IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellant, vs. BRIAN MITCHELL LIETZAU, Appellee.	)	No. 2 CA-CR 2018-0011 Department B Pima County Superior Court No. CR20162952-001

APPELLANT'S OPENING BRIEF

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STATEMENT OF FACTS AND CASE:

¶1 This case involves the warrantless search of a cell phone by a probation officer. In this case, Lietzau was charged with six counts of sexual conduct with a minor. *See* ROA 5; ROA 76 at ep 2; ROA 82 at ep 3.[1]

¶2 Lietzau was put on probation for domestic violence aggravated harassment in August 2014 in case CR20142245. ROA 76 at ep 14. As part of his conditions of probation, Lietzau agreed, in part: "I AGREE TO THE FOLLOWING AS CONDITIONS OF THE SUSPENSION OF IMPOSITION OR EXECUTION OF SENTENCE: . . . I will submit to search and seizure of person and property by the APD [Adult Probation Department] without a search warrant." *Id.* He also signed the domestic violence probation terms, which provided in part that he must "[g]rant probation officer safe access to your residence and property" and [s]ubmit to search and seizure of person and property by any probation officer." ROA 81 at ep 13. Condition 14(A) of his domestic violence probation conditions provided specifically that he could not "initiate or maintain telephone contact" with the victim without prior approval or go where the victim resides or works. *Id.*

¶3 By December 2014, APD had noted several probation violations. ROA 76 at ep 31:8-32:1, 41:38-42:9. These included Lietzau's failure to provide the APD a safe,

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1 The record on appeal does not include the indictment, but these record items show

unrestricted access to his residence in November; failure to participate and cooperate in any program of counseling or assistance as directed by the APD and/or court in October and November; failure to drug test as directed in August, September, and December; and failure to perform community restitution as directed. ROA 81 at ep 9-10. They also had information that Lietzau may be involved in an "inappropriate" relationship with a 13-year-old girl based on information from the girl's mother. ROA 76 at ep 22:15-23:17, 48:32-49:1, 50:20-30, 51:37-53:1. APD arrested Lietzau for his probation violations on December 10, 2014. Surveillance officer Casey Camacho along with surveillance officer Hick, arrested him. ROA 76 at ep 22:39-41, 32:36-33:15.

¶4 After Lietzau was arrested, Camacho looked at his phone and saw hundreds of text messages between Lietzau and the 13-year-old girl, S.E. *Id.* at ep 21:20-30, 39:9-16, 44:22-47:3, 48:12-15. He looked at the phone without a warrant because Lietzau was on probation. *Id.* at ep 39:26-36. On the phone, Camacho also saw images of a person in a bra and topless. *Id.* at 49:23-30. Lietzau told him that the text messages were from S.E. *Id.* at ep 26:41-27:6, 47:5-7, 48:17-20. Camacho read the text messages and typed a transcription of them over the next few days. *Id.* at ep 21:11-18, 25:27-37, 38:16-19. He gave the phone and his transcription to a detective. *Id.* at ep 26:18-22, 35:7-36:6. He did not open the phone when he gave it to the detective because he knew

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the charges.

the detective would need a warrant. *Id.* at ep 36:8-15. The detective used the information that Camacho obtained from the phone to apply for a search warrant for the phone. *Id.* at ep 60-61. Judge Godoy granted a search warrant. *Id.* at ep 57-58, 61-62.

¶5 Lietzau moved to suppress the evidence found on the cell phone, arguing that Camacho's initial search of the phone was unconstitutional. ROA 76. At the hearing on the motion to suppress, the prosecutor asked to put the probation officer on the stand to testify about the reasonableness of the search, but the trial court declined, saying that it did not need testimony. RT 12/11/2017 at 5:12-16, 6:1-13. The prosecutor reiterated the request a moment later. *Id.* at 7:18-21. The trial court ruled that the search was unconstitutional and suppressed "the cell phone documentation and information." *Id.* at 12:14-20; ROA 83 at 2.

¶6 The State filed a timely notice of appeal. ROA 85. This Court has jurisdiction of this appeal under Article 6, section 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A) and 13-4032(6).

STATEMENT OF THE ISSUES:

¶7 Did the trial court err in not allowing the State to call a witness?

¶8 Was the search of the cell phone reasonable, and thus constitutional?

LAW AND ARGUMENT:

¶9 This Court reviews a trial court's ruling on a motion to suppress for abuse of discretion but reviews the trial court's ultimate legal determinations de novo. *State v. Adair*, 241 Ariz. 58, 60, ¶ 9 (2016)

The trial court erred in not allowing the State to call a witness.

¶10 First, the trial court erred in not allowing the State to call its witness. In this case, the trial court did not allow the State to call the probation officer, even though the State requested to do so twice. This was error. Because the trial court said that it would not change its mind, there was no evidentiary hearing. All that the trial court had before it was the recitation of facts in the parties' pleadings, with the exhibits that were attached to them. But that is not the same as actual testimony. As this Court has noted, "the obligation to prove a prima facie case for suppression is imposed by Rule 16.2 and attaches at the hearing, not the motion, stage." *Rodriguez v. Arellano*, 194 Ariz. 211, 212, ¶ 3, n. 1 (App. 1999). In this case, there was no evidentiary hearing at which the defense could establish its prima facie case and the State could show that suppression was inappropriate. The trial court erred in not allowing the State to call its witness.

Camacho's search of the cell phone was reasonable, and thus constitutional.

¶11 Even without the probation officer's testimony, the record shows that the search was constitutional. *See State v. Navarro*, 241 Ariz. 19, 20 n.1 (App. 2016) ("Because

no hearing was held in this case, we draw our facts from the uncontested material appended to Navarro's suppression motion as well as the evidence presented at trial."), *citing State v. Cañez*, 202 Ariz. 133, ¶ 70 (2002) (acknowledging suppression arguments are subject to appellate review "even absent a pretrial motion to suppress").

¶12 Our case law allows the search in this case. In *State v. Montgomery*, the defendant was put on probation for a burglary conviction. One of his terms of probation was that he would "[s]ubmit to search and seizure of person or property at any time by any police officer or probation officer without the benefit of a search warrant." 115 Ariz. 583, 583 (1977). He appealed, arguing that the condition was overbroad and violated his Fourth Amendment rights. *Id.* Our supreme court rejected his argument. It first noted that conditions of probation are appropriate if they bear a relationship to the defendant's rehabilitation. *Id.* at 584. It then held that "[w]hile defendant is on probation his expectations of privacy are less than those of other citizens not so categorized" and that the probation condition "is not an unreasonable or an unconstitutional limitation upon his right to be free from unreasonable searches and seizures." *Id.* The court did express misgivings about allowing police officers, rather than probations officers, to search without a warrant, but concluded that Arizona law did not prevent it. *Id.* at 584-85. The probation conditions in this case are constitutional and enforceable. They authorized the search in this case.

¶13 Much more recently, in *State v. Adair*, the defendant was on probation for drug charges, and he had a probation condition, much like the conditions in this case, to "submit to search and seizure of person and property" by the probation department "without a search warrant," and to provide the probation department "safe, unrestricted access to" his residence. 241 Ariz. 58, 59, ¶ 2 (2016). He was also required to obey all laws and to not possess or use any firearms, ammunition, illegal drugs, or controlled substances. *Id.* In the case, our supreme court held that a warrantless search of a probationer's residence "complies with the Fourth Amendment if it is reasonable under the totality of the circumstances and that its legality does not hinge on whether the search is supported by reasonable suspicion." *Id.*, ¶ 1.

¶14 The court began with the proposition that the touchstone of the Fourth Amendment is reasonableness. *Id.* at 61, ¶¶ 13-14. It then looked at the Supreme Court cases of *Griffin v. Wisconsin*, 483 U.S. 868 (1987), *United States v. Knights*, 534 U.S. 112 (2001), and *Samson v. California*, 547 U.S. 843 (2006). *Id.* at 61-62, ¶¶ 14-17. Based on those cases, the Court came to the conclusion that "in assessing whether the probation officers' warrantless search of Adair's residence was lawful, 'reasonableness under the totality of the circumstances satisfies the requirements of the Fourth Amendment.'" *Id.* at 62, ¶ 18, *quoting State v. Adair*, 238 Ariz. 193, 194, ¶ 1 (App. 2015). Reasonable suspicion is not required. *Id.* The court specifically rejected the

argument that "the Fourth Amendment categorically requires reasonable suspicion for all warrantless searches of probationers' residences" because "[a] search of a convicted felon/probationer's home, conducted by probation officers pursuant to valid probation conditions, is categorically different from police officers' investigatory stops of vehicles or pedestrians." *Id.* at 63, ¶ 22.

¶15 The court then listed several factors to consider, including: "[t]he target of the search must be a known probationer subject to a valid, enforceable probation condition allowing a warrantless search"; "[t]he search must be conducted by a probation officer in a proper manner and for the proper purpose of determining whether the probationer was complying with probation obligations"; and "the search must not be arbitrary, capricious or harassing"; "the nature and severity of the probationer's prior conviction(s) for which he is on probation; the content and scope of the probation conditions; the nature and severity of the suspected criminal offenses or probation violations giving rise to the search; whether the suspected crimes or violations are the same as or similar to the crimes of which the probationer was previously convicted; and the nature, source, and plausibility of any extraneous information supporting the search." *Id.* at 64, ¶ 25, *quoting Adair*, 238 Ariz. at 199, ¶ 21. These factors are not the only ones that may be considered; "the reasonableness of the search depends on the totality of the circumstances." *Id.*, ¶ 26.

¶16 In this case, the search of Lietzau's phone was reasonable. We see that by looking at the eight factors mentioned in *Adair*, as well as other factors that make up the totality of the circumstances.

¶17 First, Lietzau was a known probationer subject to valid conditions that allowed warrantless searches of his property. He agreed to "submit to search and seizure of person and property by the APD without a search warrant." ROA 76 at ep 14. And he also signed the domestic violence probation terms, which provided that he must "[g]rant probation officer safe access to your residence and property" and [s]ubmit to search and seizure of person and property by any probation officer." ROA 81 at ep 13. This factor supports the reasonableness of the search.

¶18 Second, the search was conducted by a probation officer in a proper manner and for the proper purpose of seeing whether Lietzau was complying with his probation obligations. The reason that Camacho arrested Lietzau and looked in his phone was because he had violated his probation obligations. APD already knew that he had violated his probation in at least seven ways. ROA 81 at ep 9-10. It also had information that he was having an "inappropriate" relationship with a 13-year-old girl. ROA 76 at ep 22:15-23:17, 48:32-49:1, 50:20-30, 51:37-53:1. Furthermore, when Camacho contacted Lietzau, he was at his parents' house even though he was not supposed to be there. *Id.* at ep 41:38-42:9. One of the conditions of probation was to

not "initiate or maintain telephone contact" with the victim without prior approval or go where the victim resides or works. ROA 81 at ep 13. Given that he was found at the victim's house, it was reasonable to check if he had made phone contact as well.

¶19 Third, the search was not arbitrary, capricious, or harassing. Rather, it was done because Lietzau had violated his conditions of probation.

¶20 Fourth, it is difficult to tell the nature and severity of Lietzau's domestic violence conviction from this record, but it was serious enough to prohibit him from contacting the victims. This included contact by phone. ROA 81 at ep 13.

¶21 Fifth, the content and broad scope of Lietzau's probation conditions support the reasonableness of the search. Those conditions included obeying all laws, reporting law enforcement contact, not leaving the state without permission, participating in counseling, not using alcohol or illegal drugs and submitting to drug testing, not associating with criminals, getting and keeping a job, paying fines and restitution, and doing 100 hours of community restitution. ROA 76 at ep 14-15. They also included the domestic violence conditions of not initiating contact with victims, including by phone; having no contact with the victim's family; and other conditions, including "intermediate sanctions as directed by the probation officer" of community service, Antabuse, electronic monitoring, and curfews. ROA 81 at ep 13. These conditions are broad, somewhat intrusive, and entirely reasonable. Given all of the conditions that

Lietzau was supposed to live by, it was reasonable to look at his phone to see which conditions he was following and which he was violating. The content and scope of the search conditions also support the search. Those conditions are broad, to include "person and property" without reservation.

¶22 Sixth, while the probation violations – failure to do drug testing and community restitution, failure to provide access to his residence and participate in counseling – may not seem severe in themselves, they certainly harm Lietzau's rehabilitation. And the suspected crime – an inappropriate relationship with a 13-year-old girl – is very serious.

¶23 Seventh, Lietzau was on probation for domestic violence aggravated harassment. His known probation violations were not similar to this, but him being at his parents' house when he was not supposed to be is much closer.

¶24 Eighth, the extraneous information that supported the search was reliable. APD knew that Lietzau had violated his probation. That information was rock solid. In addition, the information from S.E.'s mother about an inappropriate relationship was reliable. The informant – S.E.'s mother – was known, rather than anonymous, and had repeated her concerns to APD several times.

¶25 Two other important factors should be considered. Lietzau consented to the search in his probation conditions and knew that he and his property were subject to

search without a warrant. He agreed and acknowledged that APD could search his property and person without a warrant. ROA 76 at ep 15; ROA 81 at ep 13. And finally, as he recognized in his motion to suppress, "Lietzau was on probation for domestic violence and aggravated harassment, offenses that involved electronic communications." ROA 76 at ep 11. Cell phones are a primary means of electronic communication. It was reasonable to search the cell phone to ensure that he was not using it to harass the victim, as well as to ensure that he was following his other conditions.

¶26 Looking at the totality of the circumstances, as *Adair* instructs us to, we see that Camacho's search of Lietzau's phone was reasonable.

¶27 The trial court relied on *United States v. Lara*, 815 F.3d 605 (9th Cir. 2016), in its ruling. RT 12/11/2017 at 9-11. In *Lara*, the Ninth Circuit held that a search of a probationer's cell phone may be unreasonable based on the balance of the probationer's privacy interests and the government's interests. The trial court's reliance on *Lara* was misplaced for several reasons.

¶28 First, *Lara* is not binding on Arizona courts. "We are not bound by the Ninth Circuit's interpretation of what the Constitution requires." *State v. Montano*, 206 Ariz. 296, 297, n.1 (2003); *see also Skydive Arizona, Inc. v. Hogue*, 238 Ariz. 357, 365, ¶ 29 (App. 2015) ("decisions of the Ninth Circuit, although persuasive, are not binding on

Arizona courts"); *State v. Mitchell*, 234 Ariz. 410, 418, ¶ 29 (App. 2014) (same). The controlling law in Arizona is set forth in the case law set forth above, including *Montgomery* and *Adair*. *Adair* was decided nearly eight months after *Lara*. It did not follow or even mention *Lara*, but did reaffirm *Montgomery*. *Adair*, 241 Ariz. at 61, ¶ 12.

¶29 Second, the probation condition that authorized the search in Lara enumerated a list of what could be searched: "my person and property, including any residence, premises, container or vehicle under my control." *Lara*, 815 F.3d at 607. The court found it significant that the list did not include a phone. *Id.* at 610-11. In this case, the conditions of probation do not enumerate, and thus by implication omit, items. The conditions provided that APD could search Lietzau's "person and property." His cell phone is included in the unqualified term "property."

¶30 Third, the search in *Lara* was held to be unreasonable because it was done after "Lara had merely missed a meeting with his probation officer." *Id.* at 612. In this case, however, APD knew that Lietzau had violated his probation in several ways. It also had reason to believe that he was involved in an inappropriate relationship with a 13-year-old girl.

¶31 In sum, *Lara* does not require suppression in this case. *Adair* is the appropriate case to apply to this case. And, as explained above, under the totality of the circumstances, the search in this case was reasonable and thus constitutional.

CONCLUSION:

¶32 The trial court erred in this case. First, it should have allowed the State to call the probation officer to testify. Second, it should have ruled that the search of the cell phone was reasonable. Even this limited record shows that it was. For these reasons, the trial court abused its discretion when it suppressed the cell phone evidence. The State respectfully requests this Court to reverse the trial court's order of suppression and remand this case for further proceedings.

RESPECTFULLY SUBMITTED this 5th day of June, 2018.

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CERTIFICATE OF SERVICE

STATE OF ARIZONA)
) ss.
County of Pima)

JACOB R. LINES hereby certifies that he is a Deputy Pima County Attorney in the above-entitled action and that on the 5th day of June, 2018, he caused to be delivered and/or mailed the following:

APPELLANT'S OPENING BRIEF

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CERTIFICATE OF COMPLIANCE

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County of Pima)

The State of Arizona certifies that the text in this Opening Brief is double-spaced, except for block quotations, contains 3018 words, and uses the following proportionately spaced type face: 14 Point Times New Roman.

RESPECTFULLY SUBMITTED this 5th day of June, 2018.

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IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION TWO

STATE OF ARIZONA Appellant, v. BRYAN MITCHELL LIETZAU, Appellee.	No. 2 CA-CR 2018-0011 DEPARTMENT B (Pima County Superior Court No. CR-20162952-001)

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ISSUES

1. Did the trial court abuse its discretion in denying the State's request to present testimony of a probation officer at the hearing on Appellee's motion to suppress, where the officer's testimony was not relevant to whether the search of Appellee's cell phone by a surveillance officer was reasonable? Even if the trial court erred in denying the State's request, was that error harmless beyond a reasonable doubt where the State failed to make an offer of proof regarding the probation officer's expected testimony?

2. Did the trial court abuse its discretion in granting Appellee's motion to suppress the evidence resulting from the search of his cell phone without a warrant?

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ISSUES

1. Did the trial court abuse its discretion in denying the State's request to present testimony of a probation officer at the hearing on Appellee's motion to suppress, where the officer's testimony was not relevant to whether the search of Appellee's cell phone by a surveillance officer was reasonable? Even if the trial court erred in denying the State's request was that error harmless beyond a reasonable doubt where the State failed to make an offer of proof regarding the probation officer's expected testimony?

2. Did the trial court abuse its discretion in granting Appellee's motion to suppress the evidence resulting from the search of his cell phone without a warrant?

STATEMENT OF THE CASE AND THE FACTS

¶1 In August 2014, Appellee Bryan Mitchell Lietzau was placed on probation for an aggravated harassment conviction, an undesignated class six felony. Record on Appeal (ROA) 76, Exhibit 1. In the conditions of his probation, Bryan agreed to "submit to search and seizure of person and property by the [Adult Probation Department] without a search warrant." *Id.* Four months later, his probation officer concluded that Bryan had violated his probation by failing to provide "safe, unrestricted access to his residence," failing to participate in counseling as

directed, failing to submit to drug testing on three occasions, and failing to perform community restitution as directed. ROA 81, Exhibit A; Reporter's Transcript (RT), 12/11/17, p. 8. On December 10, 2014, Casey Camacho, Bryan's surveillance officer, was told to arrest Bryan for those violations. ROA 76, Exhibit B (*Camacho Interview*), p. 23. According to Camacho, Bryan was supposed to be living at his grandparents' house; however, they found and arrested him at his parents' house instead. *Id.*, p. 23.

¶2 Camacho knew that there were "concern[s]" that Bryan might be in an "inappropriate relationship" with a 13-year-old girl. *Id.*, pp. 4-5, 13. However, he had no information that that relationship involved text messages between Bryan and the girl, nor did he have any information that the relationship was "inappropriate" for any reason other than it involved a "twenty-two year old having a conversation … with a thirteen year old girl without permission." *Id.*, p. 26. Nonetheless, after arresting Bryan, Camacho confiscated his cell phone and, on the way to the jail, began reading text messages that he concluded were between Bryan and the girl, SE. *Id.*, pp. 3.

¶3 Several days later, Camacho manually transcribed the text messages and then gave the transcript and the phone to Tucson Police Department Detective Hanes. *Id.*, pp. 7-8, 17-18. Camacho did not show Hanes the text messages on the

phone itself, because he knew that Hanes "needed a warrant to be able to look at the phone." *Id.* Camacho, however, believed that he himself did not need a warrant because Bryan was on probation. *Id.*, p. 21. Hanes used the Camacho's transcription of the text messages to obtain a search warrant for the phone, eventually leading to Bryan's indictment on six counts of sexual conduct with a minor.[1]

¶4 Bryan filed a motion to suppress the text messages and all other evidence resulting from the warrantless search of his phone. ROA 76. He primarily relied on the holding in *Riley v. California*, 134 S.Ct. 2473 (2014), that a search warrant is required to search a cell phone. *Id.* Citing *State v. Adair*, 241 Ariz. 58 (2016), and *U.S. v. Lara*, 815 F.3d 605 (9th Cir. 2016), he also argued that, under the totality of the circumstances, the search of his cell phone was unreasonable and a violation of the Fourth Amendment, despite the conditions of his probation requiring him to submit to warrantless searches of his "property." *Id.* The State responded that the search of Bryan's phone was authorized by the conditions of his probation. ROA 81.

[1] As the State notes, the indictment itself is not in the Record on Appeal. *Opening Brief*, ¶ 1, n.1.

¶5 At the hearing on the motion to suppress, the trial court informed the parties that he had read the pleadings and the cited cases and was ready to rule. RT, 12/11/17, p. 3. To ensure that they had "laid an adequate record in terms of issues of reasonableness," the State asked to present the testimony of Bryan's probation officer, Libby Pilcher, stating that the officer had "looked at the case notes surrounding the search and things like that." *Id.* pp. 5-6. The court pointed out that it was not the probation officer who had searched Bryan's phone, "so it's not going to do me any good or Defense Counsel any good," and concluded that he did not "need any testimony." *Id.*, p. 6.

¶6 The court said "the issue here is whether or not the -- essentially the blanket condition in the conditions of probation that Mr. Lietzau signed . . . that is sufficient to essentially give the Probation Department carte blanche about searching anything that they feel like they want to search." *Id.*, pp. 7-8. He quoted the holding in *Lara* that the defendant there retained a "substantial" privacy interest in his cell phone "in light of the broad amount of data contained in or accessible through the cell phone, and that the search of the cell phone in that case was unlawful," despite the defendant's agreement to submit to warrantless searches of his "property." *Id.*, pp. 10-11.

¶7 The court then analyzed the reasonableness of Camacho's search based on the factors listed in *Adair*. *Id.*, pp. 11-12. The court concluded that the search violated Bryan's constitutional rights based on its findings that:

- Camacho's search was not done for a "proper purpose," and was "arbitrary;"
- "[T]he conditions of probation were not broad enough to permit the search of a cell phone;" and
- The probation violations for which Bryan was arrested "were all administrative kinds of things."

Id.

¶8 The court granted the State's motion to dismiss the charges pending this appeal and the State filed a Notice of Appeal. ROA 85, 86.

¶9 This Court has jurisdiction pursuant to A.R.S. §§ 12-120.21, 13-4031 and 13-4032.

ARGUMENT ONE

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE STATE'S REQUEST TO PRESENT THE PROBATION OFFICER'S TESTIMONY.

Standard of Review

¶10 Trial court's decisions on the admissibility of evidence are reviewed for abuse of discretion. *State v. Hausner,* 230 Ariz. 60, 77 ¶ 58 (2012).

¶11 When an appellant objects to an alleged error in the trial court, the error is reviewed to determine whether the error was harmless beyond a reasonable doubt. *State v. Henderson*, 210 Ariz. 561, ¶18 (2005). "Error…is harmless if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict." *State v. Bible*, 175 Ariz. 549, 588 (1993).

Argument

¶12 The State asserts that the trial court denied the request to allow the probation officer to testify because the court "said that it would not change its mind."[2] In fact, the court denied the request because the testimony of a witness who had not conducted, and who was not present during, the challenged search would not assist the court in ruling on Bryan's motion. Although the Rules of Evidence do not apply to an evidentiary hearing on a motion to suppress, Ariz. R. Ev. 104(a), a court may nonetheless exercise its administrative powers to exclude evidence that is irrelevant and unhelpful on the issue before it. *See* Ariz. R. Ev. 402 ("Irrelevant evidence is inadmissible."), and 403 (court may preclude even relevant evidence that presents an undue risk of "wasting time" or causing "undue delay"). Certainly,

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[2] The State fails to cite where this alleged statement appears in the Record on Appeal. Ariz. R. Crim. P. 31.10(a)(7)(A) (appellant's legal arguments must include "appropriate references to the portions of the records on which the appellant relies.").

a court does not abuse its discretion in such circumstances, especially when the State has not requested an evidentiary hearing, nor disagreed with any of the facts or evidence presented in Bryan's motion and its exhibits.

¶13 Furthermore, the State made no offer of proof of what the probation officer's testimony would have contained, nor has the State argued how the preclusion of that testimony affected the outcome of the motion to suppress. *See State v. Snyder*, 240 Ariz. 551, 557 ¶ 25, (App. 2016) ("Failure to argue a claim usually constitutes abandonment and waiver of the claim." (citation and internal quotation marks omitted)); *State v. Lizardi*, 234 Ariz. 501, 506, n.5 (App. 2014) (appellate court need not address argument for which the State cites no "authority on point or otherwise develop[s] the argument"). Without any idea of what the officer would have said, this Court can only conclude that any error in precluding the officer's testimony was harmless. *State v. Vega*, 228 Ariz. 24, 31, ¶ 30 (App. 2011) (in the absence of a sufficient offer of proof, any error in precluding testimony was harmless); *State v. Robinson*, 165 Ariz. 51, 58 (1990) (same); *see also State v. Towery*, 186 Ariz. 168, 179 (1996) ("an offer of proof stating with reasonable specificity what the evidence would have shown is required" for review on appeal).

ARGUMENT TWO

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING BRYAN'S MOTION TO SUPPRESS THE EVIDENCE FROM THE WARRANTLESS SEARCH OF HIS CELL PHONE.

Standard of Review

¶14 A trial court's factual findings on a motion to suppress are reviewed for an abuse of discretion, while the court's ultimate legal conclusion whether the search complied with the Fourth Amendment[3] is reviewed *de novo*. *State v. Davolt*, 207 Ariz. 191, 202 ¶ 21 (2004). In reviewing the ruling, this Court considers only the evidence introduced at the suppression hearing and views that evidence in the light most favorable to upholding the trial court's ruling. *State v. Peoples*, 240 Ariz. 244, 247 ¶ 7 (2016) (citation omitted). When no evidentiary hearing is held, the Court considers the uncontested factual material appended to the parties' pleadings. *State v. Navarro*, 241 Ariz. 19, 20 ¶ 2, n.1 (App. 2016). This Court defers to the trial court's factual findings as long as they are supported by reasonable evidence. *State v. Bernini*, 220 Ariz. 536, 538 ¶ 7 (App. 2009).

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[3]Made applicable to the States by the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961). U.S. Const. amends. IV, XIV.

Argument

¶15 Police and other law enforcement officers may not search the data on a cell phone absent a warrant, unless the State demonstrates that a specific exception to the warrant requirement applies. *Riley*, 134 S.Ct. at 2482, 2495 ("Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant."). The State argued below that a so-called "probation search exception" authorized the warrantless search of Bryan's phone. ROA 81, p. 3. Although the State abandons that terminology on appeal, they make essentially the same argument. *Opening Brief*, ¶ 12 ("The probation conditions .... authorized the search in this case.)[4]

¶16 What the State fails to do, however, is argue that any of the trial court's factual findings are unsupported by the evidence or otherwise constitute an abuse of discretion. Instead, they simply describe how they interpret the evidence and

[4] The State does not argue that the good faith, or any other, exception to the warrant requirement permitted the search here, nor do they argue that the conditions of probation amounted to a valid waiver of Bryan's Fourth Amendment rights. *See United States v. Knights,* 534 U.S. 112, 118 (2001) (Court refrained from deciding whether probationer's acceptance of search conditions of probation constituted a valid waiver of his Fourth Amendment rights, since it found the search to be reasonable on other grounds); *Adair*, 241 Ariz. at 61 ¶ 11 (State did not argue that probation conditions constituted voluntary consent to warrantless searches). Those arguments are therefore waived. *Snyder*, at ¶ 25 (failure to argue a claim constitutes abandonment and waiver).

argue that, based on those interpretations, *Adair* requires that the motion to suppress be denied. *Opening Brief*, ¶¶ 13-26. This Court, however, must defer to the trial court's factual findings because, as demonstrated below, they are amply supported by the evidence. *Bernini*, 220 Ariz. at 538 ¶ 7. Those findings, in turn, support the trial court's conclusions that, under *Adair* and *Lara*,[5] Camacho's search violated the Fourth Amendment.

¶17 Adair was on probation for two felony convictions for solicitation to possess crack cocaine for sale, based on sales to an undercover officer. *Adair*, 241 Ariz. at 59-60 ¶¶ 2-3. His probation conditions contained essentially the same provisions permitting warrantless searches of his "person and property" as the conditions imposed on Bryan. *Id.* An informant told police several times that Adair was selling drugs from his home and that his child might have been with him while making such sales. *Id.*, 241 Ariz. at 60 ¶ 3. An officer confirmed much of the informant's information. *Id.* Based on that information, the probation department

[5] The State correctly points out that Ninth Circuit rulings are not binding on Arizona courts; they are, however, persuasive. *Opening Brief*, ¶ 28, *citing, inter alia*, *Skydive Arizona, Inc. v. Hogue*, 238 Ariz. 357, 365, ¶ 29 (App. 2015) ("decisions of the Ninth Circuit, although persuasive, are not binding on Arizona courts"). Rather than feeling bound by *Lara*, the trial court properly found that its application of the same standard of reasonableness to the search of a probationer's cell phone that *Adair* applied to the search of a probationer's home was persuasive.

searched Adair's home without a warrant and found crack, scales, cash and a gun. *Id.*, at ¶ 4. The trial court granted Adair's motion to suppress the evidence from the search, but the Supreme Court reversed, finding the trial court had applied an incorrect legal standard. *Id.*, 241 Ariz. at 64 ¶ 26.

¶18 The Court ruled that, given Adair's diminished privacy interests as a probationer, "the probation officers' warrantless search of Adair's residence pursuant to the probation conditions complied with the Fourth Amendment if it was reasonable under the totality of the circumstances." *Id.*, at ¶ 23. The Court described the factors to be considered in answering that question as follows:

> The court of appeals identified several, non-exhaustive factors it deemed relevant to the reasonableness inquiry: "[t]he target of the search must be a known probationer subject to a valid, enforceable probation condition allowing a warrantless search"; "[t]he search must be conducted by a probation officer in a proper manner and for the proper purpose of determining whether the probationer was complying with probation obligations"; and "the search must not be arbitrary, capricious or harassing." [*State v. Adair*, 238 Ariz. 193, 199 ¶ 21, (App. 2015)]. We agree with those factors but also find others that bear on whether the probationary search is reasonable, including the nature and severity of the probationer's prior conviction(s) for which he is on probation; the content and scope of the probation conditions; the nature and severity of the suspected criminal offenses or probation violations giving rise to the search; whether the suspected crimes or violations are the same as or similar to the crimes of which the probationer was previously convicted; and the nature, source, and plausibility of any extraneous information supporting the search.

Id., at ¶ 25.

¶19 Reviewing the trial court record, the Supreme Court found that

> Adair was "a known probationer subject to a valid, enforceable probation condition allowing a warrantless search"; probation officers conducted the search in a proper manner and for a proper purpose; and the search was not arbitrary, capricious, or harassing.

Id., at 65 ¶ 28. The Court also found that the informant's information indicated that Adair was committing essentially the same crimes for which he had been convicted and in a similar manner. *Id.*, at ¶ 29. The circumstances also indicated that the informant's information was reliable even if it was not sufficient to establish reasonable suspicion or probable cause. *Id.*, at ¶¶ 29-31. Finally, the search was conducted in accordance with the conditions of Adair's probation requiring him to submit to warrantless searches of his "person or property." *Id.*, at 66 ¶ 32. Based on all of these factors, the Court found that the search was reasonable and therefore constitutional. *Id.*

¶20 In this case, the trial court carefully considered each of the listed factors, in light of the evidence presented and found that the search of Bryan's cell phone was unreasonable. As in *Adair*, Bryan was "a known probationer subject to a valid, enforceable probation condition" and the search was done in a proper manner RT, 12/11/17, p. 11. It was not, however, done for a proper purpose. *Id.* In *Adair*, the probation department had reliable information that the defendant was committing the same crimes for which he had been convicted and searched his home to

determine whether he was, in fact, violating the terms of his probation. Here, however, Camacho was simply told to arrest Bryan for violating his probation for unknown reasons.

¶21 Although SE's mother had allegedly reported that she suspected that Bryan and SE were in an "inappropriate relationship," Camacho had no information as to why that relationship was inappropriate except the difference in their ages and that SE's mother had not given her permission.

¶22 Nor did he have any information that that relationship might involve text messages between Bryan and SE. In other words, Camacho provided no reason for searching Bryan's cell phone. Thus, the State failed to present any evidence to support its claim that the search was conducted "for the proper purpose of seeing whether Lietzau was complying with his probation obligations" *Opening Brief*, ¶ 18, and the trial court's finding to the contrary is supported by the evidence.

¶23 However, the State argues that the search was conducted to determine whether Bryan had violated the requirement that he not contact "the victim," including by phone, since "he was found at the victim's house." *Id.* Camacho, however, said that Bryan was found and arrested at his parents' house and that he had no idea where SE lived. Thus, there was no evidence that Bryan was found at SE's house as the State implies. Furthermore, the "victim" referred to in his

conditions of probation is the victim of his prior aggravated harassment conviction, not SE, and there was no evidence that that victim lived with Bryan's parents. Thus, there was no evidence that Bryan "was found at [either] victim's house," as the State asserts.

¶24 The State also claims that the search "was not arbitrary, capricious, or harassing .... [since] it was done because Lietzau had violated his conditions of probation." *Opening Brief*, ¶ 19. But the State presented no evidence regarding the reasons for searching Bryan's phone. Since it was conducted for no purpose, the trial court's finding that the search was arbitrary is fully supported by the record.

¶25 Next, the State concedes that "it is difficult to tell the nature and severity of Lietzau's domestic violence conviction," but nonetheless argues that the fact it "was serious enough to prohibit him from contacting the victims [sic]" supports the reasonableness of the search. The fact that Bryan was subjected to the standard terms of probation for his aggravated harassment conviction is hardly of any weight here, especially because, as indicated above, there was no evidence that contact with the victim of that offense had anything to do with the reasons for Bryan's arrest or the search of his cell phone.

¶26 The State also argues that, because the conditions of Bryan's probation were "broad, somewhat intrusive, and entirely reasonable[,] .... it was reasonable to look

at his phone to see which conditions he was following and which he was violating." *Id.* at ¶ 21. As the Supreme Court recognized, given the variety and nature of the private information stored on or accessed through a person's cell phone, "[i]t would be a particularly inexperienced or unimaginative law enforcement officer who could not come up with several reasons to suppose evidence of just about any crime could be found on a cell phone." *Riley*, 134 S.Ct. at 2492. Thus, as with the government's suggestion in *Riley* that officers should be allowed to search cell phones seized on arrest for evidence supporting the arrest, the State's argument "would in effect give 'police officers unbridled discretion to rummage at will among a person's private effects.'" *Id.*, *quoting Arizona v. Gant,* 556 U.S. 332, 345 (2009). The presence of extensive personal data on cell phones is a reason to require a warrant for such a search, not a reason to dispense with that requirement.

¶27 The State also concedes that the alleged probation violations "may not seem severe," but asserts that "they certainly harm Lietzau's rehabilitation." *Opening Brief*, ¶ 22. There is no explanation how potential interference with Bryan's rehabilitation makes a search of his cell phone reasonable, especially since, before the search, the State already had sufficient information to allege those violations in a petition to revoke the next day.

¶28 The State contrasts those "not severe" probation violations with "the suspected crime – an inappropriate relationship with a 13-year-old girl" which it asserts "is very serious." *Id.*, ¶ 22. As previously shown, however, until Camacho discovered the text messages, the State knew nothing beyond the fact SE's mother was concerned about what she considered to be an "inappropriate relationship" with Bryan, and, therefore, had no evidence that it constituted a crime. Mere speculation about what made that relationship inappropriate cannot justify the search of Bryan's phone.

¶29 The State also concedes that the alleged probation violations were not similar to Bryan's aggravated harassment conviction, but claims that the fact Bryan was found at his parents' home, where Camacho said he was not supposed to be, "is much closer." *Id.*, ¶ 23. The State does not bother to explain what the supposed connection to Bryan's conviction is. What we do know, however, is that there is no evidence that Bryan's location at the time of his arrest had anything to do with Camacho's search of his cell phone. It does not, therefore, somehow support the conclusion that the search was reasonable, as the State apparently believes.

¶30 The State asserts that "the extraneous information that supported the search," i.e., the information from SE's mother about an "inappropriate relationship," "was reliable." *Id.*, ¶ 24. This argument fails for two reasons. First, the State presented

no information that the cell phone search had anything to do with that information. Second, Camacho had no information to indicate that the inappropriate nature of that relationship was criminal or otherwise violated Bryan's conditions of probation. The reliability of information that supports a concern that Bryan violated his probation based solely on speculation does not support the State's claim that the search was reasonable.

¶31 Next, the State claims that Bryan "consented to the search in his probation conditions and knew that he and his property were subject to search without a warrant." *Id.*, ¶ 25. The State did not argue that the probation conditions constituted a voluntary waiver of Bryan's Fourth Amendment rights, and neither the Supreme Court nor, in counsel's research, any Arizona court has ruled on that question. *See Lara*, 815 F.3d at 609 (Ninth Circuit has held that agreeing to warrantless searches as a condition of probation is not a complete waiver of Fourth Amendment rights). In the absence of both argument and authority to support that claim, that claim is waived.

¶32 As for the claim that Bryan knew "his property" was subject to warrantless search, the Court in *Riley* made clear that, because of its unique nature, for Fourth Amendment purposes, a cell phone cannot be compared to any other physical object that might be found on a person and searched incident to their arrest. *Riley*,

134 S.Ct. at 2488-89 ("Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse. A conclusion that inspecting the contents of an arrestee's pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but any extension of that reasoning to digital data has to rest on its own bottom."). In fact, the search of a cell phone is more invasive of privacy rights than even the search of a home, which is the primary focus of the Fourth Amendment's protections.

> In 1926, Learned Hand observed (in an opinion later quoted in [*Chimel v. California,* 395 U.S. 752 (1969)]) that it is "a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him." *United States v. Kirschenblatt,* 16 F.2d 202, 203 (C.A.2). If his pockets contain a cell phone, however, that is no longer true. Indeed, 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.

Id., 134 S.Ct. at 2490-91 (emphasis in original).

¶33 Similarly, the Court in *Lara* held that, given the unique nature of cell phones and the data which they contain or allow access to, a probation condition allowing warrantless searches of the probationer's "person and property, including any residence, premises, container or vehicle under [his] control," does not clearly

include a cell phone, "[n]or does the word 'property' unambiguously include cell phone data." *Lara*, 815 F.3d at 610-11.

¶34 Finally, the State argues that, since the motion to suppress stated that Bryan's aggravated harassment conviction "involved electronic communications," it was reasonable to search his cell phone to see if he had been using it "to harass the victim." *Opening Brief*, ¶ 25. This argument too fails because the State presented no evidence that the search of Bryan's phone had anything to do with concerns about whether he was contacting the victim of that offense.

¶35 One final factor must be considered. Even where the defendant's expectations of privacy are diminished by an arrest, as in *Riley*, or the conditions of probation, as in *Lara*, the gross invasion of privacy resulting from the search of cell phone nonetheless requires a warrant.

> "[W]hen 'privacy-related concerns are weighty enough' a 'search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee.'" *Riley,* 134 S.Ct. at 2488 (quoting *Maryland v. King,* —— U.S. ——, 133 S.Ct. 1958, 1979, 186 L.Ed.2d 1 (2013)). The same is true of probationers, especially nonviolent probationers who have not clearly and unambiguously consented to the cell phone search at issue. Because of his status as a probationer, Lara's privacy interest was somewhat diminished, but that interest was nonetheless sufficiently substantial to protect him from the two [warrantless] cell phone searches at issue here.

Lara, 815 F.3d at 612.

¶36 For the reasons discussed above, the trial court's factual findings were fully supported by the evidence. In addition, its ruling that the search of Bryan's phone was unreasonable and violated his Fourth Amendment rights is consistent with the holdings in *Riley*, *Adair*, and *Lara*.

CONCLUSION

¶37 The trial court did not commit reversible error in denying the State's request to present the testimony of the probation officer, or in granting Bryan's motion to suppress. This Court should, therefore, affirm the trial court's grant of Bryan's motion.

Dated: (Electronically filed)

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 31.13(b)(2), Ariz. R. Crim. P., undersigned counsel hereby certifies that this Answering Brief complies with Rule 31.13(b) as follows:

1. The brief is proportionately spaced, and uses 14 point Times New Roman typeface, in compliance with Rule 31.13(b)(1);

2. The brief contains 4,591words, and has an average of no more than 280 words per page, including footnotes and quotations, in compliance with Rule 31.13(b)(2);

3. The brief is double-spaced, with top and bottom margins of at least 1 ¼ inches and side margins of at least one inch, in compliance with Rule 31.13(b)(1).

Dated: (Electronically filed) September 21, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the Appellee's Answering Brief, electronically filed with the Court, will be electronically served on September 24, 2018, to:

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and that one copy of Appellee's Answering Brief will be deposited for mailing on September 24, 2018, to:

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Dated: (Electronically filed) September 21, 2018.

PIMA COUNTY PUBLIC DEFENDER

By: /s/
TERRI SEXTON
APPELLATE SECTION

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellant, vs. BRIAN MITCHELL LIETZAU, Appellee.	)	No. 2 CA-CR 2018-0011 Department B Pima County Superior Court No. CR20162952-001

APPELLANT'S REPLY BRIEF

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LAW AND ARGUMENT:

¶1 The State relies on the arguments in its opening brief and briefly replies to Lietzau's answering brief.

¶2 First, the State must acknowledge an error in its opening brief. As Lietzau notes in paragraph 23 of his answering brief, the State did assert in its opening brief that Lietzau was found at the victim's house. This statement is incorrect. This statement was a result of undersigned counsel's confusion about a conversation he had with the trial attorney in this case. Undersigned counsel has reviewed the record again and agrees that this statement is not supported by the record. Counsel apologizes and asks this Court to disregard the statement.

¶3 Next, this Court should review de novo the reasonableness of the search in this case. In *State v. Adair*, 241 Ariz. 58, 60, ¶ 9 (2016), the court noted that, "Although we generally defer to a trial court's factual findings if reasonably supported by the evidence, we review its ultimate legal determination de novo. Whether reasonable suspicion is required to authorize a warrantless search of a probationer's residence is a question of law, which we review de novo." Later in its opinion, when it applied the factors to determine that the search was reasonable, the court appeared to apply de novo review. *Id.* at 64–66, ¶¶ 25-32. It appears that reasonableness of a search is a question of law that is reviewed de novo. *See, e.g., State v. Teagle*, 217 Ariz. 17, 22, ¶ 19 (App. 2007) (court defers to trial court's

factual findings, but reviews de novo mixed questions of law and fact and ultimate legal conclusions); *State v. Kjolsrud*, 239 Ariz. 319, 322, ¶ 8 (App. 2016) (court reviews whether reasonable suspicion existed de novo).

¶4 Finally, the search in this case was reasonable. Probation officers knew that Lietzau had violated his probation in several ways. As explained in the opening brief, the totality of the circumstances, analyzed through the lens of the *Adair* factors, shows that the search was reasonable and therefore constitutional.

CONCLUSION:

¶5 The trial court erred in this case by not allowing the State to call the probation officer to testify and by ruling that the search of the cell phone was unconstitutional. The State respectfully requests this Court to reverse the trial court's order of suppression and remand this case for further proceedings.

RESPECTFULLY SUBMITTED this 11th day of October, 2018.

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CERTIFICATE OF SERVICE

STATE OF ARIZONA)
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JACOB R. LINES hereby certifies that he is a Deputy Pima County Attorney in the above-entitled action and that on the 11th day of October, 2018, he caused to be delivered and/or mailed the following:

APPELLANT'S REPLY BRIEF

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County of Pima)

The State of Arizona certifies that the text in this Reply Brief is double-spaced, except for block quotations, contains 414 words, and uses the following proportionately spaced type face: 14 Point Times New Roman.

RESPECTFULLY SUBMITTED this 11th day of October, 2018.

BARBARA LAWALL
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