

No.: _____

IN THE

SUPREME COURT OF THE UNITED STATES

THOMAS EDWARD SPERBER, JR., Petitioner

vs.

GREGORY J. SIMATIC, DEPUTY ATTORNEY GENERAL, ^{et al}

ON PETITION FOR A WRIT OF CERTIORI TO
THE PENNSYLVANIA SUPREME COURT

PETITION FOR WRIT OF CERTIORI

THOMAS EDWARD SPERBER, JR.

Prison Number EX-1105

S.C.I. - Greene

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Waynesburg, PA, 15370

Dated: October 31, 2018

Thomas Sperber, Jr.
Petitioner / pro se

QUESTION(S) PRESENTED

DOES THE ACT OF ACCESSING ANY INFORMATION FROM A CELLULAR PHONE WITHOUT A WARRANT CONTRAVENE THIS COURT'S DECISION, THE UNITED STATES SUPREME COURT, IN RILEY V. CALIFORNIA AND UNITED STATES V. WURIE?

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TABLE OF AUTHORITIES CITED

FEDERAL CASES

PAGE NUMBER

Alabama v. White, 496 U.S. 325, 326-327 (1990)	16
Arizona v. Hicks, 480 U.S. 321, 325, 107 S. Ct. 1149, 94 L.Ed. 2d 347 (1987)	20
Florida v. Jardines, 569 U.S. 1, 6, 133 S. Ct. 1409, 185 L.Ed. 2d 495 (2013)	20
Murray v. United States, 487 U.S. 533, 536 (1988)	14
Nix v. Williams, 467 U.S. 431, 448, 108 {179 A.3d 490} S. Ct. 2501, 81 L.Ed. 2d 377 (1984)	21
Packingham v. North Carolina, 2017 BL 208397 U.S. NO. 15-1194 (6/19/17)	22
Riley v. California, 134 S. Ct. 2473 (2014)	19
Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392, 40 S. Ct. 182, 64 L.Ed. 319, T.D. 2984, 17 Ohio L. Rep. 514 (1926)	21
United States v. Baker, 221 F.3d 438, 449 (3d Cir. 2000)	15
United States v. Conley, 859 F. Supp. 847 851 (W.D. Pa. 1994)	14
United States v. Crews, 445 U.S. 463, 471, 100 S. Ct 1244, 63 L.Ed. 2d, 537 (1980)	21
United States v. Jones, 565 U.S. 400, 406 n.3, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012)	20
United States v. Rivera, 727 F. Supp. 2d 367, 376 (E.D.	

Pa, 2010)	16
United States v. Wurle, 134, S.Ct. 2473, 189 L.Ed 2d 430 (2014).	19
Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 4107 L.Ed. 2d 441 (1963) 21, 22	

STATE CASES

Commonwealth v. Altadonna, 817 A.2d 1145, 1152-53 (Pa. Super. 2003)	14
Commonwealth v. Brooks, 468 Pa. 547, 555 (1976)	16
Commonwealth v. Colon, 31 A.3d 309, 315 (Pa. Super. 2011)	15
Commonwealth v. Goodwin, 750 A.2d 795 (Pa. 2000)	17
Commonwealth v. Hunter, 963 A.2d 545, 551-52 (Pa. Super. 2008)	15
In re J.E., 937 A.2d 421 (Pa. 2007)	17
Commonwealth v. Kue, 547 Pa. 668, 671 (1997)	15
Commonwealth v. Shabazz, 166 A.3d 278, 288 (Pa. 2017) 20, 22	
Commonwealth v. Wimbush, 561 Pa. 368, 379-80 (2000)	15, 17

STATUTES

41 Pa. Cons. Stat. Ann. §6153.	15
--------------------------------	----

UNITED STATES CONSTITUTION

U.S. CONST., AMEND. IV	16
------------------------	----

PENNSYLVANIA CONSTITUTION

PA. CONST., ART. I, § 8.	16
--------------------------	----

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT.	13
CONCLUSION	23

INDEX TO APPENDICES

APPENDIX A Decision of State Supreme Court Denying Review	
APPENDIX B Decision of State Superior Court Denying Review	
En Banc Reargument/Rehearing	
APPENDIX C Decision of State Superior Court Denying Review	
APPENDIX D Decision of the Trial Court's Pa.R. A.P.	
1925(a) Denying Review	

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is unpublished. A copy of the order is attached hereto.

The opinion of the Superior Court appears at Appendix B to the petition and is reported at 707 WDA 2016, December 12, 2017. On December 26, 2017 Petitioner filed an Application for Panel Reconsideration or En Banc Review in the Pennsylvania Superior Court. The application was denied on February 20, 2018. A copy of the order denying Petitioner's request is attached hereto as Appendix C.

The opinion of the Trial Court's Pa.R.A.P. 1925(a)

Opinion is attached and marked as Appendix D.

JURISDICTION

For cases from State Courts:

The date on which the highest state court decided my case was on August 15, 2018. A copy of the order is attached as Appendix A.

The jurisdiction of this court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following statutory and constitutional provisions are involved in this case.

U.S. CONST., AMEND IV

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 seized.

PA. CONST. ART. 1, § 8

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed by the affiant.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY:

Thomas Edward Sperber, Jr., ("petitioner") was charged by Criminal Information at CC 2016-02947 with the following: Counts 1 through 11 - Possession of Child Pornography (F2), 18 Pa.C.S. § 6312(d), and Count 12 - Criminal Use of Communication Facility (F3), 18 Pa.C.S. § 7512(a).

On August 21, 2015, Petitioner, through Richard Romanko, Assistant Public Defender ("trial counsel"), filed a Motion to Suppress. On September 1, 2015, Petitioner proceeded to a Suppression hearing before the Honorable Donna Jo McDaniel ("trial court"). Following the reception of evidence, the trial court granted trial counsel's request to submit briefs on the Motion to Suppress.

On September 10, 2015, the Commonwealth filed a Brief in Opposition to Defendant's Motion to Suppress. On October 1, 2015, Mr. Sperber, through trial counsel, filed a Brief in Support of the Motion to Suppress.

The parties reconvened on October 19, 2015, at which time the trial court denied Petitioner's Motion to Suppress. The trial court failed to enter on the record a statement of findings of fact and conclusions of law as to whether the challenged evidence was obtained in violation of Petitioner's rights, as required by Pa. R. Crim. P. 581(I). Petitioner immediately proceeded to a stipulated non-jury trial, and the trial court

found Petitioner guilty as charged relative to Counts 2 through 12. Count 1 was withdrawn.

On April 14, 2016, Petitioner proceeded to sentencing. At Counts 2 through 6, the trial court imposed five (5) consecutive five (5) to 10-year terms of incarceration, the statutory maximum penalty at each count. At Counts 7 through 12, the trial court imposed no further penalty. In the aggregate, the trial court imposed a sentence of 25 to 50 years incarceration. No post-sentence motions were filed.

On May 13, 2016, Petitioner, through Stephanie M. Noel, Assistant Public Defender ("Appellate Counsel"), filed a timely Notice of Appeal to the Superior Court of Pennsylvania.

On July 14, 2016, Petitioner, through Appellate Counsel, timely filed a Concise Statement of Errors Complained of on Appeal. The trial court filed its Opinion pursuant to Pa.R.A.P. 1925(a) on September 27, 2016.

On April 6, 2017, Petitioner, through Appellate Counsel, timely filed his Brief for Appellant. The Commonwealth filed a responsive brief on June 7, 2017. Petitioner's case proceeded to oral argument before the Superior Court on July 18, 2017.

On December 12, 2017, the Superior Court issued a published Opinion affirming Petitioner's judgement of sentence.

On December 26, 2017, Petitioner, through Appellate Counsel, filed an Application for Panel Reconsideration or En Banc Review in the Superior Court. The Superior Court

denied Petitioner's Application on February 20, 2018.

On March 22, 2018, Petitioner through Appellate Counsel filed a timely Petition for Allowance of Appeal in the Pennsylvania Supreme Court.

B. FACTUAL HISTORY:

At the suppression hearing held on September 1, 2015, the Commonwealth presented the testimony of one witness,

Pennsylvania State parole agent Thomas Wolf ("Wolfe").

Notes of Testimony, Suppression Hearing, 9/1/2015 ("SH"),

3. Wolfe testified that, in December of 2013, Petitioner was paroled from prison and received an approved home plan in Wolfe's area of supervision. SH 4. Wolfe testified that before an individual is released on Parole, he or she must sign an acknowledgement of the terms and conditions of parole. SH 5. One condition of Petitioner's parole was consent to search his property. SH 5-6. Petitioner agreed to the following provision:

I expressly consent to search of my person, property, and residence without a warrant by agents of the Pennsylvania Board of Probation and Parole. Any items in the possession of which constitutes a violation of parole/reparole shall be subject to seizure and may be used as evidence in the parole revocation process.

SH 6. Petitioner also signed a document acknowledging the following condition:

You must provide probation/parole supervision staff unlimited access to any computer or other multimedia device in your possession, including but not limited to cellular phones, blackberries, et cetera, and allow parole supervision staff to search all programs and records maintained on any computer or other such device in your possession.

SH 7. The terms and conditions of petitioner's parole prohibited him from having a cell phone with internet access. SH 8.

On August 27, 2014, Wolf "got a call from Pennsylvania State Police Megan's Law Division that they got an [anonymous] tip that [Petitioner - Mr. Sperber] had access to social networking sites in a smart phone. SH 8-9, 15. Specifically, Wolfe was provided with "two user names on the internet" allegedly used by Petitioner on "two social network sites." SH 16. Wolfe also testified that "several offenders in Petitioner's treatment group" informed [Wolfe] through the months that Petitioner had a smart phone." SH 9. Wolf further testified

"A specific timeframe within which the Pennsylvania State Police received the tip was not made part of the record, nor was a specific timeframe within which Petitioner alleged violation of parole was reported to have been observed by the tipster. SH 15, 17.

that he had previously acted on one of the tips received from one of the "offenders" and searched Petitioner's residence. SH 20 ("Prior to that we also searched his residence for one of the tips we received, kind of knew he had a cell phone, just didn't know where he was hiding it.").

On the same day that Wolfe learned of the anonymous tip received by the Pennsylvania State Police - August 27, 2014 - Petitioner reported to the parole office to satisfy a scheduled, routine reporting requirement. SH 10, 15. Prior to Petitioner's arrival at the parole office, Wolfe attempted to corroborate the anonymous tip received by the Pennsylvania State Police by visiting the social networking sites in question. SH 16. Specifically, Wolfe "actually went on the internet to see whether or not [he] could ascertain if it was Petitioner or not." SH 16. However, Wolfe's attempt at corroboration did not reveal any evidence linking those two websites to Petitioner. SH 16.

On the day in question, Petitioner drove himself to the parole

^a The allegation that Wolfe received information from other offenders concerning Petitioner's alleged possession of a smart phone was not memorialized in any reports generated relative to the incident which occurred on August 27, 2014, or the Affidavit of Probable Cause filed in support of Petitioner's arrest in the instant case. SH 14. Moreover, the timeframe in which Wolfe allegedly received information, from other offenders, how many other offenders allegedly provided information, their identities, or the basis for their knowledge concerning Petitioner's alleged possession of a smart phone and his activities with it, was not made part of the suppression record. It is also unclear from the record whether one of the other "offenders" is the same tipster who made an anonymous report to the Pennsylvania State Police.

office. SH 10. When he arrived, Wolfe immediately ushered him to a private interview room and began questioning him about the tip received by the Pennsylvania State Police. SH 10, 18, 19. Wolfe also instructed Petitioner to empty his pockets. SH 10. Petitioner submitted to Wolfe's request to empty his pockets, which contained car keys and a "regular cell phone." SH 10. Wolfe asked Petitioner for the car keys and whether he "had anything to hide in his car." SH 10. Petitioner replied that he had "nothing to hide" and "nothing in his car" and handed Wolfe the keys. SH 11.

On direct examination, Wolfe testified that Petitioner gave Wolfe permission to search his car. SH 11. On cross-examination, however, Wolfe testified that he, in fact, obtained permission to search the car. SH 17.

Wolfe did not participate in the search of Petitioner's car; rather, the car was searched by Supervisor Williams and Agent Hyrokwnain.³ SH 11, 17. Petitioner was detained in the interview room while the search was conducted. SH 18. Neither Wolfe nor the individuals who actually searched Petitioner's car obtained written consent from Petitioner to search it. SH 18. They also did not obtain a search warrant to do so. SH 18.

³ Neither Supervisor Williams's nor Agent Hyrokwnain's first names were made part of the suppression record. Neither testified at the suppression hearing.

During the search of Petitioner's vehicle, a second cell

phone was discovered - a "smart" phone. SH 11, Wolfe

testified that he could tell just from looking at the phone that it had internet capabilities. SH 11, 12. Once the

smart phone was recovered, Wolfe, without obtaining a warrant or consent from Petitioner, began reviewing the contents of the smart phone and, while doing so,

noticed an "app" called Key Safe - a lock application

on the phone that "locks what's underneath" it. SH 12.

Wolfe ordered Petitioner to provide the password to the

Key Safe Application. SH 12. Wolfe testified that Petitioner

"obliged and gave us the password." SH 12.

Petitioner, however, did not provide consent to Wolfe

to view the contents of the phone to begin with.

SH 12-13. Wolfe, in fact, denied Petitioner's consent

to view the contents of the smart phone unnecessary.

Specifically, the following exchange took place on

direct examination:

PROSECUTOR. So you asked [Mr. Sperber]

for the password, and he gave you permission

for the password?

WOLFE. Yes, sir.

Q. Okay. Did he give you permission to view the phone?

A. We didn't have to ask him permission to view the phone at that time.

SH 12-13. Petitioner never consented, either verbally or in writing, to Wolfe's perusal of the contents of the phone and neither Wolfe nor any of the other parole agents ever obtained a warrant to do so. SH 18.

Wolfe entered the password into the phone and, after doing so, observed what he presumed to be "images of young minor females." SH 12. Wolfe filed a confiscation report, took custody of the phone, and turned it over to the Attorney General's office for further investigation. by the Attorney General's office were received that a search warrant was requested relative to the phone. SH 19-20.

REASONS FOR GRANTING THE PETITION

I. DOES THE ACT OF ACCESSING ANY INFORMATION FROM A CELLULAR PHONE WITHOUT A WARRANT CONTRAVENE THIS COURT'S DECISION (THE UNITED STATES SUPREME COURT) IN RILEY V. CALIFORNIA AND UNITED STATES V. WURIE?

Petitioner's rights under both the United States and the Pennsylvania Constitutions were violated when Pennsylvania State Parole Agent Thomas Wolfe ("Wolfe"), without obtaining a warrant or consent from Petitioner, began reviewing the contents of his cellular phone ("smart phone"). Agent Wolf relied on non reasonable suspicion to search Petitioner and his vehicle and questioned Petitioner in regards to an anonymous tip from the Megarr's Law hotline, commanding petitioner to empty out his pockets during his routine reporting meeting. Suppression hearing at 10. After the search bared no fruit for a smart phone, other agents searched his car without his consent, while Petitioner stayed in the interview room with Agent Wolfe.

Subsequently a "Blackberry Smart Phone" was recovered from Petitioner's vehicle. The cellphone found during the search of Petitioner's vehicle was siezed. First, Agent Wolfe conducted a warrantless search of the cellphone during which he determined that social media sites were installed.

Affidavit of Probable Cause at 3. An additional three warrantless searches occurred. Next, Supervisory Special Agent John O'Brien searched the seized phone, without a warrant, and generated a summary of his findings, Affidavit for Search Warrant at 1. Finally, Special Agent Chelsy Santoro conducted another warrantless search of the cellphone. Affidavit of Probable Cause at 3. Petitioner avers that all of the warrantless searches of the seized cellphone should have been suppressed as evidence derivative of the primary illegal search of Petitioner's vehicle, Murray v. United States, 487 U.S. 533, 536-37 (1988). The very existence of the cellphone itself was the product of the illegal search, so any evidence discovered during the subsequent searches of that phone must be derivative of that illegality. "The exclusionary rule requires the suppression at trial of evidence obtained directly or indirectly through government violations of a defendant's constitutional rights." United States v. Conley, 859 F. Supp. 847, 851 (W.D. Pa. 1994). All Agents were required to obtain a search warrant prior to searching the cellphone seized from Petitioner's vehicle due to the fact that they were acting as police officers investigating an alleged new crime. See Commonwealth v. Altadonna, 817 A.2d 1145, 1152-53 (Pa. Super. 2003).

Petitioner was a law abiding citizen in accordance to his Parole conditions - no type of any suspicion was

displayed by the petitioner. A parolee cannot be subjected to an unreasonable search, even if s/he has signed a consent to search form. United States v. Baker, 201 F.3d 438, 449 (3d Cir. 2000), as amended (Sept. 21, 2000). "The search

of a parolee is only reasonable, even where the parolee has signed a waiver, where the totality of the circumstances demonstrate that: (1) the parole officer had reasonable

suspicion to believe that the parolee committed a parole violation, and (2) the search was reasonably related to the duty of the parole officer." Commonwealth v. Colon, 31 A.3d 309, 315 (Pa. Super. 2011) (quoting Commonwealth v. Hunter, 963

A.2d 545, 551-52 (Pa. Super. 2008)). 61 Pa. Cons. Stat. Ann. §6153.

An anonymous tip alone cannot form the basis for reasonable suspicion. Commonwealth v. Wimbush, 561 Pa. 368, 379-80 (2000). Reasonable suspicion must be satisfied by evidence independent of the anonymous tip in order to act on it.

Commonwealth v. Kue, 547 Pa. 668, 671 (1997). Agent Wolfe was unable to corroborate the anonymous tip. Suppression hearing at 14. Agent Wolfe alleged that he heard from other parolees that petitioner had a "smart phone" suppression

hearing at 9-10. This information was not included in the Affidavit of Probable Cause. Affidavit of Probable Cause at 3. The contents of these comments and the identity of the

"offenders" remain unknown. These new anonymous tips

were never corroborated. Again, an uncorroborated, anonymous tip and lacks any indicia of reliability. Wimbush at 379-380. We have no evidence as to their basis of knowledge. Commonwealth v. Brooks, 468 Pa. 547, 555 (1976). "Pennsylvania law does not permit parole officers to poke around in parolees' private spaces because they are curious or because they believe that parolees may be hiding something." United States v. Rivera, 727 F. Supp. 2d 367, 376 (E.D. Pa. 2010)

Thus, the parole agents did not have reasonable suspicion to search Petitioner or his property. The results of the search of Petitioner's vehicle, including the cellular phone and all evidence derivative of it, must be suppressed as evidence obtained through the violation of his constitutional right to be free from unreasonable searches. Pa. Const. Art. I, § 8, U.S. Const. Amend. IV.

More importantly, the State Appellate Court's decision defies this Court's holding in Alabama v. White, 496 U.S. 325, 326-327 (1990), which requires an anonymous tip to be corroborated by independent police investigation - not more tips similarly lacking indicia of reliability."

⁴ It is imperative to recognize the Honorable Mary James Bowes sharply departed from the majority opinion's conclusion that reasonable suspicion existed to support any search in the instant case. She was not convinced by her distinguished colleagues that the anonymous tipster's information was corroborated rather finding that it was discredited.

Pennsylvania Courts have used *White* and its progeny to decide similar cases involving the use of anonymous tips. See e.g., *Commonwealth v. Goodwin*, 750 A.2d 795 (Pa. 2000); *Commonwealth v. Wimbush*, 750 A.2d 807 (Pa. 2000); *In re J.E.*, 937 A.2d 421 (Pa. 2007). Thus under both federal and state law, anonymous tips that fail to demonstrate the informant's basis of knowledge or veracity are insufficient to generate reasonable suspicion. *White*, supra. Such barebones tips must be independently corroborated by law enforcement. The state court utterly disregarded this critical requirement.

Petitioner believes that the Pennsylvania Appellate Courts holding conflicts with this Honorable Court's decision in *Riley*/ *Warie*, where a search of a cellphone without a warrant violates both the United States Constitution and Pennsylvania Constitutions.

This court held that although a warrantless seizure of the cell phones from *Riley* and *Warie* was permissible as the result of a search incident to arrest, the subsequent searches of their phone was not, ("AS HERE"). Instead, this Court held that to lawfully search a cellphone, police must first obtain a warrant. Id at 2485, 2493. This Court explained that although cell phones contain information that is, in substance, the same as physical items that are permissibly searched incident to an individual's arrest pursuant to Fourth Amendment jurisprudence (e.g. an address book, a wallet or a

purse), the quantity and quality of data can be stored on cell phones place them in an entirely different class for purposes of a search. *Id.* at 2488 ("That is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together.") This *Riley* *Wurie* court reasoned that the privacy concerns related to the search of a cell phone far exceed any such concerns related to the search of these other physical items, as cell phones "place vast quantities of personal information literally in the hands of individuals," all in one place. *Id.* at 2485, 2489 (referring to the name "cell phones" as a "misleading shorthand," as they "could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers"). The variety of information that can be stored, the details about a person's life that the information can convey, and the length of time the information can remain catalogued in a cell phone, which are carried by the great majority of people, led this Court to conclude that data stored on a cell phone is entirely distinguishable from any physical evidence counterpart. *Id.* at 2489-90.

Concerned that "an analogue test would launch courts on a difficult line-drawing expedition to determine which digital files are comparable to physical records," this Court precluded a case-

by-case approach to determining whether the search of a cell phone required a warrant. *Id.* Instead, this Court held that in all cases, "even when a cell phone is seized incident to arrest," the search of a cell phone requires a warrant. *Id.* In short, this high Court summarized its holding with a simple rule: when police want to search a cell phone, "get a warrant." *Id.* at 2495. This Court was unanimous on this point. In the lone minority opinion authored in the case, Justice Alito stated, "The Court strikes [the balance between law enforcement and privacy interests] in favor of privacy interests with respect to all cell phones and all information found in them," and agreed that there is no "workable alternative" to this blanket holding. *Id.* at 2497 (Alito, J., concurring) (emphasis added).

Riley/Wurie could not be clearer: in order to access any information on a cell phone, police must first obtain a warrant. This Court held that in the absence of an exception, any search of a cell phone requires a warrant. This is because, like one's home, an individual's expectation of privacy is in the cell phone itself, not in each and every piece of information stored therein. Consequently, a warrant is generally required for law enforcement to search a cell phone. See *Riley/Wurie*, 134 S. Ct. at 2491 ("[A] cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital

form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form - unless the phone is [in the house]." (emphasis original).

A search occurs when police intrude upon a constitutionally protected area without the individual's explicit or implicit permission. Florida v. Jardines, 569 U.S. 1, 6, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013) (citing United States v. Jones, 565 U.S. 400, 406 n.3, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012)); Commonwealth v. Shabazz, 166 A.3d 278, 288 (Pa. 2017). To constitute such an intrusion, the action need not uncover something "of great personal value"; even a small, seemingly insignificant act of information gathering by police in a constitutionally protected area is a search. See Arizona v. Hicks, 480 U.S. 321, 325, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987). In Hicks, for example, this Court held that the act by police of moving stereo equipment to view its serial number was a search under the Fourth Amendment: "A search is a search, even if it happens to disclose nothing but the bottom of a turntable." *Id.* Any actions taken unrelated to an otherwise authorized intrusion that result in exposing "concealed portions" of an area in which a person has a protected privacy interest is, for constitutional purposes, a search. *Id.*

A review of the record in petitioner's case reveals that his smart phone, a blackberry cellular phone, was searched without

a search warrant three times. The rule created by *Riley/White* is exceedingly simple; if a member of law enforcement wishes to obtain information from a cell phone, get a warrant. The failure to do so ["AS HERE"] violated petitioner's rights under the Fourth Amendment to the United States Constitution. Petitioner avers that any kind of evidence obtained by police through an unlawful search may not be used in any respect, including as evidence at trial against the subject of the search. *Wong Sun*, 371 U.S. at 484-85; *Silverthorne Lumber Co. v. United States*, 351 U.S. 385, 392, 40 S. Ct. 182, 64 L. Ed. 319, T.O. 8984, 17 Chso L. Rep. 514 (1960). Such evidence may only be used against the defendant "[k]nowledge of [the evidence] is gained from an independent source," *Silverthorne Lumber Co.*, 351 U.S. at 392, or "the evidence in question would inevitably have been discovered without reference to the police error or misconduct." *Nix v. Williams*, 467 U.S. 431, 448, 104 L. Ed. 434, 440 S. Ct. 950, 81 L. Ed. 2d 377 (1984). The Commonwealth could not and did not, via burden of proof, establish by a preponderance of the evidence that the evidence illegally obtained would have ultimately or inevitably been discovered by legal means. The test to determine whether derivative evidence constitutes the fruit of an illegal search is not simply whether police would not have discovered information but for the search, thus removing the taint of the original illegality. *Wong Sun*, 371 U.S. at 487-88; *United States v. Crews*, 445 U.S. 463, 471, 100

S. Ct. 1244, 63 L. Ed 2d 537 (1980). To determine whether evidence must be excluded as the fruit of an unlawful search, courts must consider "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality." Wong Sun, 371 U.S. at 488 (quoting Maguire, Evidence of Guilt, 221 (1959)); Shabazz, 166 A.3d at 289 ("The inquiry simply is whether the evidence was obtained via exploitation of the initial illegality."); see also Nix, 467 U.S. at 443 ("the prosecution is not to be put in a better position than it would have been in if no illegality had transpired" but "the derivative evidence analysis ensures that the prosecution is not put in a worse position simply because of some earlier police error or misconduct"). "In applying this test, a court must evaluate whether the illegal search or any leads gained from the search tended to significantly direct the government toward discovery of the specific evidence being challenged." Searches and Seizures, Arrest and Confessions § 3:4.

Petitioner avers that there is nothing in the record that supports a conclusion that the Parole Agents ("ACTING AS POLICE") had an independent source to identify Petitioner with the possession of a smartphone. As such Petitioner believes he was in accordance with this Court's decision in Packingham v. North Carolina, 2017 BL 208397, U.S. No. 15-1194, 6/19/17, a law abiding citizen in an attempt to

Keep up with modern times of the United States of America,
in an attempt to be a successful civilized American
citizen.

CONCLUSION

For the reasons that follow Petitioner prays that his
petition for a writ of certiorari should be granted.

Respectfully Submitted,

Thomas Sperber, Jr.

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Date: October 31st, 2018