

QUESTIONS & ANSWERS

Searches of Cell Phones

This document represents a question submitted by drug court practitioners concerning the proper limits of a search of a drug court participant's cell phone while the participant is in the program. Although it may refer to state cases as examples, the analysis of the cell phone search issue presented here is based on a review of federal authority as of October 27, 2016. State law may provide different guidance, because state constitutional protections can be greater than those provided by the United States Constitution, but states cannot provide less protection than that provided by federal constitutional safeguards. *Oregon v. Hass*, 420 U.S. 714, 719 (1975). (“[A] state is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards.”) Thus, the drug court practitioner should update the cited authority to ensure accuracy and check the law in the forum state. When there is a split in the federal authority, we will suggest the most conservative approach.

This answer has been provided by former Judge William “Bill” Meyer, a general jurisdiction trial court judge in Denver, Colorado, from 1984 to 2000. He is currently the owner of, and one of the 26 judicial mediators and arbitrators for, the Judicial Arbitrator Group, Inc. Judge Meyer serves as the first Senior Judicial Fellow for the National Drug Court Institute (NDCI). He was chair of the Standards Committee for the National Association of Drug Court Professionals, which wrote *Defining Drug Courts: The Key Components*. Judge Meyer is a faculty instructor for the National Institute of Trial Advocacy, the National Judicial College, and NDCI. He has published a book on evidence, *Colorado Evidence with Objections*, and numerous articles on alternative dispute resolution and alternative sanctions, including “Drug Courts Work” in the *Federal Sentencing Reporter*. Judge Meyer is also the co-editor of the *Drug Court Judicial Manual* produced by NDCI.

Q Under what circumstances can drug court supervision officers search a participant's cell phone?

A Any discussion of a cell phone search should start with *Riley v. California*, ___ U.S. ___, 134 S. Ct. 2473, 189 L.Ed.2d 430 (2014). In *Riley*, the court held that police generally may not, without a warrant, examine the digital information stored on a cell phone seized incident to arrest. In *Riley*, the court





observed how much data cell phones warehouse and how ubiquitous the devices have become:

These cases require us to decide how the search incident to arrest doctrine applies to modern cell phones, which 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. A smart phone of the sort taken from Riley was unheard of ten years ago; a significant majority of American adults now own such phones. See A. Smith, Pew Research Center, *Smartphone Ownership, 2013 Update* (June 5, 2013). . . .

But while *Robinson's* categorical rule (on search incident to arrest) 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*—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, *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*. We therefore decline to extend *Robinson* to searches of data on cell phones, and hold instead that officers must generally secure a warrant before conducting such a search.

(*Riley, supra*, 134 S. Ct. at p. 2484-2485)

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). See also *State v. Workman*, 22 Neb. App. 223 (2014). (The minimal due process to which a parolee or probationer is entitled also applies to participants in a drug court program.) A probationer's reasonable expectation of privacy is lower than someone who has

completed probation or who has never been convicted of a crime. *Samson v. California*, 547 U.S. 843, 850, 126 S. Ct. 2193, 165 L.Ed.2d 250 (2006).

Because of the lower expectation of privacy enjoyed by a probationer, a search of the probationer's property may be justified by "reasonable suspicion" instead of probable cause. One court described "reasonable suspicion" as follows: "[The] degree of individualized suspicion required of a search is a determination of when there is a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable." *United States v. Knights*, 534 U.S. 112 at 121 (2001). The fact that the probationer is subject to or consented to a search condition as a term of probation is a "salient circumstance" in evaluating whether reasonable suspicion exists. *Id.* at 118. See also *People v. Mahdi*,¹ ___ N.W. 2d ___ (Mich. App. 10/11/16).

In many jurisdictions, as a condition of drug court participation, the defendant executes a general Fourth Amendment waiver as a condition of participating in the drug court program. These general consents to search do not necessarily validate a cell phone search if the underlying crime is not violent. *United States v. Lara*, 815 F.3d 605 (9th Cir. 2016). In fact, the U.S. Supreme Court specifically noted that the more specific the consent to search, the greater the probability that the search will be validated, particularly 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 probationer's "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.

In analyzing *Lara's* privacy interest, the court focused on three factors: "[*Lara's*]" status as a probationer, the clarity of the conditions of probation, and the nature of the contents of a cell phone." Observing

¹ https://scholar.google.com/scholar_case?case=1062302265376803913&rq=people+v.+mahdi&hl=en&as_sdt=4006

that Lara's status as a probationer resulted in his privacy interest being "significantly diminished," yet "still substantial," particularly given that, unlike the defendants in other cases, Lara had not been "convicted of a particularly 'serious and intimate' offense." *Id.* (quoting *King*, 736 F.3d at 809). Next, the court found that Lara's probation search condition did not clearly and unequivocally extend to his cell phone. *Id.* The *Lara* court, and several subsequent decisions, have distinguished *United States v. King*, 736 F.3d 805 (9th Cir. 2013) because the *King* case involved a suspicionless search based upon a general consent as a condition of probation, where probationer King had been convicted of the violent crime of willfully inflicting corporal injury on a cohabitant. *Id.*, at 806. Lara, in contrast, had been convicted of a nonviolent drug crime. See also *United States v. Harding*² (ND California 9/2/16).

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. If the search of the probationer's cell phone is constitutionally deficient, it is possible that the information obtained could be used at a probation revocation, drug court termination, or sanction hearing. Federal authority has held that the exclusionary rule does not apply to parole revocation proceedings and, therefore, the seized evidence could be used for sanctioning or revocation. *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357 (1998) (exclusionary rule not applicable to parole revocation hearings). The majority of federal courts refuse to apply the exclusionary rule to probation revocation proceedings, absent evidence of police harassment. See *United States v. Gravina*, 906 F. Supp. 50, 53-54 (D. Mass. 1995); *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161, 1163 (2d Cir. 1970); *United States v. Bazzano*, 712 F.2d 826, 830-34 (3d Cir. 1983); *United States v. Armstrong*, 187 F.3d 392 (4th Cir. 1999); *United States v. Brown*, 488 F.2d 94, 95 (5th Cir. 1973); *United States v. Farmer*, 512 F.2d 160, 162-63 (6th Cir. 1975); *United States v. Hill*, 447 F.2d 817, 819 (7th Cir. 1971); *United States v. Frederickson*, 581 F.2d 711, 713 (8th Cir. 1978); *United States v. Winsett*, 518 F.2d 51,

53-55 (9th Cir. 1975); and *United States v. Finney*, 897 F.2d 1047, 1048 (10th Cir. 1990).

Applying the above authority leads to the following guidance:

- A search of the drug court participant's cell phone is permitted upon reasonable suspicion or proper consent.
- When the probationer is under supervision for a violent or serious crime, there is a greater probability that a search pursuant to a probation condition will be upheld.
- Search of a probationer's cell phone, pursuant to a consent search or reasonable suspicion, is more likely to be upheld if "cell phone" is explicitly listed on the consent form as a place to be searched.
- If the cell phone search is constitutionally flawed, the seized information cannot be offered as evidence to support a new charge, but its use may be possible at a probation revocation hearing, drug court termination hearing, or sanction hearing.

Drug court practitioners should always check their local state statutes and case law to ensure that they are in accord with the federal authority cited herein. Where there is a divergence between state and federal law, the practitioner should follow state law, unless it does not meet the minimum standards set forth by the U. S. Supreme Court or binding federal court constitutional mandates.

² https://scholar.google.com/scholar_case?case=6626414340243253471&hl=en&ras_sdt=4005&sciodt=4006



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