In the

United States Court of Appeals

For the Seventh Circuit

No. 20-2974

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HENRY E. WOOD,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. 3:19-cr-00038 — **Damon R. Leichty**, *Judge*.

ARGUED SEPTEMBER 14, 2021 — DECIDED OCTOBER 21, 2021

Before SYKES, *Chief Judge*, and EASTERBROOK and BRENNAN, *Circuit Judges*.

BRENNAN, *Circuit Judge*. 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.

I

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.

II

"When reviewing a district court's decision denying a motion to suppress evidence, we review the court's legal conclusions *de novo* and its factual findings for clear error." *United States v. McGill*, 8 F.4th 617, 621 (7th Cir. 2021).

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.

A

Wood asks us to apply *Riley v. California* to parolees. The primary problem with this request is that *Riley* dealt with searches incident to a lawful arrest. The Supreme Court carefully tailored its analysis to that context and expressly recognized that "other case-specific exceptions may still justify a warrantless search of a particular phone." *Riley*, 573 U.S. at 401–02. Under the Fourth Amendment, "what is reasonable depends on the context within which a search takes place." *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985).

Given the context-specific nature of the Fourth Amendment, *Riley* is not readily transferable to scenarios other than the one it addressed. Indeed, we have declined to apply *Riley* in two other contexts: consent searches and border searches. *See United States v. Wanjiku*, 919 F.3d 472, 483–85 (7th Cir.

2019) (border search); *United States v. Thurman*, 889 F.3d 356, 366 n.9 (7th Cir. 2018) (consent search).

To be sure, "the Supreme Court has recently granted heightened protection to cell phone data." *See Wanjiku*, 919 F. 3d at 484. But neither our research nor the parties' briefs reveal any circuit court decision extending a *Riley*-like rule to parolees—quite the opposite. *See United States v. Pacheco*, 884 F.3d 1031, 1043–44 & n.10 (10th Cir. 2018) (discussing *Riley*'s inapplicability in the parole context); *United States v. Johnson*, 875 F.3d 1265, 1273–76 (9th Cir. 2017) (holding that *Riley* did not require parole agents to obtain a warrant before searching a parolee's cellphone); *United States v. Jackson*, 866 F.3d 982, 985–86 (8th Cir. 2017) (same). Nevertheless, we take a fresh look.

The Supreme Court's "general Fourth Amendment approach" is to "examine the totality of the circumstances to determine whether a search is reasonable within the meaning of the Fourth Amendment." *Samson*, 547 U.S. at 848 (cleaned up). Whether a search is reasonable is determined "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999).

This balancing of interests sometimes generates categorical rules, like the search-incident-to-arrest exception addressed in *Riley*. Under that doctrine, law enforcement generally may conduct a warrantless search of an arrestee's person without "additional justification." *Riley*, 573 U.S. at 384 (quoting *United States v. Robinson*, 414 U.S. 218, 235 (1973)). Two governmental interests support this rule: officer safety and evidence preservation. *Id.* On balance, these interests

outweigh an arrestee's diminished expectation of privacy, justifying an exception to the rule that "reasonableness generally requires the obtaining of a judicial warrant." *See id.* at 382–84 (quoting *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995)).

But the "ultimate touchstone of the Fourth Amendment is 'reasonableness,'" *Riley*, 573 U.S. at 381 (internal quotation marks omitted), so technological advancements may alter the contours of Fourth Amendment doctrine. *See, e.g.*, *Kyllo v. United States*, 533 U.S. 27, 35–36 (2001). *Riley* is illustrative. There, the Supreme Court held that cellphones fall outside the search-incident-to-arrest exception because the government's interests in officer safety and evidence preservation did not outweigh an arrestee's particular privacy interest in his cellphone. Both sides of the balancing test were affected by a cellphone's ability to store "vast quantities of personal information." *Riley*, 573 U.S. at 386.

Riley first noted that the expectation of privacy, though lowered by custodial arrest, was not eliminated. *Id.* at 392. Cellphones differed greatly, the Court observed, from physical items, like a "cigarette pack, a wallet, or a purse" because of their "immense storage capacity" which may contain "a revealing montage of the user's life." *Id.* at 393, 396. Therefore, an arrestee's privacy interest in his cellphone garnered more protection than, say, the cigarette pack found on the arrestee in *United States v. Robinson*. 414 U.S. at 236.

Regarding the government's twin interests of officer safety and evidence preservation, the Court noted that "[d]igital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape." *Riley*, 573 U.S. at 387. Officers retained the

ability to "examine the physical aspects of a phone to ensure that it will not be used as a weapon." *Id.* And though potential destruction of evidence presented a stronger justification for warrantless cellphone searches, the Court reasoned that physical possession of the phone, ability to turn off the device (or remove the battery), and the existence of signal-blocking devices provided the government with reasonable alternatives to a warrantless search. *Id.* at 388–91. *Riley*'s net result, then, was a carveout for cellphones to the search-incident-to-arrest exception, essentially reinstating the warrant requirement for searches targeting cellphone data.

B

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.

Under *Knights* and *Samson*, courts balance a parolee's privacy expectations, as shaped by state law, against the state's interests in reducing recidivism and promoting reintegration. *United States v. White*, 781 F.3d 858, 861–62 (7th Cir. 2015).

For example, we recently applied *Knights* and *Samson* to Wisconsin's equivalent of parole, extended supervision, in *United States v. Caya*, 956 F.3d 498 (7th Cir. 2020). Pursuant to state law, police officers searched the home of Caya, who was serving an extended supervision term. *Id.* at 500–01. Looking to *Samson*, this court concluded that an "offender on extended supervision has no greater expectation of privacy than a parolee. And Wisconsin's interest in rigorously monitoring offenders on extended supervision is just as compelling as the government's parole-supervision interests in *Samson*." *Id.* at 503. So we held that the search was constitutional. *Id.* Though *Caya* involved a home in Wisconsin and this case concerns a cellphone in Indiana, we apply the same framework. Here, Indiana, rather than Wisconsin, law informs the analysis. *See White*, 781 at 861.

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

[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.

Department of Correction." Only a strained and unreasonable reading of these provisions would exclude a parolee's cellphone.

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.

C

Several issues remain, each of which resolve in the government's favor.

Waiver. In his opening brief, Wood argued that two other searches were unlawful: the search of his phone's exterior (which revealed methamphetamine) and the subsequent search of his home. The government asserted Wood waived both arguments.

We begin with the arguments made in Wood's motion to suppress. A defendant who moves to suppress evidence must "identify the grounds upon which he believes suppression is warranted." *United States v. Kirkland*, 567 F.3d 316, 321 (7th Cir. 2009). When defense counsel fails to develop a suppression argument, he deprives the government of "a meaningful opportunity to rebut [the defendant's] claims" and does not "notify the district court that it needs to address them." *Id.* Wood's motion to suppress challenged only the state investigator's data extraction—not the cellphone-cover search, and not the home search. Thus, to start, he bypassed an opportunity to challenge both searches, which, without good cause, would result in forfeiture. *See id.*

While omissions may result in forfeiture, counsel may go one step further and expressly waive arguments. *United States v. Flores*, 929 F.3d 443, 447 (7th Cir. 2019) (citing *United States v. Olano*, 507 U.S. 725, 733 (1993)). "[W]aiver is the 'intentional relinquishment or abandonment of a known right,'" *Olano*, 507 U.S. at 733, and it "precludes appellate review," *Flores*, 929 F.3d at 447. Whether a right must be waived by the defendant or may be waived by counsel depends on the right at issue. *Id*. at 447–48 (citing *New York v. Hill*, 528 U.S. 110, 114 (2000)). "[D]ecisions by counsel are generally given effect as to what arguments to pursue[.] … Absent a demonstration of ineffectiveness, counsel's word on such matters is the last." *Hill*, 528 U.S. at 115 (citations omitted); *see also United States v. Scott*, 900 F.3d 972, 975 (7th Cir. 2018) ("[T]he district court must be able to rely on the representations given by counsel.").

Assuming Wood could have preserved his two additional arguments at the suppression hearing, *see Kirkland*, 567 F.3d at 321, his trial counsel failed to do so. To the contrary, counsel

waived Wood's right to challenge the cellphone-cover search and home search. When asked, "[I]s the motion to suppress strictly targeting whether this was a reasonable search of his cell phone?", Wood's trial counsel responded, "It depends on which search you're talking about." The colloquy continued:

> **[Trial Counsel]**: We're not going to argue with them taking apart the back of the phone and finding the packet of methamphetamine. We're not arguing – we're not arguing about that because that doesn't matter in this Court or on this issue.
>
> **The Court**: What about the search of the home?
>
> **[Trial Counsel]**: No issue with that, as well. … And they take the back off the phone and they find the methamphetamine. No, issue with that, as well.

Wood contends his trial counsel later retracted this waiver, but the record does not show a change of position. In fact, trial counsel reiterated that Wood was not challenging the search of his phone's exterior or the search of his home. The district court accepted trial counsel's representations and analyzed only the state investigator's search of Wood's cellphone data. Wood's appeal is thus limited to that search. *See Scott*, 900 F.3d at 975 (finding that defense counsel affirmatively waived argument at revocation hearing).

Investigatory versus regulatory searches. Wood emphasizes the investigatory, rather than regulatory, purpose for the state investigator's data extraction. But the government does not defend the search based on the special-needs exception, *see Griffin v. Wisconsin*, 483 U.S. 868 (1987), where a distinction

between investigatory and regulatory searches is germane. Under *Knights* and *Samson*, it is of no moment that a parole agent's purpose in conducting a search is investigatory. *Caya*, 956 F.3d at 501–03 (discussing *Griffin*, *Knights*, and *Samson*). So the investigatory-versus-regulatory distinction is not relevant here.

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 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.

III

This case is controlled by *Knights* and *Samson*, not *Riley*. On balance, Indiana's interests outweigh Wood's privacy expectation as a parolee whose person, residence, and property were subject to search. So the warrantless search of Wood's cellphone was reasonable. For these reasons, we AFFIRM the district court's denial of Wood's motion to suppress.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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FINAL JUDGMENT

October 21, 2021

Before
DIANE S. SYKES, *Chief Judge*
FRANK H. EASTERBROOK, *Circuit Judge*
MICHAEL B. BRENNAN, *Circuit Judge*

No. 20-2974	UNITED STATES OF AMERICA, Plaintiff - Appellee v. HENRY E. WOOD, Defendant - Appellant
Originating Case Information:	
District Court No: 3:19-cr-00038-DRL-MGG-1 Northern District of Indiana, South Bend Division District Judge Damon R. Leichty	

We **AFFIRM** the district court's denial of Wood's motion to suppress in accordance with the decision of this court entered on this date.

form name: **c7_FinalJudgment** (form ID: **132**)

No. 20-2974

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

HENRY WOOD,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Indiana, South Bend Division
Case No. 3:19-cr-00038
Damon R. Leichty, Judge

PETITION FOR REHEARING *EN BANC* OF DEFENDANT-APPELLANT, HENRY WOOD

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ORAL ARGUMENT REQUESTED

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-2974

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Henry Wood

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Thomas W. Patton and Daniel J. Hillis of the Federal Public Defender's Office for the Central District of Ill;

and David P. Jones

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(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

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Attorney's Signature: s/ Daniel J. Hillis Date: December 2, 2021

Attorney's Printed Name: Daniel J. Hillis

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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FEDERAL RULE OF APPELLATE PROCEDURE 35(b)(1) STATEMENT REGARDING REASONS FOR REHEARING OR REHEARING *EN BANC*

This Court recently decided *United States v. Wood*, 16 F.4th 529 (7th Cir. Oct. 21, 2021). It should grant rehearing *en banc* because *Wood* wrongly distinguished other Circuit precedent that correctly suppressed evidence where (as here) law enforcement failed to obtain a search warrant for a cellphone, disregarded Supreme Court and Circuit precedent concerning applicable statutory interpretation canons, and created a new status of seized persons ("arrestee-parolee") who are subject to warrantless parole searches due to the parole system's interest in rehabilitation/monitoring parolees without regard for the fact that those interests via arrest (which triggers its own protections).

INTRODUCTION

Henry Wood was an Indiana parolee whom officers arrested for not attending a parole meeting. *Wood*, 16 F.4th at 532. After arresting him, officers conducted a warrantless search of Mr. Wood's cellphone and found child pornography on it. *Id.* His appeal argued that the evidence should have been suppressed since the search violated *Riley v. California*, 573 U.S. 373, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014) and because his parole condition didn't allow a search for an already completed parole violation. *Id.* at 533-38. *Wood* affirmed. *Id.*

Wood determined that *Riley* was a search incident to arrest scenario that "is not readily transferable to scenarios other than the one it addressed". *Id.* It

rejected the idea that officers' arrest of Mr. Wood triggered *Riley*. *Id.* at 538. Instead, *Wood* found that *United States v. Pacheco*, 884 F.3d 1031, 1043–44 & n.10 (10th Cir. 2018) (discussing *Riley's* inapplicability in the parole context); *United States v. Johnson*, 874 F.3d 1265, 1273–76 (9th Cir. 2017) (holding that *Riley* did not require parole agents to obtain a warrant before searching a parolee's cellphone); *United States v. Jackson*, 866 F.3d 982, 985–86 (8th Cir. 2017) (same), supported affirmance. *Id.* at 536. *Wood* distinguished Mr. Wood's case from *United States v. Lara*, 815 F.3d 605 (9th Cir. 2016) and *United States v. Fletcher*, 978 F.3d 1009 (6th Cir. 2020)---cases that relied on *Riley* to suppress evidence obtain via warrantless searches of probationers' cell phones. *Id*. Moreover, although Mr. Wood's parole condition permitted searches when Mr. Wood "is violating" or in "imminent danger of violating" a parole condition---and the arrest was for a completed violation and it made an imminent danger of another violation impossible---*Wood* said that would be an "absurd result" since requiring an ongoing violation per the condition's plain text would prevent the parole search. *Id.* at 538-39. *Wood* disregarded applicable Supreme Court precedent Mr. Wood cited. (App.R.22 at 12-13) (citing cases that require text to be applied as written even and to give effect to verb tense even if it causes prosecution to fail). *Wood* also created a new class of person ("parolee-arrestee") who could be searched under parole conditions that effectively ended by an arrest that Wood deemed to pose no

barrier to a warrantless cellphone search. *Id.* at 538.

REASONS FOR GRANTING REHEARING OR REHEARING *EN BANC*

A rehearing is proper if this Court overlooked or misapprehended a point of law or fact. *See* Fed.R.App.P. 40(a)(2). A petition for rehearing "should alert the panel to specific factual or legal matters that the party raised, but that the panel may have failed to address or may have misunderstood." *Easley v. Reuss*, 532 F.3d 592, 593 (7th Cir. 2008).

ARGUMENT

The panel's opinion misapplied pertinent circuit and Supreme Court precedent that support suppression of the evidence officers found during a warrantless cellphone search that occurred after arrest.

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), courts must balance a parolee's privacy expectations, as shaped by state law. *See United States v. White*, 781 F.3d 858, 861–62 (7th Cir. 2015). Mr. Wood's parole agreement allowed a search of his "person and residence or property under [his] control". 16 F.4th at 535. Mr. Wood relied on *Lara*, 815 F.3d 605 and *Fletcher*, 978 F.3d 1009, as support for suppression since both cases concluded that warrantless searches of probationer's cell phones violated the Fourth Amendment. (App.R.11; App.R.22).

To begin, *Wood* relied on inapt Eighth, Ninth and Tenth Circuit authority to "align" its outcome. 16 F.4th at 536. *Pacheco* affirmed 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. *Wood* cited *United States v. Johnson*, 874 F.3d 1265, 1274-75 (9th Cir. 2017), but *Johnson* turned on California's parole conditions. 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. *Wood* also relied on *United States v. Jackson*, 866 F.3d 982, 985-86 (8th Cir. 2017). Yet *Jackson* addressed a phone that was subject to a suspicionless search condition. *Id.* Since Mr. Wood's parole agreement did not permit suspicionless searches, *Jackson* is unhelpful.

Lara and *Fletcher* are, instead, the precedent that should have led to suppression. *Wood* said *Fletcher* and *Lara* were distinguishable since the 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. 16 F.4th at 536, 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").

Mr. Wood's parole agreement allowed a search of his "person and residence or property under [his] control". *Wood*, 16 F.4th at 535. Case law instructs that the word "property" must be read in conjunction with the other language in the condition. *See Lara*, 815 F.3d at 611. Here, the relevant condition permitted searches of Mr. Wood's body, the place where he lives, or places under his control (*i.e.*, temporary residences, vehicles, storage units, etc.). *Id.* Treating Mr. Wood's cell phone as that sort of property pays no heed to the condition's crucial context and incorrectly treats data as if it was a "place" to be searched. *Id.*; *see also Gonzales v. Carhart*, 550 U.S. 124, 152, 127 S. Ct. 1610, 1630, 167 L. Ed. 2d 480 (2007) ("In interpreting statutory texts courts use the ordinary meaning of terms unless context requires a different result. *See, e.g.*, 2A N. Singer, Sutherland on Statutes and Statutory Construction § 47:28 (rev. 6th ed. 2000)). Additionally, it disregards the critical difference between cellphone data and conventional property---a difference that *Riley* pointedly recognized. 134 S.Ct. at 2491 (a cell phone search "would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is."); *see also Lara*, 815 F.3d at 611 (citing same). Due to that essential dissimilarity, post-*Riley*, one cannot search cell phone data without first obtaining a search

warrant. *See Fletcher*, 978 F.3d at 1021 (suppressing evidence because, per *Riley*, a search of the probationer's cellphone "required either a warrant or some exception to it"); *Lara*, 815 F.3d at 614.

Neither Mr. Wood's parole agreement nor the agreements in *Fletcher* and *Lara* referred to cellphones or the data they contain such that the agreement unambiguously subjected those things to warrantless searches. And inasmuch as *Wood* touted Indiana's interest in reducing recidivism to overcome Mr. Wood's expectation of privacy, the governmental authorities in *Fletcher* and *Lara* had no less an interest in reducing recidivism, yet both cases resulted in suppression of evidence police found during warrantless searches of cellphones. *See Fletcher*, 978 F.3d at 1020-21; *Lara*, 815 F.3d at 614.

Moreover, *Wood* said "[o]nly a strained and unreasonable reading" of the probation conditions in *Lara* and *Fletcher* would prevent law enforcement from being allowed to search cellphones that are part of a probationer's property. 16 F.4th at 537. *Wood* provided no support for its conclusion. *Id.* It's an outcome that's contrary to *Lara*, a well-reasoned decision that explained:

> [T]he word "property" [does not] unambiguously include cell phone data, especially when the word is read in conjunction with the language that follows. We repeat the relevant language here: "property, including any residence, premises, container or vehicle under my control." Each of the specific types of property named as examples refer to physical objects that can be possessed. A cell phone is such an object, but cell phone data, which were the subject of the two searches in this case, are not property in this sense.

> Further, the Court recognized in *Riley* that cell phones differ from conventional property in that they provide access to data, such as medical and banking records, that is held by third parties. 134 S.Ct. at 2491. Such information not only cannot be possessed physically; it is also not "under [Lara's] control," as provided in the search condition.

815 F.3d at 611.

Also, *Wood* disagreed with *Fletcher's* determination that a state's interest in supervising a probationer terminates once officers secure the cellphone. *See Wood*, 16 F.4th at 537, citing *Fletcher*, 978 F.3d at 1019. *Wood* said that wasn't supported by *Knights* and *Samson* as *Wood* concluded that "*Knights* and *Samson* support the state's ongoing supervisory role over parolees" and "the continuity of a state's parole system would be severely impeded" if supervision ended upon a parolee's arrest. *Id. Wood* called that an "unreasonable result". *Id.*

Yet a person's status often dictates corresponding rights. For instance, while a parolee has to answer questions (so long as they don't implicate Fifth Amendment rights) and has no due process right to the assistance of counsel on parole until a violation is alleged, a person under arrest has right to remain silent and the right to a lawyer. *Cf. 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). An arrest ends all sorts of obligations that existed during parole. If a parole agreement required as a condition of freedom that a parolee attend compulsory meetings with parole officers, complete treatment programs,

submit to drug testing by a parole officer, allow various searches, etc., the *quid pro quo* for those parole requirements ends via the arrest that terminates a parolee's liberty. *Cf. United States v. Scott*, 450 F.3d 863, 868 (9th Cir. 2006) (suggesting that a defendant's agreement to a search condition in exchange for relief from prison is "a relevant factor in determining how strong his expectation of privacy is"); *accord Knights*, 534 U.S. 112, 117–18 (reasonable of search depends on totality of the circumstances). That supports finding that the parole condition allowing a warrantless search did not remain in effect upon Mr. Wood's arrest for a completed parole violation.

Wood does not say how a parolee's obligations can continue once the benefits of parole end. It's because they don't. A government's interest in "promoting reintegration and positive citizenship among probationers and parolees" may indicate the "imminent sense" of warrantless searches for parolees since they require intense supervision (*Samson*, 547 U.S. at 853-54), but that all ends once a parole officer initiates arrest and terminates a parolee's liberty. With an arrest, out goes the effort to reintegrate the parolee and the justification for any warrantless search condition.

And despite *Wood's* statement to the contrary, there is no ensuing discontinuity of the parole system if officers aren't allowed to search those they arrest. 16 F.4th at 537. The parole objectives of transitioning a parolee into society

and preventing recidivism end by virtue of custody (due either to a new crime of technical violation of a condition). *Wood* incorrectly rationalizes the need for a warrantless search based on parole objectives even though those objectives terminate upon arrest.[1] *Id.*

Furthermore, *Wood* states that "[u]pon arrest, Wood's status was not transformed from parolee to arrestee, but from parolee to parolee-arrestee." 16 F.4th at 538. The term "parolee-arrestee" breaks new ground. *Wood* cited no case which uses the term. *Id.* If it is a legally established status, counsel has been unable to find any case that employs the term or establishes its contours. For all the years that parole has existed, and for all the times a parolee has been arrested, there seem to be no cases that find a "parolee-arrestee" to exist.

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[1] *Wood* cited *United States v. Jones*, 152 F.3d 680, 686–87 (7th Cir. 1998) for the idea that "interests in preventing harm to the probationer and to society are fully cognizable even when the probationer is in the State's custody". *Id.* Respectfully, law enforcement objectives do not reduce the Fourth Amendment to ash; the legitimate interest in crime control coexists with the Constitution's protections. *Jones* said that there's no reason why a "parolee's reasonable expectation of privacy in his home is heightened when he is in the State's custody for the purpose of determining whether the supervisory relationship has broken down and the parolee has violated the conditions of his parole". *Id.* at 686). However, as mentioned above, the diminished expectation of privacy only exists while a person is conditionally free on parole. Mr. Wood's conditional freedom ended via arrest for a parole violation. And apropos of *Jones*, the issuance of an arrest warrant here was a conclusive determination that the supervisory relationship broke down. Mr. Wood's expectations didn't become "heightened" upon arrest; rather, the arrest terminated Mr. Wood's liberty and along with the parole justifications supporting warrantless searches. Additionally, unlike *Jones* Mr. Wood's case isn't about the search of a home; it's a search of cellphone data whose expanse is considerably different than a home's physical contents. *See Riley*, 134 S.Ct. at 2491.

Wood also distinguished the instant case from *Lara* and *Fletcher* by saying that those were probation cases and Mr. Wood was a parolee. 16 F.4th at 536, citing *Johnson*, 874 F.3d at 1275 (explaining "[the defendant's] parole status alone distinguishes our case from *Lara* and *Riley*"). However, under Indiana law, a parolee has the same expectation of privacy as a probationer. *See Carswell v. State*, 721 N.E.2d 1255, 1262 (Ind.Ct.App.1999)) ("[T]he only practical difference between the two is that 'probation' relates to judicial action taken before the prison door is closed, whereas 'parole' relates to executive action taken after the door has closed on a convict."). Still, *Wood* concluded that the lack of difference between the rights of probationers and the rights of parolees means that probationers have relatively diminished rights in Indiana and, thus, Mr. Wood had the meager protections afforded by *Samson*. 16 F.4th at 536, n.1, citing *State v. Vanderkolk*, 32 N.E.3d 775, 779 (Ind.App.Ct. 2015).

But what *Vanderkolk* said was:

> Because probation, like parole, involves the conditional release of a prisoner who would otherwise be subject to unrestricted searches during his or her incarceration, because neither probationers nor parolees enjoy the absolute liberty to which other citizens are entitled, because probation searches are necessary to the promotion of legitimate government interests, because the willingness of judicial officers to grant conditional release is likely to be impaired if supervision is uncertain or difficult, and because searches of probationers or community corrections participants require that they be unambiguously informed of a clearly expressed search condition in the conditions of release to probation or community corrections, we conclude that the holding in *Samson* is applicable to

> probationers and community corrections participants. We therefore hold that Indiana probationers and community corrections participants, who have consented or been clearly informed that the conditions of their probation or community corrections program unambiguously authorize warrantless and suspicionless searches, may thereafter be subject to such searches during the period of their probationary or community corrections status.

32 N.E.3d at 779.

The significance of *Vanderkolk* is its instruction to look at the terms of probation and parole agreements. *Id.* A person's status as a parolee isn't controlling; the terms of the release are determinative. *Id.* As such, *Wood* wrongly used Mr. Wood's parole status as a means to distinguish it from *Lara* and *Fletcher*.

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, White*, 781 F.3d at 861 ("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). *Wood* wrongly concluded that Mr. Wood's parolee status reduced his expectation of privacy vis-à-vis the probationers in *Lara* and *Fletcher*. But Mr. Wood's parole conditions are what matter and the search condition, like those in *Lara* and *Fletcher*, didn't allow a warrantless search.

Also, Mr. Wood argued that the cellphone search violated the parole agreement (authorizing "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"), because he could no longer be "violating" or in "imminent danger of violating" a parole condition, eliminating the possibility of "reasonable cause." *Id.* at 538-39. *Wood* rejected that effort, saying that no Indiana court had interpreted the condition that way and also saying it would lead to an absurd result. *Id.* at 539. However, that disregards *Samson*. 547 U.S. at 847. Just as the parole condition in *Samson* allowed a warrantless search and had to be given affect, the condition here prevented the search since there was no ongoing violation. And since the Government never raised the absurd result canon (App.R.19), *Wood* shouldn't have advanced the issue. *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). What is more, if an Indiana court rejected the proposed interpretation, that would detract from Mr. Wood's claim---but the absence of an Indiana case only shows the issue has been decided by that state. What matters is the condition's text and the text requires an ongoing violation or an imminent danger of a violation. The Government proved neither thing.

Though *Wood* says that there would be an absurd result, *Wood's* statement reflects a dissatisfaction with the prospective outcome and doesn't address what the "absurd result" constructive cannon requires. 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". J*askolski 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)). The instant parole condition makes sense as written, notwithstanding what *Wood* indicates to lead to an unfortunate outcome for law enforcement. Perceived bad consequences do not allow creative "interpretation" to avoid them. *Lamie*, 540 U.S. at 536–37, 124 S.Ct. 1023. Yet *Wood* did just that.

REASONS FOR GRANTING REHEARING *EN BANC*

Wood misapplied Supreme Court and various appellate precedent by determining that an Indiana parolee whose parole agreement allows for a search of his "property" subjects his cellphone data to a warrantless search. Consistent with *Riley*, *Lara* and *Fletcher*, law enforcement violated the Fourth Amendment by conducting a warrantless search of Mr. Wood's cellphone's data. Under

Samson, the parole condition didn't permit the search. 547 U.S. at 847. Under *Riley*, law enforcement had to "get a warrant" before the contents of Mr. Wood's phone. 573 U.S. at 403. *Wood* is distinct from the cases it cites as support. The decision created (or at least contributed to) a circuit split and created a new class of person ("parolee-arrestee") who must endure a warrantless search as a parolee and is deprived of the warrant requirement that *Riley* affords to arrestees.

CONCLUSION

WHEREFORE this Court should grant Mr. Wood's petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(C)

The undersigned certifies that this brief complies with the volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(C) and Circuit Rule 32 in that it contains 3,430 words and 299 lines of text as shown by Microsoft Word 2010 used in preparing this brief.

s/ Daniel J. Hillis
DANIEL J. HILLIS

Dated: December 2, 2021

No. 20-2974

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

HENRY WOOD,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division

Case No. Case No. 3:19-cr-00038

Hon. Damon R. Leichty, United States District Judge, Presiding.

NOTICE OF FILING AND PROOF OF SERVICE

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PLEASE TAKE NOTICE that on December 2, 2021, the undersigned attorney electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. I further certify that some of the participants in the case are

not CM/ECF users. I have mailed the foregoing documents by First Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier within three calendar days, to the non-CM/ECF participants.

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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

December 17, 2021

Before

DIANE S. SYKES, *Chief Judge*

FRANK H. EASTERBROOK, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

No. 20-2974

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
v.	No. 3:19-cr-00038
HENRY E. WOOD, *Defendant-Appellant*.	Damon R. Leichty, *Judge*.

O R D E R

On consideration of the petition for rehearing and for rehearing en banc[1] filed by Defendant-Appellant on December 2, 2021, no judge in active service has requested a vote on the petition for rehearing en banc, and the judges on the original panel have voted to deny rehearing.

Accordingly, the petition for rehearing is DENIED.

[1] Circuit Judge Thomas L. Kirsch II did not participate in the consideration of this matter.