No. _____

In the
Supreme Court of the United States

STATE OF OHIO,
Petitioner,

v.

DANIEL DEUBLE,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals to the State of Ohio, Eighth Appellate District

PETITION FOR WRIT OF CERTIORARI

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June 21, 2021

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QUESTIONS PRESENTED

1. Whether probable cause existed under the Fourth Amendment to the United States Constitution to detain a person suspected of soliciting sexual activity from a law enforcement officer posing as a minor through a social media application where the person's identity is corroborated through the person's actions. Here the suspect agreed to meet the law enforcement officer posing as a minor for sexual activity, and was the only person observed at the agreed meeting location using his cell phone as the law enforcement officer posing as the minor sent communications to the suspect through the social media application.

2. Whether a phone is searched for purposes of the Fourth Amendment of the United States Constitution where the phone's content was not affirmatively accessed by law enforcement officers?

STATEMENT OF RELATED PROCEEDINGS

The directly related proceedings are as follows.

- In the Cuyahoga County Court of Common Pleas, a decision was entered denying Respondent's motion to suppress evidence under the Fourth Amendment of the United States Supreme Court on March 28, 2019 in *State v. Deuble*, Cuyahoga C.P. No. CR-18-632279-A. Respondent's plea of no contest was entered on April 4, 2019. Respondent's sentence was entered on May 29, 2019.
- In the Ohio Court of Appeals, Eighth District for following judgments were entered:
  - A decision reversing the judgment of the Cuyahoga County Court of Common Pleas' denial of the motion to suppress on August 6, 2020 in *State v. Deuble*, 8th Dist. Cuyahoga No. 108814.
  - A decision denying Petitioner's motion to reconsider on September 22, 2020 in *State v. Deuble, 8th Dist*. Cuyahoga No. 108814.
- In the Supreme Court of Ohio, a judgment was entered denying the State of Ohio's request for discretionary review on January 22, 2021 in *State v. Deuble*, S. Ct. No. 2020-1351.

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Petitioner State of Ohio respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of Ohio, Eighth District.

OPINIONS BELOW

The Supreme Court of Ohio's order declining jurisdiction is reproduced at Pet. App. 1. The judgment of the Court of Common Pleas, Cuyahoga County, Ohio, denying Respondent's motion to suppress is reproduced at Pet. App. 2. The opinion of the Ohio Court of Appeals, Eighth District, *State v. Deuble,* No. 108814, 2020 Ohio App. LEXIS 2863, 2020 WL 4532961 (Ohio Ct. App. Aug. 6, 2020), reversing the judgment of the Court of Common Pleas, Cuyahoga County, Ohio is reproduced at Pet. App. 16. The judgment of the Ohio Court of Appeals, Eighth District, denying reconsideration is reproduced at Pet. App. 35.

JURISDICTIONAL STATEMENT

The Ohio Court of Appeals, Eighth District reversed the order denying Respondent's motion to suppress. Pet. App. 16. The Ohio Court of Appeals, Eighth District denied a timely application for reconsideration on September 22, 2020. Pet. App. 35.

The Supreme Court of Ohio denied a timely petition for discretionary review on January 22, 2021. Pet. App. 1. On March 19, 2020, this Court entered a standing order that extended the time to petition for a writ of certiorari to June 21, 2021. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides:

> 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 places to be searched, and the persons or things to be seized.

U.S. Cost. Amend. IV.

The Fourth Amendment to the United States Constitution is made applicable to the states through the Fourteenth Amendment to the United States Constitution which states in part:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

U.S. Cost. Amend. XIV, §1.

STATEMENT OF THE CASE

A. The Indictment

An Ohio grand jury indicted Respondent in a four count indictment with importuning, disseminating matter harmful to juveniles, attempted unlawful sexual conduct with a minor, and possession of criminal tools. Pet. App. 3.

Ohio Rev. Code §2907.07(D)(2) the section of the Ohio Revised Code defines the felony offense of importuning and states:

> No person shall solicit another by means of a telecommunications devices [...] to engage in sexual activity with the offender when the offender is eighteen years of age or older and [...]

The other person is a law enforcement officer posing as a person who is thirteen years of age or older but less than sixteen years of age, the offender believes that the other person is thirteen years of age or older but less than sixteen years of age or is reckless in that regard, and the offender is four or more years older than the age the law enforcement officer assumes in posing as the person who is thirteen years of age or older but less than sixteen years of age.

Ohio Rev. Code §2907.31(A)(1) defines the felony offense of disseminating matters harmful to juveniles and states:

> No person, with knowledge of its character or content, shall recklessly do any of the following:

> Directly sell, deliver, furnish, disseminate, provide, exhibit, rent, or present to a juvenile, a group of juveniles, a law enforcement officer posing as a juvenile, or a group of law enforcement officers posing as juveniles any material or performance that is obscene or harmful to juveniles[.]

The offense of attempted unlawful sexual conduct with a minor, defined by Ohio Rev. Code §2923.02 and 2907.04(A) criminalizes the attempt by a person older than eighteen years old to engage in sexual conduct with a person older than thirteen years old but less than sixteen years old. The offense of possession of criminal tools, defined by Ohio Rev. Code §2923.24(A) criminalizes the possession of an item with the purpose to use it criminally. All offenses charged were felonies.

B. The Suppression Hearing

Respondent moved to suppress evidence which the trial court denied. Pet. App 4. Specifically, Respondent sought to suppress from evidence at trial all of the evidence, including his statement and the contents of his cell phone, gathered by investigators. Pet. App. 6. Respondent asserted that he was arrested without probable cause and that all of the evidence gathered then should be excluded under his Fourth Amendment right against unreasonable seizure. *Id.*

The Court of Common Pleas, Cuyahoga County, Ohio found these facts after hearing testimony at the suppression hearing:

An undercover officer with the Ohio Internet Crimes Against Children Task Force ("ICAC") was

impersonating a 15-year old named "Bella Jane" on a social media application known as Whisper. Pet. App. 4. Whisper is a social media app that is an anonymous messaging board where users can post anything and other users can respond to those posts. *Id.* The undercover officer posted a profile picture showing a girl on a pier from behind and the comment "bored!!!!!!" *Id.* The conversation was not directed at any person in particular but was made visible to users in the same geographical area, here Northeast Ohio. *Id.*

Respondent, under the user name EY, initiated a chat with "Bella Jane" by responding to her initial post with the message "Like hung white guys." *Id.* According to Respondent's profile, which was visible to "Bella Jane", he was 18-20 years old and from Summit County, Ohio (which is next to the south of Cuyahoga County, Ohio). *Id.* "Bella Jane" replied to Respondent saying, "LOL what.", to which Respondent crudely asked whether "Bella Jane" was partial to well-endowed Caucasian men. *Id.* As the conversation continued, the undercover officer represented "Bella Jane" as being 15 years old, through the message, "I mean I'm 15 I've never seen one before." Pet. App. 5. Respondent continued the chat by sending more than one picture of a turgid phallus and proposed to meet "Bella Jane" for sexual conduct. *Id.* Respondent later changed his profile age to 21-25 years old. *Id.*

The Ohio Court of Appeals judgment would expand on the details of this conversation by explaining that Respondent sent "Bella Jane" a message that read: "I'd like to stretch your tight little virgin pussy wide," and sent "Bella Jane" two photographs of his erect penis,

one next to a Rubik's cube and another with a Post-It note on his penis with the name Bella. Pet. App. 19. The next morning Respondent asked "Bella Jane" if she was still, "okay with me coming over, us making out, me eating your pussy out, sucking my cock, and then losing your virginity." Pet. App. 20.

Respondent arranged to meet "Bella Jane" later that morning at Kurtz Park in Parma Heights, Ohio at 10:00 A.M. and Respondent said he would be driving a green Honda. Pet. App. 5, 11. That morning, several investigators conducted surveillance and Respondent sent the following message to "Bella Jane" in response to her asking if he was nearby, "I drove by and there was a cop I'm not trying to get arrested." *Id.* The surveilling investigators had seen no person suspected of being EY by then and that chat continued with Respondent agreeing to return for the planned sexual encounter. *Id.*

Respondent returned to Kurtz Park shortly before 11:00 a.m., was wearing a t-shirt and shorts and began shooting basketball. The only other man at the park was a man who appeared to be middle-aged who was playing basketball at another basketball court. Pet. App. 6.

The undercover officer, to help identify the person he had been communicating with, continued to use the Whisper app to communicate with EY. From the undercover officer's observations, time the undercover officer would send a message to EY, Respondent would go to his phone, which was in the grass near the basketball court. *Id.* The undercover officer did not observe the other man using a cell phone. *Id.*

Respondent appeared to be college-aged and was seen using his phone at the same time the messages were being sent by the undercover officer through the Whisper app. *Id.* The undercover officer radioed another officer to detain Respondent. *Id.* Petitioner argued below that this initial detention was a lawful investigatory stop.

Once Respondent was detained, officers collected his phone from the basketball court and sent a "test message" to verify that they had the right guy. Pet. App. 9. The "test message" went through to Respondent's phone, confirming that he was the person chatting with the undercover officer. *Id.* Respondent was then un-handcuffed and taken into an air-conditioned truck that had an interview room for questioning. Respondent was immediately read his *Miranda* warnings. The entire encounter between being handcuffed and unhandcuffed lasted less than six minutes. Pet. App. 9-10. Respondent conveyed he understood his rights and admitted that he had come to Kurtz Park to have sex with a 15-year-old girl. Pet. App. 21.

Testimony during the suppression hearing supports the contention that law enforcement officers did not affirmatively access the phone's contents to observe the notification on Respondent's cellular phone screen. As an investigator testified:

> [PROSECUTOR]: …in that video we saw you and Investigator Rotili having a conversation about Mr. Deuble's phone. Dou you recall seeing that?

[WITNESS]: Yes.

[PROSECUTOR]: Okay. And what were you talking about the phone for?

[WITNESS]: As is common practice with these investigations, we will send a final – when we come across a device involved with the investigation, we will send a final test or text message to the device in an attempt to determine if that's the device associated with the investigation.

[PROSECUTOR]: So if the undercover on Whisper sends a message that says, test or text, what are you looking for on the other phone?

[WITNESS]: We're looking for the notification screen to appear or some reference on that screen to appear to indicate that's the correct device.

[PROSECUTOR]: And did that happen here in this case?

[WITNESS]: It did.

[***]

[PROSECUTOR]: And I guess the question is, why do you send a test or text message instead of you just using his fingerprint and getting into that phone?

[WITNESS]: Well, again, we didn't know. At this point we're still trying to determine if this

> individual is involved in this investigation. That's just something that we've always done.
>
> [PROSECUTOR]: But you're not getting into the content of the phone in order to see the notification message?
>
> [WITNESS]: No.

(Record Tr. 84-85).

C. The Trial Court's Denial of Defendant's Motion to Suppress Evidence

The Court of Common Pleas, Cuyahoga County, Ohio rejected the initial detention of Respondent as an investigatory stop but found sufficient probable cause for the detention. The court explained:

> When [Respondent] was approached on the basketball court Rotilli had dozens of messages over Whisper from a person purporting to be a white male around 18-25 years old. The messages included pictures of a slender white man, a description that fit [Respondent]. The person agreed to meet Bella at Kurtz Park on Friday morning. The person texted Bella "I'm at the park" at a time when only two people could be seen by the officers at the park, and only [Respondent] was using his cell phone. Moreover, he was observed using that phone at the same time Bella was sending and receiving texts.
>
> It is true, as argued by [Respondent], that Rotilli and the other investigators had no reason to

> know whether anything said by EY in the chat was true. For example, EY said he would be in a green Honda and [Respondent] did not arrive in a green Honda. He also said his name is Gabe, and that proved incorrect. Nevertheless, *someone* persisted in dozens of texts over two days in persuading Bella to meet for sex and, when the time set for the assignation arrived, only two people could have been the other party to the chat, and of those two only [Respondent] was using his phone at the same time EY and Bella were sending and getting messages. Under those circumstances it would be ludicrous for the police to ignore [Respondent].
>
> This case bears some resemblance to situations where police receive anonymous tips that a crime is being committed. Typically, an anonymous tip by itself will not support a finding of probable cause; instead, the totality of circumstances, including the tip, must be examined to determine whether probable cause exists. *Illinois v. Gates,* 462 U.S. 213, 238 (1983). In essence, Rotilli was tipped that a young adult man was going to Kurtz Park that Friday morning to meet an underage girl for sex. The tip was corroborated by circumstances when [Respondent] showed up at around the appointed time and was seen using his phone at the same time the unknown suspect was communicating with the girl over a cell phone app.

Pet. App. 12-13.

D. The Conviction and Appeal

Respondent later pled no contest to all four counts of the indictment. Pet. App. 18. On appeal to the Ohio Court of Appeals, Eighth District, Respondent raised a single assignment of error and argued that the trial court erred in denying the motion to suppress because the arresting officer lacked probable cause to carry out the warrantless arrest.

The Ohio Court of Appeals, Eighth District in *State v. Deuble,* No. 108814, 2020 Ohio App. LEXIS 2863, 2020 WL 4532961 (Ohio Ct. App. Aug. 6, 2020) reversed with a dissenting opinion. The majority found that probable cause did not exist until Respondent's phone had been "searched." In doing so, the majority rejected the totality of the circumstances and reasonable conclusion that Respondent was EY, and found that Respondent had an expectation of privacy in his phone notification screen, which was described as a part of the phone's content. Pet. App. 24, 30, 32-33. More specifically the court found probable cause lacking because the description that Respondent provided through his online persona was too vague and because Respondent did not arrive in a green Honda like he said he would. Pet. App. 30.

The dissent found no issue with the vague description that Respondent provided of himself and found the existence of probable cause through facts glossed over by the majority:

> Although the officers did not have a detailed description of Deuble's physical appearance, they knew he was a young, thin, white male.

> There were only two white males at the park at the time EY indicated that he was there to meet "bella_jane." The officers sent several text messages to EY and watched to see which of the two white males would respond in order to correctly identify the perpetrator. Officer Rotili testified that Deuble picked up his phone every time Rotili sent him a message under the guise of "bella_jane," and Rotili received a response to his text messages as soon as Deuble put his phone back down. After repeating this test several times, Rotili concluded: "That's when I knew that [he] was going to be our person." (Tr. 138.)

Pet. App. 34.

Finding no probable cause to place Respondent in handcuffs, the appellate court's holding that Respondent had an expectation of privacy in his phone's notification screen was based on a conclusory application of this Court's decision in *Riley v. California,* 573 U.S. 373 (2014). Petitioner filed a motion for reconsideration and argued in part that contrary to the opinion of the Ohio Court of Appeals, Eighth District, the United States Court of Appeals, Seventh Circuit found no such expectation of privacy in a phone notification screen in *United States v. Brixen,* 908 F.3d 276 (2018), even under *Riley*. The motion for reconsideration was denied. The same issues raised in the motion for reconsideration were raised in the Petitioner's request to the Ohio Supreme Court for discretionary review. The Ohio Supreme Court denied the timely request for review. Pet. App. 1.

REASONS FOR GRANTING THE WRIT

For four reasons, the Court should grant the petition for writ of certiorari to review the Ohio Court of Appeals, Eighth District in this case. First, the constitutional issues involved here implicate a common type of police investigation as jurisdictions across the nation criminalize the online solicitation of minors for sexual activity. Second, the opinion of the Ohio Court of Appeals, Eighth District that Respondent was unlawfully detained without sufficient cause is clearly erroneous. Third, the Ohio Court of Appeals, Eighth District found that probable cause only existed after an illegal search of Respondent's cell phone. The reference here is now to the forensic examination of Respondent's cell phone but the observation of the "test message." Thus, the court found that Respondent had an expectation of privacy in his cell phone's notification screen. This holding conflicts in principle with the United States Court of Appeals, Seventh Circuit's decision in *United States v. Brixen,* 908 F.3d 276 (2018) which considered whether there was an expectation of privacy in a phone's notification screen in light of *Riley v. California,* 573 U.S. 373, 403 (2014), there was no expectation of privacy. Thus, this case serves as a good opportunity to consider whether the Court's holding in *Riley* requires a search warrant to observe a phone's notification screen. Fourth, this case provides a good vehicle for the Court to consider the issues raised as Respondent raised the constitutional issues through his motion to suppress. The decision of the trial court and opinion of the Ohio Court of Appeals, Eighth District rested mainly on federal constitutional grounds and application of decisions from this Court.

I. The Petition for a Writ of Certiorari Raises Important Constitutional Issues That Recur In A Common Type of Police Investigation As Online Child Enticement Is Criminalized Across the Country.

The petition for a writ of certiorari raises substantial constitutional questions, under the Fourth Amendment of the United States Constitution, that importantly impact a common investigative technique of the Ohio Internet Crimes Against Children ("ICAC") Task Force and other investigative agencies. The issue involves the circumstances in which police may detain a person suspected of soliciting a minor over the internet for sexual activity. A majority of the Ohio Court of Appeals, Eighth District finds that probable cause was lacking because the description Respondent provided of himself was vague and because Respondent did not arrive in the type of car he said he was driving. This logic relies on suspected online predators giving accurate information about themselves and ignores the concept of "catfishing", which Merriam-Webster defines as, "to deceive (someone) by creating a false personal profile online." Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/catfish (last visited June 18, 2021). It is not uncommon for persons to assume false personas on the internet. For instance, the National Center for Missing & Exploited Children in a 2017 report found 20% of offenders pretended to be younger. The Online Enticement of Children: An In-Depth Analysis of CyberTipline Reports, https://www.missingkids.org/content/dam/missingkids/pdfs/ncmec-analysis/Online

%20Enticement%20Pre-Travel.pdf (last visited June 18, 2021).

In determining probable cause, Petitioner focuses on the charged offense of importuning under Ohio Rev. Code §2907.07(D)(2). The question here is whether there was probable cause to believe that Respondent was the person who communicated with the law enforcement officer posing as a fifteen-year-old girl.

The facts prove that law enforcement had cause to detain Respondent. Respondent, a 21-year-old man awaited "Bella Jane" who Respondent believed was a 15-year-old girl. Earlier Respondent had sent "Bella Jane" pictures of his penis, told "Bella Jane" that he was 18 years old, asked, "Bella Jane" if she liked "white men with big dicks," and engaged in communications with "Bella Jane", and revealed that he wanted to engage in sexual activity with "Bella Jane" in no uncertain terms. Respondent provided "Bella Jane" a time and place to meet him. Unbeknownst to Respondent, he was not communicating with a 15-year-old girl but an undercover investigator of the ICAC. Investigators observed two white males at Kurtz Park. But only the younger male, Respondent, was checking his cellular phone as "Bella Jane" was sending communications to EY. Respondent was detained and his identity was confirmed beyond a reasonable doubt when a final message was sent to the EY account and a notification appeared on Respondent's cell phone. Respondent was handcuffed and escorted to a police vehicle where he was advised of his *Miranda* rights. Respondent consented to have his cell phone search and admitted that he had come to Kurtz Park to have

sex with a 15-year-old girl. Respondent pled no contest to the indictment and on appeal the Ohio Court of Appeals, Eighth District suppressed all evidence against Respondent as the court found that there was no probable cause to arrest Respondent because Respondent provided only a general description of himself and because there was no sign of the car Respondent said he would be driving. Pet. App. 30. The court also determined Respondent's phone was illegally searched when a notification appeared on Respondent's phone. Pet. App. 31. Thus, the decision below implicates two substantial questions under the Fourth Amendment of the United States Constitution: (1) whether there was cause to detain Respondent; and (2) whether Respondent had a reasonable expectation of privacy in his cell phone's notification screen. The lawfulness of the arrest is important because Respondent's confession and a forensic search of his cell phone stemmed from these events.

The effect of this case will be significant. The Ohio ICAC is a federally funded initiative. It consists of law enforcement authorities across Ohio whose mission includes the identification, arrest, and prosecution of individuals who use the internet to lure minor into illicit sexual relationships. Ohio Internet Crimes Against Children Task Force, https://www.ohioicac.org (last visited June 18, 2021). The Ohio ICAC is also part of the Internet Crimes Against Children Task Force Program, a nationwide network of 61 coordinated task forces, that engage in the investigation and prosecutions of persons involved in child abuse and exploitation involving the internet. Internet Crimes Against Children Task Force Program,

https://www.icactaskforce.org/Pages/Home.aspx (last visited June 18, 2021). A 2010 report to Congress highlights in part the dangers of online child enticement, including how online predators manipulate and groom children until they agree to meet for sex. The National Strategy for Child Exploitation Prevention and Interdiction, A report to Congress, August 2010, https://www.justice.gov/psc/docs/natstrategyreport.pdf (last visited June 18, 2010). The National Center for Missing & Exploited Children reported a 97.5% increase in online enticement reports. National Center for Missing & Exploited Children, https://www.missingkids.org/theissues/onlineenticement (last visited June 18, 2021).

The type of investigation involved highlight common investigative techniques in catching predators who use the internet to solicit minors for sexual activity. The decision below, left alone, frustrates future investigations on the local level and cannot be construed as an opinion to be isolated to the territorial jurisdiction of the Ohio Court of Appeals, Eighth District because it has implications on Ohio ICAC investigations across Ohio. More importantly this case has nationwide impact because the Ohio offense of importuning is much like federal and state statutes that criminalize the online solicitation, enticement or luring of minors or persons believed to be minors for sexual activity. It is not uncommon for law enforcement officers to pose as minors to investigate online child enticement. These statutes require only a belief that the person is a minor, and some statutory provisions make it no defense that the "minor" was a law enforcement officer. See, e.g., 18 U.S.C. §§ 2422 &

2423, Ala. Code § 13A-6-122, Alaska Stat. § 11.41.452, Ariz. Rev. Stat. § 13-3554, Ark. Code Ann. § 5-27-306, Cal. Penal Code § 288.4, Colo. Rev. Stat. § 18-3-306, Conn. Gen. Stat. § 53a-90a, Del. Code Ann. tit. 11, § 1112A, D.C. Code § 22-3010, Fla. Stat. Ann. § 847.0135, Ga. Code Ann. § 16-12-100.2, Haw. Rev. Stat. Ann. § 707-756, Idaho Code § 18-1509a, 720 Ill. Comp. Stat. Ann. 5/11-6, Ind. Code Ann. § 35-42-4-6, Iowa Code § 710.10, Kan. Stat. Ann. § 21-5509, Ky. Rev. Stat. § 510.155, La. Rev. Stat. Ann. § 14:81.3, Me. Rev. Stat. tit. 17-A, § 259-A, Md. Code Ann., Crim. Law § 3-324, Mass. Ann. Laws ch. 265, § 26C, Mich. Comp. Laws Serv. § 750.145d, Minn. Stat. Ann. § 609.352, Miss. Code Ann. § 97-5-33, Mo. Rev. Stat. § 566.151, Mont. Code Ann. § 45-5-625, Neb. Rev. Stat. Ann § 28-833, Nev. Rev. Stat. Ann. § 201.560, N.H. Rev. Stat. Ann. § 649-B:4, N.J. Stat. § 2C:13-6, N.M. Stat. Ann. § 30-37-3.2, N.Y. Penal Law § 120.70 N.C. Gen. Stat. § 14-202.3, N.D. Cent. Code § 12.1-20-05.1, Okla. Stat. tit. 21, § 1040.13a, Or. Rev. Stat. Ann. § 163.432, 18 Pa. Cons. Stat. Ann. § 6318, R.I. Gen. Laws Section 11-37-8.8, S.C. Code Ann. § 16-15-342, Tenn. Code Ann. § 39-13-528, Tex. Penal Code § 33.021, Utah Code Ann. § 76-4-401, Vt. Stat. Ann. tit. 13, § 2828, Va. Code Ann. § 18.2-374.3, Wash. Rev. Code Ann. § 9.68A.090, W. Va. Code § 61-3C-14b, Wis. Stat. Ann. § 948.075, Wyo. Stat. Ann. § 6-2-318.

Thus, whether probable cause existed to detain Respondent would have broad nationwide impact due to its applicability to criminal investigations and prosecutions across the country. Left alone, the opinion below creates an unnecessary burden to establish probable cause, particularly because like the

Respondent, suspects can provide generic or inaccurate information about themselves to avoid detection. Others may provide false information, such as their age, to help exploit their would be victim. Imagine if Respondent represented himself to be a 15-year-old boy. This false piece of information should not prevent investigators from detaining an older appearing subject who is reasonably believed to be the suspect.

Here, investigators reasonably determined that Respondent was the person who agreed to meet "Bella Jane" for sexual activity. Simply put, cause existed to detain Respondent because he was the only person at the park seen using his phone every time law enforcement sent a message through the social media application. The investigative technique used by law enforcement of sending a "test message" did not violate any expectation of privacy. The writ of certiorari should be granted to address these important issues with nationwide impact.

II. The Decision of the Ohio Court of Appeals, Cuyahoga County On Whether There Was Cause to Detain Respondent Is Clearly Erroneous

Law enforcement had probable cause to arrest Respondent for arranging to meet a law enforcement officer posing as a minor for sexual activity through a social media app. Probable cause existed because Respondent was at the meeting location and was the only person who checked his cell phone when messages were sent through the social media app. Under the totality of the circumstances, the facts provided more than sufficient cause to place Respondent in handcuffs.

Petitioner's position below was that law enforcement properly conducted an investigatory stop of Respondent under *Terry v. Ohio,* 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

The trial court found that when Respondent was first handcuffed, he was arrested. In any event, the trial court found that probable cause existed. Contrary to the trial court's finding, the Ohio Court of Appeals, Eighth District found that probable cause did not exist to arrest Respondent. Petitioner's position is the same as it was in the courts below as there was cause detain Respondent under any circumstance.

A warrantless arrest is permitted under the Fourth Amendment of the United States Constitution if it is supported by probable cause and is authorized if there is "reasonable cause" to believe that the individual is guilty of a felony. *Carroll v. United States,* 267 U.S. 132, 156 (1925), *United States v. Watson*, 423 U.S. 411 (1976) Determining probable cause requires "the assessment of probabilities in particular factual contexts." *Illinois v. Gates*, 462 U.S. 213 (1982). The existence of probable cause is based on objective facts that would support the issuance of a warrant by a magistrate, not on the subjective good-faith belief of the officers involved. See *United States v. Ross*, 456 U.S. 798 (1982), *State v. Welch*, 18 Ohio St. 3d 88 (Ohio 1985).

"The test for establishing probable cause to arrest without a warrant is whether the facts and circumstances within an officer's knowledge were sufficient to warrant a prudent individual in believing that the defendant had committed or was committing

an offense." *State v. Torres*, No. 86530, 2006 Ohio App. LEXIS 3641 (Ohio Ct. App. July 20, 2006), ¶18 citing *Beck v. Ohio,* 379 U.S. 89, 91 (1964).

As the trial court determined:

> [Probable cause] was met here.
>
> When [Respondent] was approached on the basketball court Rotilli had dozens of messages over Whisper from a person purporting to be a white male around 18-25 years old. The messages included pictures of a slender white man, a description that fit [Respondent]. The person agreed to meet Bella at Kurtz Park on Friday morning. The person texted Bella "I'm at the park" at a time when only two people could be seen by the officers at the park, and only [Respondent] was using his cell phone. Moreover, he was observed using that phone at the same time Bella was sending and receiving texts.
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> It is true, as argued by [Respondent], that Rotilli and the other investigators had no reason to know whether anything said by EY in the chat was true. For example, EY said he would be in a green Honda and [Respondent] did not arrive in a green Honda. He also said his name is Gabe, and that proved incorrect. Nevertheless, someone persisted in dozens of texts over two days in persuading Bella to meet for sex and, when the time set for the assignation arrived, only two people could have been the other party to the chat, and of those two only [Respondent]

> was using his phone at the same time EY and Bella were sending and getting messages. Under those circumstances it would be ludicrous for the police to ignore [Respondent].

Pet. App. 12-13.

All these circumstances observed by the officers are enough to warrant a prudent individual that Respondent was the person who sent "Bella Jane" messages and who was expecting to meet a fifteen-year-old girl for sexual intercourse. Based on these facts taken together, a prudent officer would conclude that out of the only two individuals in the park, the one whose phone activity precisely matched up to the suspect's responses was in fact the suspect. These facts altogether provide more than just reasonable suspicion of criminal activity. The circumstances here provided officers a reasonable belief that Respondent was guilty of criminal activity, which is adequate to establish probable cause. Again, the criminal activity here is criminalized in Ohio and across the country. The Ohio Court of Appeals, Eighth District's reasoning for finding that probable cause was lacking places impractical restrictions upon law enforcement efforts and will frustrate future investigations of predators who illegally use the internet to entice children.

Under the totality of the circumstances, law enforcement had cause to detain Respondent. The decision of the Ohio Court of Appeals, Eighth District was clearly erroneous. If not summarily reversed, the writ of certiorari should be granted.

III. The Decision of the Ohio Court of Appeals, Eighth District With Respect to Whether Respondent Had an Expectation of Privacy in his Phone's Notification Screen Conflicts in Principle with a Decision of the United States Court of Appeals, Seventh Circuit.

The Ohio Court of Appeals, Eighth District determined that police searched Respondent's phone after they handcuffed him. Pet. App. 17. The court in its legal analysis again described Respondent's phone being searched before Respondent being led to the air-conditioned interview room. Pet. App. 27. The court held that Respondent had a privacy interest in his cell phone and that there was no probable cause for police to search Respondent's cell phone when police sent the test message. This conclusion relied on federal constitutional grounds. Pet. App. 31.

First, the notification screen did not establish justification to detain Respondent. As discussed, probable cause already existed to detain Respondent well before investigators viewed the test communication. If anything, this piece of information solidified any belief that Respondent was the person who agreed to meet "Bella Jane" for sexual activity.

Second, the Ohio Court of Appeals, Eighth District, relying on this Court's decision in *Riley v. California,* 573 U.S. 373 (2014) found that Respondent had a privacy interest in his cellular phone, including his cell phone's notification screen. Pet. App. 31. It is true that in general, cell phone owners have a heightened

privacy interest in the data stored on their devices. But this privacy interest should not extend to aspects of a cellular phone that are held open to the public.

Viewing a notification screen on a cellular phone is analogous to calling a known telephone number to determine whether there is an expectation of privacy in a phone ring (an issue that also appears to be unsettled). In the context of whether the ringing of a cell phone constitutes a search, the Connecticut District Court recognized that this Court had not yet had the occasion to address whether a search occurs when an officer calls a known telephone number and observes the defendant's phone ring. *United States v. Conley*, 342 F. Supp. 3d 247, 264 (D. Conn. 2018). The district court ultimately found it was not a search under the Fourth Amendment. *Id.* at 265.

That said, just as a cellular phone owner does not have an expectation of privacy in the ringtones of their cell phone, a person cannot expect privacy in auditory and visual notifications or vibrations that emit from the cellular phone. The United States Court of Appeals, Seventh Circuit agreed in *United States v. Brixen,* 908 F.3d 276 (2018). In *Brixen,* police posed as a fourteen-year-old female on the Whisper application and began speaking to someone identifying themselves as a thirty-one-year-old male. This male sent pictures and provided his Snapchat account. There was an agreement to meet. The defendant arrived at the location and police arrested him. Police seized the cell phone incident to arrest. The police officer sent a message to the Snapchat account and a notification appeared on the defendant's cell phone confirming his

identity. The Seventh Circuit held that just as someone who fails to conceal a phone's ring does not have a reasonable expectation of privacy, someone who allows notifications to appear in plain sight does not have a reasonable expectation of privacy.

Brixen involves a similar investigation that is involved in this case. While some facts are distinguishable, an important issue in *Brixen* is whether there was an expectation of privacy in the notification on the cell phone. Here, when police detained Respondent, he left his cell phone on the ground by the basketball courts. Police could pick up that cell phone under its caretaking function and secure it while police were conducting their investigatory stop. Testimony during the suppression hearing establishes that police did not have to access the phone's contents in order to observe the notification on Respondent's cellular phone and the opinions reproduced in the appendix describe the "test message" sent by investigators as pinging a notification on Respondent's phone. Pet. App. 9, 25.

The Ohio Court of Appeals, Eighth District held that Respondent had a reasonable expectation of privacy in the contents of his cellular phone and that police performed an unlawful search of the phone, without fully considering whether Respondent had an expectation of privacy in the notifications that appeared on his phone or emitted vibrations from his phone either in its opinion or through disposition of Petitioner's motion for reconsideration. Pet. App. 31. This Court's decision in *Riley* does not compel that holding.

Petitioner's position is that when police observed Respondent's notification screen was not part of the protected contents of Respondent's cellular phone. It is important to observe that in the timeline of events, that this occurred before Respondent was interviewed and before his phone was forensically examined. As a result, it only provided more information to detain Respondent until the investigation was complete. Grant of the writ of certiorari offers a valuable opportunity to distinguish the privacy implications here from those found by this Court in *Riley v. California,* 573 U.S. 373 (2014).

IV. This Case Serves as an Excellent Vehicle to Decide the Constitutional Issues Involved and to Distinguish the Court's Opinion in *Riley v. California,* 573 U.S. 373 (2014)

The Court should grant the petition for writ of certiorari because this case provides a good vehicle to consider the questions presented. To being with, the question raised to the trial court was whether Respondent's motion to suppress should be granted. As the basis of the motion, Respondent argued that he was arrested without probable cause and that all of the evidence gathered should be excluded based on the violation of his Fourth Amendment right against unreasonable seizure. Pet. App. 7. Furthermore, the complete record below contains transcripts of the suppression hearing and evidence submitted to the court included body camera video.

Ohio Court of Appeals, Eighth District's decision rested mainly on federal constitutional grounds: the

Fourth Amendment of the United States Constitution as made applicable to the states through the Fourteenth Amendment. Pet. App. 15. Although, the court referred to the Ohio Constitution as nearly identical to the federal counterpart, the decision relied mostly on federal precedent. *See, e.g.,* Pet. App. 23-31 (citing *Katz v. United States,* 389 U.S. 347 (1967), *Terry v. Ohio,* 392 U.S. 1 (1967), *United States v. Mendenhall,* 446 U.S. 544 (1980), *Illinois v. Gates,* 462 U.S. 213 (1983), *Riley v. California,* 573 U.S. 373 (2014). The mention of the Ohio Constitution was made only in passing and it can be discerned that the opinion of the Ohio Court of Appeals rested mainly on federal law, and the adequacy of independent state grounds is not clear from the opinion, and so this Court has jurisdiction to grant to writ of certiorari. See *Ohio v. Robinette,* 519 U.S. 33, 37(1996).

Furthermore, this case will present the Court with a valuable opportunity to distinguish this case from the holding in *Riley v. California,* 573 U.S. 373 (2014). The Ohio Court of Appeals, Eighth District cited *Riley* to highlight a heightened privacy interest in the data stored in a person's devices. Pet. App. 31. It is true that the Court held,

> Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans "the privacies of life," *[Boyd v. United States,* 116 U.S. 616, 630, 6 S.Ct. 524, 29 L.Ed. 746 (1886)]. The fact that technology now allows an individual to carry such information in his hand does not make the information any less

> worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple – get a warrant.

Riley v. California, 573 U.S. 373, 403 (2014).

Riley shows this Court's interest in constitutional issues involving cell phone technology. That technology continues to evolve, not only with hardware but with changing features in cell phone operating systems and applications made available through software developers. Although, *Riley* highlights certain privacy aspects of a person's cell phone, *Riley* should not be construed as an absolute requirement that viewing data in open view and in plain sight requires a warrant under the Fourth Amendment of the United States Constitution. The Seventh Circuit in *United States v. Brixen,* 908 F.3d 276 (2018), held in a case, involving a near identical investigation, that a suspect did not have an expectation of privacy in his suspect's notification screen. This again conflicts in principle with the opinion of the Ohio Court of Appeals, Eighth District. Resolving this conflict will give this Court an opportunity to possibly draw a line over where a person's expectation of privacy in one's cell phone begins and when a warrant will be required. Given how quickly cell phone technology software is changing, the Court should hear the legal issues involved in this case now rather than wait to see how other federal and state courts will apply *Riley* to factually similar circumstances. The writ of certiorari should be granted as this case offers a good vehicle to examine the lower

courts application of federal constitutional provisions and federal precedent.

CONCLUSION

For all these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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