A CALL FOR PROBATIONER DATA PRIVACY: Can States Require Cell Phone Search Waivers?

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I. INTRODUCTION

Ninety-one percent of adults own a cell phone, making it the most quickly adopted technology by consumers in history.[1] Cell phones have become so ubiquitous that they are indispensable to modern life.[2] Once unlocked, call logs, addresses, emails, and text messages reveal the owner's professional and personal interactions with coworkers, friends, and family. Many smartphones track the owner's movement, pinpointing stops, timing routes, and listing previous location searches.[3] Applications on cell phones can count steps, record voice memos, track meals, schedule appointments, make lists, deposit checks, place food orders, and display political party-specific news.[4] The intimate information made accessible through technology is expansive and has presented courts with new Fourth Amendment search and seizure issues.

The Supreme Court recently held that it is unconstitutional to allow the warrantless search of cell phone when a person has been arrested.[5] To codify the holding, California enacted the Electronic Communications Privacy Act,[6] which required the government to obtain a warrant prior to searching a

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1. Lee Rainie, *Cell Phone Ownership Hits 91% of Adults*, PEW RES. CTR. (June 6, 2013), http://www.pewresearch.org/fact-tank/2013/06/06/cell-phone-ownership-hits-91-of-adults/.

2. *See id.*

3. *See* J.D. Biersdorfer, *How Your Phone Knows Where You Have Been*, N.Y. TIMES (Jan. 20, 2017), https://www.nytimes.com/2017/01/20/technology/personaltech/how-your-phone-knows-where-you-have-been.html?_r=0.

4. *See generally* Stuart Dredge, *The Top 50 Android Phone Apps*, GUARDIAN (Mar. 17, 2012, 8:05 PM), https://www.theguardian.com/technology/2012/mar/18/top-50-android-phone-apps.

5. Riley v. California, 134 S. Ct. 2473, 2493 (2014).

6. CAL. PENAL CODE §§ 1546–1546.4 (West 2017).

person's digital information.[7] This law barred probation officers from examining a probationer's emails and other electronic communication without first obtaining a warrant.[8] Because local courts control probation systems, San Diego Superior Courts responded by adding "expansive waivers" for data searches that gave probation officers access to probationers' "call logs, emails, text messages and social media accounts accessed through a variety of devices—everything from an iPhone to an Xbox."[9] The San Diego County Public Defender's office called the waiver "not only vague, but overly broad and possibly unconstitutional" in part because the warrantless searches could give police access to privileged attorney-client communications.[10]

This Note argues that due to the amount of data on cell phones, it is unconstitutional to require all probationers to submit their cell phones to probationary searches. Even the most basic Fourth Amendment analysis requires reasonableness,[11] and it will seldom be reasonable to require a probationer to waive his right to keep the information on his cell phone private, even if the probation condition explicitly mentions giving police access to data. Accordingly, rather than considering the clarity of search conditions to determine whether a probationer should have expected the search, the court should give highest consideration to the sensitive nature of cell phone contents, only allowing warrantless searches in extreme circumstances.

In support of this proposal, the Note proceeds as follows. Part II begins by exploring the traditional analysis for probation conditions. Next, it recounts the Supreme Court's landmark analysis in *Riley v. California*, which held that law enforcement could not search a cell phone incident to arrest without an additional warrant.[12] It then turns to a recent Ninth Circuit decision, *United States v. Lara*, which used *Riley* to expand cell phone privacy rights to probationers.[13] Finally, Part II surveys courts' treatment of cell phone privacy since *Lara* and considers current probation conditions in the United States.

If *Lara* is applied beyond the Ninth Circuit, it has the potential to change probation procedures across the country, as police struggle to identify when they must obtain a warrant to search probationers' cell phones. Thus, Part III

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7. *Id.* § 1546.1; Dana Littlefield, *Does Digital Privacy Extend to Criminals on Probation?*, SAN DIEGO UNION-TRIB. (Jan. 15, 2016, 4:35 PM), http://www.sandiegouniontribune.com/sdut-court-waiver-cellphone-passwords-search-privacy-2016jan15-story.html.

8. Littlefield, *supra* note 7.

9. *Id.*

10. *Id.*

11. U.S. CONST. amend. IV.

12. Riley v. California, 134 S. Ct. 2473, 2493 (2014).

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

argues that due to the vast amounts of data located on cell phones, courts should modify the *Lara* test to only allow probationary cell phone searches in extreme circumstances, such as with violent felons or with probationers whose rehabilitation is inextricably connected to their behavior online. The clarity of search condition language and thus the probationer's notice of cell phone searches should not control the balancing test between privacy and governmental interests. Because cell phones hold so much information about the owner, courts should be very hesitant to ever allow warrantless searches.

II. BACKGROUND

Though probationers do not have the highest degree of privacy, the state does not have unlimited power to abrogate their privacy interest.[14] For example, probation officers are not always required to obtain a warrant to search the home of a probationer, but they must at least have a reasonable suspicion.[15] For the government's interest to be legitimate, conditions of probation must be related to the rehabilitation of the accused or to promoting safety for the general public.[16] In *Riley*, a seminal case in cell phone privacy, the Supreme Court held that police officers are required to obtain a warrant before searching the cell phone of a person under arrest.[17] This presented a new question for probation procedures and whether protocol that required police officers to search the cell phones of probationers was constitutional.[18] The Ninth Circuit answered this question using the Fourth Amendment, ultimately concluding that the probation procedure was unreasonable, by balancing the probationer's privacy interest against the government's interest in the probation program.[19]

A. Conditions of Probation: Fourth Amendment Waivers Before Riley and Lara

Probation searches are governed by the Fourth Amendment, which guarantees 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

14. Griffin v. Wisconsin, 483 U.S. 868, 874–75 (1987); *Lara*, 815 F.3d at 610.
15. *Griffin*, 483 U.S. at 876.
16. Porth v. Templar, 453 F.2d 330, 333 (10th Cir. 1971).
17. *Riley*, 134 S. Ct. at 2493.
18. *Lara*, 815 F.3d at 611.
19. *Id.* at 612.

violated."[20] Even when a probationer agrees to a warrantless search in the terms of his probation, such search terms must be reasonable and related to the "treatment of the accused and the protection of the public" to be enforceable.[21] To that end, a court must balance a probationer's privacy interest against the government's interests.[22]

1. Privacy with Probationer Status

Probationers do not have the highest degree of privacy; still, the government does not have unlimited power to abrogate their privacy interest through unreasonable conditions of probation.[23] Generally, law enforcement need not show probable cause to search a probationer's home—reasonable suspicion is sufficient.[24] However in some cases, law enforcement does not even need to show a reasonable suspicion.[25]

It is lawful to require only reasonable suspicion to search a probationer's property because probationers have a lowered expectation of privacy.[26] In *Griffin v. Wisconsin*, the Court held that probation officers could conduct home searches, so long as an officer had reasonable suspicion of illegal activity.[27] Upon reasonable suspicion that Griffin broke the terms of his probation, officers searched his home and found firearms.[28] Griffin moved to suppress evidence from the search, arguing that the probation condition was unconstitutional for not requiring probable cause.[29] The Court held that a reasonable suspicion standard did not infringe upon the privacy rights of the probationer because while probationers do not enjoy the same liberties as everyday citizens, they have conditional liberty depending on their adherence to probation conditions.[30] The Court reasoned that requiring probable cause would frustrate the purpose of probation, because "so long as his illegal . . . activities were sufficiently concealed as to give rise to no more

20. U.S. CONST. amend. IV.
21. United States v. Consuelo-Gonzalez, 521 F.2d 259, 264 (9th Cir. 1975) (quoting *Porth*, 453 F.2d at 333).
22. United States v. Knights, 534 U.S. 112, 119 (2001); *Lara*, 815 F.3d at 610.
23. Griffin v. Wisconsin, 483 U.S. 868, 874–75 (1987); *Lara*, 815 F.3d at 610.
24. *See Griffin*, 483 U.S. at 874, 880.
25. United States v. King, 736 F.3d 805, 809 (9th Cir. 2013).
26. *Griffin*, 483 U.S. at 874, 880.
27. *Id.* at 870–71.
28. *Id.* at 871–72.
29. *Id.* at 872.
30. *Id.* at 874, 879–80.

than reasonable suspicion, they would go undetected and uncorrected."[31] For rehabilitation purposes, probation officers must have the ability "to act based upon a lesser degree of certainty than the Fourth Amendment would otherwise require."[32]

This reasonable suspicion standard is sufficient, even for crime-specific investigatory purposes.[33] In *United States v. Knights*, a California court's probation conditions required that probationer Knights submit his property to search "with or without a search warrant, warrant of arrest or reasonable cause" after his conviction for a drug offense.[34] Soon after his probation began, Knights became a suspect in a series of arsons.[35] The detective investigating the arson cases was aware of Knights's probationer status.[36] After observing suspicious activity, and finding suspicious objects in the back of Knights's truck, the detective searched his apartment, uncovering compelling evidence that connected Knights to the arsons.[37] The Court held it was constitutional to allow searches under a reasonable suspicion even for investigatory purposes.[38] The Court reasoned that the probationer had agreed to the terms of probation, and that "[the government's] interest in apprehending violators of the criminal law, thereby protecting potential victims of criminal enterprise, may therefore justifiably focus on probationers in a way that it does not on the ordinary citizen."[39]

When the probationer is a violent felon, a probation condition that allows warrantless, suspicionless searches is constitutional.[40] In *United States v. King*, defendant King agreed to searches "without probable cause, by any peace, parole or probation officer," after a domestic violence conviction.[41] When he became a suspect in a murder investigation, officers learned of his probation status and searched his home.[42] The court held that the warrantless

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31. *Id.* at 878–79.
32. *Id.* at 879.
33. United States v. Knights, 534 U.S. 112, 121 (2001).
34. *Id.* at 114.
35. *Id.* at 114–15.
36. *Id.* at 115.
37. *Id.*
38. *Id.* at 121. Still, not all jurisdictions have incorporated reasonable suspicion into their probation conditions. Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 319–20 (2016).
39. *Knights*, 534 U.S. at 121. The clearer the term of probation, the lower the probationer's expectation of privacy. *Id.* at 119–20.
40. United States v. King, 736 F.3d 805, 809–10 (9th Cir. 2013).
41. *Id.* at 806.
42. *Id.* at 806–07.

search was constitutional.[43] The court reasoned that because King understood the search condition of his probation and "in light of the serious and intimate nature of his underlying conviction," the officers did not even need a reasonable suspicion to search his home.[44]

Still, when compared to parolees and other convicted people, probationers have a heightened privacy interest.[45] When determining privacy expectations and interests, state-imposed punishments can be placed on a continuum, ranging widely from maximum-security prisons to community service.[46] More serious sentences restrict privacy more than less serious sentences.[47] Thus, while a person who has never been convicted of a crime would have a higher expectation of privacy than a probationer,[48] that same probationer would have a higher expectation of privacy than a parolee.[49] This is because a parolee has actually served time in prison, whereas a probationer acquired his status in lieu of incarceration.[50] Accordingly, relative to other state-imposed punishments, a probationer's privacy interest remains substantial.[51]

2. The Government's Interest

Conditions of probation must "have a reasonable relationship to the treatment of the accused and the protection of the public."[52] Courts generally consider two factors when weighing the government's interest to determine the reasonableness of probation conditions: whether the probation condition contributes to rehabilitation by promoting the convicted person's reintegration into society and whether the probation condition counteracts recidivism by preventing the convicted person from committing future crimes.[53] When a condition of probation fails to advance a legitimate government interest, it is unreasonable.[54]

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43. *Id.* at 809–10.
44. *Id.* at 809.
45. Samson v. California, 547 U.S. 843, 850 (2006).
46. *Id.*; United States v. Knights, 534 U.S. 112, 118–19 (2001).
47. *Samson*, 547 U.S. at 850; *Knights*, 534 U.S. at 118–19.
48. United States v. Lara, 815 F.3d 605, 610 (9th Cir. 2016).
49. *Samson*, 547 U.S. at 850.
50. *Id.*
51. *Lara*, 815 F.3d at 610.
52. Porth v. Templar, 453 F.2d 330, 333 (10th Cir. 1971); *see* United States v. Consuelo-Gonzalez, 521 F.2d 259, 264 (9th Cir. 1975).
53. *Consuelo-Gonzalez*, 521 F.2d at 264.
54. *Id.* at 262–63; *see* Springer v. United States, 148 F.2d 411, 416 (9th Cir. 1945) (Denman, J., concurring) (stating it was unreasonable to require probationers to donate a pint of blood to the Red Cross Blood Bank as a condition of probation).

Certainly, the government has an interest in rehabilitating its probationers back into society.[55] Probation is often given as an alternative to incarceration with the hope that the person's behavior can be corrected and that they can continue to function in society.[56] Conditions of probation aid in measuring the convicted person's progress.[57] For example, warrantless search conditions are particularly useful when there is a suspicion that the convicted person has not reintegrated into the community and is committing new crimes.[58] Successful completion of probation is meant to signal full reintegration into the community.[59] It would be difficult to maintain confidence in probation as an alternative to incarceration without regular checks to assure the probationers are indeed reintegrating.[60] Thus, conditions of probation are justified using the legitimate government interests of promoting rehabilitation and preventing recidivism.

Though the government hopes to reintegrate probationers back into society, its primary interest in crafting probation conditions is to prevent recidivism.[61] A study by the United States Sentencing Commission found that "[o]ffenders released from incarceration in 2005 had a rearrest rate of 52.5 percent, while offenders released directly to a probationary sentence had a rearrest rate of 35.1 percent."[62] Because convicted people are statistically more likely to reoffend, the government has a legitimate interest in preventing future crime.[63] And although those who serve a probationary sentence are less likely to break the law, the government still has a heightened interest in controlling their behavior.[64] The *Griffin* court suggested that "intensive supervision can reduce recidivism."[65] More recent studies suggest that routine day-to-day supervision is more effective and that the probation supervisors,

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55. *Lara*, 815 F.3d at 612.

56. United States v. Knights, 534 U.S. 112, 120–21 (2001).

57. *See id.* at 120.

58. *Lara*, 815 F.3d at 612.

59. United States v. King, 736 F.3d 805, 809 (9th Cir. 2013).

60. United States v. Consuelo-Gonzalez, 521 F.2d 259, 266 (9th Cir. 1975).

61. *See Knights*, 534 U.S. at 119; *Lara*, 815 F.3d at 612.

62. U.S. SENTENCING COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW 5 (2016), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf.

63. Griffin v. Wisconsin, 483 U.S. 868, 880 (1987); U.S. SENTENCING COMM'N, *supra* note 62, at 5.

64. *Griffin*, 483 U.S. at 880; U.S. SENTENCING COMM'N, *supra* note 62, at 5.

65. *Griffin*, 483 U.S. at 875. Recent studies question this rationale. Probation conditions that reach beyond the codified criminal law actually "broaden the behavior that constitutes recidivism [because] [a]ny violation of a probation condition is an act of recidivism that can result in a custodial sentence, whether the violation is substantive (a new crime) or technical (any other behavior that violates a condition of probation)." Doherty, *supra* note 38, at 295.

rather than the probation conditions, are what truly determine recidivism.[66] At any rate, conditions of probation do affect the legitimate government interest in preventing recidivism.

B. Riley v. California*: Launching the Right to Privacy for Cell Phones*

Cell phones present unique privacy concerns because they "are in fact minicomputers that also happen to have the capacity to be used as a telephone."[67] In the wake of this technology, the Supreme Court held in *Riley v. California* that the warrantless search of a cell phone incident to arrest is unconstitutional.[68] The Court's holding requires law enforcement to obtain a warrant before accessing any data on a cell phone of a person they have arrested.[69] Its reasoning centered on the nature of cell phones, emphasizing both the quantity and quality of information they can hold.[70] Cell phones present further complications by accessing data not actually housed on the phone itself.[71] The Court recognized the complexity of the issue, noting that comparing cell phones to their pre-digital predecessors is "like saying a ride on horseback is materially indistinguishable from a flight to the moon."[72]

Cell phones house a vast amount of information, in quantities never before contemplated by courts.[73] In traditional search analyses, and "[b]efore cell phones, a search of a person was limited by physical realities and . . . constitute[d] only a narrow intrusion on privacy."[74] With new technology, this is no longer true. First, cell phones collect many types of information, giving a comprehensive look at a person's life in a single centralized location.[75] Even just one type of information can house unprecedented detail.[76] For example, pictures on a phone may be labeled with the date, a GPS marker, and a description.[77] This provides much more detail than its predecessor, the photograph. Third, data stored on the phone may

66. Chris Trotter, *Reducing Recidivism Through Probation Supervision: What We Know and Don't Know from Four Decades of Research*, FED. PROB., Sept. 2013, at 43, 47–48.
67. Riley v. California, 134 S. Ct. 2473, 2489 (2014).
68. *Id.* at 2493.
69. *Id.*
70. *Id.* at 2489–90.
71. *Id.* at 2491.
72. *Id.* at 2488.
73. *Id.* at 2489.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*

extend back to the purchase date, or even earlier, displaying a person's current and past activities with astonishing detail.[78] Finally, an "element of pervasiveness" sets cell phones apart from physical records.[79] Almost three quarters of adult cell phone users report being within five feet of their phones—which contain a comprehensive record of their most sensitive information—at all times.[80]

Further, cell phones house data that is qualitatively different from their pre-digital ancestors.[81] Private interests or concerns could be revealed with a quick search of browsing history, "perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD."[82] Location information tracks a person's movement, even pinpointing a person's position in a particular building.[83] Besides standard features on a phone, application software, or "apps," can manage even more detailed information about a person's life.[84] With a few taps on a screen, a person's cell phone apps can reveal a wealth of information including political ideology on a party-specific news app, gambling and drug addictions on rehabilitation apps, and financial status on budgeting apps.[85] On average, a smartphone owner uses thirty-three apps, which provide not just a glimpse, but a comprehensive study of his or her life.[86]

To further complicate equating cell phones to anything that existed in the pre-digital world, much of the information accessible to a cell phone user is not actually located on the device.[87] A user's information can be stored on the "cloud," meaning users save information by uploading data to a remote server instead of on the device itself.[88] Users may not know what information is located on the device versus the remote server because they are equally accessible on the phone.[89] Every phone handles the data differently, and each user may select different settings.[90] Thus, because some of the data accessible

78. *Id.*
79. *Id.* at 2490.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at 2491.
88. *Id.*
89. *Id.*
90. *Id.*

through cell phones is not actually located on the phone itself, any analogy to a pre-digital container or object "crumbles entirely."[91]

In *Riley*, the government proposed new rules to allow either cursory or partial searches of cell phones of arrestees—or anyone who has been placed in custody of law enforcement.[92] The Court rejected each of them.[93] First, the government proposed that the Court allow the warrantless search of an arrestee's cell phone when it is reasonable to believe that it contains evidence of the crime.[94] The Court rejected this suggestion, reasoning that there would be "no practical limit," and that "[e]ven an individual pulled over for something as basic as speeding might well have locational data dispositive of guilt on his phone."[95] Second, the government proposed that the Court restrict the scope of cell phone searches to areas where the officer might reasonably find information relevant to the crime.[96] The Court also rejected this assertion, reasoning that the "approach would again impose few meaningful constraints on officers" and that any proposed categories would open the floodgates to a vast amount of information.[97]

Third, the government proposed that the Court allow officers to search the call log on a cell phone.[98] However, the Court rejected this proposal because call logs often contain more detail than just a phone number; "they include any identifying information that an individual might add, such as the label 'my house.'"[99] Finally, the government proposed that officers be allowed to search data accessible in its pre-digital equivalent.[100] The Court rejected this because "such an analogue test would allow law enforcement to search a range of items contained on a phone," even items that people do not carry with them.[101] Ultimately, the Court reasoned that because its holding allows for cell phone searches incident to arrest in exigent circumstances, the more "extreme hypotheticals" would be covered by looking at case-specific circumstances.[102]

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91. *Id.*
92. *Id.* at 2492–95.
93. *Id.*
94. *Id.* at 2492.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 2493.
100. *Id.*
101. *Id.* (including items such as video tapes, photo albums, and address books).
102. *Id.* at 2494. Justice Alito's concurrence argued that using the "blunt instrument of the Fourth Amendment" is not the best solution because legislatures are in a better position to respond to technological changes. *Id.* at 2497–98 (Alito, J., concurring). He wrote that he might reconsider

C. United States v. Lara*: A Special Case for Probationary Cell Phone Searches*

The Ninth Circuit extended *Riley*'s holding in *United States v. Lara*, granting cell phone privacy to probationers, despite their lessened privacy interests.[103] This case signals the vast impact of the *Riley* Court's reasoning, showing that courts across the country are conscious of the new Fourth Amendment issues that technology presents.

1. The Search

Defendant Lara was on probation for drug trafficking.[104] His probation terms mandated that he submit his "person and property, including any residence, premises, container or vehicle under [his] control to search and seizure at any time of the day or night by any law enforcement officer, probation officer, post-release community supervision officer, or parole officer, with or without a warrant, probable cause, or reasonable suspicion."[105] Lara stated in a sworn declaration that he did not believe the probation search condition subjected his cell phone and data to warrantless searches.[106] His probation officers, however, stated that even if the probationer objected, it was "standard protocol" to search probationer cell phones, especially in cases of drug trafficking.[107] Because drug traffickers often use cell phones to complete their sales, the officers routinely searched probationers' cell phones without obtaining an additional warrant.[108]

Without permission or objection from Lara, and under no particular suspicion, an officer searched Lara's cell phone during a routine probation search.[109] While reviewing recent text messages, the officer found photographs of semiautomatic handguns, sent by Lara, with messages assuring a potential buyer that they were "clean."[110] The officers did not find guns at the house, but found a folding knife, the possession of which was a violation of another probation condition.[111] Officers arrested Lara and took

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the holding if Congress or state legislatures "enact legislation that draws reasonable distinctions based on categories of information or perhaps other variables." *Id.* at 2497.

103. United States v. Lara, 815 F.3d 605, 611–12 (9th Cir. 2016).
104. *Id.* at 607.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 607–08.
109. *Id.* at 608.
110. *Id.*
111. *Id.*

his cell phone to a forensics lab.[112] There, lab technicians used GPS data embedded in the photo from the text message to determine that it was taken at Lara's mother's home, where law enforcement later found the handguns.[113] An officer testified that without the GPS data, she would have had no reason to visit the defendant's mother's house.[114] Prior to the officer's search, Lara had only missed one meeting with his probation officer, and had no other probation violations.[115]

After finding the handguns at his mother's home, police charged Lara with being a felon in possession of a firearm and ammunition.[116] In a motion to suppress, Lara argued that police only located the contraband because of information gathered during illegal cell phone searches at his home and the forensics lab.[117]

2. Court Discussion: Are Cell Phone Searches Reasonable as a Condition of Probation?

The government argued that by accepting the conditions of his probation, Lara consented to the cell phone search, thus waiving his Fourth Amendment right, and that even if Lara did not waive his Fourth Amendment right, the search was reasonable and thus lawful.[118] The court reasoned that a probationer's acceptance of a search condition does not in itself make the search condition lawful.[119] There is a limit on what the government can require in return for granting probation: even if the probationer agrees, each condition of probation must be reasonable to be lawful.[120] When a probationary search condition is unreasonable, it violates the probationer's Fourth Amendment right, even if he technically agreed to the search term.[121] To determine the reasonableness of probation conditions, a court must balance the intrusion on the individual's privacy against the necessity of the search for a legitimate government interest.[122]

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112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 612.
116. *Id.* at 608.
117. *Id.*
118. *Id.* at 609.
119. *Id.* (citing United States v. Consuelo-Gonzalez, 521 F.2d 259, 261 (9th Cir. 1975)).
120. *Id.* at 609.
121. *Id.*
122. *Id.* at 610. The court used this test in *United States v. King*, 736 F.3d 805 (9th Cir. 2013), to determine that a suspicionless search of a violent felon's residence was not unreasonable.

a. Lara's Privacy Interest

The Ninth Circuit considered three factors when looking at Lara's privacy interests, including (1) "his status as a probationer,"[123] (2) the "clarity of the conditions of [his] probation,"[124] and (3) the "nature of the contents of a cell phone."[125] Considered together, the court held that despite Lara's lessened privacy expectation as a probationer, his privacy interest was substantial, due to the ambiguity of the probation condition and the nature of cell phones.[126]

First, the court considered Lara's status as a probationer, reasoning that he necessarily had a lower expectation of privacy than a regular citizen.[127] However, the court held that despite his expectation of privacy being "significantly diminished," due to his conviction, it was still "substantial."[128] His already substantial privacy interest was further bolstered by the type of crime for which he was convicted.[129] The court reasoned that the less serious the crime, the more substantial the privacy interest.[130] Lara was convicted of a non-violent drug offense.[131] The court argued that because it was a less serious offense, his expectation of privacy remained greater than that of probationers convicted of more serious crimes.[132]

Second, the court considered the clarity of the cell phone search condition language, because a probationer's expectation of privacy is diminished when the conditions of probation are clearly expressed.[133] Specifically, the court considered whether references to "container" and "property" indicated that the probationer had a lower expectation of privacy for the contents of his cell phone.[134] The court reasoned that submitting "person and property, including any residence, premises, container or vehicle under [the probationer's] control to search and seizure" did not clearly notify Lara that his cell phone could be searched.[135]

There, the court expressly limited its holding to violent felons; accordingly, the ruling did not control in *Lara* where the probationer was convicted of a non-violent drug charge. *Lara*, 815 F.3d at 610.

123. *Lara*, 815 F.3d at 610.
124. *Id.* at 610–11.
125. *Id.* at 611–12.
126. *Id.*
127. *Id.*
128. *Id.* at 610; *see* United States v. Knights, 534 U.S. 112, 122 (2001).
129. *Lara*, 815 F.3d at 610.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 610.
134. *Id.* at 610–11.
135. *Id.*

The court reasoned that the word "container" did not unambiguously comprehend a cell phone and its data.[136] The Supreme Court in *Riley* had offered a similar argument, calling the analogy between a container and a cell phone "strained" because phones can be used to access data located elsewhere.[137] The *Lara* court reasoned that if it "makes no sense" to call a cell phone a container for search incident to arrest, then it would likewise be illogical for a cell phone to qualify as a container in conditions of probation.[138] Moreover, the court reasoned that the word "property" in the probation conditions did not include cell phone data.[139] When read in combination with the language that followed, "property, including any residence, premises, container or vehicle under [the probationer's] control," the court reasoned that the condition of probation referred only to physical objects that could be possessed.[140] The cell phone itself, of course, was a physical object.[141] However, the data it rendered accessible was not physical.[142] In the searches at issue in *Lara*—the text message, picture, and GPS data—the police did not examine physical objects, but data.[143] Accordingly, the court held that the word "property" in Lara's conditions of probation did not clearly include cell phone data.[144]

Third, the Ninth Circuit considered the nature of cell phones in relation to a probationer's privacy interests. Again, the court borrowed *Riley*'s "sweeping language," reasoning that the search of cell phone data would give the government far more information than even the most exhaustive search of a house.[145] A phone has the potential to give law enforcement minute details about a person's life through internet search history, photos, GPS data, voice memos, and other sensitive information.[146] While many of these records could be found during a home search, a cell phone still exposes much more than was ever accessible in a centralized location.[147]

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136. *Id.* at 610.
137. *Id.*; *see* Riley v. California, 134 S. Ct. 2473, 2491 (2014).
138. *Lara*, 815 F.3d at 611.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* The court did not specify what language would have satisfied their requirement that the probationer be aware that his cell phone could be searched as a condition of his probation. However, because the search condition only referenced "physical objects that can be possessed," it is possible that a search condition which describes data would satisfy this condition. *Id.*
145. *Id.* at 611; *see* Riley v. California, 134 S. Ct. at 2489.
146. *Lara*, 815 F.3d at 611; *see Riley*, 134 S. Ct. at 2489.
147. *Lara*, 815 F.3d at 611; *see Riley*, 134 S. Ct. at 2491.

In sum, the court concluded that Lara did have a privacy interest.[148] Certainly, his privacy interests were lessened as a probationer.[149] However, because the search condition did not clearly include cell phone data, and because of the sensitive nature of a cell phone data itself, Lara's privacy interest was substantial.[150]

b. The Government's Interest

With the first half of the balancing test completed, the court next assessed the government's interest in requiring warrantless cell phone searches as a condition of probation.[151] The court considered combating recidivism and promoting rehabilitation to be major government interests.[152] But such factors are only important to the degree that the government suspects a specific probationer is at risk of reoffending.[153] Because Lara had only missed one meeting with his probation officer, and there was no other evidence of wrongdoing, there was not any particular reason for police to suspect a heightened risk of reoffending.[154] Moreover, Lara's conviction, which involved the use of a cell phone for drug sales, did not give rise to any particular rehabilitation concerns that would allow warrantless searches of his cell phone.[155] The court reasoned that due to the ubiquity of cell phone usage in crimes, the government's "purported heightened interest" in conducting warrantless, suspicionless searches for those convicted of controlled substance crimes was not compelling.[156]

On balance, the court held the search was unreasonable.[157] Although his status as a probationer slightly lowered his expectation of privacy, Lara's privacy interest was still substantial enough to outweigh the government's interest in searching his cell phone.[158]

148. *Lara*, 815 F.3d at 611–12.
149. *Id.* at 611.
150. *Id.* at 611–12.
151. *Id.* at 612.
152. *Id.*; *see* United States v. Knights, 534 U.S. 112, 120–21 (2001).
153. *Lara*, 815 F.3d at 612.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*

D. Probationer Cell Phone Privacy After Lara *and* Riley

Since *Riley* and *Lara*, many courts have considered when to expand privacy rights for cell phones. The most common exception to the general rule against warrantless cell phone searches occurs in cases at the United States border. Though the Supreme Court has not yet commented on this exception, lower courts have reasoned that the government's interest in securing the border outweighs privacy interests.[159] Some courts have even used *Riley* to extend cell phone privacy rights when the phone is not in the owner's immediate possession.[160]

Since *Riley*, some courts have held that reasonable suspicion is sufficient to search a cell phone under a condition of probation.[161] In *United States v. Dahl*, defendant Dahl was convicted of attempted sexual activity with a minor.[162] His probation conditions prohibited him from communicating with any person under twenty-one, adding that his computers and related equipment could be searched.[163] Law enforcement notified Dahl's probation officer that he had contacted and solicited sexual favors from an undercover police officer posing as a fifteen-year-old boy.[164] Officers located and apprehended Dahl, and his probation officer examined the contents of his cell phone, confirming that he had been communicating with the "fifteen-year-old."[165] The court held that the warrantless search of Dahl's cell phone was lawful.[166] The court reasoned that this was a case-specific exception (as contemplated in *Riley*) and that allowing a probationer's cell phone to be searched "based on reasonable suspicion and without a warrant, just like a warrantless search of a cell phone based on exigent circumstances, [did] not open the floodgates to massive invasions of privacy without judicial oversight."[167]

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159. *See, e.g.*, United States v. Caballero, 178 F. Supp. 3d 1008, 1018 (S.D. Cal. 2016); United States v. Cano, No. CR 15-00768-TUC-JAS(EJM), 2016 WL 2909228, at *1, *5 (D. Ariz. Mar. 18, 2016). In *United States v. Mendez*, the court concluded that officers could search a cell phone at the border in part because the agent "knew that drug trafficking organizations often communicate using cellular phones." United States v. Mendez, 240 F. Supp. 3d 1005, 1007 (D. Ariz. 2017). Interestingly, this reasoning had already been rejected by the Ninth Circuit for the warrantless search of a probationer convicted of a similar drug crime. *Lara*, 815 F.3d at 612.

160. *See, e.g.*, State v. Peoples, 378 P.3d 421, 425–26 (Ariz. 2016).

161. *See, e.g.*, United States v. Dahl, 64 F. Supp. 3d 659, 660–61 (E.D. Pa. 2014).

162. *Id.* at 659.

163. *Id.* at 661.

164. *Id.* at 660.

165. *Id.* at 661.

166. *Id.* at 664.

167. *Id.*

Dahl is not the only case to approve probationary data searches for probationers convicted of sex-crimes with minors.[168] In *State v. Gonzalez*, after conviction for a sex-related crime with a minor, a probationer agreed to submit his property to search by any probation officer.[169] He was prohibited from contacting anyone under the age of eighteen and from using 900 numbers.[170] Law enforcement notified Gonzalez's probation officer that he was under investigation for having contact with a minor.[171] When the probation officer searched Gonzalez's cell phone, he found evidence that the probationer had breached the terms of his probation.[172] The court held that the search was lawful.[173] The court reasoned that because the conditions of his probation prohibited him from contacting minors or from using 900 phone numbers, he was on notice that his cell phone could be searched.[174] Like in *Dahl*, the court further reasoned that probationary searches should be considered case-specific exceptions as outlined in *Riley*.[175]

A probation condition that allowed officers to search "any electronic device" was overbroad for a juvenile convicted for robbery of electronic devices.[176] After an assault and robbery conviction, a juvenile in *In re Malik J.* was granted probation, provided that he submit to search of his property by law enforcement at any time.[177] Because the juvenile stole electronics, the judge ordered that the juvenile and his family disclose passwords to social media accounts and all "electronic devices including cell phones, computers and notepads within [his] custody and control, and submit to search of devices at any time to any peace officer."[178] The court held that the probation condition as written was overbroad and thus unconstitutional, but held that

168. State v. Gonzalez, 862 N.W.2d 535, 538, 540 (N.D. 2015); *see also* United States v. Howard, No. CR-16-14-H-CCL, 2017 WL 1450587, at *5 (D. Mont. Mar. 21, 2017) (holding that a search was constitutional and not contrary to *Lara* when officers found evidence that a probationer convicted of sex crimes with a minor had been using children's cell phones).

169. *Gonzalez*, 862 N.W.2d at 538, 540.

170. *Id.* The probation conditions prohibited him from "purchas[ing], possess[ing], . . . us[ing] sexually stimulating materials of any kind," or "utiliz[ing] 900 telephone numbers," likely referring to sex phone lines. *Id. See generally* Mark S. Kende, *Lost in Cyberspace: The Judiciary's Distracted Application of Free Speech and Personal Jurisdiction Doctrines to the Internet*, 77 OR. L. REV. 1125, 1157 (1998).

171. *Gonzalez*, 862 N.W.2d at 538.

172. *Id.*

173. *Id.* at 543.

174. *Id.* at 540–41. The North Dakota Supreme Court argued in *State v. Ballard* that this did not extend to suspicionless probation searches. State v. Ballard, 874 N.W.2d 61, 69 (N.D. 2016).

175. *Gonzalez*, 862 N.W.2d at 541–42.

176. *In re* Malik J., 193 Cal. Rptr. 3d 370, 378 (Ct. App. 2015).

177. *Id.* at 373.

178. *Id.*

by omitting the social media password provision and amending the search provision to only permit searches of devices within his own control, the probation conditions would be constitutional.[179]

The court reasoned that officers could only search the juvenile's devices "so long as [the searches] are not arbitrary, capricious or harassing."[180] The court suggested that the officers should not be allowed to use specialized equipment to perform a forensic search, and should turn the internet off to ensure they can only access information that is on the device itself.[181] The court reasoned that the condition was related to the juvenile's conviction, because probation officers could determine whether the devices in the probationer's possession were stolen.[182]

Because *Lara* is a recent decision, few courts have commented on the Ninth Circuit's holding and reasoning as it pertains to the constitutionality of cell phone searches in probation conditions. Some courts have held that when a probationer is a violent criminal and in custody as a suspect for another crime, the government's interest in combating recidivism outweighs the probationer's privacy interests.[183] In *United States v. Harding*, the defendant was on probation for a felony robbery conviction.[184] Upon arrest for suspicion of auto burglary, law enforcement searched his cell phone.[185] In a ruling on a motion to suppress evidence from the cell phone search, the judge held that the search was reasonable.[186] The court reasoned that the case was distinguishable from *Lara* for two reasons.[187] First, Harding was a violent criminal, unlike Lara.[188] Second, Harding had already been arrested in connection with auto burglary, so "the government clearly had a specific reason to suspect that [the defendant] was 'reoffending or otherwise

179. *Id.* at 375.

180. *Id.*

181. *Id.* at 376. Interestingly, this very concept was rejected by the *Riley* Court as an unworkable solution in cases of searches incident to arrest. "[T]he Government proposes that law enforcement agencies 'develop protocols to address' concerns raised by cloud computing. Probably a good idea, but the Founders did not fight a revolution to gain the right to government agency protocols." Riley v. California, 134 S. Ct. 2473, 2491 (2014) (quoting Reply Brief for the United States at 14, Riley v. California, 134 S. Ct. 2473 (2015) (No. 13-212)).

182. *Malik J.*, 193 Cal. Rptr. 3d at 377.

183. *E.g.*, United States v. Harding, No. 13-CR-00764-WHO-10, 2016 WL 4585743, at *2–3 (N.D. Cal. Sept. 2, 2016).

184. *Id.* at *1.

185. *Id.* at *4.

186. *Id.*

187. *Id.*

188. *Id.*

jeopardizing his reintegration into the community.'"[189] Thus, the search was reasonable and constitutional.[190]

E. A Survey of Current Probation Conditions

There is no uniform set of probation conditions recognized by any national legal organization. Each county sets its own probation conditions, which can range from very narrow to extremely expansive.[191] A study of probation conditions found that Ohio, a state with one of the least intrusive search conditions, simply requires probationers to submit to "a search of their person and any bag or package in their possession."[192] Conversely, one of the most expansive standard conditions of probation, from courts in Idaho, requires that probationers "give up all of their Fourth Amendment rights."[193] The study looked at probation conditions for counties in Pennsylvania, Minnesota, Ohio, Indiana, Illinois, New Jersey, California, and Idaho.[194]

Looking at each of those counties, only Lake County in Illinois explicitly mentions computer data, requiring that the probationer consent to the search of "any device capable of accessing the internet or storing electronic data" as a general condition of probation.[195] Similarly, the federal government requires that registered sex offenders "submit . . . computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, . . . with reasonable suspicion concerning a violation of a condition of [probation] or unlawful conduct by the person."[196] However, the majority of probation conditions in the study did not mention electronic data.[197] If probation conditions continue to be scrutinized under the same analysis used by the Ninth Circuit in *Lara*, then the police may not be able to search cell phones in these jurisdictions. Because a probationer's expectation of privacy is diminished when the conditions of probation are clearly expressed, *Lara* requires that the courts consider the clarity of the cell phone search condition language.[198] Without the explicit mention of data or

189. *Id.* (quoting United States v. Lara, 815 F.3d 605, 612 (9th Cir. 2016)).
190. *Id.*
191. Doherty, *supra* note 38, at 317–18.
192. *Id.* at 317.
193. *Id.* at 317–18.
194. *Id.* at 319 tbl.8.
195. *Id.*
196. 18 U.S.C. § 3583(d)(3) (2012).
197. Doherty, *supra* note 38, at 319. For example, Arizona's Uniform Conditions of Supervised Probation simply read, "I will submit to search and seizure of person and property by the APD without a search warrant." ARIZ. CODE JUDICIAL ADMIN. § 6-207 app. A (2017).
198. United States v. Lara, 815 F.3d 605, 610 (9th Cir. 2016).

cell phones, courts may find that probationers were not notified of the possibility that their cell phone would be searched.

III. ANALYSIS: MODIFYING THE *LARA* TEST

The following proposes a modified version of the *Lara* court's analysis. Cell phones require special consideration in a legal context, especially for probationers. Due to the nature of cell phone use, and the large amount of information cell phones store about the owner, courts should modify the *Lara* balancing test to only allow probationary cell phone searches when cell phone use is inextricably connected to the government's probation interests.

A. The Problem with Lara

Lara has the potential to change probation procedures across the country. If indeed it is standard protocol for probation officers to look through probationers' cell phones as did the officers in *Lara*,[199] then this new case will force probation offices across the country to train their officers either to ask permission before searching probationers' cell phones, or to obtain a warrant. However, probation officers may have another option: because *Lara* places such an emphasis on the probationer's understanding of the search terms,[200] probation services might try to circumvent *Lara* by adopting probation search procedures that explicitly mention cell phone data.[201] It is unclear from *Lara* whether the Ninth Circuit would consider a set of probation search conditions that clearly allows for data searches to be constitutional. The privacy interest analysis in *Lara* was comprised of three parts: the probationer's status, the clarity of the search conditions, and the nature of a cell phone.[202] In that case, the last two factors weighed toward the probationer. It is possible that in a case where the probation conditions specifically allow the search of cell phone data, that courts will determine that privacy interests are not substantial enough to prevent the search. Even if probation conditions explicitly mention cell phone data, cell phones should not be searchable because *Riley* establishes a broad right to privacy for cell phones.[203] Much like the holding in *Riley*, there should be a general rule that probationary cell phone searches require an additional warrant. It should not matter whether the probationer is aware that his cell phone could be searched as a condition of probation,

199. *Id.* at 607–08.
200. *See, e.g.*, Doherty, *supra* note 38, at 319 tbl.8.
201. *See, e.g.*, Littlefield, *supra* note 7.
202. *Lara*, 815 F.3d at 610.
203. *Id.* at 611.

because to require a person to give police access to so much data without probable cause will not be reasonable absent extreme circumstances.

B. Modifying Lara*: Privacy Interests of a Probationer*

In determining the privacy interests of probationers, the *Lara* court considered the probationary status, the clarity of the search term, and the nature of a cell phone.[204] Because of the sweeping language establishing a right to cell phone privacy in *Riley*, courts should give the nature of cell phones the most weight when considering the privacy interests of probationers.

Certainly, courts would still consider the probationer's status. As acknowledged in *Samson*, privacy rights of those serving state-imposed punishments can be placed on a continuum.[205] So while probationers do not have the same privacy rights as people who are not incarcerated, their interests are still substantial because they have been granted probation in lieu of incarceration. Further, not all probationers would be treated the same. Those with a violent conviction like the probationer in *King*[206] or those whose conviction is directly related to cell phones like the juvenile in *Malik*[207] would have a lessor privacy interest than those like the defendant in *Lara* who were convicted of non-violent drug charges. This would actually further the government's interest in preventing recidivism by giving it more power over probationers who are the most dangerous thus most likely to reoffend, and in promoting rehabilitation for those less at risk by making them feel more integrated into society.

Courts should not need to scrutinize the clarity of the search term when it comes to cell phones; the nature of the information on a digital device is so expansive, making almost any cell phone search term unreasonable. The *Lara* court adopted some of the "sweeping language" from the *Riley* decision, but did not give proper weight to its meaning. The *Lara* court spent much of its discussion on Lara's understanding of the probation search term and how it did not unambiguously include cell phone data. However, even if the search term was explicit, probation officers should not have been allowed to browse a probationer's cell phone as standard procedure. Cell phones contain data in massive amounts, stringing together a comprehensive view of not only a person's present, but also of a person's past. What privacy a probationer does

204. *Id.* at 610.
205. Samson v. California, 547 U.S. 843, 850 (2006).
206. United States v. King, 736 F.3d 805, 809–10 (9th Cir. 2013).
207. *In re* Malik J., 193 Cal. Rptr. 3d 370, 372–73 (Ct. App. 2015).

forfeit for the privilege of probation should not include allowing probation officers to look through every electronic trace of his life.

C. Government Interest in Searching Cell Phones of Probationers

Certainly, the government has a legitimate interest in imposing probation conditions to prevent recidivism. Statistically, probationers are at a higher risk of committing crimes than the general public. However, in general, probation should not be considered the kind of case-specific circumstance that the Supreme Court referenced in *Riley*. Calling all probation conditions a "case-specific circumstance" that calls for an exception, like the courts in *Dahl*[208] and *Gonzalez*,[209] is not in line with the idea of case-specific analyses. An actual case-specific analysis may include some probation cases, but would not necessarily include all probation conditions used to justify warrantless cell phone searches. Requiring probation officers to obtain a warrant to search most cell phones will not cripple the government's interest in preventing recidivism. If law enforcement suspects wrongdoing, they can ask for the probationer's permission to search the phone, or obtain a warrant from a neutral judiciary officer, except in exigent circumstances.[210]

In many instances where courts have allowed cell phone searches, the probationary searches were simply used as a shortcut in situations where law enforcement likely could have obtained a warrant anyway. For example, in *Dahl*, the police had gathered information regarding new crimes from the probationer's contact with an undercover police officer.[211] At that point, law enforcement likely could have obtained a warrant through probable cause. Instead, knowing that *Dahl* was on probation, they asked his probation officer to look through his cell phone. His status as a probationer was used as a shortcut to circumvent standard Fourth Amendment protections. While the government maintains a legitimate interest in preventing recidivism, it would have still been able to prevent crime without infringing on a probationer's high expectation of cell phone privacy.

Though the nature of cell phones calls for the highest level of privacy, there will still be instances where the government's interest outweighs the

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208. United States v. Dahl, 64 F. Supp. 3d 659, 664 (E.D. Pa. 2014).

209. State v. Gonzalez, 862 N.W.2d 535, 541 (N.D. 2015).

210. These exigent circumstances would "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." Riley v. California, 134 S. Ct. 2473, 2494 (2014).

211. *Dahl*, 64 F. Supp. 3d at 660.

probationer's rights. When the search condition relates directly to the probationer's rehabilitation—because their criminal behavior is inextricably connected with cell phones—the government interest may overcome the privacy interest. One example of this would be in *Malik*, where the juvenile was on probation for stealing cell phones, and the court narrowed the search condition, only giving probation officers access to the devices so that they could determine ownership of each device.[212] There, the narrowed search condition was directly related to the rehabilitation of the juvenile. Another example would be probationers convicted for child pornography they accessed on a cell phone. Perhaps probation officers would then be allowed to check internet search history and downloads to ensure that the probationer's online activities did not break the law. Other than instances like *Malik* where conditions relate directly to rehabilitation, the more extreme hypotheticals could be covered under the exigent circumstances exception in *Riley*, which gives the government the power to search without a warrant in extreme circumstances.

CONCLUSION

A substantial portion of the American population carries a cell phone with them every day. For many, these are smartphones that document countless interactions and transactions, both professional and personal. The Supreme Court recognized the unique search issues that cell phones present, and established a right to privacy for cell phones. The Ninth Circuit extended this right to probationers, but in a way that could allow probation offices across the country to circumvent their ruling. While probationers give up some rights for the privilege of forgoing incarceration, they should not be forced to give a comprehensive record of their cell phone usage to their probation officer, even when it is required in their probation conditions.

212. *Malik J.*, 193 Cal. Rptr. 3d at 366–77.