced to 10 years in prison followed by 3 years of supervised release. The supervised release terms prohibited Mr. Ramon from, among other things: possessing a firearm; possessing or using any controlled substances; possessing any paraphernalia related to any controlled substances; frequenting places where controlled substances are illegally sold, used, distributed, or administered; and associating with any persons engaged in criminal activity.

Mr. Ramon began serving supervised release, under Officer Jordan Buescher's supervision, in August 2016. By September 2016, officers found methamphetamine and black tar heroin in Mr. Ramon's car. Officer Buescher, accordingly, reported this violation to the district court and petitioned the court to modify Mr. Ramon's supervised release terms. The district court agreed, adding the following special conditions:

> [Mr. Ramon] shall submit his person, property, house, residence, papers, computers or office to a search conducted by a United States Probation Officer. Failure to submit to

> search may be grounds for revocation of release. The defendant shall warn any and other occupants that the premises may be subject to searches pursuant to this condition. *An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that the defendant has violated a condition of his supervision and that the areas to be searched contain evidence of this violation*. Any search must be conducted at a reasonable time and in a reasonable manner.

R. Vol. 4 at 67–68 (emphasis added).

Red flags continued. In December 2017, Officer Buescher found plastic baggies in Mr. Ramon's bedroom and suspected that someone used them to distribute drugs. In March 2018, Mr. Ramon reported to the Probation Office to discuss a request to travel out-of-state. A urinalysis tested positive for cocaine. Mr. Ramon initially denied using cocaine, but changed his story and signed an admission acknowledging that he did. Officers from the Denver Police Department also reported seeing Mr. Ramon's car in a known drug trafficking area. So at the end of the month, Officer Buescher again moved—this time unopposed—to modify Mr. Ramon's supervised release terms. The district court approved the modification, adding the following agreed special conditions:

> [Mr. Ramon] must participate in and successfully complete a program of testing and/or treatment for substance abuse, as approved by the probation officer, until such time as [Mr. Ramon is] released from the program by the probation officer. [Mr. Ramon] must abstain from the use of alcohol or other intoxicants during the course of treatment and must pay the cost of treatment as directed by the probation officer.

Order, Docket No. 116, Case No. 1:07-cr-437-REB.[1]

In April 2018, a DEA agent informed Officer Buescher of an open investigation into Mr. Ramon's involvement in a drug distribution conspiracy. The agent believed the drug ring operated out of a local Nik-Mart—a convenience store that Mr. Ramon's family owned and operated and at which he sometimes worked. The DEA also suspected that someone stored firearms inside a safe located in the store. Coincidentally, Officer Buescher had seen a key on Mr. Ramon's keychain that looked like a key to a safe.

By July 2018, a confidential informant claimed that Mr. Ramon often carried guns and characterized him as "extremely dangerous." In November 2018, during a surprise visit to Mr. Ramon's residence, Officer Buescher noticed several cell phones in Mr. Ramon's room and noted that Mr. Ramon was especially nervous when Officer Buescher entered his mother's room.

In January 2019, Mr. Ramon failed his second urinalysis. Given the pattern of noncompliance, Officer Buescher planned a home search. Officer Buescher's

[1] Both parties omitted from the appellate record this specific unopposed request to modify Mr. Ramon's supervised release conditions, as well as Judge Blackburn's subsequent Order regarding that request. "Nonetheless, we have authority to review [them] because we may take judicial notice of public records, including district court filings." *United States v. Walters*, 492 F. App'x 900, 902 (10th Cir. 2012) (citing *United States v. Smalls*, 605 F.3d 765, 768 n. 2 (10th Cir.2010) (taking judicial notice of district court record that was not part of the record on appeal)). We therefore sua sponte supplement the appellate record with these documents, which are in the district court record for Mr. Ramon's original criminal case. *United States v. Charles Ramon III*, No. 1:07-cr-00437-REB.

supervisor, the search coordinator, and the chief probation officer each concluded that Officer Buescher had reasonable suspicion to search Mr. Ramon's home.

On March 13, 2019, Officer Buescher and his supervisor executed the search. During the sweep, Mr. Ramon aggressively exclaimed:

> I want to self-revoke right now. Get the f**k away from [unintelligible]. Mom, you [unintelligible]. Mom [unintelligible] f**k you [unintelligible], you're a f**king punk. I wanna go to jail. I want to self-revoke right now.

R. Vol. 1 at 385.

The officers discovered a loaded Taurus .357 Magnum revolver atop a shoebox, nestled against the wall, high on a shelf in Mr. Ramon's mother's closet. Given its placement and his mother's height, they deduced Mr. Ramon's mother would need a stepladder to access it. Mr. Ramon's height, by contrast, suggested he could easily reach the firearm. And, although Mr. Ramon sometimes used a wheelchair, pre-search video footage depicted him standing upright in his home. A later DNA test of the gun showed traces linked to Mr. Ramon.

II. Discussion

Mr. Ramon makes two arguments on appeal: (1) the officers lacked reasonable suspicion to search the residence; and (2) the jury lacked sufficient evidence to conclude he had constructively possessed the firearm. The district court disagreed, denying both a motion to suppress and a Rule 29 motion at the close of the government's case. We agree with the district court and affirm.

A. Motion to Suppress

Mr. Ramon first contends that the district court erred in denying his motion to suppress, arguing that the officers lacked reasonable suspicion that the house contained evidence related to his violation of the conditions of supervised release.

When reviewing the denial of a motion to suppress, "we view the evidence in the light most favorable to the government, accept the district court's findings of fact unless they are clearly erroneous, and review de novo the ultimate question of reasonableness under the Fourth Amendment." *United States v. Cortez*, 965 F.3d 827, 833 (10th Cir. 2020).

"Reasonable suspicion is a particularized and objective basis for suspecting criminal activity." *Leatherwood v. Welker*, 757 F.3d 1115, 1120 (10th Cir. 2014) (citation omitted). "To determine if reasonable suspicion existed, we consider both the quantity of information possessed by law enforcement and its reliability, viewing both factors under the totality of the circumstances." *Id*. (internal quotation marks omitted).

Before initiating the search of Mr. Ramon's residence, the officers possessed reliable information showing that: (1) Mr. Ramon had failed two drug tests; (2) the DEA had begun to investigate Mr. Ramon's involvement in a drug distribution conspiracy, linking him to firearms possibly stored at the family business; and (3) he previously possessed paraphernalia and multiple cell phones that might be consistent with drug trafficking. Under the totality of the circumstances, the officers had

adequate facts to support an inference that Mr. Ramon violated his supervised release conditions and that his residence might contain evidence related to those violations.

First, the positive urinalyses strongly suggest that Mr. Ramon violated the supervised release condition prohibiting him from using or possessing controlled substances. "Failing a drug test" constitutes an "objective indicatio[n]" that a person serving supervised release has failed to comply with a condition of release, and thus "strongly contribute[s]" to a reasonable suspicion finding. *United States v. Trujillo*, 404 F.3d 1238, 1245 (10th Cir. 2005) (citation omitted). The supervised release agreement—which Mr. Ramon does not challenge—included a condition that prohibited him from "us[ing] . . . any controlled substance[s]." Six weeks before the search, Mr. Ramon tested positive for cocaine—his second failed test. That most recent positive test suggested that Mr. Ramon likely used controlled substances, violating his supervised release agreement.

That the failed drug test occurred six weeks before the search did not render the information stale either. *See Trujillo*, 404 F.3d at 1245 (concluding that failed drug test, although four months old at the time of the search, suggested probationer violated probation agreement). Reasonable suspicion "is not an onerous standard." *Cortez*, 965 F.3d at 834 (citation omitted). Given the supervised release agreement

and the two positive drug tests here, we cannot find it unreasonable for Officer Buescher to suspect that Mr. Ramon violated his supervised release agreement.[2]

Second, the DEA's open investigation into Mr. Ramon's involvement in a drug conspiracy suggested that searching his residence would reveal contraband related to drug possession, drug use, or evidence showing Mr. Ramon's associations with persons engaged in criminal activity. "Because of the unique characteristics of the probation relationship," it is "reasonable to permit information provided by a police officer, whether or not on the basis of firsthand knowledge, to support a probationer search." *Trujillo*, 404 F.3d at 1245 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 879 (1987)). Here—as the district court found—a DEA agent conveyed to Officer Buescher that the DEA had begun to investigate Mr. Ramon, suspecting his involvement in a large-scale drug operation.[3] Under existing precedent, this

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[2] Indeed, we have concluded that given a probation agreement and positive urinalysis "no further justification of a protective sweep [is] necessary." *United States v. Blake*, 284 F. App'x 530, 533 (10th Cir. 2008).

[3] That a "confidential informant" told the DEA agents the information about Mr. Ramon is not significant here because "probation searches may be premised on less reliable information than that required in other contexts." *Leatherwood*, 757 F.3d at 1121 (citing *Griffin v. Wisconsin*, 483 U.S. 868, 879 (1987)). Plus, confidential informants are not necessarily anonymous. *See United States v. McHugh*, 639 F.3d 1250, 1257–58 (10th Cir. 2011) (distinguishing informants known to officers from anonymous tipsters). Even if the confidential informant here was actually anonymous, the DEA agent who conveyed the information "was known" and "could be held responsible if [the agent's] allegations turned out to be fabricated." *United States v. Tucker*, 305 F.3d 1193, 1201 (10th Cir. 2002). In any event, Mr. Ramon waived the argument regarding the informant's reliability because he never presented it to the district court in his suppression papers and did not argue for plain-error review in his opening brief. *See United States v. Portillo-Uranga*, 28 F.4th 168, 177 (10th Cir. 2022).

information contributes to reasonable suspicion justifying the officers' search of Mr. Ramon's residence. *See Griffin*, 483 U.S. at 879 (finding reasonable suspicion when a police officer conveyed uncorroborated hearsay information from an unidentified third party asserting that the defendant "had or might have" contraband).[4]

Mr. Ramon concedes that this evidence "may justify a finding of reasonable suspicion that he generally violated the terms of his release," but contends that it's insufficient to justify searching his mother's home specifically. Aplt. Br. at 15. True, Officer Buescher testified that the DEA "did not supply [him with] any direct information regarding narcotic distribution outside of [Mr. Ramon's mother's house]," but only to Nik-Mart. Indeed the district court found that there is "no information from the DEA that [Mr. Ramon's mother's house] was being used by [Mr. Ramon] for drug dealing." Mr. Ramon therefore argues that the evidence discussed above "fails to create the necessary factual nexus between [him], a specific violation, and his residence at the time of the search"—his mother's house.

But—as we have held—this argument "fails on its own terms." *Trujillo*, 404 F.3d at 1245. While "[a] probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be reasonable," probation search conditions—almost by definition and design—"considerably diminish the probationer's reasonable expectation of privacy." *Leatherwood*, 757 F.3d at 1120

[4] It is similarly insignificant here that Officer Buescher's information came from an "anonymous" tipster's phone call: Officer Buescher would have had reasonable suspicion to search Mr. Ramon for *drugs* even without the anonymous tipster's phone call about *weapons*.

(cleaned up). Accordingly, "[o]nce there was reason to believe that [Mr. Ramon] violated his [supervised release] agreement, there is, by definition, reasonable suspicion to support a search of his residence to ensure compliance with the conditions of his [supervised release]." *Trujillo*, 404 F.3d at 1245 (quotation marks omitted).

Thus, the information from the DEA agent combined with the positive drug tests and Mr. Ramon's checkered history, provided Officer Buescher with sufficient "articulable facts that criminal activity may be afoot," *Hemry v. Ross*, 62 F.4th 1248, 1254 (10th Cir. 2023) (quotation marks omitted), and that he would discover evidence of that criminal activity at Mr. Ramon's residence.

B. Sufficiency of the Evidence

Mr. Ramon also contends the evidence at trial was insufficient to support a conviction for unlawful possession of a firearm.

To obtain a conviction for unlawful possession of a firearm, the government must prove beyond a reasonable doubt that: (1) Mr. Ramon had a prior felony conviction; (2) Mr. Ramon knowingly possessed a firearm; and (3) the firearm traveled in or affected interstate commerce. *See* 18 U.S.C. § 922(g)(1); *United States v. Samora*, 954 F.3d 1286, 1290 (10th Cir. 2020). Mr. Ramon stipulated to the first and third elements. But he disputes the sufficiency of the evidence about possession.

"We review de novo the sufficiency of the evidence, viewing all evidence and any reasonable inferences drawn therefrom in the light most favorable to the conviction." *United States v. Fernandez*, 24 F.4th 1321, 1326 (10th Cir. 2022).

"Evidence is sufficient to support a conviction so long as after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Cavazos v. Smith*, 565 U.S. 1, 7 (2011) (quotation marks omitted).

"Possession under § 922(g)(1) can be actual or constructive." *Samora*, 954 F.3d at 1290. Because Mr. Ramon did not have "direct physical control over [the] firearm," *id.*, when officers found it, the question is whether the government presented sufficient evidence to permit a jury to find beyond a reasonable doubt that Mr. Ramon constructively possessed the firearm. Viewing the evidence in the light most favorable to the conviction, we conclude that the government satisfied its burden.

"Constructive possession occurs when a person not in actual possession knowingly has the power and intent to exercise dominion and control over a firearm." *Id*. Where—as here—"the defendant jointly occupies the premises" with someone else, the government must prove "a nexus between the defendant and the firearm" by demonstrating that a defendant "knew of," "had access to," and "intended to exercise dominion or control" over the firearm found there. *United States v. Johnson*, 46 F.4th 1183, 1187 (10th Cir. 2022). This "may be proved by circumstantial as well as direct evidence." *Id*.

The evidence fully supports the jury's finding of access, dominion, and control.[5]

1. Access

Regarding access, the DNA evidence provided valid circumstantial evidence to permit a reasonable jury to infer that Mr. Ramon handled the firearm. In a case of joint occupancy of a home—as here—"access may be . . . inferred from circumstantial evidence, so long as the circumstantial evidence includes something other than mere proximity." *Hooks*, 551 F.3d at 1212 (cleaned up). The circumstantial evidence here includes more than mere proximity: the government's DNA expert witness testified that the Taurus firearm bore Mr. Ramon's DNA at several locations, and at one location was "at least 1 trillion times more likely if it originated from Charles Ramon than if it originated from an unrelated unknown individual." R. Vol. 4 at 275. There was no evidence, by contrast, that Mr. Ramon's mother's DNA was on the gun.

[5] Mr. Ramon concedes that during the search, his outbursts like "get out of our house"—when viewed in the light most favorable to the conviction—"would be rationally interpreted as evidence that [he] had knowledge that a gun was on the premises." Aplt. Br. at 36. These declarations show more "than mere proximity," *United States v. Hooks*, 551 F.3d 1205, 1212 (10th Cir. 2009), to the firearm and—when viewed in totality—tend to support a finding that Mr. Ramon "knew of" the firearm, *Johnson*, 46 F.4th at 1187. But since Mr. Ramon concedes as much, we need not address that issue here. *See United States v. Aguayo-Gonzalez*, 472 F.3d 809, 812 n.3 (10th Cir. 2007) (declining to address conceded issue). Our analysis therefore focuses on whether the government presented sufficient evidence to permit a jury to find beyond a reasonable doubt that Mr. Ramon "had access to," and "intended to exercise dominion or control" over the firearm.

The government may demonstrate that a defendant *handled* the firearm at "some point" by establishing that the defendant's DNA matches a major profile located on the "specific firearm at issue." *See Samora*, 954 F.3d at 1294. So the DNA evidence discussed above suffices to establish a reasonable basis to conclude that Mr. Ramon handled the gun. Indeed, Mr. Ramon's DNA expert conceded on cross-examination that the DNA quantities found on the gun were consistent with "direct transfer." So, as the government correctly notes, if Mr. Ramon "handled the gun, logically, he had the power and access to control it." Aple. Br. at 42 (citing *Samora*, 954 F.3d at 1291); *see United States v. Benford*, 875 F.3d 1007, 1020–21 (10th Cir. 2017) (holding that evidence establishing the defendant handled a firearm may provide circumstantial evidence demonstrating the ability to exercise control).

Mr. Ramon challenges the DNA evidence, arguing that the government's DNA expert "never gave her expert opinion on whether the DNA found on the gun got there via touch, or as the result of a transfer or secondary transfer." But this argument does not change our conclusion for two reasons.

First, the jury need not accept Mr. Ramon's theory of the case. "[I]t is solely within the province of the fact-finder to weigh the expert testimony," *United States v. Cope*, 676 F.3d 1219 (10th Cir. 2012) (cleaned up), and "decide how to credit [expert] testimony," *Samora*, 954 F.3d at 1291 n.5. As discussed above, the government presented DNA evidence consistent with Mr. Ramon handling the gun. To be sure—as Mr. Ramon accurately points out—his expert testified on direct examination that the DNA quantities found on the gun were also consistent with

"background DNA." But the fact that the jury did not draw from this testimony the inference Mr. Ramon desired does not invalidate reasonable inferences supporting his conviction. *See United States v. Edmonson*, 962 F.2d 1535, 1547–48 (10th Cir. 1992) (noting that a jury "is free to choose among reasonable constructions of evidence"). True, "DNA does not give us information on when it was deposited," Aplt. Br. at 8, but "evidence that the defendant actually handled a firearm"—*even if* "outside the indictment period"—may circumstantially support a finding of the "ability and intent to exercise control over the firearm necessary to establish constructive possession," *Benford*, 875 F.3d 1020–21. *See also Samora*, 954 F.3d at 1292 ("[H]ow much time must have passed since Defendant handled the firearm . . . is a question of fact for the jury.").

Second, the government introduced testimony that: (1) the doors to the rooms in the house were always open when Officer Buescher visited; (2) the officers did not believe Mr. Ramon's mother's closet had a door; (3) Mr. Ramon's mother, given her height, probably could not reach the gun without help; and (4) Mr. Ramon, by contrast, could reach the firearm while standing. The government also introduced a pre-search video footage depicting Mr. Ramon standing upright despite his use of a wheelchair. This evidence and testimony more than suffices to circumstantially support the finding that the firearm was "readily accessible" to Mr. Ramon. *See Samora*, 954 F.3d at 1291 (distinguishing firearm found under the passenger seat as "not within arm's reach" of driver from firearm found in the center console as "readily accessible" to the driver).

2. Intent

Regarding intent, the loaded firearm strongly suggests that Mr. Ramon intended to control it the day officers found it. A firearm "ready to fire at the press of a trigger" generally compels the conclusion "that *someone* had the intent to exercise control" over it. *United States v. Veng Xiong*, 1 F.4th 848, 860 (10th Cir. 2021); *see Johnson*, 46 F.4th at 1190 (considering fact that "firearm was loaded" as "evidence of intent"); *see also United States v. Shannon*, 809 F. App'x 515, 520 (10th Cir. 2020) (noting that a loaded AR-15 with its safety switched off indicates "an intent to use the weapon if needed").

In addition to the physical evidence, Mr. Ramon's verbal tirade during the search bolsters the finding of intent to exercise dominion or control over the gun. The government argues that Mr. Ramon's tirade "supports an attempt to halt the search so the officers would not find the revolver," thus demonstrating a purposeful resolve to exercise control over the gun. Aple. Br. at 44. Mr. Ramon disagrees, arguing that only if we interpret his statements as "get out of [his mother's] bedroom" or "get out of [his mother's] closet," would his tirade "have at least a rational relationship between the content of the statement and the contents of her bedroom or the contents of her closet." Aplt. Br. at 36. In either case, "[i]t is for the jury, as the fact finder, to resolve conflicting testimony, weigh the evidence, and draw reasonable inferences from the facts presented." *Wells*, 843 F.3d at 1253. "[C]onsidering the collective inferences to be drawn from the evidence as a whole," *United States v. Nguyen*, 413 F.3d 1170, 1175 (10th Cir. 2005) (internal quotations

marks omitted), a reasonable jury could construe Mr. Ramon's behavior on the day of the search as evidence of his intent to obstruct the search.

We therefore conclude that the loaded firearm, the DNA evidence, and Mr. Ramon's behavior on the day of the search logically and circumstantially support a plausible inference that Mr. Ramon exercised dominion and control over the weapon.

* * *

Accordingly, we **AFFIRM** the denial of Mr. Ramon's motion to suppress and **AFFIRM** Mr. Ramon's conviction.

Entered for the Court

Timothy M. Tymkovich
Circuit Judge

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157
Clerk@ca10.uscourts.gov

Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

October 20, 2023

Ms. Kari S. Schmidt
Conlee, Schmidt & Emerson
200 West Douglas Avenue, Suite 300
Wichita, KS 67202

RE: 22-1249, United States v. Ramon
Dist/Ag docket: 1:20-CR-00327-PAB-1

Dear Counsel:

Enclosed is a copy of the order and judgment issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. Rule 40(a)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R.35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Elizabeth Ford Milani

CMW/sds

United States of America

v.

Charles Ramon III, a/k/a/ Charles Roger Ramon

Charles Ramon's Petition for Writ of Certiorari

APPENDIX B

Minute Sheet of U.S. District Court for the District of Colorado
Reflecting Bench Order Denying Petitioner's Motion to Suppress;

Transcript of Bench Rulings, Orders and Findings of Fact

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Philip A. Brimmer

Criminal Action No.: 20-cr-00327-PAB	Date: June 10, 2021
Courtroom Deputy: Sabrina Grimm	Court Reporter: Janet Coppock

Parties:	*Counsel:*
UNITED STATES OF AMERICA,	Daniel McIntyre Laura Cramer-Babycz
Plaintiff,	
v.	
CHARLES RAMON, III	John Schlie
Defendant.	

COURTROOM MINUTES

MOTION HEARING

9:03 a.m. Court in session.

Appearances of counsel. Defendant present in custody.

Also present and seated at Government's counsel table, ATF Agent Larry Bazin.

Counsel states they have narrowed the scope of the issues to be discussed today.

Government's witness, USPO Jordan Buescher, sworn.

9:06 a.m. Direct examination of Mr. Buescher by Mr. McIntyre.

Exhibits 2 and 3 are admitted.

9:41 am. Cross examination of Mr. Buescher by Mr. Schlie.

10:13 a.m. Redirect examination of Mr. Buescher by Mr. McIntyre.

10:17 a.m. Court in recess.
10:30 a.m. Court in session.

Argument by Mr. Schlie and Mr. McIntyre.

Court states its findings of fact and conclusions of law.

ORDERED: Defendant's Motion to Suppress Results of Search [34] is DENIED, for reasons stated on record.

ORDERED: Defendant is remanded to the U. S. Marshal.

11:33 a.m. Court in recess.

Hearing concluded.
Total time in court: 2:17

most of his time at the house, I think there is more than reasonable suspicion to think that evidence of a violation of supervised release or a crime would be found at the house at the time of the search.

THE COURT: Anything else, Mr. McIntyre?

MR. McINTYRE: No, Your Honor. Thank you.

THE COURT: Mr. Schlie, anything else in rebuttal?

MR. SCHLIE: No, Your Honor. Thank you.

THE COURT: All right. So the matter before the Court is the defendant's motion to suppress results of search, which is Docket No. 34. However, as Mr. Schlie mentioned at the very beginning of the hearing, Mr. Schlie withdrew his argument regarding there not being a knowing and voluntarily waiver which resulted in the search condition that was -- that the Court took judicial notice of. Why don't we start there just so that I can talk about that a bit.

So that waiver resulted in a search condition being added to the terms and conditions of Mr. Ramon's supervised release. And let me go ahead and read that paragraph into the record. It states as follows: The defendant shall submit his person, property, house, residence, papers, computers or office to a search conducted by a United States Probation Officer. Failure to submit to search may be grounds for revocation of release.

The defendant shall warn any and other occupants that

the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that the defendant has violated a condition of his supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

So both sides agree that the issue before us for this hearing is, in fact, whether reasonable suspicion exists that the defendant has violated a condition of his supervision and that the areas to be searched contain evidence of this violation. Mr. Schlie's argument is that the areas to be searched refers to the residence, the residence of the defendant's mother where the defendant was living as his designated residence during supervised release in the case. And that was Judge Blackburn's case which was 07-CR-437.

Let me make the following findings of fact and conclusions of law: The Court heard testimony from Jordan Buescher, who is a United States Probation Officer for the District of Colorado. Mr. Buescher testified that he was assigned as the probation officer in Judge Blackburn's case for the defendant and that he had his first meeting with the defendant on September 6th of 2016.

Not long after that in October of 2016, Mr. Buescher testified that he learned the defendant had been arrested by

the Denver Police Department. In that particular incident, officers had been called to the Viking Bar, a known gang hangout for the GKI. The report to the police causing them to respond to that location were there were people arguing outside of the bar with weapons. Cars were pulled over.

Mr. Buescher testified that the police reports indicated that both of the vehicles belonged to the Ramon family. The defendant was driving one of the cars. His son was driving another. The defendant at the time he was driving that vehicle did not have a valid driver's license. The car itself was registered to the defendant's mother. A search was conducted of the trunk of the vehicle that Mr. Ramon was driving, and in it the officers found 8 grams of methamphetamine and 12 grams of heroin. The charges against Mr. Ramon that apparently were initially filed presumably pertaining to the drugs in the trunk was later dropped.

In terms of Judge Blackburn's case, Officer Buescher testified that the defendant, the defendant's attorney and Mr. Buescher discussed a modification of the terms and conditions. The modification that resulted from that particular incident was the search condition that I talked about just a moment ago.

Officer Buescher testified that he conducted a home visit of the Everett Street address where the defendant was authorized to reside, his mother's house, in 2017. And during

that home visit, Officer Buescher observed plastic baggies in the residence and Officer Buescher testified that the defendant had no good explanation for them.

Officer Buescher later in the chronological report, which is Exhibit 2 which was admitted for purposes of this hearing, identified that finding of baggies as a red flag which is consistent with his testimony that he found the bags to be concerning. In Officer Buescher's experience, baggies of that nature are consistent with drug distribution. Officer Buescher denied having ever seen little bags of that nature when he visited the Nik-Mart 2, a place that the defendant's family owns and which the defendant was working at some time or at least occasionally on a volunteer basis, that he didn't see any baggies like that there.

Officer Buescher also testified that in March of 2018 the defendant had a positive UA, urinalysis for cocaine, and that he noticed that the DEA, the Drug Enforcement Administration, had run the defendant's name in NCIC on March 27th of 2018 because the defendant's car was observed in a high drug trafficking area. Actually, I take that back. That wasn't the DEA. That was the Denver Police Department had run his name back on March 27th of 2018 because the defendant's car was in a high drug trafficking area.

However, in April of 2018 Officer Buescher testified that the DEA had queried the defendant's name in NCIC. In

response to learning that information, Officer Buescher contacted the special agent involved from the DEA who indicated to Officer Buescher that the DEA had opened an investigation into the defendant on suspicions of the defendant being involved in a large scale drug operation. The DEA had a confidential informant who had told the DEA that the defendant was known to possess weapons.

In July of 2018, Officer Buescher testified that he received an anonymous phone call that indicated the defendant concealed weapons on his person and was extremely dangerous. Officer Buescher testified that he passed that information on to the DEA. In September of 2018, Officer Buescher testified that he contacted the special agent from the DEA again and that the special agent indicated that the DEA's investigation of the defendant was still active, but it was taking longer than anticipated.

On October 31st of 2018, the defendant had a negative UA. And then on November 15 of 2018, Officer Buescher and his partner, presumably a fellow probation officer, made a home visit to the Everett Street address. The Chron fine indicates that when the defendant became visible once they arrived at the home coming from the bedroom area, that he seemed nervous. Officer Buescher testified that he had his partner clear the bedroom wing of the house, and then he had a conversation with the defendant about a variety of things.

At some point he told the defendant that he wanted to do a full walk-through of the home since he had not done that for a while, and one of the rooms that they walked through was the defendant's mother's bedroom. Officer Buescher testified that both the defendant and his mother appeared to be trying to deflect the probation officers away from that room. The officers did not see any contraband or anything that would constitute a violation of the terms and conditions in plain view, but Officer Buescher believed that there were objective signs of nervousness by both the mother and the defendant.

In terms of the defendant, Officer Buescher testified that he noticed the defendant was breathing heavier than he had before, that his conversation appeared to be in an attempt to deflect attention from that room, and that he had different mannerisms. In terms of the mother's behavior, Officer Buescher testified that the mother asked the probation officers why they were in her bedroom, that she didn't know why they were in her room.

Officer Buescher also testified that once they left the bedroom area of the home and went to a different part of the home, that he noticed that both the defendant's mother and the defendant calmed down and that their breathing and speech patterns returned to normal. Officer Buescher testified that as a result of that home visit, he didn't take any additional steps such as changing some term or condition of supervised

release for the defendant.

On January 25th of 2019, the defendant had a UA. That UA tested positive for cocaine. The lab report for that particular UA also indicated that the sample was diluted. Officer Buescher testified that in his experience the dilution of a urine sample is indicative of an attempt by the person giving the urine sample to try to hide evidence of drug use that would otherwise be found in the sample. And that positive UA result then caused Officer Buescher to begin discussions of a possible search of the defendant's residence with his supervisor.

Officer Buescher testified that that process required his supervisor to consider and himself as well to consider the defendant's record as a whole. Officer Buescher testified that as a result of him being the assigned probation officer for Mr. Ramon, that he looked through the defendant's criminal history, and Officer Buescher testified that the defendant's criminal history consisted of criminal history beginning when the defendant was age 14 through 2007, which was the date that he was arrested for the Judge Blackburn case. Officer Buescher testified that the defendant had criminal history involving assault, a couple of menacings, weapons possession, cocaine possession and also parole revocations.

Officer Buescher testified that in considering that search, he and his supervisor considered both reasonable

suspicion and probable cause, although Officer Buescher testified that the search condition at issue in this particular hearing required only reasonable suspicion and not probable cause.

On February 5th of 2019, Officer Buescher testified that he talked to the DEA agent again, the purpose of which was at least in part to determine whether a search that was conducted by the probation officers would impede or interfere with the DEA's investigation and, if not, whether the DEA was interested in participating in a home search of the Everett Street. On March 8th of 2019, the defendant had another UA. That UA was negative.

And then Officer Buescher also testified about Exhibit 3. Exhibit 3 is a redacted or at least partially redacted version of what he described as a search plan. A search plan is put together before a search is actually conducted. And he testified that his supervisors participated in the review of that particular plan. He also testified that the search in question took place on March 13th of 2019.

On cross-examination Officer Buescher admitted that the reports that he had -- or information that he had received from the DEA focused -- or at least did not focus on the Everett Street residence. There is no information from the DEA that the Everett Street address was being used by the defendant for drug dealing. There is no mention of drug dealing at the

Everett Street residence. Instead, the DEA was focusing on the defendant possibly being involved in drug distribution from Nik-Mart 2, a location of a family-run business that the defendant's family was operating. As I mentioned before, there was evidence from Officer Buescher that the defendant, while not allowed to work there, was doing at least some volunteer work occasionally at that location to help out his mother. But because the defendant had never produced paystubs for any paid work there, the defendant was not authorized to work apparently for a salary or for pay at that location.

Officer Buescher also testified that he had not received any information from any source that the defendant was possessing firearms at Everett Street, although Officer Buescher mentioned that the confidential information that he had received, not the confidential informant that the DEA had, but the call from the anonymous source indicated that the defendant was possessing firearms on his person. And as a result, Officer Buescher testified that he considered that to at least potentially mean that the defendant, given the fact that he was residing at Everett Street, may be possessing firearms at that location as well.

There was also testimony about a key. When the November 15, 2018 walk-through was performed, Officer Buescher noticed a key to a safe on the defendant's key chain. Officer Buescher learned that the DEA suspected that the defendant was

storing firearms, including potentially an assault rifle, at a safe located at the Nik-Mart 2.

So those are the Court's findings of fact. Now on to the conclusions of law. So it is true that most of the time when you're talking about reasonable suspicion, you're talking about a traffic stop because that's a common situation where some type of investigative stop would occur. However, the defendant agreed to the condition that tied reasonable suspicion to a search of his home. So let's talk about, first of all, exactly what the standard is regarding reasonable suspicion.

The Supreme Court recently in 2020 in *Kansas v. Glover,* 140 S.Ct. 1183, specifically at 1187, indicated that "Although a mere 'hunch' does not create reasonable suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause."

Moreover, the 10th Circuit in *United States v. Martinez*, a case from 2018, held that, "An officer need not rule out the possibility of innocent conduct. He or she simply must possess some minimal level of objective justification for making the stop." It's also clear from the Supreme Court and from 10th Circuit authority that whether an officer's suspicion is reasonable does not depend on any one factor, but on the

totality of the circumstances.

So the Court has to look at the totality of the circumstances in order to determine whether or not Officer Buescher, who is the one who initiated this particular search of the defendant's residence, had reasonable suspicion to believe that there was some violation of the terms and conditions of supervised release.

It is true, and Mr. Schlie, he didn't really argue it, but it was brought out in cross-examination that there were both positive UAs and there were also negative UAs. The most recent UA -- and it was, in fact, quite recent when compared to the date of the search -- was a negative UA. And the question is whether or not that negative UA would somehow dissipate reasonable suspicion of drug use. The Court finds that would not be a reasonable conclusion and that, in fact, the defendant's positive tests, even when combined and considered with the negative ones, would still give a reasonable probation officer suspicion that the defendant was using narcotics.

The reason for that is, of course, No. 1, a negative test doesn't mean that the defendant may not use it again in the future. And there were negative tests in the past, but they were followed by positive tests. All of that would suggest that even though the defendant may have had some negative test, it doesn't mean that he was not subject to using narcotics in the future.

There was a January positive test for cocaine. And even though that was followed by a March negative test, that would certainly give a reasonable officer cause to believe that the defendant was in possession of narcotics and was also a perfectly reasonable conclusion that if the defendant were using a controlled substance such as cocaine for personal use, that that person's residence would be a possible location where the narcotics were being stored.

Of course, there was also other evidence. The fact that the DEA was maintaining an active investigation of the defendant for drug distribution was a relevant consideration and is relevant to the Court in determining whether there is reasonable suspicion. It's true that that investigation was centered on the Nik-Mart 2, but that would suggest that the defendant had access to narcotics. That would suggest that the defendant may have been possessing firearms. That would also suggest that the defendant could possibly have cause to arm himself, as many drug dealers do, for purposes of protecting himself from people who may be involved in the drug trade from rival gang members, who knows. But the 10th Circuit and Supreme Court have held on many occasions that drugs and guns typically go hand in hand. That would be something that would suggest reasonable suspicion to believe that the defendant could be possessing firearms or narcotics within his residence.

The home visit that took place back in 2017 I think is

relevant too. An argument could be made that it was stale because it took place way back in 2017. However, in considering whether there is some type of staleness, you have to look at what took place afterwards. And what took place after that fact is the fact that the DEA is still actively investigating Mr. Ramon for being involved in large scale drug distribution. That makes the baggy information relevant to something that took place later like the determination by Officer Buescher that there was reasonable suspicion for a search.

Moreover, the Court finds it relevant that the November 15th, 2018 home visit would also provide reasonable suspicion that there was evidence of a violation in the Everett Street address. Mr. Schlie is quite correct that testimony about nervousness has to be looked at carefully, but the testimony from Officer Buescher presented objective signs of nervousness.

In particular, Officer Buescher testified about a difference in behavior by both Mr. Ramon and by Mr. Ramon's mother when they were doing the walk-through and got to the defendant's mother's bedroom. At that time Officer Buescher testified the behavior of Mr. Ramon changed. He was breathing heavier. His conversational manner changed. He appeared to be trying to get the -- somehow get the officers out of the bedroom.

And consistent with his behavior, Officer Buescher testified that the defendant's mother was also acting differently. She seemed nervous about the fact that they were in her bedroom. She asked why they were in her bedroom. She didn't know why they were in her bedroom. But then by contrast once the officers and Mr. Ramon and his mother left that area and returned to another area, Officer Buescher testified that he noticed their behavior change. The attempts to deflect the conversations from where they were now talking disappeared. He testified that their breathing and speech patterns returned to normal.

The Court finds that those are objective justifications for a conclusion that he made when he determined that it was appropriate to conduct a search of that residence, and the Court finds that those are appropriate for the Court to consider in the totality of the circumstances.

It's also relevant to take into account the defendant's past. Officer Buescher testified that Mr. Ramon has an extensive criminal history that involves both cocaine possession and weapons possessions and also parole revocations. Those are circumstances which in the totality of the circumstances would cause a reasonable officer in Mr. Buescher's position to believe that the defendant may be falling back into that type of behavior and when combined with the DEA's investigation would certainly provide a justification

for a search of the home because of the drug and gun connection that I referred to earlier.

When the Court takes into account the totality of the circumstances and the testimony of Mr. Buescher regarding each of those things that the Court has already discussed today, the Court finds that the officer did have reasonable suspicion to believe that the areas to be searched would contain evidence of a violation of the terms and conditions of supervised release, namely his possession of narcotics and/or firearms. There is no -- there has been no issue raised concerning the time or the manner in which the search was conducted. As a result, the Court will deny the motion to suppress.

Mr. Schlie, anything else on the motion?

MR. SCHLIE: No, Your Honor.

THE COURT: Okay. Mr. McIntyre, anything else on behalf of the United States?

MR. McINTYRE: No, Your Honor. Thank you.

THE COURT: Then Mr. Ramon will be remanded to the custody of the United States Marshals and the Court will be in recess. Thank you.

THE DEFENDANT: Your Honor, I wanted to state for the record that I haven't been able to communicate.

THE COURT: Hold on. Let's go back on the record.

Mr. Ramon, does this have anything to do with the motion to suppress?