No. _____

IN THE

Supreme Court of the United States

HENRY WOOD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of *Certiorari* to
the United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTION PRESENTED

I. Whether the Seventh Circuit's decision allowing law enforcement officers to conduct a warrantless search of a parolee's mobile phone upon arrest has created a circuit split relative to Sixth and Ninth Circuit opinions that require authorities to obtain a warrant before searching cellphones?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2022

HENRY WOOD,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, HENRY WOOD, respectfully prays that a writ of *certiorari* issue to review the published opinion of the United States Court of Appeals for the Seventh Circuit, issued on October 21, 2021, affirming the denial of Mr. Wood's suppression motion. On December 17, 2021, the Seventh Circuit entered an order denying Mr. Wood's Petition for Rehearing and Petition for Rehearing *en banc*.

OPINION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is published at 16 F.4th 529. (Pet. App. 1a-17a)

JURISDICTION

The appellate court entered its judgment on October 21, 2021. (Pet. App. 18a). Mr. Wood timely filed a petition for rehearing and for rehearing *en banc*. (Pet. App. 19a-39a). The Seventh Circuit denied it on December 17, 2021. (Pet. App. 40a). That court had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 3742. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISION

The U.S. Constitution's Fourth Amendment, says "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated."

INTRODUCTION

This case squarely presents an important issue of constitutional law that divides the federal courts of appeals: whether law enforcement officers can conduct warrantless searches of a cell phone belonging to a parolee/probationer after arrest. Mobile phones can be massive data repositories and that fact distinguishes them from a simple container, filing cabinet, wallet or other physical property. The Sixth Circuit and the Ninth Circuit correctly recognize

that mobile phones are not property that can be subject to warrantless searches upon arrest, but the Seventh Circuit has reached the opposite conclusion by relying on Eighth and Tenth Circuit cases. The Seventh Circuit said it would be an "absurd result" not to consider a mobile phone as ordinary property (even though the Government never made that argument) and broke from the Sixth and Ninth Circuit cases which recognize mobile phones are not subject to search incident to arrest given *Riley v. California*, 573 U.S. 373 (2014). The Seventh Circuit's opinion is contrary to the Sixth and Ninth Circuit cases, creating a circuit split that only the Supreme Court can resolve. Moreover, *Wood* is contrary the plain text of Mr. Wood's parole agreement and a parole agreement's text is key to determining the lawfulness of a search. *See Samson v. California*, 547 U.S. 843, 852, 857 (2006) (search permissible when parolee agrees to warrantless, suspicionless search as a condition of release). Also, *Wood* violates the party presentation principle most recently highlighted in *United States v. Sineneng-Smith*, ---U.S.---, 140 S.Ct. 1575, 1579, 206 L.Ed.2d 866 (2020). The Government never argued the agreement's ongoing violation requirement would lead to an absurd result, yet *Wood* held that requiring such a violation would be absurd.

Mr. Wood's case presents an ideal vehicle to resolve the circuit split as to *Riley's* applicability to mobile phones of parolees/probationers upon arrest. Both the district court and the Seventh Circuit considered and addressed the issue,

and it is cleanly presented here. There are no threshold issues that would preclude this Court from reaching the question presented. Furthermore, timely resolution of the conflict is particularly important because similar suppression challenges will be filed around the country with very different outcomes based solely on which circuit's law applies. This Court should grant *certiorari* and reverse the Seventh Circuit's decision due to the erroneous legal determinations.

STATEMENT

The Seventh Circuit stated the facts in *Wood* as follows:

> Henry Wood was arrested for violating his parole. Midway through the arrest, parole agents found methamphetamine hidden underneath the back cover of his cellphone. An investigator later extracted the data from his cellphone, revealing child pornography. Wood moved to suppress the data, arguing the Fourth Amendment requires a warrant before such a search. We disagree and affirm the district court's denial of Wood's motion to suppress.
>
> * * *
>
> Henry Wood served time in Indiana state prison for methamphetamine-related offenses. In 2018, he was released on parole under enumerated conditions. Any violation subjected him to "being taken into immediate custody." Wood's parole release agreement required him to "report to [his] assigned supervising officer" as instructed. Wood also affirmed the following:
>
> > I understand that I am legally in the custody of the Department of Correction and that my person and residence or property under my control may be subject to reasonable search by my supervising officer or authorized official of the Department of Correction if the officer or official has reasonable cause to believe that the parolee is violating or is in imminent danger of violating a condition to remaining on parole.

About three months after being released, Wood violated his parole by failing to report to his supervising officer. The Indiana Parole Board issued an arrest warrant, and parole agents arrested Wood at his home in North Judson. One of the agents, Agent Gentry, secured Wood with wrist restraints and conducted a frisk search. During the frisk, Gentry noticed Wood repeatedly turning toward his cellphone, which was lying on a "junk pile." Gentry picked up the cellphone and handed it to Agent Rains. This upset Wood. He demanded that his cellphone be turned off and he began to physically resist Gentry. With the help of another agent, Gentry restrained Wood against a nearby wall, and Wood "calmed down immediately."

Meanwhile, Rains felt something "lumpy" on the back of Wood's cellphone, so he removed the back cover and found a packet of a substance which Rains believed to be methamphetamine. Wood eventually admitted the substance was, in fact, methamphetamine. A later search of the home revealed syringes and other drug paraphernalia. Based on these findings, Wood was arrested for possession of methamphetamine and parole agents seized his cellphone as evidence.

Seven days after Wood's arrest, an investigator for the Indiana Department of Correction performed a warrantless search of Wood's cellphone by extracting its stored data. This search revealed child pornography. The investigator forwarded this information to a special agent of the Federal Bureau of Investigation, who obtained a search-and-seizure warrant for Wood's cellphone and its contents.

A federal grand jury indicted Wood for both receiving and possessing child pornography, in violation of 18 U.S.C. § 2252(a)(2), (a)(4)(B). Before the district court, Wood moved to suppress the data extracted from his cellphone. He argued principally that the state investigator's warrantless search of his cellphone violated *Riley v. California*, 573 U.S. 373 (2014). The district court disagreed, holding that the search of Wood's cellphone complied with the Fourth Amendment. *United States v. Wood*, 426 F. Supp. 3d 560, 575 (N.D.

Ind. 2019).

Following the denial of his motion to suppress, Wood entered a conditional guilty plea. See Fed. R. Crim. P. 11(a)(2). He pleaded guilty to the receiving charge in Count 1 of the indictment—Count 2 was dismissed—and he reserved the right to appeal the district court's denial of his motion to suppress.

This appeal followed.

* * *

The district court rejected Wood's argument that *Riley v. California* required law enforcement to obtain a search warrant before searching his cellphone. Instead, the court used the totality of the circumstances approach articulated in *United States v. Knights*, 534 U.S. 112 (2001), and *Samson v. California*, 547 U.S. 843 (2006), to conclude that the search of Wood's cellphone was reasonable under the Fourth Amendment. We affirm in both respects.

(Pet. App. 1a-4a).

Wood further said:

The Supreme Court's close attention to balancing interests means that *Riley* cannot be casually applied to other contexts. Instead, we must consider the privacy and governmental interests in the factual circumstances before us: a warrantless search of a parolee's cellphone conducted under the terms of the parole agreement. We take into account, of course, the Supreme Court's general emphasis on cellphone privacy in the modern era—and for that purpose *Riley* is instructive—but we do not attempt a full-scale doctrinal transplant.

For searches of parolees and probationers, two Supreme Court decisions set the stage. In *United States v. Knights*, the Court held that a warrantless search of a probationer's home based on reasonable suspicion satisfied the Fourth Amendment. 534 U.S. at 122. But *Knights* reserved the question of whether a suspicionless search would also satisfy the Fourth Amendment. *Id.* at 120 n.6. In *Samson v. California*, the Court answered a variation of that question in the

affirmative, holding that a warrantless, suspicionless search of a parolee was reasonable under the Fourth Amendment. 547 U.S. at 857.

* * *

Parolee status diminishes one's privacy expectations, *Samson*, 547 U.S. at 852, and Indiana courts have affirmed this principle, *State v. Vanderkolk*, 32 N.E.3d 775, 779 (Ind. 2015). Wood's parole agreement, authorized by IND. CODE § 11-13-3-4, reminded him that he was "legally in the custody of the Department of Correction" and explained that his "person and residence or property under [his] control may be subject to reasonable search[es]." Nothing in this provision indicates that a cellphone does not qualify as "property under [Wood's] control," and Wood does not make such an argument. Wood was unambiguously informed of his parole conditions, which permitted searches based on less than probable cause. So, any privacy interest Wood retained in his cellphone was greatly diminished. *See Samson* 547 U.S. at 852.

Turning to the state's interests, we recognize that Indiana has an "overwhelming interest in supervising parolees." *Id.* at 853 (internal quotation marks omitted). Its goals of "reducing recidivism" and "promoting reintegration … warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment." *Id.* The district court noted Indiana's 34% recidivism rate for parolees within three years of release. *Wood*, 426 F. Supp. 3d at 574. It also highlighted the public safety concerns that accompany a high recidivism rate. *Id.* at 575 (discussing parole division operations discovering illegal firearms and large quantities of drugs). Indiana has a strong interest in supervising parolees, as did California in *Samson*.

Despite cellphones' ability to hold "vast quantities of personal information," *Riley*, 573 U.S. at 386, they do not, as a categorical matter, receive heightened protection under *Knights* and *Samson*. Unlike the governmental interests discussed in *Riley* (officer safety and evidence preservation), Indiana's governmental interests (reducing recidivism and promoting reintegration) apply equally to

cellphone searches. As stated above, the interests in reducing recidivism and promoting reintegration are "overwhelming." And "the Fourth Amendment does not render the States powerless to address these concerns effectively." *Samson*, 547 U.S. at 854 (emphasis in original).

First, parolees are "more likely to engage in criminal conduct than an ordinary member of the community." *Knights*, 534 U.S. at 121. The government's interest in discovering criminal activity applies no less when the evidence is data in a cellphone. By contrast, the government's interests in *Riley*—officer safety and evidence preservation—were less compelling when the target of the search was cellphone data. Not so here. Reducing recidivism is an independent goal of the parole system, exclusive from those discussed in *Riley*, and it would be frustrated by imposing a warrant requirement because it would incentivize concealment of criminal activity. *See Knights*, 534 U.S. at 120–22.

Second, the government has an interest in "promoting reintegration and positive citizenship among probationers and parolees." *Samson*, 547 U.S. at 853. A supervisor must be able to obtain information about the supervisee. Transparency is key because "most parolees are ill prepared to handle the pressures of reintegration[,] [t]hus, most parolees require intense supervision." *Id.* at 854. Requiring a warrant for a search of a parolee's cellphone would hinder the state's efforts to rehabilitate offenders and reintroduce them to society. Identifying recalcitrance earlier rather than later is central to the parole system. This is why *Knights* and *Samson* permit warrantless searches with less than probable cause for probationers and parolees alike; it makes "eminent sense." *Id.*

Given Wood's diminished expectation of privacy and Indiana's strong governmental interests, the search of Wood's cellphone was reasonable. In reaching this decision, we align our law with that of the Eighth, Ninth, and Tenth Circuits. *See Pacheco*, 884 F.3d at 1044; *Johnson*, 875 F.3d at 1273; *Jackson*, 866 F.3d at 985.

Resisting this conclusion, Wood relies on two other cases,

United States v. Fletcher, 978 F.3d 1009 (6th Cir. 2020), and *United States v. Lara*, 815 F.3d 605 (9th Cir. 2016). Both are distinguishable. *Fletcher* and *Lara* involved probationers, not parolees. This matters because "on the continuum of state-imposed punishments[,] … parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment." *Samson*, 547 U.S. at 850 (internal quotation marks omitted). As an example, the Ninth Circuit declined to extend its holding in *Lara* to parolees, explaining "[the defendant's] parole status alone distinguishes our case from *Lara* and *Riley*." *Johnson*, 875 F.3d at 1275. In addition to parolees differing from probationers,[1] *Fletcher* and *Lara* do not control for other reasons.

First, both *Fletcher* and *Lara* held that the operative probation agreements did not clearly or unambiguously include cellphones as searchable items. *Fletcher*, 978 F.3d at 1019; *Lara*, 815 F.3d at 610. In *Fletcher*, the probation agreement's search provision included the probationer's "person, [his] motor vehicle or [his] place of residence." *Fletcher*, 978 F.3d at 1019. In *Lara*, the probationer agreed to "submit [his] person and property, including any residence, premises, container or vehicle under [his] control to search and seizure." *Lara*, 815 F.3d at 610. Certainly, *Samson* described as "salient" that parole conditions be "clearly expressed" to the parolee. 547 U.S. at 852. But clear expression does not require an exhaustive list.

Probation agreements need not express, in granular detail, every item subject to a search. In this case, Wood's parole agreement provided that his "person and residence or property under [his] control" could be searched with "reasonable cause" because he remained in the "custody of the Department of Correction." Only a strained and unreasonable reading of these provisions would exclude a parolee's cellphone.

[1] Indiana applies *Samson's* holding to probationers, in effect lowering a probationer's privacy expectation to that of a parolee. *Vanderkolk*, 32 N.E.3d at 779. To the extent Indiana treats probationers and parolees the same, that determination does not render *Lara* applicable to parolees.

> Second, *Fletcher* held that a state's interest in supervising a probationer terminates abruptly once the phone is secured. *Fletcher*, 978 F.3d at 1019. This reasoning, imported from *Riley*, does not find support in *Knights* and *Samson*. The state's interests are different here and justify a post-arrest, post-seizure search of a parolee's cellphone. *Fletcher* relied on *Riley's* explanation that "once law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone." *Id.* (quoting *Riley*, 573 U.S. at 388). *Fletcher* also observed that a seized cellphone does not pose a safety risk. *Id.* But the twin interests of preventing evidence destruction and protecting officers are not the interests underpinning *Knights* and *Samson*. Rather, *Knights* and *Samson* support the state's ongoing supervisory role over parolees. If such supervision abruptly terminated once a parolee was arrested—whether for a failure-to-appear violation or a serious crime—the continuity of a state's parole system would be severely impeded. The Fourth Amendment does not dictate this unreasonable result.

(Pet. App. 7a-12a).[2]

* * *

> *Status.* Because context matters under the Fourth Amendment, one's status in the eyes of the government matters. Along these lines, Wood maintains his arrest rendered *Samson* inapplicable and instead triggered *Riley*. On its face, this seems plausible—Wood was arrested, making him an arrestee, and *Riley* is about arrestees. But a parolee is on the "'continuum' of state-imposed punishments," one step removed from incarceration. *See Samson*, 547 U.S. at 850. A custodial arrest would not increase a parolee's privacy expectations by placing him outside *Samson's* reach. Upon arrest, Wood's status was not transformed from parolee to arrestee, but from parolee to parolee-arrestee, so *Samson* continued to apply. *Cf. United States v. Jones*, 152 F.3d 680, 687 (7th Cir. 1998) ("[The State's] interests in preventing harm to the probationer and to society are fully

[2] In addition to images found on the cell phone, the Seventh Circuit addressed methamphetamine found in the phone's case. (Pet. App. 12a-14a). The Seventh Circuit found Mr. Wood waived the issue by not preserving it in the district court. *Id.* Mr. Wood does not challenge that determination here.

cognizable even when the probationer is in the State's custody.").

Terms of the parole agreement. Finally, Wood argues the search of his cellphone violated the precise terms of his parole agreement, which authorized "reasonable searche[s]" only when an "official has reasonable cause to believe that the parolee is violating or is in imminent danger of violating a condition to remaining on parole." According to Wood, once he was arrested, he could no longer be "violating" or in "imminent danger of violating" a parole condition, eliminating the possibility of "reasonable cause." There are a few problems with this argument.

To begin, Indiana courts have not interpreted this provision in the manner Wood suggests. For example, in *State v. Harper*, a parolee was arrested for violations of parole conditions. *State v. Harper*, 135 N.E.3d 962, 967 (Ind. Ct. App. 2019), transfer denied, 143 N.E.3d 950 (Ind. 2020). Thereafter, parole officers searched both his home and storage unit, with the latter search revealing evidence of additional crimes. *Id.* The Court of Appeals of Indiana held that the warrantless search of the parolee's storage unit did not violate the Fourth Amendment because the search "was predicated on the parole conditions and reasonable suspicion." *Id.* at 972.

Indeed, Wood's reading, which requires an "ongoing parole violation", would lead to absurd results. Taken to its logical end, the "ongoing parole violation" requirement would prevent parole agents from conducting a reasonable search even if they had reasonable cause to believe a parolee committed a robbery the day before. Unless the robbery was "ongoing," parole agents would be unable to exercise authority under the parole agreement to conduct a reasonable search for evidence. This understanding of the parole agreement renders its search provision virtually meaningless, a result "no reasonable person could approve." See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 234 (2012).

Finally, even if parole agents violated the parole agreement's precise terms, such a violation would not, on its own, transgress the

> Fourth Amendment. *Virginia v. Moore*, 553 U.S. 164, 178 (2008) (noting "it is not the province of the Fourth Amendment to enforce state law"). The terms of the parole agreement are "neither dispositive nor inconsequential in the constitutional analysis. Rather, [they are] one factor in considering the totality of the circumstances." *United States v. Graham*, 553 F.3d 6, 17 (1st Cir. 2009). Under the Supreme Court's guidance, the parole agreement's terms do not directly shape the contours of Fourth Amendment reasonableness. They merely elucidate the nature of the parolee's privacy expectations.

(Pet. App. 15a-17a).

Mr. Wood moved for a rehearing or for an *en banc* hearing, noting that the *Wood* opinion improperly determined that *Riley* is inapplicable to warrantless searches of a parolee's mobile phone. (App.R. 41, p.1, 13). Mr. Wood also explained that since his parole agreement only permitted a warrantless search for an ongoing parole violation, and his failure to attend a parole meeting was a completed violation, the warrantless search exceeded the agreement's scope. (App.R. 41, pp.2, 8-9). Finally, Mr. Wood explained that while *Wood* called that an "absurd result", the Government waived that issue by not asserting it and that *Wood* incorrectly deemed the result to be absurd. (Pet. App. 10a). The Seventh Circuit denied further any hearing. (Pet. App. 18a).

REASONS FOR GRANTING THE WRIT

This Court should grant *certiorari* to resolve whether law enforcement

may search conduct a warrantless search incident to arrest of mobile phones belonging to people under criminal justice sentences (*i.e.* probationers and parolees). This case meets all of the Court's criteria for granting *certiorari*. First, the question presented concerns an unresolved circuit split as to *Riley* on a recurring Fourth Amendment question that only this Court can resolve. Second, the Seventh Circuit's conclusion is contrary to the parole agreement's requirement that the parolee must be engaged in an ongoing violation before officers can search the parolee's phone. Thus, *Samson* ----which gives effect to a parole agreement's terms---prohibited the instant search. Third, although *Wood* dispatched the *Samson* prohibition by calling it an absurd result, the Government never made that argument. The *Wood* decision, therefore, violates the party presentation principle. This case is an ideal vehicle to resolve these matters. Critically, the *Riley* issue stands to affect numerous parolees by subjecting them to warrantless searches upon arrest.

I. The Seventh Circuit's *Wood* opinion aligned itself with inapposite cases from other circuits and incorrectly decided that a parolee's diminished expectation of privacy makes a warrantless cell phone search upon arrest reasonable despite *Riley's* prohibition on such warrantless searches.

Riley v. California, 573 U.S. 373 (2014) held that "a warrant is generally required" for searching a cell phone, even one seized incident to arrest. *Id.* at 401. Indeed, *Riley* said that "reasonableness generally requires the obtaining of

a judicial warrant." *Id.* at 382 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995)). Absent a search warrant, "a search is reasonable only if it falls within a specific exception to the warrant requirement." *Id.*

After parole officers arrested Mr. Wood, they took his phone and gave it to law enforcement officers who performed a warrantless search of the cellphone's data and found child pornography on it. The Seventh Circuit's Wood opinion found that Riley did not prevent the search and that the warrantless was proper under *United States v. Knights*, 534 U.S. 112, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001), and *Samson v. California*, 547 U.S. 843, 126 S.Ct. 2193, 165 L.Ed.2d 250 (2006) since Mr. Wood's parole agreement allowed a search of his "person and residence or property under [his] control". (Pet. App. 8). *Wood* splinters from correctly decided circuit cases to "align" itself with inapt Eighth, Ninth and Tenth Circuit authority. (Pet. App. 9a).

Wood relied on *United States v. Jackson*, 866 F.3d 982, 985-86 (8th Cir. 2017), but whereas *Jackson* addressed a phone that was subject to a suspicionless search condition, Mr. Wood's parole agreement (*supra*) did not permit suspicionless searches. That makes *Jackson* inapposite. The Ninth Circuit in *United States v. Johnson*, 874 F.3d 1265, 1274-75 (9th Cir. 2017), relied on California's parole conditions to reject suppression effort. Mr. Wood was

subject to Indiana's parole conditions, and for the reasons below, Indiana's parole conditions didn't allow for the warrantless search. The Tenth Circuit, in *United States v. Pacheco*, affirmed the denial of suppression where police discovered child pornography on a cell phone following their execution of a search warrant. 884 F.3d at 1039-41, 1045. Unlike *Pacheco*, Mr. Wood suffered a warrantless search of his cellphone.

The Ninth Circuit's *Lara* case and the Sixth Circuit's *Fletcher* case are, instead, the applicable precedent that *Wood* should have followed. Both say that *Riley* requires law enforcement to obtain a search warrant before looking at information stored on a probationer's cellphone. *See Lara*, 815 F.3d at 611-12; *Fletcher*, 978 F.3d at 1017-19. *Wood* dismissed *Fletcher* and *Lara* because those cases' operative probation agreements there "did not clearly or unambiguously include cellphones as searchable items" whereas Mr. Wood's condition allowed the search of his "property" which must include a cellphone. (Pet. App. 10a) (citing *Fletcher*, 978 F.3d at 1019 (probation agreement allowed search of probationer's "person, [his] motor vehicle or [his] place of residence") and *Lara*, 815 F.3d at 610 (probation agreement required probationer to "submit [his] person and property, including any residence, premises, container or vehicle under [his] control to search and seizure")). Respectfully, the conditions of Mr. Wood's release are materially the same as *Lara's* and *Fletcher's*. By

focusing on Mr. Wood's status rather his conditions, *Wood* creates an inconsequential distinction and uses it to avoid suppression per *Lara* and *Fletcher*. *See, generally, United States v. White*, 781 F.3d 858, 861 (7th Cir. 2015), ("our analysis is shaped by the state law that governed White's terms of parole"); *United States v. Caya*, 956 F.3d 498, 503 (7th Cir. 2020) (applicable law and terms of parole set privacy expectations).[3]

Wood wrongly concluded that Mr. Wood's parolee status reduced his expectation of privacy vis-à-vis the probationers in *Lara* and *Fletcher*. (Pet. App. 10a-11a). In *Lara*, the Ninth Circuit determined that a warrantless search of a probationer's cell phone was unlawful because, while probationers have a diminished expectation of privacy, the interest is "still substantial" and that a probation agreement allowing a search of property extended to physical property but not to cellphone data since the agreement was understood to cover only physical property. *Id.* at 610-11. In *Fletcher*, the Sixth Circuit held that if there was no exigency allowing a probation officer to conduct a warrantless search of a probationer's cell phone, a warrantless search was only permissible if it comported with a probationer's conditions of probation. 978

[3] *Wood* stated that, unlike the defendant in Lara, Mr. Wood did not argue his cellphone data wasn't property subject to search under the agreement. (Pet. App. 8a). However, Mr. Wood did make that argument in his opening brief. (App.R.11 at pp.42-43). He pointed that out in his petition for rehearing/hearing *en banc* too. (App.R.43 at pp.5-6). The effort went nowhere.

F.3d at 1015.

Indiana makes no distinction between the rights enjoyed by probationers and parolees: probationers and parolees have the same rights. *See State v. Vanderkolk*, 32 N.E.3d 775, 779 (Ind. 2015). An Indiana parole has no less expectation of privacy than an Indiana probationer. *Id*. So, Mr. Wood's parole conditions are what matter and the search condition, like that in *Lara* and *Fletcher*, didn't allow a warrantless search. *Wood*, therefore, incorrectly ascribed importance to Mr. Wood's parole status to depart from *Lara* and *Fletcher*.

Next, the Seventh Circuit's conclusion that Mr. Wood's diminished expectation of privacy and Indiana's strong governmental interests made the cellphone search reasonable conflicts with *Riley's* holding that the data on cellphones of people under arrest can only be searched if a warrant has been issued. Although parolees undoubtedly have a diminished expectation of privacy per *Samson*, *Riley* requires a warrant be issued before police search the data on a person's cellphone. *Wood* elevates *Samson's* concerns about law enforcement's ability to prevent recidivism to defeat *Riley's* clear protection of data on an arrestee's cellphone. *Wood* said that requiring a warrant before searching a parolee's cellphone would "frustrate[]" the government's interest in discovering criminal activity by a parolee that may be on the parolee's cellphone. (Pet. App. 9a-10a). It seems that *Wood* would remove all of a

parolee's protections in the name of government oversight. However, *Riley* imposes a concrete warrant requirement applicable to the cellphones of anyone the government arrests. That includes parolees. By making the decision to arrest Mr. Wood, the parole officers and those who assisted them triggered their obligation to secure a search warrant prior to looking at data on Mr. Wood's phone. It wasn't a difficult task. And since the arrest took Mr. Wood out of free society and placed him in law enforcement's custody, the warrant requirement didn't undermine public safety or any rehabilitative objective. Inasmuch as *Samson* spoke to the need to "effectively" ensure public safety, prevent recidivism, and promote a parolee's reintegration into society (547 U.S. at 853-54), those objectives aren't being advanced once a parolee is arrested. Accordingly, the cover of parole does not allow a government search of a parolee's cellphone after authorities arrest the parolee. An arrest is a transformative event. With it, a person's liberty ends and certain rights attach (like the right to be free from making incriminating statement, the right to counsel, etc.). *See Minnesota v. Murphy*, 465 U.S. 420, 421, 104 S.Ct. 1136, 1139, 79 L. Ed. 2d 409 (1984); *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Upon arrest, parole's objectives end and *Riley's* warrant requirement begins. Indeed, that is consistent with the terms of Mr. Wood's parole

agreement. The parole agreement stated that an officer could search a parolee's property "if the officer or official has reasonable cause to believe that the parolee is violating or is in imminent danger of violating a condition to remaining on parole". Once the officer arrested Mr. Wood for missing a parole meeting, the officer had no reasonable cause to believe Mr. Wood was violating any parole condition or posed a risk of imminently committing a violation such that a warrantless search could be conducted via the parole agreement.

Additionally, the parole agreement's language is what set the bounds of reasonableness. An agreement's verbiage is what determines reasonableness under *Samson*. A parolee who accepts a warrantless, suspicionless search in exchange for conditional freedom from prison cannot validly assert a Fourth Amendment challenge based on evidence obtained by such a search. By contrast, when a state affords a parolee greater protections through the terms of a parole agreement, the reasonableness of the search hinges on whether the search conformed to the agreement's terms. Here, because authorities conducted a search without reasonable cause to believe the by-then arrested Mr. Wood "is violating or is in imminent danger of violating a condition to remaining on parole", the search violated *Samson*.

While *Wood* deemed that an "absurd result[]", that aspect of *Wood* is troubling in at least two regards. It reveals an incorrect application of the

absurd results canon of construction. *Wood* said an absurd result is one that "no reasonable person could approve." *See* Antonin Scalia & Bryan A. Garner, Reading Law: The interpretation of Legal Texts 234 (2012). *Wood* offered a robbery example and said that "[u]nless the robbery was 'ongoing,' parole agents would be unable to exercise authority under the parole agreement to conduct a reasonable search for evidence".

Wood conflates something it regards as objectionable with something that is actually absurd. The absurd results doctrine "does not license courts to improve statutes (or rules) substantively, so that their outcomes accord more closely with judicial beliefs about how matters ought to be resolved". *Jaskolski v. Daniels*, 427 F.3d 456, 461 (7th Cir. 2005); *see also Lamie v. United States Trustee*, 540 U.S. 526, 542, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004) ("It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think ... is the preferred result.") (quoting from *United States v. Granderson*, 511 U.S. 39, 68, 114 S.Ct. 1259, 127 L.Ed.2d 611 (1994) (concurring opinion)).

Mr. Wood's parole agreement made sense as written---allowing parole officers to respond to any ongoing activity by Mr. Wood that affected his rehabilitation. *Wood's* complaint that parole officers would be unable to intercede if a parolee completed a crime misses the mark. The complaint goes

to a perceived bad consequence. Yet courts are not allowed to engage in creative "interpretation" to avoid consequences it dislikes. *See Lamie*, 540 U.S. at 536–37, 124 S.Ct. 1023. And if one thinks law enforcement would be stymied by the robbery example *Wood* gave, there's no reason to worry: the parole officer could question the suspected robber, try to develop probable cause (which is a low standard), arrest the suspect if there's a basis, and search as the law allows. Parole efforts are hardly thwarted by complying with an agreement's text. Given that parolees must adhere to a parole agreement, it isn't asking too much for law enforcement to do the same.

Furthermore, the Government never made an absurd results argument. *Wood* shouldn't have advanced the issue given that the Government chose not to raise it. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020); *United States v. Starks*, 2021 WL 5507036, at *1 (7th Cir. Nov. 24, 2021) (citing same for proposition that the party presentation rule generally limits a court to the positions the parties take). Relatedly, although *Wood* cited *Virginia v. Moore*, 553 U.S. 164, 178, 128 S.Ct. 1598, 165 L. Ed. 2d 250 (2008) for the proposition that "it is not the province of the Fourth Amendment to enforce state law" and then determined that a parole officer's violation of the parole agreement would not itself transgress the Fourth Amendment, the Government made no such assertion. Judges who umpire disputes are not supposed to pitch new

arguments for a party. The scales of justice only work when they are held from the middle. *Wood's* reliance on *Moore* was improper. *See, generally, Sineneng-Smith*, 140 S.Ct. at 1579.

Also, *Wood* incorrectly applied *Moore*. *Moore* held that police do not violate the Fourth Amendment when they make an arrest, and perform a search incident to the arrest, if the arrest satisfies the federal "probable cause" requirement—even if the arrest violated state law. 553 U.S. at 171–72. The case explained that when a state protects privacy beyond what the Fourth Amendment requires, a violation of the state's protections does not require exclusion of evidence in a federal case. *Id.* at 171. Mr. Wood's case isn't one where he was deprived of a state law privacy protection that exceeded the protections afforded by the Fourth Amendment. The Fourth Amendment provided the federal constitutional privacy protection which could only be lowered via the parole agreement. *See Samson*, 547 U.S. at 850. Albeit Mr. Wood's Fourth Amendment privacy interests were diminished under his parole agreement, the requirements of the parole protections were fully enforceable by him to prevent officers from conducting an unlawful search. *See Samson*, 547 U.S. at 850. *Wood* wrongly determined that *Moore* changed anything in that regard.

The question of *Riley's* applicability to parole searches of cellphone data is

one that will arise in numerous parole cases. This case is an ideal vehicle for resolving whether *Riley* requires law enforcement to obtain a warrant before searching data contained on a parolee's cellphone upon arrest. Mr. Wood squarely presented the issue to Seventh Circuit and *Wood* resolved it incorrectly, creating a circuit split relative to the Sixth Circuit's *Fletcher* decision and the Ninth Circuit's *Lara* decision. Allowing the Seventh Circuit's *Wood* opinion to stand will deprive any arrested parolee in the circuit's jurisdiction of protection that *Riley* affords. Permitting law enforcement officers to search the cellphone data of arrested parolees greenlights a complete disregard for those individuals' Fourth Amendment protections and is especially improper given the ease by which an officer can obtain a search warrant. The potential for abuse is significant. This Court should intervene to ensure that arrested parolees are given the protection *Riley* provides.

CONCLUSION

For the foregoing reasons, the petition for writ of *certiorari* should be granted.

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