No. _____

IN THE SUPREME COURT OF THE UNITED STATES

BRYAN MITCHELL LIETZAU,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Bryan Lietzau was arrested for administrative violations of his probation, and a surveillance officer searched his cellular phone because, as he put it, he does not need a warrant and he "go[es] through hundreds of phones a month." The Arizona Supreme Court determined that *Riley v. California*, 573 U.S. 373 (2014), has no bearing on the question of cell phone searches of probationers. In so doing, it deepened a split of authority on two issues.

The questions presented are:

Does the Fourth Amendment require reasonable suspicion for a probation officer to conduct a warrantless search of a probationer's person or property?

Does the Fourth Amendment prohibit suspicionless and comprehensive searches of a probationer's cell phone absent standards for ensuring that such searches are not arbitrary?

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

UNITED STATES SUPREME COURT CASES PAGES

ARIZONA CASES

OTHER CASES

UNITED STATES CODE

ARIZONA REVISED STATUTES

CONSTITUTIONAL PROVISIONS

PETITION FOR WRIT OF CERTIORARI

Bryan Mitchell Lietzau respectfully petitions for a writ of certiorari to review the Arizona Supreme Court's opinion dated May 22, 2020, as amended June 12, 2020, which held that probationers' expectation of privacy is diminished to the extent that probation officers may conduct suspicionless searches of their cellular phones and all of their data pursuant to a condition of probation that permits warrantless searches of "person or property."

In a trilogy of cases, this Court addressed standards for probation and parole searches. In *Griffin v. Wisconsin*, 483 U.S. 868 (1987), this Court approved of probation searches conducted under a regulatory scheme that required reasonable grounds to believe the probationer had committed a crime or probation violation. In *United States v. Knights*, 534 U.S. 112 (2001), this Court approved a search of a probationer, pursuant to a condition of probation permitting such a search, that was supported by reasonable suspicion that the probationer had committed a new crime. And in *Samson v. California*, 547 U.S. 843 (2006), this Court concluded that reasonable suspicion was not necessary to search a parolee because parolees do not have a privacy expectation that society

would deem as legitimate.

These three cases, however, left open whether a warrantless probation search may be conducted without a showing of reasonable suspicion. Without an answer, both state and circuit courts have intractably split. The majority of courts have required probation searches to be supported by reasonable suspicion. A substantial minority of courts, including Arizona, have concluded reasonable suspicion is not required.

This Court has also recognized that modern technology requires nuanced application of Fourth Amendment principles. *E.g.*, *United States v. Jones*, 565 U.S. 400 (2012) (rule in *United States v. Knotts*, 460 U.S. 276 (1983), does not apply to GPS trackers); *Carpenter v. United States*, 585 U.S. __, 138 S. Ct. 2220 (2018) (third-party doctrine is not absolute; cell site location information in the possession of a cell phone provider is entitled to protection from government snooping). In *Riley v. California*, 573 U.S. 373, 392-93 (2014), this Court held that the general rule allowing officers to search a person and any containers within reach incident to an arrest, *see Arizona v. Gant*, 556 U.S. 332, 343-44 (2009), does not apply to cell phones because modern phones contain so much more information. If cell phones are different for purposes of a search

incident to arrest, it necessarily follows that cell phones are different for purposes of a probation search. Although fewer courts have addressed this question, they are equally divided.

This case presents an ideal opportunity to answer a question that has remained unanswered for twenty years: whether probation officers may search probationers without reasonable suspicion. This case also presents the Court with the question whether the principle explained in *Riley* that cell phones are different from other property extends to cell phone searches of probationers. Probationers' privacy rights are diminished, but they are not eliminated. This Court should explain that probationers' cell phones may not be searched pursuant to a condition that permits searches of one's "person or property" and that the heightened privacy protections afforded to cell phones must be respected.

OPINIONS BELOW

The Arizona Court of Appeals' opinion dated March 25, 2019, is reported at 439 P.3d 839 (Ariz. Ct. App. 2019). Exhibit 1. The Arizona Supreme Court's opinion dated May 22, 2020, as amended on June 12, 2020, is reported at 463 P.3d 200 (Ariz. 2020). Exhibit 2.

STATEMENT OF JURISDICTION

The Arizona Court of Appeals, Division Two, entered its judgment on March 25, 2019. Exhibit 1. The Arizona Supreme Court entered its judgment on May 22, 2020, and amended its opinion on June 12, 2020. Exhibit 2. The issues raised herein were raised before the Arizona courts as issues of federal constitutional law. Exhibits 1, 2. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides as follows:

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

Section One of the Fourteenth Amendment to the United States Constitution provides as follows:

> 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 the laws.

STATEMENT OF THE CASE

On August 6, 2014, Bryan Lietzau was placed on supervised probation for eighteen months for the crime of aggravated harassment, a domestic violence offense and a class 6 undesignated felony.[1] App. 014. His standard conditions of probation included Condition 4, which stated that he would "submit to search and seizure of person and property by the [Adult Probation Department] without a search warrant." App. 014, 061-062. Four months later, his probation officer filed a petition to revoke Lietzau's probation, alleging he had failed to provide "safe, unrestricted access to his residence," to participate in counseling as directed, to submit to drug testing on three occasions, and to perform community restitution as directed. App. 119-121. On December 10, 2014, Casey Camacho, Lietzau's surveillance officer, arrested Lietzau for those violations and brought him to jail to await a court appearance. App. 064, 088.

[1] Under Arizona law, class 6 is the least serious felony classification, and an undesignated class 6 felony may be designated as a felony or as a class 1 misdemeanor in the discretion of the sentencing court. Ariz. Rev. Stat. §§ 13-601 & 13-604(A).

Camacho was aware of "concern[s]" Lietzau might be in an "inappropriate relationship" with a 13-year-old girl, SE. App. 064, 070. However, he had no information that the relationship was "inappropriate" beyond the fact of a "twenty-two year old having a conversation … with a thirteen year old girl without permission." App. 098-099. Nonetheless, after arresting Lietzau, Camacho confiscated his cell phone and, on the way to the jail, began reading text messages that he concluded were between Lietzau and SE. App. 068, 095.

Over the next few days, Camacho manually transcribed the text messages and then gave the transcript and the phone to Tucson Police Department Detective Hanes. App. 068, 072-073, 082. Camacho did not show Hanes the text messages on the phone itself, because he knew that Hanes "needed a warrant to be able to look at the phone." App. 083. Camacho, however, believed that he himself did not need a warrant because Lietzau was on probation. App. 086. Camacho said he searches "hundreds of phones a month." App. 093. Camacho provided no other information supporting the search of the phone. Hanes used Camacho's text-message transcription to obtain a search warrant for the phone, eventually leading to Lietzau's indictment on six counts of sexual conduct

with a minor.[2]

Lietzau moved to suppress the text messages and all other evidence resulting from Camacho's warrantless search of his phone. Lietzau acknowledged the Arizona Supreme Court's recent opinion in *State v. Adair*, 383 P.3d 1132 (Ariz. 2016), which held that a probation officer need not possess reasonable suspicion in order to search a probationer subject to standard Condition 4. Lietzau argued that Camacho's search failed to meet even *Adair*'s reasonableness standard. The State responded that the search of Lietzau's phone was authorized by his probation conditions, specifically Condition 4.[3]

The court relied on *United States v. Lara*, 815 F.3d 605 (9th Cir. 2016), which under similar facts held probationers retain "substantial" privacy interests in cell phones "in light of the broad amount of data

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[2] The Arizona Court of Appeals erroneously stated that the police search of Lietzau's phone revealed incriminating photos and text messages. *State v. Lietzau*, 439 P.3d 839, 841 (Ariz. Ct. App. 2019). The Arizona Supreme Court repeated this error, App. 038, but after Lietzau filed a motion for reconsideration highlighting several factual errors, it corrected this error. App. 025-026.

[3] The State also suggested in its response that "Lietzau might not have standing" to challenge the search, App. 116, but it did not pursue this argument at the hearing in the trial court and never raised it on appeal.

contained in or accessible through the cell phone," and that searching cell phones may be unlawful notwithstanding probationers' agreement to submit to warrantless searches of "property." App. 143-145. It then analyzed the reasonableness of Camacho's search based on the factors listed in *Adair*, 383 P.3d at 1138. The court concluded that the search violated Lietzau's constitutional rights based on its findings that:

- Camacho's search was not done for a "proper purpose," and was "arbitrary;"
- "[T]he conditions of probation were not broad enough to permit the search of a cell phone;" and
- The probation violations for which Lietzau was arrested "were all administrative kinds of things."

App. 145-146.

The Arizona Court of Appeals reversed the trial court's suppression order. On discretionary review, the Arizona Supreme Court vacated the court of appeals' opinion but also ruled against Lietzau. *State v. Lietzau*, 463 P.3d 200 (Ariz. 2020). It found that Condition 4 was broad enough to include cell phone searches because phones are "property." *Id.* at 203. It concluded that under its reasonableness test in *Adair*, Camacho's search of Lietzau's phone was not arbitrary because Camacho "did not delve deeper than reasonably necessary to determine whether Lietzau was complying with his probation terms." *Id.* at 207. This last point is

unsupported by any facts in the record; Camacho never explained the purpose of his search of the phone, never explained the extent of his search, and had no recollection of anything else he found during the search except for the text messages that led to the prosecution in this case. App. 072.

REASONS FOR GRANTING THE WRIT

This Court should grant this petition for two reasons. First, there is an intractable split on the question of whether a warrantless probation search may be conducted without reasonable suspicion. Second, courts are similarly split on the question of whether probation conditions that allow probation officers to search "property" extend to cell phones. This case offers an ideal vehicle to resolve both of these questions.

I. Courts Are Intractably Split Whether Probationers, Who Have Diminished Privacy Rights, May Have Their Property Searched Without Reasonable Suspicion.[4]

This Court has previously considered probationer and parolee searches in three cases: *Griffin v. Wisconsin*, 483 U.S. 868 (1987); *United*

[4] Lietzau did not ask the Arizona courts to overturn *Adair*'s holding that reasonable suspicion is not required for the search of a probationer subject to a valid search condition. Nonetheless, because he challenged the search of his cell phone under the Fourth Amendment, that issue is fairly presented here. *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992).

States v. Knights, 534 U.S. 112 (2001); and *Samson v. California*, 547 U.S. 843, 852 (2006). In *Griffin*, this Court approved of a probation search that was conducted pursuant to a regulatory scheme that required reasonable grounds to justify the search. 483 U.S. at 880. In *Knights*, this Court approved of a probation search that was supported by reasonable suspicion—the lowest quantum of individualized suspicion. 534 U.S. at 121-22. However, this Court expressly refused to decide if the defendant's status as a probationer with a search condition so diminished the defendant's privacy expectation as to authorize a search without any individualized suspicion. *Id.* at 120 n.6. Then, in *Samson*, this Court answered the question left open in *Knights*, but only as it relates to parolees. 547 U.S. at 847. Distinguishing between probationers and parolees, this Court concluded that a parolee with a search condition can be subjected to a suspicionless search because such a parolee does not have a privacy expectation that society would consider legitimate. *Id.* at 852.

Samson did not answer, however, whether a probationer with a search condition—a person with greater privacy interests than a parolee—can also be searched with neither a warrant nor reasonable

suspicion of an offense or probation violation. *See Adair*, 383 P.3d at 1135 (noting this Court has not resolved whether a probation search may be conducted without reasonable suspicion); *United States v. Tessier*, 814 F.3d 432, 433 (6th Cir. 2016) ("This case involves an issue that was left open by the Supreme Court in [*Knights*]: Whether, under the Fourth Amendment, a probationer whose probation order contains a search condition may be subjected to a search in the absence of reasonable suspicion.").

State and circuit courts have reached very different conclusions. The First, Second, and Third Circuits have applied a reasonable suspicion standard. *See McInnis v. Maine*, 638 F.3d 18, 22 (1st Cir. 2011) ("Here, given good reason to believe that McInnis was on probation, the standard to be met was one of reasonable suspicion that contraband would be found where he lived."); *United States v. Chirino*, 483 F.3d 141, 149 (2d Cir. 2007) ("the search of Chirino's bedroom, including the furniture in that room, was justified by Chirino's diminished expectation of privacy as a probationer and the officers' reasonable suspicion that Chirino had engaged in unlawful activity…"); *United States v. Crews*, 494 Fed.Appx. 240, 244 (3d Cir. 2012) ("All that is required is reasonable

suspicion of a probation violation. Here that requirement was met the moment that Crews tested positive for opiates, marijuana, and cocaine.") (citing *United States v. Baker*, 221 F.3d 438, 443-45 (3d Cir. 2000)). The Fifth Circuit has also suggested reasonable suspicion is the proper standard. *United States v. LeBlanc*, 490 F.3d 361, 369 (5th Cir. 2007) ("Accordingly, we must determine whether Cruice, by asking to look around LeBlanc's house, crossed the line from a home visit into a search requiring proof of reasonable suspicion. We conclude that he did not."). The Sixth Circuit, on the other hand, held that reasonable suspicion is not necessary to justify a probation search, *Tessier*, 814 F.3d at 433, and that "*Knights* held that reasonable suspicion is sufficient to uphold a search of a probationer who is subject to a search condition but left open the question of whether reasonable suspicion is required to search a probationer who is subject to a search condition." *Id.* at 435.

State courts have also split. One year after *Samson* was decided, the Minnesota Supreme Court, considering the search of a probationer with a search condition, required the search to be justified by reasonable suspicion. *State v. Anderson*, 733 N.W.2d 128, 137-38 (Minn. 2007) ("We need not, and do not, reach the issue of whether absent a valid probation

condition, a probation search based on reasonable suspicion violates the Fourth Amendment because we conclude that (1) the search was supported by reasonable suspicion; and (2) based on the record before us, we must presume that Anderson's probation condition is valid."). This holding was reiterated five years later by the Minnesota Court of Appeals in *State v. Heaton*, 812 N.W.2d 904, 907-08 (Minn. App. 2012): "probationers have a diminished expectation of privacy, and, accordingly, their homes may be searched without a warrant as long as a valid condition of probation exists and authorities have reasonable suspicion of criminal conduct." (citing *Anderson*, 733 N.W.2d at 139-40). The Supreme Court of Kansas determined that probation terms that authorize suspicionless searches violate the Fourth Amendment. *State v. Bennett*, 200 P.3d 455, 463 (Kan. 2009). It reasoned that the state legislature did not authorize parolees to be searched without reasonable suspicion, and "[i]t logically follows from this conclusion that because probationers have a greater expectation of privacy than parolees, searches of probationers in Kansas must also be based on a reasonable suspicion." *Id.* at 462-63.

Other state courts agree that reasonable suspicion is required for a

warrantless search of a probationer. *Bamberg v. State*, 953 So.2d 649, 653-54 & n.4 (Fla. App. 2007) ("If law enforcement officers lack a reasonable suspicion to search, then *Knights* is inapplicable."); *State v. Jones*, 119 So.3d 9, 17 (La. App. 2013) ("Even though a probationer has a reduced expectation of privacy, there is no statutory support for the contention that a probation officer may conduct a warrantless search of a probationer's residence without reasonable suspicion of criminal activity."); *State v. Diana*, 89 A.3d 132, 137-38 (Me. 2014) ("the record supports the court's finding that the probation search of Diana's apartment was justified by a reasonable suspicion that Diana had engaged in criminal activity connected to Windred's disappearance."); *State v. Baca*, 90 P.3d 509, 522 (N.M. App. 2004) ("We … do not construe our Constitution to require any higher degree of probability than reasonable suspicion as long as the suspected probation violation on which the warrantless search is based is reasonably related to the probationer's rehabilitation or to community safety.").[5]

[5] Other states have required reasonable suspicion or more based upon state laws or constitutions. *E.g.*, *State v. Ochoa*, 792 N.W.2d 260, 287-92 (Iowa 2010); *Commonwealth v. Parker*, 152 A.3d 309, 316-23 (Pa. Super. 2016); *State v. Cornwell*, 412 P.3d 1265, 1266 (Wash. 2018).

Considering the Fourth Amendment and the Hawai'i constitution, the Supreme Court of Hawai'i held that a probation search "must still be justified by a reasonable suspicion supportable by specific and articulable facts that dangerous drugs and substances are being secreted by the probationer." *State v. Fields*, 686 P.2d 1379, 1390 (Haw. 1984). Hawai'i has not revisited this holding in the wake of *Knights* or *Samson*.

North Dakota also found the warrantless search of a probationer with a search condition unreasonable when it was not supported by reasonable suspicion in *State v. Ballard*, 874 N.W.2d 61, 72 (N.D. 2016). This decision is notable in part because it reversed course in North Dakota. Prior to *Knights* and *Samson*, the North Dakota Supreme Court held that reasonable suspicion was "not required for a probationary search as long as the search is reasonable." *State v. Smith*, 589 N.W.2d 546, 548 (N.D. 1999). But after *Knights* and *Samson*, it revisited the reasoning of *Smith*, and weighing the State's interests against the defendants and taking *Knights* and *Samson* into account, the court found the warrantless and suspicionless search of a probationer with a search condition unreasonable under the Fourth Amendment. *Ballard*, 874 N.W.2d at 67, 70-72; *see also State v. White*, 890 N.W.2d 825, 829 (N.D.

2017) (distinguishing *Ballard* and holding that "no more than reasonable suspicion was required to conduct a search under the conditions of White's probation").

Other states have rejected the reasonable suspicion standard. The Supreme Court of New Hampshire refused to require individualized suspicion and held that probation searches need only "be conducted in a manner that is reasonable in time, scope, and frequency." *State v. Zeta Chi Fraternity*, 696 A.2d 530, 547 (N.H. 1997). Similarly, Alaska held that probation searches "must be conducted at a reasonable time and in a reasonable manner, and that the search must not be conducted for the purpose of harassing the probationer." *Brown v. State*, 127 P.3d 837, 844 (Alaska App. 2006). California also concluded individualized suspicion is not required and a search of a probationer is proper "so long as the search is not undertaken for harassment or for arbitrary or capricious reasons or in an unreasonable manner." *People v. Durant*, 205 Cal. App. 4th 57, 64 (2012).

This Court has not decided whether a search of a probationer subject to a search term must be supported by individualized suspicion. Without this Court's guidance, the issue has been extensively litigated to

very different ends. Accordingly, this Court should grant certiorari to resolve this split. In resolving the split, this Court should hold that reasonable suspicion is necessary to justify a warrantless probation search. Reasonable suspicion is a relatively low bar. *See Kansas v. Glover*, 589 U.S. __, 140 S. Ct. 1183, 1188 (2020) ("The reasonable suspicion inquiry 'falls considerably short' of 51% accuracy, for, as we have explained, '[t]o be reasonable is not to be perfect.") (quoting *United States v. Arvizu*, 534 U.S. 266, 274 (2002), and *Heien v. North Carolina*, 574 U.S. 54, 60 (2014)). At the same time, reasonable suspicion requires more than just a "hunch." *Id.* at 1187. Reasonable suspicion gives full weight to this Court's rulings in *Griffin*, *Knights*, and *Samson*; is a clearer and more administrable rule than reasonableness under the totality of circumstances; and better balances the interests of the individual and government.

II. State And Federal Courts Are Divided On Whether Probationers Have Heightened Privacy Interests In The Content Of Their Cell Phones.

In *Riley v. California*, 573 U.S. 373 (2014), this Court unanimously recognized that the warrant exception for searches incident to arrest that allows a police officer to search every other object in an arrestee's

possession does not extend to the arrestee's cellular phone. Because of their unique nature for Fourth Amendment purposes, cell phones are incomparable to other physical objects such as "a cigarette pack, a wallet, or a purse" and thus not subject to search incident to arrest. *Id.* at 393. In fact, the search of a cell phone is more invasive of privacy rights than even a home search, which is the primary focus of the Fourth Amendment's protections:

> In 1926, Learned Hand observed (in an opinion later quoted in [*Chimel v. California*, 395 U.S. 752 (1969)]) that it is "a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him." *United States v. Kirschenblatt*, 16 F.2d 202, 203 (C.A.2). If his pockets contain a cell phone, however, that is no longer true. Indeed, 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.

Id. at 396-97. This Court concluded: "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." *Id.* at 403.

Probationers are not merely accused but have been convicted of crime; thus they clearly have less expectation of privacy than arrestees.

Nevertheless, after *Riley*, it is equally indisputable that the search of a cell phone is far more expansive than the search of any other property, even of the probationer's home. One's cell phone reveals not only a record of every recorded thought, every communication, and every website visited, but also a complete record of a person's travels. *See Carpenter*, 138 S. Ct. at 2211 (describing cell-site location information generated by a person's cell phone as a "comprehensive chronicle of the user's past movements"). For this reason, while cell phones are undoubtedly "property," *Riley* recognized that cell phones are different and rules permitting searches of property cannot apply identically to cell phones.

Courts are divided on whether *Riley* requires application of a different rule than that which would apply to other tangible property. In *Lara*, the Ninth Circuit addressed suspicionless searches of probationers' phones. First, it noted that Lara's agreement to be subject to suspicionless and warrantless searches does not eliminate all Fourth Amendment protections, but it does have an impact on the totality of the circumstances in determining reasonableness. 815 F.3d at 609. It next distinguished its prior holding in *United States v. King*, 736 F.3d 805 (9th Cir. 2013), as being restricted to suspicionless searches of residences and

to violent offenders—neither of which applied. *Lara*, 815 F.3d at 609-10. Then, it found that Lara's "significantly diminished" privacy interest was not as diminished as that of a violent offender. *Id.* at 610. Finally, it recognized that the government's interest in reducing recidivism was not served in this circumstance:

> "[W]hen 'privacy-related concerns are weighty enough' a 'search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee.'" *Riley*, 134 S.Ct. at 2488[ ]. The same is true of probationers, especially nonviolent probationers who have not clearly and unambiguously consented to the cell phone search at issue. Because of his status as a probationer, Lara's privacy interest was somewhat diminished, but that interest was nonetheless sufficiently substantial to protect him from the two [warrantless] cell phone searches at issue here.

Id. at 612. Thus, the balance of interests weighed in Lara's favor. *Id.*

The California Supreme Court addressed the issue in the context of a juvenile probationer who challenged the constitutionality of a condition that would explicitly permit a cell phone search. *In re Ricardo P.*, 446 P.3d 747 (Cal. 2019). The trial court imposed a condition that specifically permitted searches of electronic devices,

> including any electronic accounts that could be accessed through these devices. Although there was no indication the juvenile used an electronic device in connection with the burglaries, the court imposed the condition in order to monitor his compliance with separate conditions prohibiting him from

using or possessing illegal drugs.

Id. at 749. The court vacated the condition as invalid because, even accepting the nexus between the offense and the search condition cited by the trial court, "the burden it imposes on Ricardo's privacy is substantially disproportionate to the countervailing interests of furthering his rehabilitation and protecting society." *Id.* at 751. The California Supreme Court heavily relied on *Riley* to show that the search condition was disproportionate to the need to supervise the probationer. *Id.* at 754. "This disproportion leads us to conclude, on this record, that the electronics search condition is not reasonably related to future criminality and is therefore invalid…." *Id.* at 755 (internal quotation omitted).

On the contrary, the North Dakota Supreme Court held that a probation condition permitting a search of property or residence includes cell phones found in the residence. *White*, 890 N.W.2d at 829. But that court failed even to cite *Riley* much less distinguish it. Instead, it relied on prior cases that interpreted probation conditions authorizing a search of "person, place of residence or vehicle." *Id.* (citing *State v. Gonzalez*, 862 N.W.2d 535, 540 (N.D. 2015)). In this case, the Arizona Supreme Court

held that a probation condition authorizing "search and seizure of person and property … without a search warrant" extends to cell phones because the phone constitutes "property" as defined in Black's Law Dictionary. *Lietzau*, 463 P.3d at 203.[6]

Courts are equally split on the question whether searches of probationers' cell phones require a different standard than searches for tangible objects. This Court's review is imperative to explain whether cell phones may be searched according to the same rules as tangible objects, or if cell phones are entitled to heightened protections.

III. This Case Squarely Presents Both Fourth Amendment Issues And Thus Provides An Ideal Vehicle For Deciding Them.

Lietzau's case presents both of these questions cleanly. The trial court resolved the facts on a stipulated record; to the extent that there is any factual dispute, it must be resolved in Lietzau's favor since he was the prevailing party in the trial court.[7]

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[6] The California Court of Appeal reached a similar conclusion in *People v. Sandee*, 15 Cal. App. 5th 294 (2017), but that holding is suspect in light of the California Supreme Court's more recent decision in *Ricardo P.*

[7] Under Arizona law, appellate courts "consider only the evidence introduced at the suppression hearing and view that evidence in the light most favorable to upholding the trial court's ruling." *State v. Peoples*, 378

The first question had been answered by the Arizona Supreme Court in *Adair* in 2016—the same year Lietzau was charged in this case. For that reason, he did not repeat Adair's arguments to that court, and this Court is his first practical opportunity to raise the issue. Moreover, he squarely presented a claim that the Fourth Amendment prohibited the search of his cell phone. "Having raised a [Fourth Amendment] claim in the state courts," Lietzau can "formulate any argument [he] like[s] in support of that claim here." *Yee*, 503 U.S. at 535. Indeed, he can "frame the question as broadly or as narrowly as he sees fit." *Id*.

No evidence in this case supports a finding of reasonable suspicion, and the Arizona Supreme Court did not so find. Instead, the State's sole argument in this case has been that a "probation-search exception" to the warrant requirement authorized the search of Lietzau's phone. Nor has it argued that the conditions of probation amounted to a valid Fourth Amendment waiver. *See Knights*, 534 U.S. at 118 (2001) (refraining from deciding whether probationer's acceptance of search conditions of probation constituted valid waiver of Fourth Amendment rights, since

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P.3d 241, 247 (Ariz. 2016). *See also Glossip v. Gross*, 576 U.S. 863, 890 (2015) ("the District Court's conclusion … is reviewed under the deferential 'abuse-of-discretion' standard.").

search was determined reasonable on other grounds); *see also Adair*, 383 P.3d at 1135 (State did not argue that probation conditions constituted voluntary consent to warrantless searches).

As the searching surveillance officer admitted, he conducted the search of Lietzau's phone not because of any individualized suspicion that the phone contained evidence of a probation violation, but because he "go[es] through hundreds of phones a month" and "he did not need a warrant because Lietzau was on probation." *Lietzau*, 463 P.3d at 205. The Arizona Supreme Court recognized this but erroneously assumed that the probation officer had objectively reasonable grounds for the search based on a misstatement of the evidence. *Id.* at 206-07.[8] After correcting the error, it stated that Camacho could check the phone for evidence whether Lietzau was obeying the no-contact order regarding his domestic violence victim, *id.* at 206. But searching the phone would not tell

[8] The Arizona Supreme Court amended its opinion in response to a motion for reconsideration that pointed out several factual errors, most notably that "Lietzau, a domestic violence offender, was prohibited from contacting the victim and her family as a condition of probation." App. 045. The court stated that it was clarifying the opinion but that it intended "the victim" to refer to "the domestic violence victim." App. 025. This cannot be correct, however, because nowhere in the record is there any information about the domestic violence victim's family, whereas there is evidence about SE and her family.

Camacho whether Lietzau contacted the domestic violence victim if he used other means; the only sensible way to check Lietzau's compliance with this condition was to ask the victim. Furthermore, this *post hoc* rationale was never offered by Camacho or by the State.

Most importantly, this case presents an ideal vehicle to explain when a probation search is "arbitrary." The trial court, which was personally familiar with Lietzau and his case and correctly stated the facts, found the search to be arbitrary. The Arizona Supreme Court recognized that "Condition 4 did not grant Camacho carte blanche to indiscriminately search all information accessible by the cell phone," *id.* at 207, but it had no evidentiary foundation for its assertion that Camacho limited his search or was reasonable in the manner in which he carried out the search. The court also provided no guidance or limitation on such searches and failed to define an arbitrary search beyond quoting two old California cases. *Id.*

This Court recognizes that the purpose of requiring individualized suspicion for searches "is to protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents." *Skinner v. Ry. Labor Executives'*

Ass'n, 489 U.S. 602, 621-22 (1989). Probation conditions that amount to a full waiver of all protections against warrantless searches look very much like the "general warrants" that "were the immediate evils that motivated the framing and adoption of the Fourth Amendment." *Payton v. New York*, 445 U.S. 573, 583 (1980). A case in which a surveillance officer working for a probation department searched a phone because he "go[es] through hundreds of phones a month" is an ideal vehicle for holding that such searches must have some minimal limitations.

CONCLUSION

For these reasons, Petitioner respectfully requests that this Court accept review of the opinion of the Arizona Supreme Court.

Respectfully submitted,

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