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## Suspicionless Searches: *U.S. v. King* and the Ninth Circuit's Dismissal of the Probationer-Parolee Distinction

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# SUSPICIONLESS SEARCHES: *U.S. V. KING* AND THE NINTH CIRCUIT'S DISMISSAL OF THE PROBATIONER-PAROLEE DISTINCTION

TRICIA NICHOLSON\*

**Abstract:** In *U.S. v. King*, the U.S. Court of Appeals for the Ninth Circuit considered whether a suspicionless search of a probationer, conducted pursuant to a condition of his probation, violated the Fourth Amendment. The Ninth Circuit held that the search did not violate the Fourth Amendment because legitimate governmental interests outweighed the probationer's privacy interest. In conducting the balancing test, however, the court failed to give significance to the distinction between probationers and parolees for Fourth Amendment purposes and used an analysis that overrides any individual privacy interest that a probationer may have.

## INTRODUCTION

In 2012, Marcel King was convicted in the U.S. District Court for the Northern District of California of being a felon in possession of a firearm, after the court denied his motion to suppress evidence of a shotgun found underneath his bed.<sup>1</sup> The San Francisco Police Department suspected that King was involved in a homicide and learned that he was on adult felony probation, which, under the terms of King's probation agreement, subjected him to a suspicionless-search condition.<sup>2</sup> In connection with this condition, the officers searched his residence and found the shotgun.<sup>3</sup> King, in his motion to suppress, argued that the shotgun evidence was the fruit of an illegal search.<sup>4</sup> The district court held that the officers had reasonable suspicion to conduct the search and denied King's motion.<sup>5</sup> On appeal, the majority of a panel of the U.S. Court of Appeals for the Ninth Circuit concluded that the police lacked reasonable sus-

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<sup>1</sup> *United States v. King (King II)*, 672 F.3d 1133 (9th Cir.) (per curiam), *vacated*, 687 F.3d 1189 (9th Cir. 2012) (en banc) (per curiam); *United States v. King (King I)*, No. C10-00455, 2011 WL 9315, at \*1–6 (N.D. Cal. Jan. 3, 2011) (ordering denial of motion to suppress fruits of search of King's residence).

<sup>2</sup> *United States v. King (King V)*, 711 F.3d 986, 988 (9th Cir.), *amended and superseded by* 736 F.3d 805, 806 (9th Cir. 2013) (denying rehearing en banc).

<sup>3</sup> *See id.*

<sup>4</sup> *See id.*

<sup>5</sup> *King I*, 2011 WL 9315, at \*1.

picion of King's involvement in criminal activity, but still upheld the denial of the motion to suppress, relying on *U.S. v. Baker*.<sup>6</sup> Under *Baker*, the court viewed probationers and parolees equally for Fourth Amendment purposes and held that suspicionless search conditions for probationers did not violate the Fourth Amendment.<sup>7</sup> *Baker*, however, was in direct conflict with a Supreme Court case, *Samson v. California*, which held that parolees have fewer expectations of privacy than probationers.<sup>8</sup> Thus, the en banc court granted a rehearing to consider the continuing validity of *Baker* in light of *Samson*.<sup>9</sup> On the rehearing en banc, the court overruled the *Baker* opinion and vacated the earlier King decision.<sup>10</sup>

With *Baker* no longer controlling, the case was remanded to a Ninth Circuit panel.<sup>11</sup> The remaining issue was whether the search of King's residence violated his Fourth Amendment rights, given that the police lacked reasonable suspicion to search his residence.<sup>12</sup> Using another Supreme Court decision, *U.S. v. Knights*, along with the *Samson* decision, the panel examined the totality of the circumstances to determine whether the suspicionless search of King's residence was reasonable.<sup>13</sup> In doing so, the court "'assess[ed] . . . the degree to which [the search] intrudes upon [Defendant's] privacy and . . . the degree to which it is needed for the promotion of legitimate governmental interests,'" conducting a balancing test based on these inquiries.<sup>14</sup> The court found that the governmental interests at stake were substantial, while King's privacy rights as a probationer were only slightly intruded upon.<sup>15</sup> Consequently, it held that the suspicionless search, conducted pursuant to a suspicionless-search condition of the probation agreement, did not violate the Fourth Amendment.<sup>16</sup>

Part I of this Comment briefly summarizes the factual and procedural history of King's case. Part II then discusses the totality test used by the majority

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<sup>6</sup> See *King V*, 711 F.3d at 988; *King II*, 672 F.3d at 1139; *United States v. Baker*, 658 F.3d 1050, 1055–56 (9th Cir. 2011) (holding that a suspicionless search of a probationer does not violate the Fourth Amendment), *overruled by* *United States v. King (King IV)*, 687 F.3d 1189, 1189–90 (9th Cir. 2012) (en banc) (per curiam).

<sup>7</sup> See *King V*, 711 F.3d at 988–89; *Baker*, 658 F.3d at 1055.

<sup>8</sup> See *Samson v. California*, 547 U.S. 843, 850 (2006); *King V*, 711 F.3d at 988–89; *United States v. King (King III)*, 682 F.3d 779 (9th Cir. 2012) (ordering rehearing en banc); *Baker*, 658 F.3d at 1055.

<sup>9</sup> See *Samson*, 547 U.S. at 850; *King V*, 711 F.3d at 988–89; *King III*, 682 F.3d at 779; *Baker*, 658 F.3d at 1055.

<sup>10</sup> *King V*, 711 F.3d at 989; *King IV*, 687 F.3d at 1189–90.

<sup>11</sup> See *King V*, 711 F.3d at 989; *King IV*, 687 F.3d at 1189–90.

<sup>12</sup> *King V*, 711 F.3d at 989.

<sup>13</sup> *Id.* at 989–90; see *Samson*, 547 U.S. at 848–57; *United States v. Knights*, 534 U.S. 112, 119 (2001).

<sup>14</sup> *King V*, 711 F.3d at 990 (quoting *Samson*, 547 U.S. at 848 and *Knights*, 534 U.S. at 119).

<sup>15</sup> *Id.* at 990–91.

<sup>16</sup> *Id.*

and the dissenting opinion's criticism. Finally, Part III argues that the substantial governmental interest offered by the court as support to outweigh King's individual privacy interest will always outweigh the probationer's individual privacy interests. These overly broad interests used by the court effectively erase any individual privacy interest a probationer may have, nearly always leading to an unfair result for the probationer.<sup>17</sup> This structure ultimately results in the same outcome as that which would occur if parolees and probationers were viewed equally for Fourth Amendment purposes.<sup>18</sup>

### I. KING'S SUSPICIONLESS SEARCH AND CONVICTION

On May 10, 2010, Inspector Joseph Engler was investigating the shooting of Shawnte Sparks, which had occurred the night before.<sup>19</sup> Engler spoke with an individual near the crime scene, known as CW1, who was one of the victim's family members, but was not present at the crime scene.<sup>20</sup> CW1 received information about the shooting from another individual, known as Moniker, who was present at the scene, but did not actually see the shooting.<sup>21</sup> Moniker claimed to have obtained information about the identity of the shooter from a third individual who had allegedly seen the shooting directly.<sup>22</sup> This fourth-hand hearsay tip resulted in the identification of Marcel King as the suspected shooter.<sup>23</sup> After receiving the tip, Engler checked King's criminal history and discovered that he was on adult felony probation.<sup>24</sup>

King was serving a probationary sentence for the willful infliction of corporal injury on a cohabitant, but had never been charged or arrested for any firearms offense.<sup>25</sup> There was a warrantless search condition attached to King's probation agreement, stating that he was subject to warrantless searches with or without probable cause.<sup>26</sup> Engler and other police officers relied on this term of King's probation agreement to search his residence without a warrant and

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<sup>17</sup> See *id.* at 988–91; *id.* at 995–98 (Berzon, J., dissenting).

<sup>18</sup> See *id.* at 991, 995–98 (Berzon, J., dissenting).

<sup>19</sup> United States v. King (*King I*), No. C10-00455, 2011 WL 9315, at \*1 (N.D. Cal. Jan. 3, 2011) (denying motion to suppress fruits of search of 78 Edgar Place, the home of the defendant's mother).

<sup>20</sup> See *id.* at \*2–3.

<sup>21</sup> *Id.* at \*3.

<sup>22</sup> *Id.*

<sup>23</sup> See *id.*; Appellant's Opening Brief at 7, United States v. King (*King II*), 672 F.3d 1133 (9th Cir.) (per curiam), *vacated*, 687 F.3d 1189 (9th Cir. 2012) (en banc) (per curiam) (No. 11-10182).

<sup>24</sup> United States v. King (*King V*), 711 F.3d 986, 988 (9th Cir.) (en banc), *amended and superseded by* 736 F.3d 805, 806 (9th Cir. 2013) (denying rehearing en banc).

<sup>25</sup> CAL. PENAL CODE § 273.5 (West 2013); see Appellant's Opening Brief, *supra* note 23, at 6.

<sup>26</sup> *King V*, 711 F.3d at 988; *King I*, 2011 WL 9315, at \*4. King's warrantless search condition stated, "Defendant is subject to a warrantless search condition, as to defendant's person, property, premises and vehicle, any time of the day or night, with or without probable cause, by any peace, parole or probation officer." *King V*, 711 F.3d at 988.

found an unloaded shotgun underneath his bed.<sup>27</sup> The police then arrested King and charged him with being a felon in possession of a firearm.<sup>28</sup>

King filed a motion to suppress evidence of the shotgun with the U.S. District Court for the Northern District of California, arguing that the police officers lacked the reasonable suspicion needed to conduct a valid probation search.<sup>29</sup> The court, however, found that there was reasonable suspicion, and King was convicted of being a felon in possession of a firearm.<sup>30</sup> King was never charged for the homicide that led to the search, and is no longer a suspect.<sup>31</sup>

On appeal, a panel of the Ninth Circuit determined that the police lacked reasonable suspicion.<sup>32</sup> Nevertheless, the panel held that the suspicionless search of King's residence was constitutional because the Ninth Circuit had previously held in *U.S. v. Baker* that a probation condition allowing for a suspicionless search was constitutional.<sup>33</sup> The *Baker* court had reasoned that a parolee and probationer had the same expectation of privacy under the Fourth Amendment, and thus, because suspicionless search conditions were constitutional for parolees, they were constitutional for probationers as well.<sup>34</sup> This premise was in direct conflict with the Supreme Court's decision in *Samson v. California*, where the Court held that probationers have a greater expectation of privacy than parolees.<sup>35</sup> In light of the *Samson* decision, the Ninth Circuit, sitting en banc, reheard King's case and overruled *Baker*.<sup>36</sup> In the same opinion, the Ninth Circuit vacated the panel's earlier decision and remanded it to the panel for a disposition consistent with the Supreme Court's decision in *Samson*.<sup>37</sup>

<sup>27</sup> *King V*, 711 F.3d at 988.

<sup>28</sup> *King I*, 2011 WL 9315, at \*1.

<sup>29</sup> *Id.* at \*1–2.

<sup>30</sup> *King V*, 711 F.3d at 988; *King II*, 672 F.3d at 1133–34.

<sup>31</sup> See Appellant's Opening Brief, *supra* note 23, at 6.

<sup>32</sup> *King V*, 711 F.3d at 988; *King II*, 672 F.3d at 1139. The Ninth Circuit followed the reasoning in *United States v. Baker*, in which the Ninth Circuit decided that suspicionless search conditions for probationers do not violate the Fourth Amendment. See *King V*, 711 F.3d at 988–89; *King II*, 672 F.3d at 1139; *United States v. Baker*, 658 F.3d 1050, 1055–56 (9th Cir. 2011), *overruled by* *United States v. King (King IV)*, 687 F.3d 1189, 1189–90 (9th Cir. 2012) (en banc) (per curiam).

<sup>33</sup> See *King V*, 711 F.3d at 989; *King IV*, 687 F.3d at 1189–90; *United States v. King (King III)*, 682 F.3d 779 (9th Cir. 2012) (ordering rehearing en banc); *King II*, 672 F.3d at 1139; *Baker*, 658 F.3d at 1055–56.

<sup>34</sup> *Baker*, 658 F.3d at 1055–56.

<sup>35</sup> *Samson v. California*, 547 U.S. 843, 850 (2006); *King V*, 711 F.3d at 988–90; *Baker*, 658 F.3d at 1055–56. The Supreme Court in *Samson* stated, “parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment.” 547 U.S. at 850.

<sup>36</sup> *Samson*, 547 U.S. at 850; see *King V*, 711 F.3d at 989; *King IV*, 687 F.3d at 1189–90.

<sup>37</sup> *King V*, 711 F.3d at 989; *King IV*, 687 F.3d at 1189–90.

## II. DIFFERING OPINIONS ON THE APPLICATION OF THE PROBATIONER-PAROLEE DISTINCTION

On remand, a majority of the Ninth Circuit followed the Supreme Court's holdings in *U.S. v. Knights* and *Samson v. California* and recognized the critical distinction between probationers and parolees for Fourth Amendment purposes.<sup>38</sup> Nevertheless, the majority of the Ninth Circuit placed King's privacy interests as a probationer close to those of a parolee, finding the suspicionless search to be reasonable when weighed against the state interests.<sup>39</sup> In her dissenting opinion, Judge Berzon highlighted the majority's error, arguing that the majority unduly softened the probationer-parolee distinction.<sup>40</sup> The dissent offered an important and significantly different view of both King's individual privacy interests and the governmental interests in regards to the probationer-parolee distinction.<sup>41</sup>

### A. The Majority's Analysis and the Soft Probationer-Parolee Distinction

The majority focused on whether the search of King's residence satisfied the Fourth Amendment, despite the police's lack of reasonable suspicion.<sup>42</sup> More specifically, the Ninth Circuit asked whether a suspicionless search, performed on a condition of the defendant's probation, violated the Fourth Amendment.<sup>43</sup> To answer this question, the court balanced two opposing interests: first, the degree to which the search intruded upon King's reasonable privacy expectations as a probationer; and second, the degree to which the search was necessary for the promotion of legitimate governmental interests.<sup>44</sup>

When determining the degree to which the search intruded upon King's privacy as a probationer, the majority assessed King's reasonable expectation of privacy in light of *Knights* and *Samson*.<sup>45</sup> In doing so, the court grappled with where exactly to place King's expectations of privacy relative to those of a parolee and an average citizen.<sup>46</sup>

In *Knights*, the Supreme Court upheld a search that was conducted pursuant to the terms of the defendant's probation agreement, which authorized

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<sup>38</sup> See *United States v. King (King V)*, 711 F.3d 986, 988–90 (9th Cir.), *amended and superseded by* 736 F.3d 805, 806 (9th Cir. 2013) (denying rehearing en banc); see also *Samson v. California*, 547 U.S. 843, 850 (2006); *United States v. Knights*, 534 U.S. 112, 114 (2001).

<sup>39</sup> See *King V*, 711 F.3d at 989–91.

<sup>40</sup> See *id.* at 991–98 (Berzon, J., dissenting).

<sup>41</sup> See *id.*

<sup>42</sup> *Id.* at 989 (majority opinion). With *Baker* no longer controlling, coupled with the panel majority's holding that police lacked reasonable suspicion, the main issue was the validity of a suspicionless search under the Fourth Amendment. *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 990.

<sup>45</sup> See *id.* at 989–990.

<sup>46</sup> See *id.* at 990.

searches “with or without a search warrant, warrant of arrest or reasonable cause.”<sup>47</sup> In that case, unlike in King’s case, the police were found to have reasonable suspicion of criminal activity.<sup>48</sup> In deciding *Knights*, the Supreme Court used a balancing test, considering the totality of the circumstances, including the search condition in the probation agreement.<sup>49</sup>

In attempting to follow *Knights*, the Ninth Circuit explained that one of the inherent facts of probation is that probationers do not enjoy the absolute liberty to which every citizen is otherwise entitled.<sup>50</sup> Thus, from the outset, the court placed King’s expectation of privacy below that of a citizen who is not subject to a criminal sanction.<sup>51</sup> The majority lowered this expectation of privacy further, reasoning that because King agreed to the suspicionless search condition as a necessary condition of his probation, his expectations were significantly diminished.<sup>52</sup> The Ninth Circuit then compared King’s expectation of privacy to that of a parolee by looking to *Samson*.<sup>53</sup>

In *Samson*, the Supreme Court held that a parolee did not have an expectation of privacy that society would recognize as legitimate, and that a parolee’s expectation of privacy was below that of a probationer’s.<sup>54</sup> In order to adhere to the probationer-parolee distinction emphasized in *Samson*, the Ninth Circuit majority placed a probationer’s expectation of privacy above a parolee’s.<sup>55</sup> Nevertheless, the majority also held that the distinction between a parolee’s privacy interest and a probationer’s was very small, and, as such, a probationer only had a slightly stronger privacy interest than parolee.<sup>56</sup>

Regarding the governmental interests that needed to be balanced against the probationer’s privacy interests, the majority weighed three substantial governmental interests.<sup>57</sup> The first interest that the court noted was the state interest in protecting potential crime victims from probationers’ recidivism.<sup>58</sup> The majority explained that the recidivism rate of probationers is significantly higher than the general crime rate.<sup>59</sup> The second state interest noted by the court was discovering criminal activity and preventing the destruction of evidence.<sup>60</sup> In support of this state interest, the court explained that probationers

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<sup>47</sup> *Knights*, 534 U.S. at 114; *King V*, 711 F.3d at 989.

<sup>48</sup> *Knights*, 534 U.S. at 114–15; *King V*, 711 F.3d at 989.

<sup>49</sup> *Knights*, 534 U.S. at 118–19; see *King V*, 711 F.3d at 990.

<sup>50</sup> See *King V*, 711 F.3d at 990; see also *Knights*, 534 U.S. at 119.

<sup>51</sup> See *King V*, 711 F.3d at 990.

<sup>52</sup> See *id.*

<sup>53</sup> See *id.*

<sup>54</sup> *Samson*, 547 U.S. at 852.

<sup>55</sup> See *King V*, 711 F.3d at 990.

<sup>56</sup> See *id.*

<sup>57</sup> See *id.* at 990–91; *id.* at 997 (Berzon, J., dissenting).

<sup>58</sup> See *id.* at 990 (majority opinion).

<sup>59</sup> See *id.*

<sup>60</sup> See *id.*

are more incentivized to quickly dispose of incriminating evidence than ordinary criminals, because they are aware that they may be subject to supervision and may face serious consequences as a result.<sup>61</sup> The third state interest that the court cited was an interest in a probationer's successful completion of probation and his or her reintegration into society.<sup>62</sup> To reinforce this point, the court cited the Supreme Court's statement that the "ability to conduct suspicionless searches of parolees . . . aids, rather than hinders, reintegration of parolees into productive society."<sup>63</sup> Although this statement specifically applies to parolees, the majority grouped probationers in as well.<sup>64</sup>

When comparing King's small privacy interest as a probationer to the substantial governmental interests, the court held that the search was reasonable.<sup>65</sup> The court emphasized that the state needed to have the ability to promote its interests through suspicionless searches of probationers and that such searches, when conducted pursuant to suspicionless search conditions, did not violate the Fourth Amendment.<sup>66</sup>

### *B. Judge Berzon's Dissent Exposes the Majority's Flaws*

Judge Berzon's dissent focused on the majority's failure to give proper weight to both the particular language in King's search condition and the Supreme Court's holding in *Samson* that probationers have a greater expectation of privacy than parolees.<sup>67</sup> In response to the majority's emphasis on King's acceptance of the probation condition, Judge Berzon contended that the majority did not place enough significance on the specific text of the condition.<sup>68</sup> Emphasizing the actual text of the probation search condition, Judge Berzon pointed out that King's probation agreement subjected him to searches "with or without probable cause" as opposed to "with or without cause" or "with or without a search warrant, warrant of arrest or reasonable cause."<sup>69</sup> Focusing on the text, Judge Berzon argued that the sentencing judge chose the specific phrasing for a reason, namely to require at least some type of suspicion, just not the high standard of probable cause.<sup>70</sup> Judge Berzon's reasoning implied

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<sup>61</sup> See *id.*

<sup>62</sup> See *id.* at 991.

<sup>63</sup> See *id.* (citing *Samson*, 547 U.S. at 854 ).

<sup>64</sup> See *id.* The majority simply states, "[t]hat statement is true of probationers as well," without further explanation to support the assertion. See *id.*

<sup>65</sup> See *id.* at 990–91.

<sup>66</sup> See *id.* at 991.

<sup>67</sup> See *id.* at 991–98 (Berzon, J., dissenting).

<sup>68</sup> See *id.* at 991–95.

<sup>69</sup> See *id.* at 991–92.

<sup>70</sup> See *id.* at 992–93. According to the Supreme Court, in order to have probable cause, the officer must know that the search presents "a 'fair probability' or 'substantial chance' of discovering evidence of criminal activity." See *id.* at 993 n.4 (quoting *Safford Unified Sch. Dist. No. 1 v. Redding*,

that the probation condition was not as unambiguous and clear as the majority found, and, thus, King's individual privacy expectation should not be diminished to the level it was.<sup>71</sup>

Judge Berzon also elaborated on the significance of King's status as a probationer rather than a parolee, and argued that King's privacy interest was more robust than the majority suggested.<sup>72</sup> In doing so, she referenced a concurring opinion in *U.S. v. Crawford*, which the *Samson* court cited approvingly.<sup>73</sup> For instance, the *Crawford* concurrence placed probationers and parolees on opposite ends of the spectrum in terms of their punishment and level of harmfulness.<sup>74</sup>

Using the *Crawford* concurrence as guidance, Judge Berzon explained that parolees have been sentenced to prison for felonies and released before the end of their prison term.<sup>75</sup> Furthermore, every person released from state prison in California is placed on parole, regardless of whether the inmate is capable of reintegration into productive society.<sup>76</sup> In contrast, probationers are those who may have been convicted of an infraction, misdemeanor, or felony and subsequently sentenced to probation.<sup>77</sup> Judge Berzon emphasized that while parolees automatically receive parole after serving time in prison, probationers are placed on probation upon judicial determination that the offender does not pose such a danger that substantial imprisonment is necessary.<sup>78</sup> Thus, when focusing on the fundamental distinction between parolee and probationer, Judge Berzon argued that the majority should have given greater weight to King's reasonable expectation of privacy because of his status as a probationer.<sup>79</sup>

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557 U.S. 364, 371 (2009)). Conversely, in searches based on reasonable suspicion, officers need only have "a moderate chance of finding evidence of wrongdoing." *Id.* (quoting *Safford*, 557 U.S. at 371). The dissent in *King* insisted that reasonable suspicion requires "at least a minimal level of objective justification." *See id.* (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000)).

<sup>71</sup> *See id.* at 995.

<sup>72</sup> *See id.* at 995–96.

<sup>73</sup> *See id.* (citing *United States v. Crawford*, 372 F.3d 1048, 1077 (9th Cir. 2004) (Kleinfeld, J., concurring)). Officers searched Crawford's residence, pursuant to a mandatory suspicionless search condition in his parole agreement, seeking his confession to a robbery that occurred two years earlier. *Crawford*, 372 F.3d at 1050–52. The court upheld Crawford's conviction, but remanded the case for resentencing. *Id.* at 1062.

<sup>74</sup> *See King V*, 711 F.3d at 995–96 (Berzon, J., dissenting) (citing *Crawford*, 372 F.3d at 1077 (Kleinfeld, J., concurring)). "[P]arolees are persons deemed to have acted more harmfully than anyone except those felons not released on parole. Probationers are close to the other end of the harmfulness scale." *Crawford*, 372 F.3d at 1077 (Kleinfeld, J., concurring).

<sup>75</sup> *See King V*, 711 F.3d at 996 (Berzon, J., dissenting).

<sup>76</sup> *See id.*

<sup>77</sup> *See id.*

<sup>78</sup> *See id.* (citing *Crawford*, 372 F.3d at 1077 (Kleinfeld, J., concurring)).

<sup>79</sup> *See id.* at 996–97.

Finally, Judge Berzon viewed the substantial governmental interests as a “general interest in crime control.”<sup>80</sup> Judge Berzon explained that the government always has a general interest in crime control, but this alone cannot justify suspicionless searches.<sup>81</sup> The purpose of the Fourth Amendment is to prevent routine intrusions on the fundamental right to privacy.<sup>82</sup> The majority’s use of broad governmental interests contradicts this purpose.<sup>83</sup> Finally, Judge Berzon noted that King’s status as a probationer, as opposed to a parolee, gave him a privacy interest that outweighed the governmental interests.<sup>84</sup>

### III. AN UNFAIR RESULT FOR PROBATIONERS

Despite the majority’s initial emphasis on the probationer-parolee distinction, the broad governmental interests used to outweigh King’s privacy interest essentially obliterated any difference between the two.<sup>85</sup> As a result, the outcome was the same as it would be if parolees and probationers were treated identically under the Fourth Amendment.<sup>86</sup> As the dissent highlights, there should be a substantial difference in the outcome of these cases, depending on the defendant’s status as a parolee or a probationer.<sup>87</sup>

Although the majority relied on *U.S. v. Knights* and *Samson v. California* for guidance, these cases were limited in application to King’s situation.<sup>88</sup> Unlike the situation in *Knights*, where the probationer was subject to a warrantless search because there was reasonable suspicion that he committed a crime, police did not have reasonable suspicion in King’s case.<sup>89</sup> Additionally, the notion that a parolee and probationer were not equal for Fourth Amendment purposes was an established principle in *Samson*, emphasizing the significant distinction between *Samson* and *King*.<sup>90</sup> This principle in *Samson* was so important that

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<sup>80</sup> See *id.* at 997 (quoting *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000)).

<sup>81</sup> See *id.*

<sup>82</sup> See *id.* at 996.

<sup>83</sup> See *id.*

<sup>84</sup> See *id.* at 997–98.

<sup>85</sup> See *United States v. King (King V)*, 711 F.3d 986, 988–91 (9th Cir.), *amended and superseded by* 736 F.3d 805, 806 (9th Cir. 2013) (denying rehearing en banc); *id.* at 995–98 (Berzon, J., dissenting).

<sup>86</sup> See *id.* at 991, 995–98 (Berzon, J., dissenting).

<sup>87</sup> See *id.* at 995–98.

<sup>88</sup> See *Samson v. California*, 547 U.S. 843, 846–57 (2006) (considering whether a California law that authorized searches of parolees “with or without a search warrant and with or without cause” violated the Fourth Amendment); *United States v. Knights*, 534 U.S. 112, 114–22 (2001) (holding that the warrantless search of the probationer’s residence, based on reasonable suspicion, was constitutional under the Fourth Amendment); *King V*, 711 F.3d at 988–91.

<sup>89</sup> See *Knights*, 534 U.S. at 114–22; *King V*, 711 F.3d at 988–91.

<sup>90</sup> See *Samson*, 547 U.S. at 846–57; *King V*, 711 F.3d at 989.

the Ninth Circuit went to great lengths to protect it by overruling *Baker* and related cases that contradicted it.<sup>91</sup>

Although the majority opinion began by recognizing this distinction, it only placed King's reasonable expectation of privacy on a small step above that of a parolee, despite the fact that there are significant differences between parolees and probationers.<sup>92</sup> The dissent elaborated on these differences by explaining that, in regard to their level of harmfulness to society, probationers are more similar to average citizens than parolees.<sup>93</sup> Unlike parolees, probationers may be first offender felons, or those convicted of an infraction or misdemeanor.<sup>94</sup> King was on probation for a crime wholly unrelated to firearms, let alone homicide, yet he was only given an individual privacy expectation slightly above a convicted criminal who may have served several years in prison and committed a much more serious crime.<sup>95</sup>

The majority did slightly acknowledge the probationer-parolee distinction in its analysis of King's individual privacy interests.<sup>96</sup> They seemed to cast off the distinction, however, when the state interests were examined.<sup>97</sup> The state interests discussed by the majority can apply to both parolees and probationers in different ways, yet the majority did not weigh those interests differently.<sup>98</sup> As Judge Berzon explained in her dissent, the majority's first state interest, protecting potential victims from recidivism, fails to account for the significant difference in recidivism rates between probationers and parolees.<sup>99</sup> Because there is a forty-three percent recidivism rate for probationers and a sixty-eight to seventy percent recidivism rate for parolees, this interest in preventing recidivism should be weighed more favorably towards probationers.<sup>100</sup> Addition-

<sup>91</sup> See *King V*, 711 F.3d at 989; *United States v. King (King IV)*, 687 F.3d 1189, 1189–90 (9th Cir. 2012) (en banc) (per curiam); *United States v. King (King III)*, 682 F.3d 779 (9th Cir. 2012) (ordering rehearing en banc); *United States v. King (King II)*, 672 F.3d 1133, 1139 (9th Cir.) (per curiam), *vacated*, 687 F.3d 1189 (9th Cir. 2012) (en banc) (per curiam).

<sup>92</sup> *King V*, 711 F.3d at 988–91; *id.* at 995–96 (Berzon, J., dissenting); *United States v. Crawford*, 372 F.3d 1048, 1076–77 (9th Cir. 2004) (Kleinfeld, J., concurring). Parolees are individuals who were sentenced to prison for felonies and released before the end of their prison terms. *Crawford*, 372 F.3d at 1077 (Kleinfeld, J., concurring). They have acted more harmfully than anyone except those felons still in prison. *Id.* In contrast, probationers are viewed as much less harmful and are usually minor offenders, misdemeanants, or, occasionally, first-time-offender felons. See *id.* Probationers and parolees are on “opposite sides of the punishment scale.” *Id.*

<sup>93</sup> See *King V*, 711 F.3d at 995–96 (Berzon, J., dissenting) (citing *Crawford*, 372 F.3d at 1077 (Kleinfeld, J., concurring)).

<sup>94</sup> See *id.* at 996.

<sup>95</sup> See *id.* at 990 (majority opinion); Appellant's Opening Brief, *supra* note 23, at 6.

<sup>96</sup> See *King V*, 711 F.3d at 989–91.

<sup>97</sup> See *id.* at 989–91; *id.* at 995–97 (Berzon, J., dissenting).

<sup>98</sup> See *id.* at 990–91 (majority opinion); *id.* at 995–96 (Berzon, J., dissenting).

<sup>99</sup> See *id.* at 997 (Berzon, J., dissenting).

<sup>100</sup> See *Samson*, 547 U.S. at 853–54; *Knights*, 534 U.S. at 120; *King V*, 711 F.3d at 996–97 (Berzon, J., dissenting).

ally, the statement from *Samson* that the majority used to support the third state interest, promoting a probationer's successful reintegration into society, referred specifically to parolees—not probationers.<sup>101</sup> The Supreme Court in *Samson* stated that a state's "ability to conduct suspicionless searches of parolees . . . aids, rather than hinders, the reintegration of parolees into productive society."<sup>102</sup> The majority grouped probationers into this statement without any further analysis.<sup>103</sup>

When taken as a whole, the state interests can be seen as a general interest in crime prevention.<sup>104</sup> This broad interest, however, overrides any distinction between probationers and parolees, despite the fact that both the Supreme Court and the Ninth Circuit specifically found the distinction important enough to protect.<sup>105</sup> In essence, these three interests used by the majority will outweigh any individual privacy interest, whether or not the individual is a probationer or a parolee—effectively making the probationer-parolee distinction immaterial.<sup>106</sup>

Although he was a probationer subject to a suspicionless search, King was essentially treated the same as a parolee when the court considered the state's interest in preventing crime.<sup>107</sup> As a result, despite King's innocence regarding the homicide that triggered the original search, he still faces serious jail time because police engaged in a suspicionless search of his residence.<sup>108</sup> As explained previously, a probationer may be convicted of a misdemeanor, infraction, or a felony.<sup>109</sup> Following this case, someone on probation for a simple infraction will have the same expectation of privacy as a parolee guilty of a serious felony, leading to the exact scenario the Ninth Circuit was trying to avoid when it overruled *Baker*.<sup>110</sup>

## CONCLUSION

In deciding whether a suspicionless search, conducted pursuant to a condition in a probation agreement, violated the Fourth Amendment, a majority of the Ninth Circuit used a balancing test in which it weighed the intrusion on the individual's privacy interest against the state's governmental interests. In doing

<sup>101</sup> See *Samson*, 547 U.S. at 854; *King V*, 711 F.3d at 991.

<sup>102</sup> *Samson*, 547 U.S. at 854; *King V*, 711 F.3d at 991.

<sup>103</sup> See *King V*, 711 F.3d at 991.

<sup>104</sup> See *id.* at 997 (Berzon, J., dissenting).

<sup>105</sup> See *Samson*, 547 U.S. at 850; *King IV*, 687 F.3d at 1189–90.

<sup>106</sup> See *King V*, 711 F.3d at 990–91; *id.* at 995–97 (Berzon, J., dissenting).

<sup>107</sup> See *id.* at 992, 995–97 (Berzon, J., dissenting).

<sup>108</sup> See *id.* at 987, 991 (majority opinion); Appellant's Opening Brief, *supra* note 23, at 6.

<sup>109</sup> See *King V*, 711 F.3d at 996 (Berzon, J., dissenting) (citing *Crawford*, 372 F.3d at 1077 (Kleinfeld, J., concurring)).

<sup>110</sup> See *id.* at 988 (majority opinion); *King IV*, 687 F.3d at 1189–90; *King III*, 682 F.3d at 779; *King II*, 672 F.3d at 1139.

so, the court found only a slight intrusion of privacy on King's part that was outweighed by three substantial governmental interests in preventing crime. The majority opinion failed to give significance to the distinction between probationers and parolees for Fourth Amendment purposes—a distinction that the Supreme Court explicitly highlighted in *Samson v. California*. As a result, King, a probationer, was treated as if he were a parolee under the Fourth Amendment, leading to a severely unjust result. Although King was no longer a suspect in the original crime and his probation was wholly unrelated to firearms or homicide, he will face serious jail time because the Ninth Circuit treated him as a parolee, rather than a probationer.