No.

in the

Supreme Court

of the

United States

Term,

THOMAS SWEENEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DEBORAH L. WILLIAMS
Federal Public Defender Southern District of Ohio

Kevin M. Schad
Appellate Director
Office of the Federal Public Defender
Southern District of Ohio
250 E. Fifth St. Suite 350
Cincinnati OH 45202
(513) 929-4834
Kevin_schad@fd.org
Counsel for Petitioner

QUESTION PRESENTED

This Court has held that persons on parole have a "lesser" expectation of privacy than the general public, due to the "special needs" of the state in preventing recidivism and promoting rehabilitation. *Griffin v. Wisconsin*, 483 U.S. 868, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987). After *Griffin*, most circuits recognized that despite these lesser expectation, a probation officer cannot be used as a "stalking horse" to allow police officers to conduct new criminal investigations. Did (as the Sixth Circuit found in this case) this Court's decision in *Samson v. California*, 547 U.S. 843, 126 S. Ct. 2193, 165 L. Ed. 2d 250 (2006) overturn the "stalking horse" doctrine?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

No.

in the

Supreme Court

of the

United States

Term,

THOMAS SWEENEY,
Petitioner,
vs.
UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

The Petitioner, Thomas Sweeney, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on May 25, 2018.

OPINION BELOW

The Sixth Circuit's opinion in this matter was published at 891 F.3d 232, and is attached hereto as Appendix 1. The district court's opinion denying the motion to suppress was unpublished, and is attached as Appendix 2.

JURISDICTION

The Sixth Circuit denied Petitioner's appeal on May 25, 2018. This petition is timely filed. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1291 and

Supreme Court Rule 12.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution states:

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

STATEMENT OF THE CASE

On July 9, 2015, Petitioner Thomas Sweeney appeared at the Ohio Adult Parole Authority office for his regularly scheduled visit with his parole officer, Corrine Pugh. Unbeknownst to Sweeney, he was under investigation by the Franklin County Ohio Sheriff's office for charges relating to child pornography. Sweeney's biological daughter, TR, had been surreptitiously texting with someone using Sweeney's cell phone, and nude photographs were exchanged.

At the Parole Authority office that day were officers Zech and Greenberg from the Franklin County Sheriff's office, who were investigating the case. Officer Zech had spoken with parole officer Pugh prior to Sweeney's appointment, and filled her in on the investigation. Zech was interested in obtaining Sweeney's cell phone to further his investigation.

Zech did not attend the parole meeting; however, he positioned himself outside of the meeting room so that he could hear what Sweeney was saying. Pugh asked Sweeney about his use of cell phones. Sweeney produced two phones, which Pugh inspected, finding nothing of an incriminating nature. Pugh then terminated the meeting.

Immediately after the meeting, officers Zech and Greenberg entered the room and detained Sweeney for about half an hour. At the end of that interrogation, it was determined that Sweeney had in his possession another cell phone (an HTC smartphone) at his residence, which was a homeless shelter. Zech and Greenberg,

along with parole officer Kaleb Kaschalk (who was unrelated to Sweeney's supervision but was pulled by Zech to assist), immediately went to the shelter to look for the phone. Officer Zech searched Sweeney's personal belongings (which were in a closed bag on his bunk), found the phone, and took custody of it.

Zech took the phone back to his office and performed a search on it, uncovering incriminating information, such as nude and partially nude pictures of TR sent from her phone, and similar pictures of Sweeney. Zech also found text messages sent between the two phones on June 19 and 20, 2015. Zech then obtained a search warrant for the phone. Zech had the phoned "imaged", and sent it for further analysis.

As a result of Zech's findings, on March 31, 2016, an indictment was filed in the Southern District of Ohio charging Sweeney with: (1) one count of production of child pornography, in violation of 18 U.S.C. § 2251(a); (2) one count of use of a cell phone to entice a minor into sexual activity, in violation of 18 U.S.C. § 2422(b); (3) one count of receipt of child pornography, in violation of 18 U.S.C. § 2252(a)(2); and (4) one count of committing a sex offense against a minor while being required to register as a sex offender under SORNA, in violation of 18 U.S.C. § 2260A.

Sweeney filed a motion to suppress the evidence obtained from his cell phone, claiming that the warrantless search was without probable cause. After a hearing held on December 19, 2016, the district court denied the motion, finding that

Sweeney's status as a parolee allowed Zech, acting on behalf of parole authorities, to seize and search Sweeney's phone. The district court determined that:

> Pugh testified that she routinely asked Defendant about whether he had been communicating with minors and that she routinely searched his cell phone during parole meetings. Given the nature of his conditions of supervision and the nature of the sanction, Defendant clearly was on notice that his communications would be monitored by the APA. The Court finds that these facts render the Supreme Court's concerns about cell phone searches to be misplaced in this case, in which communications in Defendant's cell phone are directly relevant to his conditions of parole. Although this Court acknowledges the Supreme Court's concern about the litany of data that is available through cell phone searches, its reasoning that an arrestee's privacy interests outweigh the government's interest in conducting a warrantless cell phone search do not apply, or apply with much less force, to the facts of this case. . . . . The Court reiterates that, under *Knights*, 'there is no basis for examining [the] official purpose · of the search.'

(Appendix 2, p.12-13)

Sweeney was convicted of all counts after a jury trial and appeared for sentencing on July 5, 2017. The court calculated the advisory Guidelines range at 360 months to life, based upon a base offense level 40, criminal history category of IV, and imposed a sentence of 660 months incarceration.

On appeal to the Sixth Circuit, Sweeney raised the following issues:

I. THE ENHANCEMENT SET FORTH IN U.S.S.G. § 2G2.1(b)(5) DOES NOT APPLY TO BIOLOGICAL PARENTS WHO HAVE NO CUSTODIAL RELATIONSHIP WITH THE MINOR

II. THE COURT COMMITTED PROCEDURAL ERROR AT SENTENCING BY FAILING TO ADDRESS ARGUMENTS MADE IN

MITIGATION OF THE SENTENCE, AND BY FAILING TO DISCUSS 18 U.S.C. § 3553(a) FACTORS

III. SEIZURE AND SEARCH OF SWEENEY'S CELLULAR PHONE WITHOUT A WARRANT OR PROBABLE CAUSE VIOLATED THE FOURTH AMENDMENT

The Sixth Circuit denied the appeal on all claims in a published decision issued on May 25, 2018. As to the Fourth Amendment claim, the court found that

> When the government relies on the "special needs" doctrine to justify a search, the stalking horse exception may still apply, but when the government relies on the totality-of-the circumstances doctrine as articulated in Samson, it does not. See *United States v. Lykins*, 544 F. App'x 642, 647 n.2 (6th Cir. 2013). Because the district court explicitly relied on the doctrine in *Samson*, and because the state defends the search on those grounds, the stalking-horse exception does not apply. . . . . In short, the stalking-horse exception to the general rule allowing parole officers to search a parolee's residence does not apply when, as here, that search is reasonable under the totality of the circumstances, as authorized by *Samson*, and even if it did apply, the parole officer was not acting as a stalking horse.
>
> (Appendix 1, pp.4-5)

REASONS FOR GRANTING THE WRIT

1. Probation officers may not be used as pawns by police officers to further criminal investigations so as to evade the Fourth Amendment warrant requirement

The Fourth Amendment to our Constitution was promulgated to prevent "unlawful police action." *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2188, 195 L. Ed. 2d 560 (2016). "[A] central aim of the Framers [in creating the Fourth Amendment] was 'to place obstacles in the way of a too permeating police surveillance.'" *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018). "[W]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, ... reasonableness generally requires the obtaining of a judicial warrant.'" *Riley v. California*, 134 S. Ct. 2473, 2482, 189 L. Ed. 2d 430 (2014).

At issue in this case is the intersection between a parolee's right to privacy and an investigating officer's duty to obtain a warrant to search a parolee's possessions and residence. Petitioner Sweeney was on parole in Ohio. Investigators suspected him of a crime, but instead of seeking a warrant to search his belongings and residence, they instead utilized his status as a parolee to perform a search. This conduct violated the Fourth Amendment, as the search was not performed to further a legitimate parole purpose, but was a subterfuge to evade the warrant process.

This Court first addressed the intersection between the Fourth Amendment and parolees in *Griffin v. Wisconsin*. 483 U.S. 868, 870, 107 S. Ct. 3164, 3166, 97 L.

Ed. 2d 709 (1987). In *Griffin*, the defendant was on probation with the state of Wisconsin, which had a law that a probation officer could search a person on probation's person, house or effects if they had "reasonable grounds" that probation was being violated by the presence of "contraband". 107 S.Ct. 3167. The Court determined that "[a] State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, likewise presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.'" *Id.* at 3168. Ultimately, Wisconsin's scheme was determined reasonable under the Fourth Amendment, despite the fact that no warrant was required.

After *Griffin*, most of the Circuits held that although such parole searches are permissible without a warrant, they cannot become a subterfuge for police officers to commit new criminal investigations. This was based in part on *Griffin*'s acknowledgement that the needs of a state as to parole or probation are different from the state's need to investigate new crime. Thus, "a parole search is unlawful when it is nothing more than a ruse for a police investigation." *United States v. McFarland*, 116 F.3d 316, 318 (8th Cir. 1997). "The law will not allow a parole officer to serve as a cat's paw for the police." *United States v. Cardona*, 903 F.2d 60, 65 (1st Cir. 1990). "[T]he police may not use a parole officer as a 'stalking horse' to evade the fourth amendment's warrant requirement." *United States v. Harper*, 928 F.2d 894, 897 (9th Cir. 1991). "A law enforcement officer cannot use the special-

needs doctrine as a 'stalking horse' simply to evade the Fourth Amendment's usual warrant and probable cause requirements." *United States v. Lykins*, 544 F. App'x 642,647 (6th Cir. 2013). "It is equally well established that a probation officer cannot act as a "stalking horse" on behalf of police to assist police in evading the Fourth Amendment's warrant requirement." *United States v. McCarty*, 82 F.3d 943, 947 (10th Cir. 1996).

This so called "stalking horse" doctrine was thus the consensus of the courts until 2001, when this Court decided *United States v. Knights*. 534 U.S. 112, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001).1 There, the Court assessed California's supervision scheme, which allowed a probationer to be searched by "any probation officer" *without* stating a purpose. At issue was whether the California statute comported with the Fourth Amendment when it did not limit searches to those with a "probationary purpose." The Court found that, as in all Fourth Amendment cases, a "totality of the circumstances" approach required weighing of the state interest against that of the probationers privacy interest. 122 S.Ct. at 592. Using that approach, the Court held that "reasonable suspicion" was required "to conduct a search of this probationer's house." *Id.* The Court finally noted "[b]ecause our

---

1 Later, this Court applied the *Knights* rationale to California parolees. *Samson v. California*, 547 U.S. 843, 126 S. Ct. 2193, 165 L. Ed. 2d 250 (2006).

holding rests on ordinary Fourth Amendment analysis that considers all the circumstances of a search, there is no basis for examining official purpose." *Id.* at 593.

That last phrase, stating that there was no basis to examine the "official purpose", has caused many circuits to reverse course on the "stalking horse" doctrine. For instance, the Eleventh Circuit has held that this Court in *Knights* "suggested that it is impermissible to examine the purpose of a probationary search." *United States v. Harris*, 635 F. App'x 760, 766 (11th Cir. 2015). The Third Circuit has agreed, finding "[i]t is clear that the Supreme Court's more recent teaching in Knights precludes the viability of 'stalking horse' claims in this context. 'Stalking horse' claims are necessarily premised on some notion of impermissible purpose, but *Knights* found that such inquiries into the purpose underlying a probationary search are themselves impermissible." *United States v. Williams*, 417 F.3d 373, 377 (3d Cir. 2005). See also *United States v. Reyes*, 283 F.3d 446, 462 (2d Cir. 2002); *United States v. Brown*, 346 F.3d 808, 810-12 (8th Cir.2003); *United States v. Tucker*, 305 F.3d 1193, 1199-1200 (10th Cir.2002).

The Sixth Circuit so found in this case. In denying Petitioner Sweeney's claim that his probation department acted as a stalking horse for investigators in this case, the court held that "the Supreme Court has grounded this exception in the lower expectation of privacy enjoyed by probationers, which is weighed against the promotion of legitimate governmental interests to determine whether the search was

reasonable under "the totality of the circumstances." Samson, 547 U.S. at 849–52. Because this justification for the exception is not always related to the special needs of the probationary system, the reason for conducting the search need not necessarily be related to those needs either." (Appendix 1, p.4)

Both the Sixth Circuit's holding in this case and the other circuits' post-*Knights* approach are a misreading of this Court's precedents. *Knights* did not purport to overturn or alter anything determined in *Griffin*; rather, the Court was merely comparing Wisconsin and California probation/parole statutes.2 The Sixth Circuit misunderstood the primary holding of this Court's parole supervision Fourth Amendment jurisprudence – that being that a state has primary authority to determine the level of proof necessary to allow a search by a probation officer. Each of these cases turned ultimately on the language of the state statute, and the state's individual assessment of its probation/parole goals. In contrast to the post-*Knights* cases, Justice Souter's concurrence in *Knights* makes it clear that the subjective intent question was still at issue. *Knights*, 122 S.Ct. at 593.

Further, *Knights* reference to the "totality of the circumstances," keyed in on by the Sixth Circuit in this case and by the other circuits addressing this issue, was not intended to shift the law away from the special needs doctrine; rather, it was a

---

2 Sweeney would note that Ohio's statute, under which Officer Zech purportedly searched Sweeney's belongings, requires "reasonable suspicion." See Ohio Rev. Code Ann. § 2967.131 (West)

recognition of general principles of Fourth Amendment jurisprudence. The Court in *Knights* cited to *Ohio v. Robinette*, 519 U.S. 33, 39, 117 S. Ct. 417, 421, 136 L. Ed. 2d 347 (1996) for this proposition: that the touchstone of Fourth Amendment is reasonableness, and reasonableness varies depending on the circumstances presented. This comment in *Knights* was only intended to allow for a recognition that probation or parole status is a salient factor among others; not upend the standard from one of subjective to objective reasoning for the search.

Another problem with the Sixth Circuit's holding is that it allows a prosecutor, post-search, to determine the "reasoning" for the search. The Sixth Circuit found that "[w]hen the government relies on the 'special needs' doctrine to justify a search, the stalking horse exception may still apply, but when the government relies on the totality-of-the circumstances doctrine as articulated in *Samson*, it does not." (Appendix 1, p.4) Certainly, probation officers do not decide which doctrine they are using to make their search – they simply rely on the state statute. It is only when a suppression challenge is made that these two theories come into play. Further, since the "totality of the circumstances" doctrine espoused by the Sixth Circuit is easier to meet, why would any prosecutor rely on the "special needs" doctrine? Thus, the Sixth Circuit's decision effectively vitiates *Griffin* altogether, which was not this Court's intent in *Knights*.

In sum, the Sixth Circuit has over-read this Court's holding in *United States v. Knights*. 534 U.S. 112, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001) to preclude a

finding that police officers utilized a probation officer as a stalking horse. This Court should grant certiorari to affirm the "stalking horse" doctrine, and to correct the circuits who have found otherwise.

Finally, because the "stalking horse" doctrine clearly continues post-*Knights*, this Court should remand for further consideration by the Sixth Circuit. Officer Zech did subvert the parole process in this case solely to further his criminal investigation. Zech attended the regularly scheduled parole meeting between Sweeney and his parole officer, and lingered outside to be able to hear the content of the conversation. Zech had a conversation with parole officer Pugh prior to the meeting so that Pugh would ask questions about Sweeney's cell phones to further his criminal investigation. After the parole interview, Zech and another officer privately interviewed Sweeney for half an hour. At the end of that interview, Zech had information that Sweeney possessed a phone that he had not brought to the parole meeting or previously disclosed. Once Zech learned of the phone, he utilized the guise of a parole violation to go get the phone.

Zech was the one that looked through Sweeney's personal items. The parole officer present (who was not Sweeney's parole officer but a random officer) never took possession of the phone or asked Zech to do anything with it; rather, Zech found it, kept possession of it, and searched it for evidence relating to his criminal investigation. He then reported his findings back to the parole officer and at the same time obtained a search warrant. It clear that under the circumstances of this

case, the fact that Sweeney was on parole was nothing more than a device for Zech to further his criminal investigation. The Ohio parole authority was a pawn put in use by Zech, and that is what makes this a classic "stalking horse" scenario. The warrantless search of Sweeney's property and the phone itself thus violated the Fourth Amendment, and requires suppression of its contents.

CONCLUSION

Sweeney requests that this Court grant certiorari, reverse the Sixth Circuit's decision, and remand for further proceedings.

Respectfully submitted,

DEBORAH L. WILLIAMS
Federal Public Defender

Kevin M. Schad
Appellate Director
Office of the Federal Public Defender
Southern District of Ohio
Appellate Director
250 E. Fifth St.
Suite 350
Cincinnati OH 45202
(513) 929-4834
Kevin_schad@fd.org
Counsel for Petitioner

APPENDIX

1. COURT OF APPEALS ORDER May 25, 2018

2. DISTRICT COURT DECISION January 11, 2017

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 18a0095p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

THOMAS A. SWEENEY,

Defendant-Appellant.

No. 17-3768

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 2:16-cr-00073-1—Michael H. Watson, District Judge.

Decided and Filed: May 25, 2018

Before: GIBBONS, BUSH, and LARSEN, Circuit Judges.

COUNSEL

ON BRIEF: Kevin M. Schad, FEDERAL PUBLIC DEFENDER, Cincinnati, Ohio, for Appellant. Benjamin C. Glassman, Heather A. Hill, UNITED STATES ATTORNEY'S OFFICE, Cincinnati, Ohio, for Appellee.

OPINION

JOHN K. BUSH, Circuit Judge. Defendant Thomas Sweeney appeals his conviction and sentence for production and receipt of child pornography, attempted enticement of a minor to engage in sexual conduct, and commission of a sex offense against a minor while being required

to register as a sex offender. For the reasons explained below, we affirm his conviction and sentence.

I

Sweeney's parental rights over his daughter, T.R., were terminated after he was convicted of raping his niece, and he had no contact with T.R. during his ten-year imprisonment. Upon his release from prison in 2013, Sweeney began contacting T.R. via Facebook and text message. By June 2015, when T.R. was 14, their communications had turned sexual and included the mutual sending of explicit pictures, detailed discussion of sex acts, and ultimately unconsummated plans to meet for the purpose of engaging in sexual acts.

T.R. alerted her adoptive parents to the nature of her conversations with Sweeney, and they alerted officers from the Department of Homeland Security, who alerted Sweeney's parole officer. During a meeting with his parole officer, Sweeney indicated that he owned a cellular telephone that he had left at the homeless shelter where he lived. The parole officer told waiting DHS officers about this telephone and that Sweeney was planning on going to a hospital. A parole officer, accompanied by the DHS officers, went to the homeless shelter, located the telephone, and secured the phone's media-storage card, which DHS officers later searched pursuant to a warrant.

After a jury trial at which evidence from the media-storage card was admitted, Sweeney was convicted on all counts and received a carceral sentence of fifty-five years.

II

Sweeney makes three arguments on appeal. First, he contends that the district court erred in admitting evidence derived from the media-storage card, which he argues was obtained in violation of the Fourth Amendment. Second, Sweeney claims that the trial court erred by applying a two-level enhancement under USSG § 2G2.1(b)(5), which applies when the defendant is the "parent" of the victim; Sweeney argues he was not T.R.'s parent after his parental rights were terminated. And finally, he maintains that his sentence was procedurally unreasonable for

the district court's failure to address various mitigation arguments that Sweeney raised at sentencing.

* * *

On appeal from the denial of a motion to suppress, we review the district court's factual findings for clear error and its legal conclusions de novo. *United States v. Foster*, 376 F.3d 577, 583 (6th Cir. 2004). We may overturn a district court's denial of a motion to suppress only if the defendant has met his burden to show "a violation of some constitutional or statutory right justifying suppression." *United States v. Rodriguez-Suazo*, 346 F.3d 637, 643 (6th Cir. 2003) (citation omitted).

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Though "this fundamental right is preserved by a requirement that searches be conducted pursuant to a warrant issued by an independent judicial officer," there are "exceptions to the general rule that a warrant must be secured before a search is undertaken." *California v. Carney*, 471 U.S. 386, 390 (1985).

One such exception allows warrantless searches so long as they are pursuant to a constitutional state law authorizing the warrantless searches of parolees and their residences. *See Samson v. California*, 547 U.S. 843, 856 (2006). We have already held that Ohio R.C. § 2967.131(C), the law authorizing the warrantless search of Sweeney's residence, is constitutional, *see United States v. Loney*, 331 F.3d 516, 521 (6th Cir. 2003), and Sweeney does not contest that the search was pursuant to the requirements of that statute.

He argues instead that we should apply an exception to the exception and disallow this search because the parole officer who searched Sweeney's domicile was impermissibly acting as a "stalking horse" to help the DHS officers evade the Fourth Amendment's warrant requirement in their investigation into Sweeney.

The prohibition on law-enforcement officers' using parole officers as "stalking horses" for their own investigations stems from a line of cases starting with *Griffin v. Wisconsin*,

483 U.S. 868 (1987). *Griffin* justified warrantless searches of probationers based on the "special needs" of a state in administrating its system of probation, just as the special needs of administering a penal system limit the requirements of the Fourth Amendment in the prison context. *Id.* at 873–77. Because the exception to the warrant requirement is predicated on the special needs inherent in a system of probation, the search must be related to those needs and not merely an instance of law-enforcement officers' using a parole officer as a stalking horse to assist in an unrelated investigation. *See United States v. Goliday*, 145 F. App'x 502, 505 (6th Cir. 2005).

More recently, however, the Supreme Court has grounded this exception in the lower expectation of privacy enjoyed by probationers, which is weighed against the promotion of legitimate governmental interests to determine whether the search was reasonable under "the totality of the circumstances." *Samson*, 547 U.S. at 849–52. Because this justification for the exception is not always related to the special needs of the probationary system, the reason for conducting the search need not necessarily be related to those needs either.

When the government relies on the "special needs" doctrine to justify a search, the stalking horse exception may still apply, but when the government relies on the totality-of-the-circumstances doctrine as articulated in *Samson*, it does not. *See United States v. Lykins*, 544 F. App'x 642, 647 n.2 (6th Cir. 2013). Because the district court explicitly relied on the doctrine in *Samson*, and because the state defends the search on those grounds, the stalking-horse exception does not apply.

Regardless, there is no reason to think that the parole officer was acting as a stalking horse for the DHS officers. Under the "special needs" doctrine, the stalking-horse exception only prevents probation officers from assisting law enforcement in evading the Fourth Amendment's warrant requirement—it allows that "police officers and probation officers can work together and share information to achieve their objectives." *United States v. Martin*, 25 F.3d 293, 296 (6th Cir. 1994).

Here, the parole officer who searched Sweeney's residence had every parole-related reason to do so—he had recently been informed by DHS officers that Sweeney was exchanging

explicit pictures with his daughter, a clear violation of the terms of his parole, which he had been sentenced to as a result of his conviction for raping his niece. That DHS also wanted access to Sweeney's phone does not detract from the parole officer's legitimate interest in searching it.

In short, the stalking-horse exception to the general rule allowing parole officers to search a parolee's residence does not apply when, as here, that search is reasonable under the totality of the circumstances, as authorized by *Samson*, and even if it did apply, the parole officer was not acting as a stalking horse.

* * *

At sentencing, the district court applied a two-level enhancement to Sweeney's Guidelines range under USSG § 2G2.1(b)(5), which applies if "the defendant was a parent, relative, or legal guardian of the minor involved in the offense, or if the minor was otherwise in the custody, care, or supervisory control of the defendant."

The appropriate interpretation of USSG § 2G2.1(b)(5) is a legal issue, which we review de novo. *See, e.g.*, *United States v. Stubblefield*, 682 F.3d 502, 510 (6th Cir. 2012). The factual findings required to determine whether Sweeney fell within USSG § 2G2.1(b)(5), appropriately interpreted, are reviewed for clear error. *United States v. Hodge*, 805 F.3d 675, 678 (6th Cir. 2015) (citing *United States v. Maken*, 510 F.3d 654, 656–57 (6th Cir. 2007)).

Sweeney's position is that he is not T.R.'s parent, as the term is used in USSG § 2G2.1(b)(5), because his parental rights over T.R. had been terminated before the offense.

In support of his argument, he points to the text of the enhancement, which describes several enumerated categories—parents, relatives, and legal guardians—and also applies the enhancement to anyone who "otherwise [has] custody, care, or supervisory control" of the victim. Sweeney reads the term "otherwise" as requiring that the preceding enumerated categories be limited such that only people who have custody, care, or supervisory control count as parents, relatives, or legal guardians for purposes of § 2G2.1(b)(5).

Additionally, Sweeney cites the "Reason for Amendment" offered by the Sentencing Commission for § 2G2.1(b)(2),[1] which tells us that this section was added "to provide an increase for defendants who abuse a position of trust in exploiting minor children." USSG app. C, amend. 324 (2003). Not all parents are in a position of trust relative to their children, says Sweeney, inviting us to imagine a biological parent who gives up his biological child for adoption and has no subsequent relationship with that child, against whom the biological parent then offends. Arguing that this hypothetical parent should not be subject to the enhancement, Sweeney concludes that we should limit the definition of "parent, relative, or legal guardian" to those who have custody, care, or supervisory control over the victim, because anyone who has custody, care, or supervisory control over a child is in a position of trust.

We are unconvinced that USSG § 2G2.1(b)(5) only applies to parents, relatives, or legal guardians who have custody, care, or supervisory control over their victims. Because anyone who has custody, care, or supervisory control over a victim is already subject to the enhancement, this would render the terms "parent," "relative," and "legal guardian" superfluous, and we are "'reluctan[t] to treat statutory terms as surplusage' in any setting."[2] *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (alteration in original) (quoting *Babbitt v. Sweet Home Chapter of Cmties. For a Great Or.*, 515 U.S. 687, 698 (1995)).

What, then, is the correct definition of "parent?"[3] "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). The term "parent" is normally used to refer to the progenitors of a child, as well as anyone who has taken

---

[1]USSG § 2G2.1(b)(2) later became USSG § 2G2.1(b)(5).

[2]When confronted with very similar language in a different context, the Supreme Court came to the same conclusion. *See Taylor v. United States*, 495 U.S. 575, 597 (1990). In *Taylor*, the Court interpreted the term "burglary" as it appears in 18 U.S.C. § 924(e)(2)(B), which defines "violent felony" as, among other things, a crime that "is burglary, arson, or extortion, involves use of explosives, or *otherwise* involves conduct that presents a serious potential risk of physical injury to another" (emphasis added).

[3]Because the government does not argue that Sweeney was T.R.'s relative or legal guardian, we do not define those terms.

on the role traditionally reserved for those progenitors, such as a stepfather.[4] One can be a parent in this sense without having parental rights over one's child.

Sweeney argues that in addition to biological parentage, the statute requires that the defendant must have also abused a position of trust, citing the Guidelines commentary earlier noted. He argues that, here, there was no position of trust between himself and T.R. But, as explained below, even applying the definition that Sweeney asks us to adopt—and it seems clear that, as used in § 2G2.1(b)(5), "parent" includes at least the child's biological father who abuses a position of trust—the district court did not clearly err in finding that the enhancement applies in this case. We need not decide, therefore, whether a biological relationship alone between the perpetrator and the victim would be sufficient for the "parent" enhancement to apply.

The district court applied § 2G2.1(b)(5) because T.R. "saw [Sweeney] in [his] biological father role despite the fact that she'd been adopted." While the district court used the term "biological," it applied the enhancement because of the *role* Sweeney was playing in T.R.'s life, not the mere fact that she was his biological daughter.[5]

In determining whether the district court clearly erred in finding that Sweeney is T.R.'s parent under § 2G2.1(b)(5), we must be mindful that the Sentencing Commission directed that the enhancement "have broad application." USSG § 2G2.1(b)(5), cmt. n.5. The trial transcript is replete with testimony showing that Sweeney had reestablished his parental relationship with T.R. and was therefore in a position of trust relative to her. The district court did not clearly err in finding that their relationship fell within the broad application of § 2G2.1(b)(5).

---

[4] *See, e.g.*, *Oxford English Dictionary*, *Parent*, http://www.oed.com/view/Entry/137816?rskey=h61fNd&result=1&isAdvanced=false#eid ("A person who is one of the progenitors of a child; a father or mother. Also, in extended use: a woman or man who takes on parental responsibilities towards a child, e.g. a stepmother, an adoptive father.").

[5] Further supporting our view that the district court's application of the enhancement was not predicated solely on the biological relationship between Sweeney and T.R., the district court invited "the Circuit to clarify whether a biological father is an appropriate application of this guideline, but I believe it is in this case." Had the district court been of the opinion that being the biological father of the victim was sufficient simpliciter, it would not have said that it was sufficient *in this case*. In the context of the sentencing transcript, clearly the district court thought that it was sufficient in this case because of the familial relationship that had developed between Sweeney and T.R. beyond their biological relationship.

Sweeney and T.R. were in periodic contact for approximately two and a half years. T.R. described their relationship immediately prior to the criminal activity as "good, like friendly, like trying to see if we could be like father/daughter again." As the following example shows, the text-message conversations between the two support T.R.'s characterization of the relationship.

T.R.:	"Leave me alone and forget about being lovers because it's not going to happen."
Sweeney:	"What! What did I do, love?"
T.R.:	"I don't want to be lovers. I just want you to be my dad, nothing more than a father."

The record makes it clear that Sweeney had re-entered T.R.'s life as a father figure, even if he did not have custody, care, or supervisory control over her. The district court did not clearly err in finding that this was sufficient to show that Sweeney was T.R.'s parent for purposes of § 2G2.1(b)(5).

* * *

Finally, Sweeney argues that his sentence is procedurally unreasonable because the district court failed to address various mitigating arguments he presented at sentencing.[6] In passing sentence, district courts must address legitimate mitigating arguments raised by the defendant. *See, e.g.*, *United States v. Wallace*, 597 F.3d 794, 803 (6th Cir. 2010) ("When a defendant raises a particular[, nonfrivolous] argument in seeking a lower sentence, the record must reflect both that the district judge considered the defendant's argument and that the judge explained the basis for rejecting it." (alteration in original) (quoting *United States v. Gapinski*, 561 F.3d 467, 474 (6th Cir. 2009))). But we have been clear that district courts need not engage in a formulaic point-by-point refutation of a defendant's mitigation arguments; the district court discharges its duty so long as it "conduct[s] a meaningful sentencing hearing and truly consider[s] the defendant's arguments." *United States v. Gunter*, 620 F.3d 642, 646 (6th Cir. 2010).

[6]Sweeney also cursorily argues that his sentence is procedurally unreasonable because the district court "did not review or address on the record in any meaningful way [the] 18 U.S.C. § 3553(a) factors," although he fails to mention which factors he believes were inadequately reviewed or why their review was inadequate. Reviewing the record has convinced us that the district court considered the § 3553(a) factors adequately.

Sweeney admits we review this issue under the deferential plain-error standard. We are not convinced that the district court plainly failed to consider or adequately explain its rejection of any of the arguments Sweeney presented at sentencing.

Sweeney claims that the district court failed to address his argument that "the Sentencing Guidelines for these type [sic] of offenses themselves were skewed, and not commiserate [sic] with actual offense conduct," that "the instant offense was less appalling than some other offenses prosecuted under the statute," that "there would be a sentencing disparity if the court imposed a 45 year sentence," and that "a 30 year sentence was in effect a life sentence."

The district court, however, clearly considered these arguments. It granted that "this does seem to be a category of cases where there is growing agreement that perhaps the punishments are treated more harshly under the guidelines than with other types of criminal offenses" and indicated that it was "mindful of the need to avoid unwarranted sentencing disparities." It agreed with Sweeney that "this is not the worst offense the Court has seen." And it recognized that "[a] 35-year sentence may in fact be a life sentence."

While the district court did not engage in a point-by-point explanation of why each of the mitigation arguments did not further influence its decision,[7] the record shows that it considered each of these arguments and rejected each after a careful consideration of the appropriate § 3553(a) factors.

III

For the foregoing reasons, we **AFFIRM**.

[7]The district court was moved, at least, by Sweeney's argument that more appalling offenses have been committed, crediting this fact with its having "chosen a sentence below the statutory maximum range."

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES,

Plaintiff,

v.

Case No. 2:16–cr–73
JUDGE MICHAEL H. WATSON

THOMAS A. SWEENEY,

Defendant.

OPINION AND ORDER

Thomas Sweeney ("Defendant") moves to suppress statements that he allegedly made to his parole officer and evidence found on his cell phone. Mot., ECF No. 29. The Court held a hearing on the motion on December 19, 2016. For the reasons that follow, the Court **DENIES** the motion.

I. BACKGROUND

Defendant is accused of engaging in text message conversations with T.R., aged fourteen, in June of 2015. Defendant was on parole and on probation at the time of the alleged incident. Defendant began post-release control in September of 2013 and began a three-year probation term in January of 2015. The following facts were presented at the suppression hearing through the testimony of two witnesses: former Ohio Adult Parole Authority ("APA") Officer Corrinne Pugh, and Sergeant Jeff Zech, a task force officer with the Franklin

County Internet Crimes Against Children Task Force and with the Department of Homeland Security ("TFO Zech").

1. Facts

Corrinne Pugh was Defendant's parole officer in June of 2015. Pugh testified that Defendant was informed on the day he began post-release control that he was subject to certain conditions of supervision. Defendant was to have no unsupervised contact with minors, was required to follow all orders given by his parole officer, and was informed that, "pursuant to section 2967.131, I will be subject to warrantless searches" (among other conditions). Ex. A, Conditions of Supervision, ECF No. 35-1.[1] Defendant signed a form on September 17, 2013, setting forth these conditions and acknowledging that he read and understood the same.

On June 11, 2015, Pugh imposed an additional sanction on Defendant after receiving reports of inappropriate sexual behavior towards a counselor. In addition to the other conditions of supervision, Defendant was not permitted to access the internet. Defendant signed a form acknowledging this new condition. Ex. B, Sanction Receipt, ECF No. 35-2.

TFO Zech testified that he received information on June 24, 2015, about inappropriate sexual communication involving a fourteen-year-old female, T.R. TFO Zech spoke with both T.R. and her parents. At that time, TFO Zech learned

[1] This document, as well as the other documents cited throughout this Opinion and Order, were admitted into evidence at the suppression hearing on December 19, 2016, and are reflected on the docket in connection with the Government's Opposition to Defendant's motion to suppress.

that T.R.'s parents were her adoptive parents, and that Defendant was T.R.'s biological father. TFO Zech also learned that Defendant had previously been imprisoned for sexual contact with a juvenile niece.

Jane Doe informed TFO Zech that, on June 19 and 20, 2015, she communicated with Defendant via text message. Jane Doe informed TFO Zech that Defendant instructed her to take and send pictures of her vaginal area. Jane Doe provided specific information about the conversation, such as the fact that Defendant instructed her to delete the text messages and that he wanted to meet in a park by Jane Doe's house to engage in specific sexual conduct.

TFO Zech examined Jane Doe's phone. The texts at issue had been deleted, but TFO Zech was able to forensically retrieve the content of Jane Doe's texts. TFO Zech observed a text message conversation on Jane Doe's phone that began, "Hi Thomas Andrew Sweeney," to which a message replied, "hi [Jane Doe's full name]." The text conversation also included references to "dad." Finally, the text conversation corroborated Jane Doe's allegations regarding the specific texts she received from Defendant.

TFO Zech took this information to Pugh. On July 6, 2015, TFO Zech informed Pugh that he wanted to interview Defendant but had not been able to locate him. Pugh informed TFO Zech that Defendant had a parole meeting coming up on July 9, 2015.

TFO Zech and his partner showed up at the parole office at the time of Defendant's scheduled meeting. Defendant arrived at the meeting and met with Pugh as scheduled. Meanwhile, TFO Zech positioned himself outside the door so that he could hear snippets of the conversation.

Pugh asked Defendant the standard questions she usually asked, such as whether he had any contact with minors, whether he had accessed the internet, and whether he was sexually active. Defendant disclosed that he had two cell phones on his person, both of which Pugh confiscated and searched. When asked at the hearing if she had authority to search the phones, Pugh responded, "I had a right to search those" as "an officer though the state of Ohio and APA" because "offenders know that they're subject to warrantless searches and have a lesser standard of privacy than a regular citizen." ECF No. 38, at 22. Pugh did not find anything incriminating on the phones she examined.

At some point during the interview, Pugh was informed that Defendant had a third phone that he left at the shelter where he was residing. Although Pugh did not remember how she learned that information, TFO Zech testified that he overheard Defendant divulge that information directly to Pugh.

At the conclusion of Defendant's interview with Pugh, TFO Zech and his partner identified themselves to Defendant. TFO Zech and his partner entered the interview room with Defendant and read him his *Miranda* rights. Defendant declined to answer the officers' questions. TFO Zech left the room and informed

Pugh that Defendant did not provide any information. At that point, Pugh escorted Defendant to the building's exit, and Defendant left on his own accord.

Pugh returned and spoke to a supervising officer about the third phone. The decision was made that another parole officer, Kaleb Kaschalk, would accompany TFO Zech and his partner to the shelter to retrieve the third phone. TFO Zech testified that the purpose of the outing was to retrieve the phone and give it to TFO Zech to forensically analyze for parole violations. TFO Zech also had the two other cell phones, which Pugh had confiscated, in his possession to forensically analyze.

The trio arrived at the shelter and located Defendant's bunk, which had a bag sitting on top of it. TFO Zech opened the bag and found a white HTC cell phone. Officer Kaschalk was with TFO Zech at the time but did not handle the phone.

TFO Zech took all three phones back to his office to analyze. Because the white HTC phone was password protected, TFO Zech was not able to examine the phone's contents (such as text messages). TFO Zech could, however, remove the phone's SD card to examine any images stored on the phone. Upon performing this analysis, TFO Zech found pornographic images, images of T.R.'s face, and an image that TFO Zech knew Defendant had recently uploaded to Facebook. TFO Zech reported this information to Pugh on July 9, 2015 (the same day as the parole meeting).

This information evidenced to Pugh that Defendant had been on the internet and had contact with minors, both of which violated his conditions of supervision. Pugh testified that, upon receiving this evidence, the APA attempted to arrest Defendant. The APA was not able to immediately locate Defendant because he had left the shelter. Defendant eventually was arrested in California in September of 2015 on the aforementioned parole violations.

Meanwhile, on July 30, 2015, TFO Zech applied for a search warrant for the white HTC phone. The warrant issued that same day. TFO Zech testified that he forensically "imaged" the phone on July 31, 2015. Sometime in August, his colleague was able to bypass the phone's password and extract the full contents of the phone.

TFO Zech was not able to view any text messages prior to June 22, 2015, because they had been deleted. He did, however, find text messages dated after June 22, 2015, in which Defendant apologized to his girlfriend for soliciting T.R. to send nude photographs. TFO Zech testified that he did not view any text messages prior to obtaining the search warrant.

Defendant was indicted on March 31, 2016, for soliciting a minor for the purpose of producing a visual image of sexually explicit conduct and for soliciting a minor to engage in sexual activity. Defendant moved to suppress his statement about the existence and location of the white HTC phone, as well as the evidence gleaned from the phone itself.

Following the suppression hearing on December 19, 2016, the parties filed supplemental briefs in support of their position. Defendant abandoned his contention that his statements about the white HTC phone were coerced. Defendant now argues that the warrantless search of his phone violated his Fourth Amendment right to be free from unreasonable searches. Defendant also argues that the search warrant was invalid. As such, Defendant argues that the evidence found on his cell phone should be suppressed.

The Government responds that the warrantless search of Defendant's cell phone was reasonable under the circumstances. Defendant further argues that the search warrant was valid and, in any event, TFO Zech had a good faith belief that it was valid.

The Court considers the parties' arguments below.

II. DISCUSSION

A. The Warrantless Cell Phone Search

The Court begins its analysis with familiar framework:

> The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined by 'assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'

United States v. Knight, 122 S. Ct. 587, 591 (2001) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). Defendant's status as a parolee "informs

both sides of that balance." *Id.* (discussing a probationer); *see also Samson v. California*, 547 U.S. 843, 850 (2006) (applying the same reasoning to a parolee).

Regarding the individual's privacy interest, parolees are on the "continuum of state-imposed punishments" that approach the level of incarceration. *Samson*, 547 U.S. at 850. Because states generally are "willing to extend parole only because [they] are able to condition it upon compliance with certain requirements," parolees "have severely diminished expectations of privacy by virtue of their status alone." *Id.* at 851.

In *Samson*, the Supreme Court noted that the parolee at issue had signed an order submitting to the condition that he would submit to suspicionless searches by parole or other peace officers "at any time." *Id.* at 852. This fact, combined with the parolee's status as such, led the Court to conclude that the parolee "did not have an expectation of privacy that society would recognize as legitimate." *Id.*

The Court went on to weigh this negligible privacy interest against the state's considerable interest in effectively regulating parolees. Because parolees are significantly more likely to offend than the general population, and because of the "grave safety concerns that attend recidivism," the Court concluded that "the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee." *Id.* at 854, 856.

Samson was decided five years after *Knights*, in which the Court discussed a probationer's diminished—although less so than a parolee's—expectation of privacy. *Knights*, 534 U.S. at 118; *Samson*, 547 U.S. at 850 ("parolees have fewer expectations of privacy than probationers"). The *Knights* Court weighed a probationer's expectation of privacy against the state's considerable interest in preventing recidivism and found, on balance, that the Fourth Amendment "requires no more than reasonable suspicion to conduct a search of this probationer's house." 534 U.S. at 121. The Court noted that "[t]he 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 of the individual's privacy interest reasonable." *Id.* Where the state satisfies the reasonable suspicion standard, a warrant is "unnecessary." *Id.*

The *Knights* Court expressly noted that its holding "rests on ordinary Fourth Amendment analysis that considers all the circumstances of a search." *Id.* at 122. As such, "there is no basis for examining official purpose" reflected in the "actual motivations of individual officers." *Id.* (quoting *Whren v. United States*, 517 U.S. 806, 813 (1996)).

Defendant asks the Court to take note of two additional cases: *Riley v. California*, 134 S. Ct. 2473 (2014), and *United States v. Lara*, 815 F.3d 605 (9th Cir. 2016). In *Riley*, the Supreme Court discussed the privacy concerns inherent in cell phones and the amount of data they can store. 134 S. Ct. at 2489. Given

the heightened privacy interests at stake, the Court declined to extend the "search incident to arrest" exception to the Fourth Amendment's warrant requirement to cover searches of arrestee's cell phones. *See id.* at 2493–93. Central to this holding was the fact that the "search incident to arrest exception" is routed in officer safety, and officers are not at risk of being harmed by the data contained in cell phones. *See id.*

In *Lara*, the Ninth Circuit Court of Appeals applied the Supreme Court's statements about cell phone privacy interests to a probationer who had been convicted of a nonviolent drug crime. 815 F.3d at 607. After the probationer missed a meeting, officers traveled to his home, searched it, and found a cell phone containing photographs of a gun. *See id.* After the gun was located and the probationer was arrested for being a felon in possession of a firearm, the Ninth Circuit held that the search of his cell phone was unconstitutional. See id. at 614. Several facts informed the court's holding: that the probationer had a higher expectation of privacy than a parolee or one convicted of a violent offense, that the conditions of probation did not clearly inform the offender that his cell phone was subject to warrantless searches, and that the missed probation meeting was "worlds away" from the suspected offenses in *Knights*. *Id.* at 610–12.

Having considered the aforementioned authority, the Court begins its analysis by assessing Defendant's expectation of privacy on July 9, 2015. The

Court takes into account Defendant's status as a parolee, the nature of the offense that necessitated parole, the form he signed acknowledging that he would be subject to warrantless searches, the no-internet sanction imposed against him at the time, and the nature of the search (his cell phone).

Unlike the probationer in *Lara*, who had been convicted of a drug crime, Defendant was a parolee at the time of the search who had been convicted of a crime involving a specific victim. He had notice that, "[p]ursuant to section 2967.131, I will be subject to warrantless searches." Ex. A, ECF No. 35-1. He also had notice that he was prohibited from having unsupervised contact with minors. *Id.* Finally, Defendant had notice that, while on parole, he had been accused of inappropriate sexual conduct and had been prohibited from using the internet.

Consistently with these conditions, Pugh testified that she routinely asked Defendant about whether he had been communicating with minors and that she routinely searched his cell phone during parole meetings. Given the nature of his conditions of supervision and the nature of the sanction, Defendant clearly was on notice that his communications would be monitored by the APA.

The Court finds that these facts render the Supreme Court's concerns about cell phone searches to be misplaced in this case, in which communications in Defendant's cell phone are directly relevant to his conditions of parole. Although this Court acknowledges the Supreme Court's concern about the litany

of data that is available through cell phone searches, its reasoning that an arrestee's privacy interests outweigh the government's interest in conducting a warrantless cell phone search do not apply, or apply with much less force, to the facts of this case.

The Court likewise finds unpersuasive Defendant's argument that he was not clearly notified that his cell phone would be subject to warrantless searches. Although the form Defendant signed was more general than the form in *Knights*, and although it did not specifically reference Defendant's cell phone, Defendant clearly was on notice that his cell phone, and specifically any communications with minors and evidence of pornography or internet usage, were at the heart of his parole supervision. Pugh routinely checked his cell phone during meetings for this exact reason. Defendant therefore cannot claim a legitimate expectation of privacy in his cell phone.

In any event, even if Defendant had an increased expectation of privacy in his cell phone (as compared to his home or person), that expectation still must be balanced against the State's compelling interest in preventing Defendant from communicating with minors and committing the same type of offense for which he was incarcerated. The Court finds that the Government demonstrated that the "probability that criminal conduct [was] occurring" made "the intrusion of the individual's privacy interest reasonable," *Knights*, 534 U.S. at 121, in this case. *Compare id.* at 115 (finding that the officer had reasonable suspicion to conduct

a search when he observed an individual leaving the probationer's house with suspected pipe bombs, among other facts, such that the search was constitutional) *with Lara*, 815 F.3d at 612 (finding unconstitutional a search of a probationer's home when the probationer failed to attend a scheduled probation meeting). TFO Zech and Pugh knew, on the day the search was conducted, that a minor had accused Defendant of soliciting her to send him sexually explicit photos, that text messages on the minor's phone corroborated the statements the minor accused Defendant of making, and that references to "dad" and even "Thomas Andrew Sweeney" further corroborated the minor's claims. TFO Zech and Pugh also knew that Defendant brought two cell phones to the parole meeting but left a third one behind, which further suggests that the third phone might contain incriminating evidence. As such, even if Defendant had the same or higher expectation of privacy than the probationers in *Knight* and *Lara* (which is doubtful), the Court finds that the intrusion into Defendant's privacy interests was still reasonable under the circumstances.

The Court reiterates that, under *Knights*, "there is no basis for examining [the] official purpose" of the search. 534 U.S. at 122. But the scope of the search is relevant to the totality of the circumstances, and in this case, the scope of the search weighs against Defendant's position that the search was unreasonable. TFO Zech testified that he stopped his initial search when he identified parole violations, that he reported those violations to Pugh, and that the

APA is the entity that set out to (and eventually did) arrest Defendant. TFO Zech later applied for a search warrant and examined the rest of the phone. The fact that TFO Zech and the APA had an overlapping interest in the content underlying the parole violations does not render the search unreasonable. *Id.*

In sum, the Court concludes that the search of Defendant's cell phone was constitutionally sufficient, which "render[s] the warrant requirement unnecessary." *Id.* at 121. The Court reaches this conclusion under a traditional Fourth Amendment analysis. It therefore need not determine whether Ohio Revised Code § 2967.131 authorized the search and whether TFO Zech was an "authorized field officer" within the meaning of the statute.

B. The Search Warrant

Defendant makes three arguments in support of his contention that the search warrant is invalid such that the communications TFO Zech retrieved from the cell phone should be suppressed. None of these arguments has merit.

First, Defendant argues that the twenty-one delay between TFO Zech's seizure of the phone and his application for a search warrant renders the subsequent search unreasonable. Although the Court acknowledges that the Government did not provide a reason for this delay, it ultimately agrees with the Government that the seizure itself (independent from the content found on the phone and subsequent prosecution) did not cause any injury within the meaning of the Fourth Amendment. According to TFO Zech, he reported the evidence of

parole violations to Pugh on July 9, 2015. The APA tried to arrest Defendant but he had since left the shelter and could not be located until he was found and arrested in California. As such, given that Defendant did not seek the return of his phones and that his location was unknown, it is unclear to the Court how TFO Zech could have returned the phones even if he wanted to. The Court therefore cannot conclude that the twenty-one day delay itself caused any Fourth Amendment injury to Defendant.

Second, Defendant argues that the warrant is impermissibly overbroad because it is not limited to the short time period in which he allegedly communicated with Jane Doe. As a factual matter, however, the Court is not persuaded that only text messages within that two-day time frame are relevant to Jane Doe's allegations. Indeed, in this case, TFO Zech found text messages between Defendant and his girlfriend that purport to corroborate the allegations involving Jane Doe. Given this fact, and because the warrant in this case identifies a specific phone, allegations involving a specific person, and corroborating evidence identified on Jane Doe's phone, *see* Ex. C, In re: Application and Search Warrant, ECF No. 35-3, the Court finds no defect with the warrant in this regard.

Defendant's final argument—that the warrant lacked probable cause—likewise fails. This argument is based on Defendant's contention that TFO Zech's initial search of the phone's SD card was unconstitutional and that,

without this information, there was no probable cause for the search warrant. This argument is moot given the Court's finding that the warrantless search of the cell phone satisfied the Fourth Amendment. This argument also fails to acknowledge the information gleaned from Jane Doe, including TFO Zech's review of Jane Doe's phone and the text messages corroborating her allegations, and especially including the specific reference in those text messages to "dad" and to "Thomas Andrew Sweeney." The Court accordingly finds no defect in the warrant on this basis.

III. CONCLUSION

For the foregoing reasons, the Court **DENIES** Defendant's motion to suppress, ECF No. 29. The Clerk is **DIRECTED** to remove this motion from the Court's pending motions list.

IT IS SO ORDERED.

MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT