22-6580

No. _____

ORIGINAL

FILED
DEC 22 2022
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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Daniel J. Campbell — PETITIONER
(Your Name)

vs.

State of Ohio — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Supreme Court of Ohio
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Daniel Campbell
(Your Name)

5900 BIS Road
(Address)

Lancaster, Ohio, 43130
(City, State, Zip Code)

(740) 536-7403
(Phone Number)

QUESTION(S) PRESENTED

Questions Presented

1. Is a search reasonable under the 4th Amendment when a probation officer who lacks required reasonable suspicion and is in violation of Ohio Revised Code R.C. 2951.02(A) subjects a probationer to a search of his cell phone and other digital devices, which are not subject to his specific search conditions?

2. Does the word "property" in a probationer's Terms and Conditions of Community Control encompass a cell phone when the conditions include an "Electronics Search Condition" that the probationer was not subject to?

3. Two Fourth Amendment doctrinal frameworks govern the relationship between state actors and individuals subject to state supervision following release from prison. One arises from the Supreme Court's decision in Griffin v. Wisconsin and the other from the Court's decision in United States v. Knights. Can a state court determine the reasonableness of a search without first testing it by either of these two frameworks?

LIST OF PARTIES

[√] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

RELATED CASES

State v. Campbell, 2022-Ohio-3626, 2022 Ohio LEXIS 2098, 2022 WL 7171562 (Ohio October 13, 2022)

State v. Campbell, 2020-Ohio-4119, 157 N.E.3d 373, 2020 Ohio App. LEXIS 3016, 2020 WL 4814198 (Ohio Ct. App., Fairfield County August 18, 2020)

United States v. Fletcher, 978 F.3d 1009, 2020 U.S. App. LEXIS 33688, 2020 FED App. 0339P (6th Cir.) (6th Cir. Ohio October 26, 2020)

United States v. Fletcher, 2018 U.S. Dist. LEXIS 65591, 2018 WL 1863825 (S.D. Ohio April 18, 2018)

Riley v. California, 573 U.S. 373, 134 S. Ct. 2473, 189 L. Ed. 2d 430, 2014 U.S. LEXIS 4497, 82 U.S.L.W. 4558, 42 Media L. Rep. 1925, 24 Fla. L. Weekly Fed. S 921, 60 Comm. Reg. (P & F) 1175, 2014 WL 2864483 (U.S. June 25, 2014)

State v. Smith, 124 Ohio St. 3d 163, 2009-Ohio-6426, 920 N.E.2d 949, 2009 Ohio LEXIS 3496, 62 A.L.R.6th 677 (Ohio December 15, 2009)

United States v. Lara, 815 F.3d 605, 2016 U.S. App. LEXIS 3995 (9th Cir. Cal. March 3, 2016)

United States v. Knights, 534 U.S. 112, 122 S. Ct. 587, 151 L. Ed. 2d 497, 2001 U.S. LEXIS 10950, 70 U.S.L.W. 4029, 2001 Cal. Daily Op. Service 10246, 2001 Daily Journal DAR 12759, 15 Fla. L. Weekly Fed. S 27 (U.S. December 10, 2001)

Griffin v. Wis., 483 U.S. 868, 107 S. Ct. 3164, 97 L. Ed. 2d 709, 1987 U.S. LEXIS 2897, 55 U.S.L.W. 5156 (U.S. June 26, 1987)

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[✓] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[✓] reported at State v. Campbell, 2022-Ohio-3626; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Court of Appeals of Ohio, Fifth Appellate District, Fairfield County court appears at Appendix B to the petition and is

[✓] reported at State v. Campbell, 2020-Ohio-4119; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[✓] For cases from **state courts**:

The date on which the highest state court decided my case was Oct. 13, 2022. A copy of that decision appears at Appendix A.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Proposition of Law No. 1: Probationers are still protected under the 4th Amendment even if they have a reduced expectation of privacy, they have a heightened expectation of privacy in their cell phones, especially when their terms of probation do not include electronics search conditions, and probation officers lack required "reasonable suspicion" to satisfy the reasonableness requirement of the 4th Amendment and are in violation of Ohio law

The US Constitution provides:

USCS Const. Amend. 4 Amendment 4 Unreasonable searches and seizures.

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

A person's status as a probationer reduces his interest in privacy. But while the privacy interest of a probationer has been significantly diminished, it is still substantial

The Fourth Amendment provides that "[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." U.S. Const. amend. IV. "[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Riley v. California*, 573 U.S. 373, 381-82, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006)). And "reasonableness [**5] 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)). If there is no warrant, then "a search is reasonable only if it falls within a specific exception to the warrant requirement." *Id.*

Search & Seizure, Scope of Protection
A court must evaluate the reasonableness of a warrantless search in light of the totality of the circumstances 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.

The U.S. Supreme Court's decision in United States v. Knights clarified that a probationer's reasonable expectation of privacy is significantly diminished when the terms of the probation agreement clearly expressed the search condition so that the probationer was unambiguously informed.

The search of a Cell Phone is unique and—as compared to the search of a home—infringes far more on individual privacy. As a result, the court cannot assume that provisions in a probation agreement authorizing the search of a probationer's person or place of residence also authorize the search of his cell phones.

Proposition of Law No. 2: Ohio Rev. Code Ann. § 2951.02(A) Is reasonable under 4th Amendment considerations.

Here, the relevant Ohio statute provides that: during the period of a felony offender's nonresidential sanction, authorized **probation** officers who are engaged within the scope of their supervisory duties or responsibilities may search, with or without a warrant, the person of the offender, . . . another item of tangible or intangible personal property, or other real property in which the offender has a right, title, or interest . . . **if the probation officers have reasonable grounds** to believe that the offender is not abiding by the law or otherwise is not complying with the conditions of . . . the felony offender's nonresidential sanction.

Ohio Rev. Code Ann. § 2951.02(A)

Warrantless Searches, Parolees & Probationers

To conduct the **cellphone** search of a probationer, Ohio requires that the probation officer have reasonable grounds to believe that the probationer was either in violation of the law or of the conditions of his probation. Ohio Rev. Code Ann. § 2951.02(A). Reasonable suspicion is based on the totality of the circumstances and has been defined as requiring articulable reasons and a particularized and objective basis for suspecting the particular person of criminal activity.

This condition lets it be known that Ohio requires probation officers to have reasonable grounds to conduct a search on a probationer.

Proposition of Law No. 3: Individuals subject to state supervision may have lesser privacy interests than the general public. Two Fourth Amendment doctrinal frameworks govern the relationship between state actors and individuals subject to state supervision in lieu of or following release from prison. One arises from the Supreme Court's decision in Griffin v. Wisconsin and the other from the Court's decision in United States v. Knights. The reliance of the Ohio Supreme Court on Benton is in error

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Search & Seizure, Scope of Protection

In Griffin v. Wisconsin, the U.S. Supreme Court created a two-part inquiry to evaluate the reasonableness of a warrantless search of a probationer's home conducted under a specific statute or regulation. First, courts examine whether the relevant regulation or statute pursuant to which the search was conducted satisfies the Fourth Amendment's reasonableness requirement. If so, courts then analyze whether the facts of the search itself satisfy the regulation or statute at issue.

Jones v. Lafferty, 173 F. Supp. 3d 493, 2016 U.S. Dist. LEXIS 41069, 2016 WL 1255720 (E.D. Ky. March 29, 2016)

"The Fourth Amendment protects the right of citizens to be free from unreasonable government intrusions into areas where they have a legitimate expectation of privacy. Kyllo v. United States, 533 U.S. 27, 33-34, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001). In determining whether a particular search is permissible under the Fourth Amendment, "the touchstone ... is reasonableness." United States v. Lifshitz, 369 F.3d 173, 178 (2d Cir. 2004). With very few exceptions, a search conducted by

*government officials [**9] without a warrant supported by probable cause is presumptively unreasonable. Kyllo, 533 U.S. at 32 (citing Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)).*

*In a series of cases decided since 1987, the Supreme Court has explored whether a search conducted under the authority provided by a state statute, regulation, or court order which permits the warrantless search of a probationer's or parolee's person or property is compatible with the Fourth Amendment's reasonableness requirement. In Griffin v. Wisconsin, over a year after Griffin was placed on probation, Wisconsin enacted a regulation which permitted the warrantless search of a probationer's home if there were "reasonable grounds" to believe that there was contraband inside. The Supreme Court upheld a warrantless search of Griffin's apartment while he was on probation, but not because the search itself satisfied the Fourth Amendment's reasonableness requirement. Instead, "[t]he search of Griffin's home satisfied the demands of the Fourth Amendment because it was carried out pursuant to a regulation that itself satisfies the Fourth Amendment's reasonableness requirement under well-established principles." Griffin v. Wisconsin, 483 U.S. 868, 873, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987). Noting that under its precedent "special needs" can "make the warrant and probable-cause requirement impracticable," the Court held that a state's need to supervise [**10] those persons on probation constituted such a special need, thus "permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large." Id. at 873-76.*

*More than a decade later, in United States v. Knights the Supreme Court took a different approach when considering the constitutionality of a warrantless search supported only by an officer's "reasonable suspicion" of criminal activity by Knights. There, a condition in Knights' California probation order permitted search of his home without either a warrant or "reasonable cause." The Court unanimously held that the search satisfied the Fourth Amendment even where conducted in search of evidence of a new crime, rather than for purposes related to probation for an old one. United States v. Knights, 534 U.S. 112, **[*498]** 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001).*

*In doing so, however, the Supreme Court relied upon neither the "special needs" justification underpinning Griffin nor the "consent" rationale found in Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). Id. at 118, 122. Instead, it concluded that the search "was reasonable under our general Fourth Amendment approach of 'examining the totality of the circumstances,' with the probation search condition being a salient circumstance." Knights, 534 U.S. at 118 (citing Ohio v. Robinette, 519 U.S. 33, 39, 117 S. Ct. 417, 136 L. Ed. 2d 347 (1996)). Under that approach, "the reasonableness of a search is determined 'by assessing, on the [**11] 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.'" Id. at 119-20 (quoting Wyoming v. Houghton, 526 U.S. 295, 300, 119 S. Ct. 1297, 143 L. Ed. 2d 408 (1999)).*

The Supreme Court held that Knights' status as a probationer was relevant to both questions. On the one hand, the intrusion upon Knights' privacy was lessened both because probation generally is a "form of criminal sanction" and because the terms of the search condition in Knights' probation order "significantly diminished Knights' reasonable expectation of privacy." Knights, 534 U.S. at 119-20. On the other hand, probation provides the government with a legitimate interest in searching probationers' homes to deter recidivism and detect criminal activity. Considering these factors, the Supreme Court held that "[w]hen an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable." Knights, 534 U.S. at 120-21.

*Importantly, in Knights it was not contested that the search of the residence was based upon reasonable suspicion, and the Court therefore [**12] did not reach the question whether the search condition - which permitted a search even without "reasonable cause" - would have satisfied the reasonableness requirement of the Fourth Amendment, or constituted consent, if there had been no reasonable suspicion to support it. Knights, 534 U.S. at 120 n.6.*

*The Supreme Court took up that unresolved question five years later in Samson v. California, but in the context of a parolee. Samson, as a condition to being released on parole in California, had agreed to be searched without a search warrant and without "cause." Noting that the interests at stake in matters related to probationers and parolee are very similar, the Supreme Court utilized the same "totality of the circumstances" analysis set forth in Knights to determine the reasonableness of the search under the Fourth Amendment. The Court held that even the suspicionless search of Samson was reasonable because all parolees in California have reduced expectations of privacy, Samson was actually aware of the parole search condition that subjected him to suspicionless searches, "the extent and reach of these conditions clearly demonstrate that parolees like petitioner have severely diminished expectations of privacy by virtue of their status alone," [**13] and the state has a strong interest in supervising parolees. Samson v. California, 547 U.S. 843, 849-55, 126 S. Ct. 2193, 165 L. Ed. 2d 250 (2006).* 4

Following these decisions, some federal courts of appeal have suggested that the Supreme Court invoked its "special needs" jurisprudence in Griffin - rather than the Fourth Amendment's general "reasonableness" requirement applied in Knights and Samson - because the Wisconsin search condition was enacted only after Griffin's placement on probation. See United States v. Williams, 417 F. 3d 373, 378 (3d Cir. 2005) (holding that Griffin does not apply where the probationer has expressly agreed to a search condition). But the Sixth Circuit and other courts have held that Knights and Griffin simply "represent two distinct analytical approaches under which a warrantless probationer search may be excused." United States v. Herndon, 501 F. 3d 683, 688 (6th Cir. 2007) (citing United States v. Freeman, 479 F.3d 743, 746 (10th Cir. 2007)); see also United States v. Warren, 566 F. 3d 1211, 1215 (10th Cir. 2009). [5]

*Under the Griffin line of cases, the Sixth Circuit has held [**15] that:*

In analyzing a special needs search of a parolee under Griffin and its progeny, courts conduct a two-pronged inquiry. First, courts examine whether the relevant regulation or statute pursuant to which the search was conducted satisfies the Fourth Amendment's reasonableness requirement. If so, courts then analyze whether the facts of the search itself satisfy the regulation or statute at issue. With respect to the first prong of the Griffin analysis, it is now beyond question that a state statute survives Fourth Amendment scrutiny if it authorizes searches of parolees based on a reasonable suspicion that an individual is violating the terms or conditions of parole. As for the second prong, the reasonable suspicion standard is less stringent than the probable cause requirement. Nonetheless, it still requires that, given the totality of the circumstances, parole officers provide "'articulable reasons' and 'a particularized and objective basis'" for their suspicion of a parole violation.

United States v. Loney, 331 F. 3d 516, 520-21 (6th Cir. 2003).

*In United States v. Henry, 429 F.3d 603 (6th Cir. 2005), the Sixth Circuit applied that test to the same KDOC Policy at issue in this case. At the time, the Kentucky Supreme Court had interpreted the KDOC **[*500]** Policy to require parole officers to have "reasonable suspicion" that a parolee [**16] had violated the terms of his parole to justify a warrantless search. Coleman v. Commonwealth, 100 S.W.3d 745, 754 (Ky. 2002). Because federal courts are generally bound by the Kentucky Supreme Court's interpretation of Kentucky law, Griffin, 483 U.S. at 875, the Sixth Circuit concluded that "the reasonable-suspicion aspect of the policy remains reasonable under the Fourth Amendment." Id. at 609 (emphasis added). With respect to the scope aspect of the KDOC Policy, after the Policy had previously been upheld in United States v. Payne, 181 F.3d 781 (6th Cir. 1999), Kentucky broadened the Policy to permit a warrantless search if the officer possessed reasonable suspicion that the probationer has violated any condition of probation, not just by possessing contraband. Nonetheless, the Sixth Circuit found the scope aspect of the KDOC Policy reasonable for Fourth Amendment purposes in light of Loney, which upheld a comparable provision under Ohio law. Henry, 429 F. 3d at 609. With respect to the second prong of the Loney analysis, the court concluded that the actual search of Henry did not conform to the requirements of the KDOC Policy because the officers lacked the "reasonable suspicion" required by the Policy under the circumstances of the case, hence invalidating the search. Id. at 609-14.*

*The Sixth Circuit has also explained that under the first part of the Griffin analysis - determining [**17] whether a state search condition "itself satisfies the Fourth Amendment's reasonableness requirement," Griffin, 483 U.S. at 873, a court must "test[] a search condition's validity by confirming the presence of a reasonable suspicion requirement and its consistency with the federal reasonable suspicion standard."). United States v. Herndon, 501 F. 3d 683, 689 (6th Cir. 2007) (quoting Henry at 609 ("Because Kentucky's probationary search policy incorporates both the quantum of evidence (i.e., reasonable suspicion) approved in Payne and the breadth (i.e., not just contraband but any probation violation) approved in Loney, we hold that the policy is reasonable under the Fourth Amendment.")). Thus, a search condition that authorizes a search without a "reasonable suspicion requirement that cabined the authority vested in his probation office ... may not be justified as a special needs search under Griffin."* [6] *Id.*

*These principles are fairly settled in the federal [**18] courts of appeal. However, in Bratcher, the Kentucky Supreme Court reviewed the Supreme Court's precedent in Knights and recent decision in Samson and concluded:*

the Supreme Court upheld the [California] statute, concluding that "the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee." Hence, while the requirement for a warrantless search of a probationer's residence remains the "reasonable suspicion" standard enunciated in Knights, based upon Samson, there is no analogous requirement under the federal constitution for the search of a parolee's residence.

*** *** ***

In summary, the current state of Fourth Amendment analysis under United States Supreme Court precedent is that ***HN3*** *a warrantless search of a probationer* ***[*501]*** *who has given consent as part of his probation satisfies the Fourth Amendment if there is reasonable suspicion of criminal activity, but the Fourth Amendment presents no impediment against a warrantless and suspicionless search of a person on parole.*

Bratcher, 424 S.W.3d at 414-15. Each of these conclusions is incorrect.

*First, the Supreme Court in Samson did not "uphold" the California statute: the validity of a statute under the Fourth Amendment is only a question under the "special needs" analysis in Griffin; the "totality of the circumstances" [**19] approach in Knights and Samson examines the state statutes, but only to inform and assess the probationer or parolee's reasonable expectations of privacy and weigh the state's countervailing interests in searching the person or home of those on supervision. Knights, 534 U.S. at 119-20. Validity is simply not an issue.*

*Second, neither Knights nor Samson purported to create a universally-applicable "reasonable suspicion" standard for warrantless searches of probationers. Rather, both cases assessed the validity of the search under a "reasonableness" test in light of the totality of the circumstances. In Tessier, the Sixth Circuit flatly rejected the notion that Knights established a "reasonable suspicion" requirement to support a warrantless search of a probationer subject to a search condition, stating that "Knights stood for no such thing; Knights held that reasonable suspicion is sufficient to uphold a search of a probationer who is subject to a search condition but left open the question of whether reasonable suspicion is required to search a probationer who is subject to a search condition." In short, Tessier viewed Knights as establishing "reasonable suspicion" as a sufficient condition rather than a necessary [**20] one. Tessier, 2016 U.S. App. LEXIS 2757, 2016 WL 659251, at *2.*

*But even Tessier goes too far, if only just. While courts in search of easy answers and bright lines may take comfort in such pronouncements, they are plainly inconsistent with the test actually articulated by the Supreme Court: that the search must "reasonable" when considering the "totality of the circumstances." Knights, 534 U.S. at 118. In many instances the probation and parole systems of the various states may be similar, but this does not mean that a court may blindly assume that they are the same as the California system at issue in Knights and Samson when evaluating the importance of governmental interests in permitting warrantless searches. Likewise, variations in the specifics of a state laws, including the exact terms of the state's probation and parole regulations and search conditions, are particularly relevant when determining the "degree to which [the search] intrudes upon an individual's privacy" because they directly inform the parolee's legitimate expectations of privacy. Samson, 547 U.S. at 849 ("We also considered the facts that Knights' probation order clearly set out the probation search condition, and that Knights was clearly informed of the condition. We concluded that under these circumstances, Knights' [**21] expectation of privacy was significantly diminished.") (internal citations omitted). Simply put, reducing the decision in Knights to a "reasonable suspicion" standard applicable to warrantless searches of probationers under all state systems of supervision is wholly antithetical to the Supreme Court's holding that each search must be evaluated under the totality of its circumstances.[7]*

*Third, Samson neither held nor suggested that "the Fourth Amendment presents no impediment against a warrantless and suspicionless search of a person on parole." Importantly, the specific question presented in Samson was "whether a condition of release [which permitted [**22] search of a parolee "with or without a search warrant and with or without cause" (emphasis added)] can so diminish or eliminate a released prisoner's reasonable expectation of privacy that a suspicionless search by a law enforcement officer would not offend the Fourth Amendment." Samson, 547 U.S. at 846-47. The Supreme Court held that, in light of the broad California provision in that case, a suspicionless search of a parolee was reasonable under the Fourth Amendment. As it did in Knights, the Supreme Court discussed at length the totality of the circumstances, including the particular provisions of California law applicable to parolees, Samson, 547 U.S. at 851-53; noted that "the parole search condition under California law - requiring inmates who opt for parole to submit to suspicionless searches by a parole officer or other peace officer "at any time" was "clearly expressed" to Samson, and that he signed an order expressly agreeing to its terms, id. at 852; set forth matters supporting California's interest in searching those under supervision, including statistical evidence showing the number of California's parolees and the recidivism rates, id. at 853-55; and noted that California law independently proscribes suspicionless searches if conducted in an "arbitrary, capricious or harassing" [**23] manner, id. at 856.*

The Kentucky Supreme Court in Bratcher also addressed the fact that the KDOC Policy, unlike the search condition in Samson, required the probation officer to have "reasonable suspicion" that the probationer was violating the conditions of probation before conducting a search. The Court held:

Although these provisions may be seen as more stringent than Samson, they do not alter the Fourth Amendment analysis. It is fundamental that by administrative rule or statute a state may impose upon its police authorities more restrictive standards than the Fourth Amendment requires. Such standards, however, cannot expand the scope of the Fourth Amendment itself. Virginia v. Moore, 553 U.S. 164, 128 S.Ct. 1598, 170 L.Ed.2d 559 (2008) (a state is free to prefer one search and seizure policy among several constitutionally permissible options, but its choice of a more restrictive option does not render less restrictive ones violative of the Fourth Amendment).

Bratcher, 424 S.W.3d at 415. This too is incorrect.

*The Kentucky Supreme Court's reliance upon Moore to conclude that the particular terms of the KDOC Policy are simply not relevant to the reasonableness of the search under the Fourth Amendment was misplaced. In Moore, the Supreme Court held that a violation of state law restricting searches to conditions more narrow than those permitted under the Fourth Amendment does not, ipso [**24] facto, result in a violation of the Fourth Amendment and the consequences resulting from such violation, such as the exclusion of evidence **[*503]** obtained. Virginia v. Moore, 553 U.S. 164, 171-77, 128 S. Ct. 1598, 170 L. Ed. 2d 559 (2008). But merely considering state law to inform the supervisee's reasonable expectations of privacy and the state's interests in warrantless searches does not alter the contours of the Fourth Amendment, which requires in all instances that the search be "reasonable."*

*Numerous courts of appeal have therefore held that the particular terms of the state's search condition are directly relevant to this inquiry. Cf. United States v. Graham, 553 F. 3d 6, 17 (1st Cir. 2009) (rejecting government's reliance upon Moore, noting that "[t]he Fourth Amendment's totality of the circumstances test does account for a probationer's expectation of privacy, which in turn may be shaped to some degree by state law and by what the state has communicated to the probationer. The Supreme Court appears to have established as much in cases like Knights and Samson."); United States v. Hill, 776 F. 3d 243, 249 (4th Cir. 2015) ("In our view, however, the specific probation condition authorizing warrantless searches was critical to the Court's holding [in Knights]."); United States v. Carnes, 309 F. 3d 950, 961-63 (6th Cir. 2002) (noting the differences in the search conditions as relevant under the Fourth Amendment analysis); United States v. Herndon, 501 F. 3d 683, 690 (6th Cir. 2007) ("In addition [to his status as a probationer], the specific terms of Herndon's probation, [**25] to which he assented, alerted him to his reduced privacy expectation. Directive 5 ... authorized Harrien to check Herndon's computer for Internet connectivity and activity at any time without restriction, creating a significant limit on any privacy interest Herndon may have held in the computer."); United States v. Hagenow, 423 F. 3d 638, 642 (7th Cir. 2005) (noting that "Like the probationer in Knights, Hagenow signed a specific waiver of rights regarding searches during probation, agreeing to 'waive any and all rights as to search and seizure' while on probation."); United States v. White, 781 F.3d 858, 861 (7th Cir. 2015) (explaining that because reasonableness of search of parolee's bag "turns in large part on the extent of White's legitimate expectations of privacy ... our analysis is shaped by the state law that governed White's terms of parole.") (internal citation omitted); United States v. Gonzales, 535 F. 3d 1174, 1182 (10th Cir. 2008) (noting that under Moore a violation of state law is not determinative of the constitutionality of police conduct, but it may be relevant to the reasonableness under the Fourth Amendment, and "compliance with state law is 'highly determinative' only when the constitutional test requires an examination of the relevant state law or interests."); Watson v. Cieslak, No. 09Civ2073(DAB)(JCF), 2009 U.S. Dist. LEXIS 122706, 2010 WL 93163 at *4 (S.D.N.Y. Jan. 11, 2010) ("Because the [Supreme] Court based its holding at least [**26] in part upon the language of the California parole agreement, which more explicitly diminishes the parolee's expectation of privacy than does the equivalent New York agreement, the effect of Samson in this jurisdiction remains unclear.")*

*As the Tenth Circuit has explained, "[p]arolee searches are ... an example of the rare instance in which the contours of a federal constitutional right are determined, in part, by the content of state law." United States v. Freeman, 479 F.3d 743, 747-48 (10th Cir. 2007). Invalidating the search in that case, the court placed direct reliance upon the language of the particular parolee search condition at issue: "Samson does not represent a blanket approval for warrantless parolee or probationer searches by general law enforcement officers without reasonable suspicion; rather, the Court approved the constitutionality of such searches only when authorized under state law. Kansas has not gone as far as California in authorizing **[*504]** such searches, and this search therefore was not permissible in the absence of reasonable suspicion." Id. at 748."*

Ohio law is similar in that it too requires reasonable suspicion and does not inform its probationers that they may be subject to suspicionless searches like the California court in Samson.

Proposition of Law No. 4: The 4th Amendment Exclusionary Rule

To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. The exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.

Next consider whether the exclusionary rule applies. "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. . . . [T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Herring v. United States*, 555 U.S. 135, 144, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009).

According to State v. Campbell, 2020-Ohio-4119, 157 N.E.3d 373, 2020 Ohio App. LEXIS 3016, 2020 WL 4814198 (Ohio Ct. App., Fairfield County August 18, 2020)

The **probation** officer was forthright about the common usage of random searches as a policy of the Fairfield County **Probation** Department. Her testimony also suggested she scrupulously reviewed the law regarding the legality and constitutionality though neither she nor appellee reconciled her policy with the obligations contained within R.C. 2951.02 nor is there any effort to distinguish our application of the statute. We are concerned the record reflects "deliberate, reckless, or grossly negligent conduct, or *** recurring or systemic negligence" that the exclusionary rule is designed to deter. *Herring, supra.*

It has been found that the probation officer's conduct was deliberate, reckless, or grossly negligent conduct, and recurring or systemic in its negligence. **CAMPBELL**'s conditions of probation did not clearly or unambiguously allow for such a search and the probation officer lacked reasonable suspicion to initiate that search. *See Knights*, 534 U.S. at 119; *Tessier*, 814 F.3d at 433. Application of the exclusionary rule here will deter suspicionless searches of a probationer's **cell** phone post-*Riley* where the terms of a probation agreement do not authorize such a search. Application of the rule would also encourage the future inclusion in probation agreements of clear and unambiguous terms regarding the distinct category of **cell** phones.

STATEMENT OF THE CASE

Statement Of The Case

This case arises at the intersection of two branches of Fourth Amendment law—one governing the traditional balancing of privacy and governmental interests and the other addressing searches of the digital content of cell phones. In short, the revolution in digital capacity of cell phones has shifted the balance between individual privacy and governmental interests. This case involves the decision of **CAMPBELL**'s probation officer to conduct a phone search for reportedly no reason. The search revealed suspected contraband. **CAMPBELL** appeals the Ohio Supreme court's reversal of his motion to suppress evidence found on his phone, because the probation officer did not have reasonable suspicion to search **CAMPBELL**'s **cell** phone and **CAMPBELL**'s probation agreement did not authorize the search.

I. BACKGROUND

Campbell was indicted for two counts of robbery in May 2012 and he entered a guilty plea to one count in December 2012. Campbell pursued and exhausted his appellate rights and in December 2015 he began serving his three-year sentence. The trial court granted his request for judicial release in December 2017 and placed him on community control. During a "house visit" with his probation officer conducting training of the entire probation department, during which he was to be reduced to non-reporting probation, the officer started a search of a phone while CAMPBELL was in another room, unaware that the search was taking place. The probation officer admitted to having no probable cause, reasonable grounds, or any other justification for the search. The probation officer reported that she believed she found contraband on the phone. Campbell was arrested for a probation violation.

The officers then began to confiscate numerous electronic items from the house, and sought, obtained, and executed a warrant to search the phone, based on the initial suspicionless and warrantless search of the phone. **CAMPBELL** now appeals the Ohio Supreme Court's reversal of his motion to suppress.

II. ANALYSIS

Question 1: Is a search reasonable under the 4th Amendment when a probation officer who lacks required reasonable suspicion and is in violation of Ohio Revised Code R.C. 2951.02(A) subjects a probationer to a search of his cell phone and other digital devices, which are not subject to his specific search conditions?

CAMPBELL argues that his probation officer lacked reasonable suspicion to search his **cell** phone without a warrant. The State of Ohio concedes that there was no reasonable suspicion. The Fourth Amendment provides that "[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." U.S. Const. amend. IV. "[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Riley v. California*, 573 U.S. 373, 381-82, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006)). And "reasonableness [**5] 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)). If there is no warrant, then "a search is reasonable only if it falls within a specific exception to the warrant requirement." *Id.*

In *Riley v. California*, the Supreme Court addressed how the data capacity of modern **cell** phones intersects with individual privacy concerns recognized by the Fourth Amendment and set out guiding principles for **cell** phone

searches. It held that "a warrant is generally required" for searching a **cell** phone, including phones seized incident to arrest. *Id.* at 401. But "even though the search incident to arrest exception does not apply to **cell** phones, other case-specific exceptions may still justify a warrantless search of a particular phone." *Id.* at 401-02. The Court explained that "exigencies could include the need to prevent the imminent destruction of evidence in individual cases, to pursue a fleeing suspect, and to assist persons who are seriously injured or are threatened with imminent injury." *Id.* at 402. "The critical point is that, unlike the search incident to arrest exception, the exigent circumstances exception requires a court to examine whether an emergency justified a warrantless [**6] search in each particular case." *Id.*

Applying these principles, the courts have explained that the Fourth Amendment requires the courts to "determine whether to exempt a given type of search from the warrant requirement '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.'" *United States v. Lichtenberger*, 786 F.3d 478, 487 (6th Cir. 2015) (quoting *Riley*, 573 U.S. at 385). Noting *Riley's* explanation that neither officer safety nor preservation of evidence "has much force with respect to digital content on **cell** phones," the court concluded that when the belonging being searched "is a device like a **cell** phone, the balance between governmental and privacy interests shifts enormously." *Id.* (quoting *Riley*, 573 U.S. at 386). The court relied on **[*1015]** *Riley's* instructions for balancing the interests involved in the arrest context:

On the government interest side, [we have previously] concluded that the two risks identified . . . —harm to officers and destruction of evidence—are present in all custodial arrests. There are no comparable risks when the search is of digital data. In addition, [we have] regarded any privacy interests retained by an individual after arrest as significantly diminished by the fact [**7] of the arrest itself. **Cell** phones, however, place vast quantities of personal information literally in the hands of individuals. A search of the information on a **cell** phone bears little resemblance to the type of brief physical search considered in [our prior cases]. [***5] *Id.* (alterations in original) (quoting *Riley*, 573 U.S. at 386).

The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *See also* Article I, Section 14, Ohio Constitution. "The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search 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.'" *United States v. Knights*, 534 U.S. 112, 118-119, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001), quoting *Wyoming v. Houghton*, 526 U.S. 295, 300, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999). Courts "'examin[e] the totality of the circumstances' to determine whether a search is reasonable within the meaning of the Fourth Amendment." (Brackets sic.) *Samson v. California*, 547 U.S. 843, 848, 126 S.Ct. 2193, 165 L.Ed.2d 250 (2006) [**17], quoting *Knights* at 118.

Consent-to-search provisions that are included as part of probation conditions are valid if they are clear and unambiguous. *See Knights* at 119-120 (probationer's reasonable expectation of privacy was "significantly diminished" when the "probation order clearly expressed the search condition" and probationer "was unambiguously informed" of that condition). If the consent-to-search condition is clear and unambiguous, then the person does not "have an expectation of privacy that society would recognize as legitimate." *Samson* at 852.

Regarding the consent-to-search provision here, the majority observes that **Campbell** consented to "searches of [his] person, [his] property, [his] vehicle, and [his] residence at any time without a warrant," and thus "***Campbell's*** *'property'*" "[p]lainly" and "inarguably" encompassed his cell phone, so there was no Fourth Amendment violation. (Emphasis sic.) Majority opinion at ¶ 13, 14. However, because courts recognize that searching the contents of a cell phone is different from searching other property, the issue is not as plain or clear as the majority views it. Due to the unique nature of a cell phone, **Campbell**'s generic consent to a search of his "property" did not clearly and unambiguously [**18] include an agreement to allow the search of the contents of his cell phone. Without

such a clear consent-to-search condition, **Campbell** still retained an expectation of privacy in the contents of his cell phone that society recognizes as legitimate.

In *State v. Smith*, the Ohio Supreme Court described the "unique nature" of cell phones "as multifunctional tools" that "defy easy categorization." 124 Ohio St.3d 163, 2009-Ohio-6426, 920 N.E.2d 949, ¶ 22. They explained that cell phones "have the ability to transmit large amounts of data in various forms, likening them to laptop computers, which are entitled to a higher expectation of privacy." *Id.* They then held that "because a person has a high expectation of privacy in a cell phone's contents, police must then obtain a warrant before intruding into the phone's contents." *Id.* at 23.

In *Riley v. California*, this United States Supreme Court unanimously held that with respect to "data on cell phones," police "must generally secure a warrant before conducting a search" incident to a lawful arrest. 573 U.S. 373, 386, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014). The *Riley* court stated that modern cell phones "are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Id.* at 385. The court explained that it [**19] "generally determine[s] whether to exempt a given type of search from the warrant requirement '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.'" *Id.*, quoting *Houghton*, 526 U.S. at 300, 119 S.Ct. 1297, 143 L.Ed.2d 408.

In *Riley*, this court discussed *United States v. Robinson*, 414 U.S. 218, 235, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973), which held that an officer's search of a suspect incident to a lawful arrest did not violate the Fourth Amendment. But this court explained, "The fact that an arrestee has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely." *Riley* at 392. "To the contrary, when 'privacy-related concerns are weighty enough' a 'search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee.'" *Id.*, quoting *Maryland v. King*, 569 U.S. 435, 463, 133 S.Ct. 1958, 186 L.Ed.2d 1 (2013). This court compared searches incident to an arrest with warrantless searches of cell phones, stating:

[W]hile *Robinson*'s categorical rule strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to digital content on cell phones. On the government interest side, *Robinson* concluded that the two risks identified in *Chimel* [*v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969)]—harm to officers and destruction of evidence—are present in all [**20] custodial arrests. There are no comparable risks when the search is of digital data. In addition, *Robinson* regarded any privacy interests retained by an individual after arrest as significantly diminished by the fact of the arrest itself. Cell phones, however, place vast quantities of personal information literally in the hands of individuals. A search of the information on a cell phone bears little resemblance to the type of brief physical search considered in *Robinson*.

Id. at 386.

This *Riley* court went on to describe the unique characteristics of cell phones, which of course, are numerous. The court discussed the storage capacity of smart phones, which "translates to millions of pages of text, thousands of pictures, or hundreds of videos." *Id.* at 394. The court further explained:

The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two * * * tucked into a wallet. * * * [T]he data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. [**21] Jones for the past several months, as would routinely be kept on a phone.

Id. at 394-395.

The *Riley* court also discussed how cell phones differ from other personal items—not only because cell phones contain a vast amount of private information—but because of how pervasive they are in society, with more than 90 percent of American adults owning one. 573 U.S. at 395, 134 S.Ct. 2473, 189 L.Ed.2d 430. Because cell phones are ubiquitous, allowing law-enforcement officers to scrutinize the "sensitive personal information" contained within them "is quite different from allowing [officers] to search a personal item or two in the occasional case." *Id.*

Similarly to one who has been arrested, a person who is serving probation likewise has diminished privacy interests. But also relevant is the fact that searching the contents of a cell phone bears little to no resemblance to the types of general searches contemplated by the boilerplate language of the consent-to-search condition in this case. Particularly, as the majority opinion acknowledges, the probation officer in this case had no reasonable suspicion of criminal activity to conduct a search in the first place.

The majority of the Ohio Supreme Court disagrees with **Campbell** that a recent Sixth Circuit Court of Appeals case, *United States v. Fletcher*, 978 F.3d 1009 (6th Cir.2020), supports [**22] **Campbell**'s argument that the search of his cell phone violated the Fourth Amendment. *See* majority opinion at ¶ 14. In *Fletcher*, the defendant had been convicted in an Ohio court of importuning a minor and was sentenced to five years of probation. *Id.* at 1013. "The terms of [community control] prohibited him from contacting the victim of his offense, contacting any minors unsupervised, and possessing any kind of pornography." *Id.* An additional condition provided that Fletcher "'[a]greed to a search without warrant of [his] person, [his] motor vehicle or [his] place of residence by a Probation Officer at any time.'" (Brackets sic.) *Id.*

"During a routine visit with his probation officer, the officer noticed that Fletcher had two phones." *Id.* The officer searched one of the phones and saw child pornography. He then turned off the phone and contacted a detective, who obtained a warrant to search the phone. The detective then discovered "child pornography that had been downloaded from the internet and that had been filmed by the phone itself." *Id.* Fletcher was charged in state court with multiple [**23] counts of pandering sexually oriented matter involving a minor. Fletcher was also charged in federal court with conspiracy to produce child pornography and production of child pornography. In Fletcher's federal case, "[h]e filed a motion to suppress the evidence recovered from his cell phone, which the district court denied." *Id.* at 1014. The district court found Fletcher guilty of both child-pornography offenses. Fletcher appealed the district court's denial of his motion to suppress.

The Sixth Circuit reversed the district court and held that the government's legitimate interests, "ensuring that Fletcher successfully complete[d] probation and refrain[ed] from engaging in criminal activity," did not outweigh Fletcher's expectation of privacy. *Id.* at 1019. Although Fletcher had agreed to a warrantless search of his person, motor vehicle, and residence as part of his community control, the Sixth Circuit explained that "[n]one of these terms clearly or unambiguously includes a cell phone." *Id.*, citing *United States v. Lara*, 815 F.3d 605, 610 (9th Cir.2016). In *Lara*, a probationer agreed to a search of, among other things, his "property." *Lara* at 607. The Ninth Circuit Court of Appeals held that this term did not "clearly or unambiguously encompass[] his cell phone and the information [**24] contained therein." *Id.* at 610.

Here, the majority opinion distinguishes *Fletcher* from the present case because the consent-to-search condition in *Fletcher* "covered the probationer's 'person,' 'motor vehicle,' and 'residence,' but it made no mention of other property." Majority opinion at ¶ 14, quoting *Fletcher*, 978 F.3d at 1019. The majority concludes that because "**Campbell** explicitly consented to a search of his property, something that inarguably encompasses his cell phone," he "'did not have an expectation of privacy that society would recognize as legitimate.'" Majority opinion at ¶ 14, quoting *Samson*, 547 U.S. at 852, 126 S.Ct. 2193, 165 L.Ed.2d 250. The Sixth Circuit, however, did not state anywhere in its opinion that Fletcher's cell phone should be excluded because the consent-to-search condition did not include an agreement to search his "property." And more importantly, in support of its holding, the Sixth Circuit cited to *Lara*, a case in which the consent-to-search agreement, like **Campbell**'s, allowed for a warrantless search of "property" in general, which the *Lara* court determined did *not* include a cell phone. *Fletcher* at 1018-1019, citing *Lara* at 610-611.

Because this court and others have recognized the unique nature of cell phones, I would conclude that a consent-to-search condition included as part of a person's community-control [**25] sanctions must clearly and unambiguously include cell phones before a probation officer may search the person's cell phone without a warrant. **Campbell** retained a legitimate expectation of privacy in the contents of his cell phone and that his Fourth Amendment rights were violated when the probation officer searched the phone without first obtaining a warrant.

This court should also conclude that the evidence should have been excluded under the exclusionary rule because **Campbell**'s Fourth Amendment rights were violated. I further agree with the Sixth Circuit Court of Appeals that the good-faith exception to the exclusionary rule does not apply under these circumstances. As the court explained in *Fletcher*:

Application of the exclusionary rule here will deter suspicionless searches of a probationer's cell phone post-*Riley* where the terms of a probation agreement do not authorize such a search [of a probationer's cell phone]. Application of the rule would also encourage the future inclusion in probation agreements of clear and unambiguous terms regarding the *distinct category* of cell phones.

Id. at 1020. (Emphasis added.)

The search of **Campbell**'s cell phone was unlawful, and the exclusionary rule should bar the admission of the evidence that was the fruit of that unlawful search. Further, the evidence from the subsequent search of **Campbell**'s other electronic devices should be excluded because the subsequent search was itself the product of the initial unlawful cell-phone search.

Question 2: Does the word "property" in a probationer's Terms and Conditions of Community Control encompass a cell phone when the conditions include an "Electronics Search Condition" that the probationer was not subject to?

As for the Ohio Supreme Court's opinion that the term "property" in Campbell's Terms and Conditions of Probation stands for cell phones and other electronics, it fails to take into consideration the compete language of the document. Included with the agreement were a form for "Special Probation Conditions" that dealt with "electronics, computer, and internet" searches that was further marked with "for sex offenders only". As Campbell was on probation for robbery and not a sex offence, it would be plain that these terms of search did not apply to him. Further if the probation officer's testimony is to be believed, she would have gone over this section as well with Campbell and explained as much. In addition, none of the boxes were checked in regards to selecting the electronics to be searched, and Campbell did not sign the "Authorization for Electronics Search" provision.

United States v. Fletcher, 2018 U.S. Dist. LEXIS 65591, 2018 WL 1863825 (S.D. Ohio April 18, 2018)

Warren County Court of Common Pleas placed **Fletcher** on probation following a conviction for importuning a minor in violation of Ohio Revised Code § 2907.07(B). As part of his probation, **Fletcher** signed Community Control Supervision Rules and Conditions in which he agreed—among other things—to the following provisions:

I will comply with all orders given to me by my Probation Officer or other authorized representative of the Court, including any written instructions **[*2]** issued at any time during the period of supervision.

* * *

I agree to a search without warrant of my person, my motor vehicle or my place of residence by a Probation Officer at any time.

(Doc. 22-1, PageID 52-53.) In addition, **he also agreed to "Sex Offender Special Conditions"** in which he promised to have no contact with the victim from his prior offense, no contact with minor children other than his own, and not to possess any sexually explicit material. (*Id.* at PageID 56.) **Although the "Sex Offender Special Conditions" form contains options to preclude probationers from using or possessing cameras, video cameras, computers, and other devices which access the internet, Fletcher** was **not asked to agree to those conditions.** (*See Id.*)

The Court concludes that there is **insufficient evidence that Fletcher agreed to the phone search as a condition of probation**. While **many sex offenders** are forbidden from using or possessing **computers or other devices with cameras and internet capabilities, Fletcher was not subject to that condition.** *See* Doc. 22-1 at PageID 56. **Fletcher** contends that he did not agree to a warrantless search of his **phone**, and the record lacks sufficient evidence to the contrary.

According to the Ohio Supreme Court:

State v. Campbell, 2022-Ohio-3626, 2022 Ohio LEXIS 2098, 2022 WL 7171562 (Ohio October 13, 2022)

[*P13] **Campbell** contends that the consent-to-search provision that he signed does not encompass his cell phone. We disagree. He consented to "searches of my person, my property, my vehicle, and my residence at any time without a warrant." Plainly, ***Campbell's*** "*property*" encompasses his cell phone.

[*P14] In arguing that the search violated the Fourth Amendment, **Campbell** relies on *United States v. Fletcher*, a case in which the Sixth Circuit Court of Appeals applied the Fourth Amendment balancing approach and concluded that a search of a probationer's cell phone was unreasonable. 978 F.3d 1009, 1019 (6th Cir.2020). But that case is different from ours. There, the consent-to-search [**8] condition of supervision covered the probationer's "person," "motor vehicle," and "residence," but it made no mention of other property. *Id.* Central to the court's analysis was the fact that the consent agreement did not "clearly or unambiguously" extend to a search of the probationer's cell phone. *Id.* In contrast, **Campbell** explicitly consented to a search of his property, something that inarguably encompasses his cell phone. Thus, by virtue of his status as a probationer, including the plain terms of the consent-to-search form, **Campbell** "did not have an expectation of privacy that society would recognize as legitimate," *Samson*, 547 U.S. at 852, 126 S.Ct. 2193, 165 L.Ed.2d 250; *see also United States v. Tessier*, 814 F.3d 432, 433, 435 (6th Cir.2016) (upholding suspicionless search of the computer of a probationer who had consented to searches of his "person, vehicle, property, or place of residence" as a condition of probation).

However, the reliance on Tessier is wrong, because Tessier's terms and conditions of probation were not just for the term "property" as the Ohio Court suggests. According to Tessier:

United States v. Tessier, 814 F.3d 432, 2016 U.S. App. LEXIS 2757, 2016 FED App. 0042P (6th Cir.) (6th Cir. Tenn. February 18, 2016)

The district court's well-reasoned opinion correctly denied **Tessier**'s motion to suppress under **the Fourth Amendment totality-of-the-circumstances reasonableness approach** employed by the Supreme Court in *Knights. United States v. **Tessier***, No. 3:13-00077, 2014 U.S. Dist. LEXIS 137301, 2014 WL 4851688 (M.D. Tenn. Sept. 29, 2014). We adopt the district court's reasoning, which fully supports upholding the **search** and which **does not need to be repeated here**.

So to find the relevant portion that does need to be repeated here:

United States v. Tessier, 2014 U.S. Dist. LEXIS 137301, 2014 WL 4851688 (M.D. Tenn. September 29, 2014)

Defendant, along with the sentencing judge, executed a "**Probation** Order," as well as "**Special Probation Conditions for Sex Offenders**," on September 30, 2011, that set forth the terms and conditions of Defendant's **probation**. So far as germane to the pending Motion to Suppress, the **Probation** Order provided:

6. I will allow my **Probation** Officer to visit my home, employment site, or elsewhere, will carry out all lawful instructions he or she gives, [and] will report to my **Probation** Officer as instructed. . . .

7. I agree to a **search**, without a warrant, of my person, vehicle, property, or place of residence by any **Probation**/Parole officer or law enforcement [*5] officer, at any time.

12. **If convicted of a sex offense**, I will abide by **the Specialized Probation Conditions for Sex Offenders** as adopted by the Board of **Probation** and Parole.

(Docket No. 25-1 at 1). Defendant signed the **Probation** Order, immediately below bolded language that read: **"I have read or have had read to me the conditions of my Probation. I fully understand them and agree to comply with them."** (Id., emphasis in original).

The Specialized **Probation** Conditions contained **several additional conditions**, including the following:

1. I will not purchase or possess any pornographic or sexually explicit written, printed, photographed or recorded materials[or] software. . . .

2. I will not obtain Internet access on any computer unless my Officer has given me written permission for Internet access. I will not utilize an **electronic device** for any sexually oriented purpose. I further consent to the **search** of **any electronic device, software, or electronic data storage device at any time by my Officer.**

(Docket no. 25-1 at 2). Defendant signed the Specialize **Probation** Conditions form immediately below the following bolded language:

I have read or have had read to me the above supervision instructions [*6] and fully understand them. . . . I understand that all instructions apply to me until my Officer and treatment provider, or the Court determines otherwise.

I understand that if I do not agree with any condition, I have the right to petition the Sentencing Court for a modification. Any release from these instructions will be provided to me in writing.

(Id. at 3, emphasis in original).

Thus it is clear that Tessier was a sex offender who was without doubt clearly informed of his Special Sex Offender Search Conditions. And that the word "Property" was not relied upon to do any searches of his electronics, instead the terms "electronic device", "software", "data storage device" were used for that purpose. Including how he could or could not use them and only with the probation officer's permission.

A probationer should not be subject to Terms and Conditions of Probation that he did not agree to.

Question 3: Two Fourth Amendment doctrinal frameworks govern the relationship between state actors and individuals subject to state supervision following release from prison. One arises from the Supreme Court's decision in Griffin v. Wisconsin and the other from the Court's decision in United States v. Knights. Can a state court determine the reasonableness of a search without first testing it by either of these two frameworks?

Individuals subject to state supervision, however, may have lesser privacy interests than the general public. Two Fourth Amendment doctrinal frameworks govern "the relationship between state actors and individuals subject to state supervision in lieu of or following release from prison." *United States v. Herndon*, 501 F.3d 683, 687 (6th Cir. 2007). One arises from the Supreme Court's decision in *Griffin v. Wisconsin*, 483 U.S. 868, 873-80, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987), and the other from the Court's decision in *United States v. Knights*, 534 U.S. 112, 118-22, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001). This court should consider both.

A. *Griffin* Framework

In *Griffin*, this Supreme Court created a two-part inquiry to evaluate the reasonableness of a warrantless search of a probationer's home conducted under a specific statute or regulation. *See* 483 U.S. at 873-80. "First, courts examine whether the relevant regulation or statute pursuant to which the search was conducted satisfies the Fourth Amendment's reasonableness requirement. If so, courts then analyze whether the facts of the [**8] search itself satisfy the regulation or statute at issue." *United States v. Loney*, 331 F.3d 516, 520 (6th Cir. 2003) (citations omitted).

Here, the relevant Ohio statute provides that:

during the period of a felony offender's nonresidential sanction, authorized probation officers who are engaged within the scope of their supervisory duties or responsibilities may search, with or without a warrant, the person of the offender, . . . another item of tangible or intangible personal property, or other real property in which the offender has a right, title, or interest . . . if the probation officers have reasonable grounds to believe that the offender is not abiding by the law or otherwise is not complying with the conditions of . . . the felony offender's nonresidential sanction.

Ohio Revised Code § 2951.02(A). I believe that this statute satisfies the reasonableness requirement. *See United States v. Goliday*, 145 F. App'x 502, 505 (6th Cir. 2005) (finding reasonable nearly identical wording in a statute); *see also Griffin*, 483 U.S. at 872 (finding reasonable a regulation that authorized warrantless search of a probationer's home where "reasonable grounds" existed).

The parties do not dispute that there was no reasonable suspicion for the probation officer to open and view material in **CAMPBELL**'s **cell** phone. To conduct that search, Ohio requires that the probation officer have "reasonable grounds" to believe that **CAMPBELL** was either **[*1016]** in violation of the law or of the conditions of his probation. Ohio Revised Code § 2951.02(A); *see Goliday*, 145 F. App'x at 505 (treating reasonable grounds as synonymous with reasonable suspicion for Fourth Amendment purposes). "Reasonable suspicion is based on the totality of the circumstances and has been defined as requiring 'articulable reasons' and 'a particularized and objective basis for suspecting the particular person . . . of criminal activity.'" *United States v. Payne*, 181 F.3d 781, 788 (6th Cir. 1999) (quoting *United States v. Cortez*, 449 U.S. 411, 417-18, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981)).

When the probation officer searched the phone, she admitted she had no reasonable suspicion to do so.

Reasonable suspicion, requires that the Government show "a particularized and objective basis for suspecting the particular person . . . of criminal activity." *Payne*, 181 F.3d at 788 (quoting *Cortez*, 449 U.S. at 417-18). It "requires more than a mere hunch." *United States v. Lyons*, 687 F.3d 754, 763 (6th Cir. 2012) (quoting *Dorsey v. Barber*, 517 F.3d 389, 395 (6th Cir. 2008)).

CAMPBELL's offense was for robbery and did not involve a **cell** phone. The fruits of a search cannot serve as the justification for initiating that search.

In *Riley*, the Supreme Court established that searching a **cell** phone generally requires a warrant unless some exception, such as exigent circumstances, applies in that particular case. 573 U.S. at 401-02. At the time the officer was going to search **CAMPBELL**'s phone, there were no exigent circumstances or other reasonable grounds to support a finding that **CAMPBELL** was violating his legal obligations. The officer's search of the phone at that point was unreasonable. The Government responds that the terms of the probation agreement allow searches of **CAMPBELL**'s "person," "motor vehicle," property," or "place of residence". It argues that, even though the terms of probation do not specify the search of a **cell** phone, they can be understood to authorize such a search, as the term "property" can be understood as "cell phone". Terms of **CAMPBELL**'s probation do not specifically authorize the search of cell phones or other electronics, data, data storage devices, or internet activity. In fact, as there are "special terms and conditions" that were included, but were not checked or signed by CAMPBELL that included these terms, it would seem by plain understanding and language that CAMPBELL was in fact not subject to these terms and that the additional terms dilute the plain meaning of the word "property". Thus Creating a carve out for electronics that CAMPBELL was not included in. Cell phones, *Riley* clarified, that the search of a person is treated separately from the search of a **cell** phone. *See* 573 U.S. at 373-86. The probation officer's interpretation of the probation terms as authorizing the search of a **cell** phone is not objectively reasonable.

Because the search of **CAMPBELL**'s phones does not "satisfy the regulation or statute at issue," the Government does not meet the *Griffin* test. *Loney*, 331 F.3d at 520.

B. *Knights* Framework

Under the *Knights* framework, the Government's arguments fare no better. In *Knights*, this Supreme Court determined that a court must evaluate the reasonableness of a warrantless search "in light of the totality of the circumstances '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.'" *Herndon*, 501 F.3d at 690 (quoting *Knights*, 534 U.S. at 119).

As the Government correctly points out, **CAMPBELL**'s status as a probationer reduces his interest in privacy. *See Knights*, 534 U.S. at 119 (quoting *Griffin*, 483 U.S. at 874) ("Inherent in [**16] the very nature of probation is that probationers 'do not enjoy the absolute liberty to which every citizen is entitled.'") (cleaned up). But "while the privacy interest of a probationer has been 'significantly diminished,' it is still substantial." *See United States v. Lara*, 815 F.3d 605, 610 (9th Cir. 2016) (citation omitted) (quoting *Knights*, 534 U.S. at 120). As a probationer, **CAMPBELL**'s expectation of privacy is greater than that of a parolee, *see Samson v. California*, 547 U.S. 843, 850, 126 S. Ct. 2193, 165 L. Ed. 2d 250 (2006), and of someone on supervised release, *see United States v. Sulik*, 807 F. App'x 489, 493 (6th Cir. 2020) [***10]. In addition to **CAMPBELL**'s status as a probationer, in evaluating his interests the court should also consider "the clarity of the conditions of probation, and the nature of the contents of a cell phone." *Lara*, 815 F.3d at 610.

This Supreme Court's decision in *Knights* clarified that a probationer's reasonable expectation of privacy is "significantly diminished" when the terms of the probation agreement "clearly expressed the search condition" so that the probationer "was unambiguously informed." 534 U.S. at 119. The Government relies on the 6th Circuit's decision in *United States v. Tessier*, which held that a suspicionless search of a probationer's residence & electronic devices was reasonable given the terms of the probation agreement. 814 F.3d 432, 435 (6th Cir. 2016). In that case, the officers searched a residence and the terms of the probation [**17] agreement "clearly expressed the search condition"; *Tessier*, 814 F.3d at 433. The terms of **CAMPBELL**'s probation agreement provide that he "agree[d] to a search without warrant of [his] person, [his] property, [his] motor vehicle or [his] place of residence by a Probation Officer at any time." None of these terms clearly or unambiguously includes a **cell** phone. *See Lara*, 815 F.3d at 611 (reviewing more expansive probation terms, which allowed for warrantless searches of "property," and determining that the terms **did not** include the search of a **cell** phone).

Turning to the nature of **cell** phones, *Riley* notes the quantity of information contained in modern **cell** phones, explaining that "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." 573 U.S. at 396-97. The Supreme Court in *Riley* recognized that the search of a **cell** phone is unique and—as compared to the search of a home—infringes far more on individual privacy. As a result, it cannot be assumed that provisions in **CAMPBELL**'s probation agreement authorizing [**18] the search of his person, place of residence, or property also authorize the search of his **cell** phone.

The Government's interests here include ensuring that **CAMPBELL** successfully completes probation and refrains from engaging in criminal activity. These interests are adequately addressed by securing the **cell** phone, [***11] without searching its contents. As *Riley* explained, "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.* at 388. There is no suggestion that the officer here experienced any safety risk from the physical aspects of the phone. "Digital 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. . . . Once an officer has secured a phone and eliminated any potential physical threats, however, data on the phone can endanger no one." *Id.* at 387. And if **CAMPBELL** were engaging in criminal activity, the officer could determine that quickly by taking the course of action *Riley* prescribes—"get [**19] a warrant"—and then searching the phones' contents. *Id.* at 403.

In sum, balancing **CAMPBELL**'s expectation of privacy with the legitimate governmental interests, the search of **CAMPBELL**'s **cell** phone was unreasonable.

United States v. Hathorn, 920 F.3d 982 (5th Cir. 2019), is a case where the Fifth Circuit upheld the district court's imposition of a special condition allowing searches of the **cell** phone of an individual on supervised release. *Id.* at 986-87. That case exemplifies what did not occur in **CAMPBELL**'s case. And it reveals a simple solution. [**20] **CAMPBELL**'s probation agreement could have but did not authorize the search of his **cell** phone or digital devices.

Under both the *Griffin* and *Knight* frameworks, the Government fails to demonstrate that its original search of **CAMPBELL**'s **cell** phone was reasonable.

C. Exclusionary Rule

Next consider whether the exclusionary rule applies. "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. . . . [T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Herring v. United States*, 555 U.S. 135, 144, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009).

According to State v. Campbell, 2020-Ohio-4119, 157 N.E.3d 373, 2020 Ohio App. LEXIS 3016, 2020 WL 4814198 (Ohio Ct. App., Fairfield County August 18, 2020)

The **probation** officer was forthright about the common usage of random searches as a policy of the Fairfield County **Probation** Department. Her testimony also suggested she scrupulously reviewed the law regarding the legality and constitutionality though neither she nor appellee reconciled her policy with the obligations contained within R.C. 2951.02 nor is there any effort to distinguish our application of the statute. We are concerned the record reflects "deliberate, reckless, or grossly negligent conduct, or *** recurring or systemic negligence" that the exclusionary rule is designed to deter. *Herring, supra.*

It should be found that the probation officer's conduct was deliberate, reckless, or grossly negligent conduct, and recurring or systemic in its negligence. **CAMPBELL**'s conditions of probation did not clearly or unambiguously allow for such a search and the probation officer lacked reasonable suspicion to initiate that search. *See Knights*, 534 U.S. at 119; *Tessier*, 814 F.3d at 433. Application of the exclusionary rule here will deter suspicionless searches of a probationer's **cell** phone post-*Riley* where the terms of a probation agreement do not authorize such a search. Application of the rule would also encourage the future inclusion in probation agreements of clear and unambiguous terms regarding the distinct category of **cell** phones.

The state argues that, in the alternative, the evidence should not be excluded because the **probation** officer's search was conducted based upon an objectively reasonable good faith reliance upon the court's order imposing the terms of community control. There two faults with this contention, the "good faith exception" typically applies to searches incident to a warrant that is later determined to be invalid. "Under the "good faith exception," the exclusionary rule should not be applied so as to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in objectively reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause. *State v. Laubacher*, 5th Dist. Stark No. 2018 CA 00169, 2019-Ohio-4271, ¶ 44 quoting *State v. George*, 45 Ohio St.3d 325, 330, 544 N.E.2d 640 (1980). The trial court below found that though this case does not involve a warrant, "little distinction can be drawn from a judicial authorized search warrant and a judicially required term of **probation** from an officer acting in good faith. In each instance the officer acts in part on the authority of a judge who has authorized and or required that the place or individual to be search comply." Appellee provides no [***27] precedent directly on point, but does cite to the case of *State v. Gies*, 1st Dist. No. C-180597, 2019-Ohio-4249, 146 N.E.3d 1277, ¶ 17 cert. denied, *U.S., 140 S. Ct. 2840, 207 L. Ed. 2d 166, 2020 WL 2814851. The **probation** officers in that case "relied in good faith upon R.C. 2951.02(A) in conducting their warrantless search of Mr. Gies's residence." *Id* at ¶ 17. **Campbell**'s **probation** officer does not mention R.C. 2951.02 in her testimony and the record contains nothing that would suggest that the **probation** officer was aware of the code section despite her contention of annually reviewing the requirements for a search.

And the **probation** officer's reliance on the court's order lacks an objective basis. She confirmed that she believed that the document signed by **Campbell** authorized her to search **Campbell** and that no one had told her that the law had changed, but she provides no explanation or basis for that belief. She acknowledges an annual review of

policies and procedures that would include lawful and constitutional searches, but she does not address the terms of R.C. 2951.02 despite its application to the facts of this case. The record provides scant evidence from which we can determine whether her belief that her actions were permissible under the Fourth amendment were objectively reasonable. She did not claim that she relied on advice [***28] she received from an assistant prosecuting attorney, fellow members of law enforcement or information she had received during [**386] training seminars or upon binding appellate precedent from any court. *State v. Johnson*, 141 Ohio St.3d 136, 2014-Ohio-5021, 22 N.E.3d 1061, (2014) ¶¶ 44-45. Further, unlike the issuance of a warrant, this case does not involve the submission of an affidavit supporting probable cause and the issuance of a warrant based upon that affidavit, later determined to be defective. *State v. Wilmoth*, 22 Ohio St.3d 251, 261, 22 Ohio B. 427, 490 N.E.2d 1236, 1244 (1986). **Probation** Officer Conn expressed a subjective belief that random warrantless searches of probationers were permitted, but the record lacks an unambiguous objective basis for her conclusion.

When considering the facts in this case and the holdings in *Karn, Bays*, and *Maschke* as well as language of R. C. 2951.02, it cannot be found that the good faith exception is applicable to the failure to comply with the unambiguous requirements of the Ohio Revised Code.

Indeed, the 6th Circuit Federal Court of Appeals agrees in the *Fletcher* case.

United States v. Fletcher, 978 F.3d 1009, 2020 U.S. App. LEXIS 33688, 2020 FED App. 0339P (6th Cir.) (6th Cir. Ohio October 26, 2020)

We next consider whether the exclusionary rule applies. "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. . . . [T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Herring v. United States*, 555 U.S. 135, 144, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009).

The Government contends that the officer's initial search was not sufficiently culpable because he was not reckless or grossly negligent. We find that his conduct was deliberate. The moment **Fletcher** walked in the door to meet with his probation officer and the officer noticed that he had two **cell phones**, the officer demanded to search his **phones**. **Fletcher**'s conditions of probation did not clearly or unambiguously allow for such a search and the probation officer lacked reasonable suspicion [**21] to initiate that search. *See Knights*, 534 U.S. at 119; *Tessier*, 814 F.3d at 433. If exigency did exist in this case, the officer's conduct created it, which cannot support a finding of reasonable suspicion. *See King*, 563 U.S. at 462. Application of the exclusionary rule here will deter suspicionless searches of a probationer's **cell phone** post-*Riley* where the terms of a probation agreement do not authorize such a search. Application of the rule would also encourage the future inclusion in probation agreements of clear and unambiguous terms regarding the distinct category of **cell phones**.

The Government also contends that the exclusionary rule should not apply because the executing officers relied in good faith on the subsequently issued warrant. It relies on *United States v. McClain*, in which we refused to apply the exclusionary rule even though the warrant relied in part on evidence seized during an illegal, warrantless search. 444 F.3d 556, 566 (6th Cir. 2005). We did so because (1) "the officers who sought and executed the search warrants acted in good faith" and (2) "the facts surrounding the initial warrantless search were close enough to the line of validity to make the executing officers' belief in the validity of the search warrants objectively reasonable." *Id.* We must determine [**22] whether "this is one of those unique cases in which the *Leon* good faith exception should apply despite an earlier Fourth Amendment violation." *Id.* at 565.

[***13] Detective Carter sought and obtained a warrant for **Fletcher**'s **phone** that included a description of, and relied on in whole, the probation officer's conduct and initial search of the **phone**. The probation officer lacked reasonable suspicion when he first sought to search the **phone** and the terms of **Fletcher**'s probation agreement did not clearly or unambiguously allow for the search of his **phones**. *See Knights*, 534 U.S. at 119; *Tessier*, 814 F.3d at 433. The Government's interests in ensuring **[*1021]** that **Fletcher** did not destroy incriminating evidence or

engage in unlawful activity were effectively satisfied when the **phone** was seized. A subsequent search of the **phone**, as demonstrated by *Riley*, required either a warrant or some exception to it. 573 U.S. at 401-02. Neither was present here. The facts surrounding the initial warrantless search were not close enough to the line of validity to fit within the confines of *McClain*. Having two **phones** does not give rise to reasonable suspicion, even for a probationer who has lesser privacy interests. **Fletcher**'s probation terms did not allow for such a search, and, unlike *McClain*, the entirety [**23] of the warrant was based on the unlawful activity that gave rise to the Fourth Amendment violation. Detective Carter's reliance on the probation officer's conduct and initial search was not objectively reasonable. The exclusionary rule applies.

Likewise, the same result should be reached in this case. The search of Campbell's **cell** phone was unlawful, and the exclusionary rule should bar the admission of the evidence that was the fruit of that unlawful search. Further, the evidence from the subsequent search of Campbell's other electronic devices should be excluded because the subsequent search was itself the product of the initial unlawful **cell**-phone search.

REASONS FOR GRANTING THE PETITION

Reasons why this case should be accepted

This case provides the Supreme Court the opportunity to apply its holding in Riley v. California to the millions of people on probation, parole, community control, or any other post release control that American citizens would be subject to. By accepting this case the Supreme Court would clear up a multitude of misunderstandings in the lower courts. There is a direct circuit split in Ohio, where the Federal courts have held in line with this Supreme Court, applying this court's finding in *Riley* to apply to probationers. Meanwhile the Ohio Supreme Court has gone its own way in disregard to following the Federal cases that have preceded it. Further, throughout the United States there are various State courts that have aligned to the path that the Federal Courts have established. For instance, in Montana v. Mefford No. DA 20-0330, a case decided in the Montana Supreme Court, it was decided that a parolee who gave permission to his parole officer to search his cell phone was still protected by the 4th Amendment and held a legitimate expectation of privacy in his cell phone, regardless of his status as a parolee and his limited permission to the officer to search his cell phone for evidence of a parole violation. The Court did not decide Mefford's argument that his cell phone was not "property" in the terms of his parole agreement. The Federal Court in *US v. Fletcher* has held that the terms of "Property" do not indicate a cell phone of a probationer, meanwhile in the same jurisdiction in the State court, the Ohio Supreme Court in this case at hand (*State v. Campbell*) has held that not only does the word "property" indicate a cell phone, but that probationers have no expectation of privacy in their cell phone that society would deem as reasonable. This is directly in conflict with well-established federal precedent. There is also a plain language issue at hand. One word cannot have one definition in one state court and another definition in a different state court, let alone a separate definition in the same state but one in state and one in federal. The entire essence of making a fully informed legal decision, like agreeing and signing a term of probation, is expecting the language of the document to comport with the national understanding of the language of a nation. Especially when the document being signed in this case specifically set aside electronic searches, something unquestionably encompassing cell phones. As this Supreme Court has established, in today's modern life the majority of adults (and people under probation) own and use a cell phone every day of their lives, for both personal and professional uses. In *Riley* Chief Justice Roberts said that cell phones are life-altering instruments which a "visitor from Mars might conclude ... were an important feature of human anatomy"

Some courts have attempted to withhold this Courts finding in Riley from probationers claiming it is for recent arrestees only because recent arrestees are entitled to the "presumption of innocence" and "the absolute liberty to which every citizen is entitled" probationers are entitled to neither. Despite the superficial appeal of that observation, arrestees have nothing like absolute liberty. On probable cause, an arrestee may be handcuffed, transported to the police station, fingerprinted, booked, photographed, and, unless the recent occupant of a car,

thoroughly searched. All that for even the most minor transgressions, including, to name just one, riding with an unfastened seat belt. When an arrest is not by warrant, the arrestee may be forced to wait in jail for 48 hours for a judicial determination of probable cause. On arriving at jail, a strip search may follow regardless of the offense of arrest, as may countless suspicionless searches thereafter. Once a judge has found probable cause, the constitutional right to a speedy trial places only weak pressure on the prosecution to charge and try an arrestee, even one who remains in custody. Such (perfectly lawful) pretrial punishment inflicted on arrestees is far from "absolute liberty".

Further, this Court did not hold that Riley was only for arrestees. In fact, the 8-0-1 decisions only reference to the status of convicted persons is in Justice Alito's concurrence, which traces searches incident to arrest back nearly two centuries to "the interest which the State has in a person guilty (or reasonably believed to be guilty) of a crime being brought to justice. . . ." The quoted passage places arrestees (who are believed to be guilty) on the same privacy plane as adjudicated criminals (who are guilty). There is not to be found a single item of evidence that Riley is a narrow ruling elevating the rights of arrestees alone, as opposed to a broad ruling elevating the digital privacy across the board. Accordingly, the Ninth Circuit hardly overstated the matter in recording that *Riley* "used sweeping language to describe the importance of cell phone privacy." *Riley* not only finds digital devices more private than automobiles, but remarkably, more private even than homes:

> "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."

So much for the ancient adage that a man's house is his castle. Justifiably, *Riley's* sweeping language has extended beyond searches incident to arrest to invalidate electronics conditions that cut into the lawful spheres of the probationer's life that are unlikely to peek into criminality. Extending *Riley's* reach in such a fashion cannot count as a denial of *Samson's* recognition of a difference in a privacy sense between arrestees and probationers. Rather, it counts as an acknowledgment that *Riley* is unconcerned with that difference.

United States v. Lara, 815 F.3d 605, 611 (9th Cir. 2016)

(distinguishing cell phone data from types of property appropriately subject to probation searches)

Other institutions, such as the National Drug Court Institute also recognize Federal authority on the matter. According to former Judge William Meyer, a general jurisdiction trial court judge in Denver, Colorado and the Senior Judicial Fellow for the National Drug Court Institute, states that court supervision officers must begin with the question of *Riley v. California*. Indeed, even with the reduced expectation of privacy probationers, parolees, and

people subject to drug court observation, all possess a heightened interest that society deems as reasonable in their digital devices. "Cellphones, however, place vast quantities of personal information literally in the hands of individuals. A search of the information on a cell phone bears little resemblance to the type of brief physical search considered in *Robinson*. We therefore decline to extend *Robinson* to searches of data on cellphones, and hold instead that officer's must generally secure a warrant before conduction such a search." (*Riley*) Indeed, commonly, when a defendant enters a drug court program, the participant is either on probation or has probationary-like status. Although the probationary status results in diminished constitutional entitlements, such rights are not abolished and are still substantial. *United States v. Lara, 815 F.3d 605, 610 (9th Cir. 2016)* Additionally, because of the lower expectation of privacy, a search of a probationer's property may be justified by "reasonable suspicion" instead of probable cause. This Supreme Court decided what reasonable suspicion was in its decision in *United States v. Knights, 534 U.S. 112 (2001).* In Ohio, reasonable suspicion is written into law as the requirement for a search of a probationer, and in this case that this Supreme Court has the opportunity to hear, the State of Ohio concedes that there was no reasonable suspicion, or reason at all to search this probationer's phone and other digital devices. Although in other situations, probationers may be required to consent to general Fourth Amendment Waivers, that was also not done in this case. Further, not only did the terms that this defendant agreed to not include digital devices (it excluded them when read in its entirety), but the conditions were beyond the trial court's jurisdiction to enforce, and this defendant was not given written notice as required by Ohio law. As this Supreme Court has said that the more specific the consent to search, the greater the probability that the search will be validated, particularity when the place searched is precisely noted in the consent. *United States v. Knights, supra, 534 U.S. at 114.* As noted in *Lara, supra*:

> The Supreme Court in *Knights* explained that a probationer's reasonable expectation of privacy is "significantly diminished" when the defendant's probation order "clearly expressed the search condition" of which the probationer "was unambiguously informed". *534 U.S. at 119-20, 122 S. Ct. 587.* But the search term in *Knights* expressly authorized searches of the probationers "place of residence," which was precisely what the officers searched. See *id. At 114-15, 122 S. Ct. 587.*
>
> That is not true here.
>
> *Lara, supra at 610-611.*

Indeed, that is also not true in this case at hand. Therefore, in the circumstance where there is a search of a probationer's **cell phone based upon reasonable suspicion** or *a valid consent* **explicitly referring to the cell phone** as a place to be searched, the search would be proper and the information procured could be used in a new case filing.

Absent such a finding this defendant's Fourth Amendment Rights should be found to have been violated, and the evidence should be excluded, because said evidence is subject to suppression under the exclusionary rule. As "fruit of the poisonous tree", any other evidence should also be suppressed as it stems from the initial illegal search of the cell phone. No higher courts have found that the probation officer in this case has acted in "good faith" reliance on a warrant, because not only was no warrant issued, but there was simply no good faith. The 5th district found in the opposite, and the decision was left as-is in the Supreme Court of Ohio, that instead of "good faith" that the officer acted in a "deliberate, reckless, or grossly negligent" fashion.

("...neither she nor appellee reconciled her policy with the obligations contained within R.C. 2951.02 nor is there any effort to distinguish our application of the statute. We are concerned the record reflects "deliberate, reckless, or grossly negligent conduct, or *** recurring or systemic negligence" that the exclusionary rule is designed to deter. "...)

State v. Campbell, 2020-Ohio-4119, 157 N.E.3d 373, 2020 Ohio App. LEXIS 3016, 2020 WL 4814198 (Ohio Ct. App., Fairfield County August 18, 2020)

Riley should apply to probationers just as the 9th District Court in *Lara* decided, and later right here in Ohio in the 6th District Federal Court of Appeals case in *Fletcher* United States v. Fletcher, 978 F.3d 1009, 2020 U.S. App. LEXIS 33688, 2020 FED App. 0339P (6th Cir.) (6th Cir. Ohio October 26, 2020). *Fletcher* is a case that was decided in line with what Federal authority has been saying about digital devices and privacy of probationers. This decision in State v. Campbell, 2022-Ohio-3626, 2022 Ohio LEXIS 2098, 2022 WL 7171562 (Ohio October 13, 2022) is completely opposite of the federal holdings found in *Fletcher, Lara, Riley,* and elsewhere.

Because this case affects millions of people every year on any sort of government imposed sanction or supervision (probation, parole, arrestee, post release control, community control, drug court supervision, etc.) it involves many more people than just this defendant before you. It also will address a significant Constitutional question that is especially important in these modern technologically driven times. A cell phone is used every day by millions of adults in America, for matters involving medical, banking, family matters, business, private communication, photos, videos, voice memos, private files, location information (historic and real time), web site history, social networking, job applications, dating, romance, food take out, shopping, etc. The digital revolution as it were has completely changed how we as a nation interact and go about our business in our collective daily lives. As a country that prides itself on freedom, are we really ready to say that probationers (who have not demonstrated criminal behavior in the use of digital devices, and not signed waivers specifically allowing searches of said digital devices) truly have no expectation of privacy in their digital life?

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: December 22, 2022