No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

SETH ANTHONY JOHNSON,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit Court

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PETITION FOR WRIT OF CERTIORARI

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Question Presented

Whether the Ninth Circuit improperly ruled that Mr. Johnson's supervised release search condition substantially diminished his weighty privacy interest his cell phone and authorized agents from Homeland Security Investigations to conduct a warrantless forensic search of its contents despite the fact that the search condition expressly limited the authority to conduct such a search to a United States Probation officer.

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Cases

Petition for Certiorari

Petitioner Seth Anthony Johnson petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in Case Nos. 20-30051 and 21-30138.

Orders Below

This case arises from the following proceedings in the United States District Court for the District of Idaho, and the United States Court of Appeals for the Ninth Circuit:

United States v. Johnson, No. 20-30051, Dkt. 61 (9th Cir. May 3, 2022)

United States v. Johnson, CR18-214-S-DCN, Dkt 62 (D. Idaho October 4, 2019)

Counsel is aware of no related cases currently pending before the Court.

Jurisdictional Statement

The Ninth Circuit's opinion (Appendix A) is unreported but available at *United States v. Johnson,* No. 20-30051, Dkt No. 61 (9th Cir. May 3, 2022). The district court's order denying petitioner's motion to suppress (Appendix B) is unreported but available at *United States v. Johnson*, CR18-214-S-DCN, Dkt 62 (D. Idaho October 4, 2019).

Relevant Constitutional Provision

The Fourth Amendment of the United States Constitution provides that:

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

Statement of the Case

On August 3, 2010, Mr. Johnson was sentenced in the United States District Court for the District of Idaho (CR09-287-S-BLW) to 51 months of imprisonment followed by three years of supervised release for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), and making a false statement to deputies with the United States Marshals Service, in violation of 18 U.S.C. § 1001. On December 8, 2016, Mr. Johnson was sentenced to 12 months and one day for violating his supervision conditions, to be followed by a 17-month term of supervised release.

The district court's judgment memorializing its sentence for Mr. Johnson's violations of his conditions of supervised release set forth various standard and special conditions to govern during that 17-month term of supervised release. One special condition mandated that Mr. Johnson submit to searches by a United States Probation officer.

In 2017, Mr. Johnson's supervising probation officer filed another petition alleging new violations of his conditions of supervised release. On November 29, 2017, United States Probation officers and deputies from the United States Marshals Service arrested Mr. Johnson pursuant to the warrant issued in response to the probation officer's petition alleging the new violations.

At the time of his arrest on the warrant, a cell phone in Mr. Johnson's possession was seized from him. After probation officers searched the phone manually, they turned it over to agents from Homeland Security Investigations (HSI) to conduct a more penetrating search using forensic tools.

Only one day after the cell phone was seized from Mr. Johnson, and after he had been secured in custody pending his supervised release violation proceedings, HSI agents conducted a warrantless forensic search of the phone's contents. Six images were located during that search that agents determined were pornographic images of a young child. The six images did not show the female child's face, but rather only the area between the knees and navel; they displayed the genital area of what the agents believed was a female child between the ages of six and ten.

On January 18, 2018, over six weeks after its initial warrantless search of the cell phone, HSI applied for and obtained a search warrant for the phone. However, the HSI agent's affidavit in support of the search warrant request included a description of two of the images that HSI had discovered during its initial warrantless forensic examination of the phone's contents. The HSI agent indicated in his affidavit that he suspected that those images constituted child pornography.

The only illicit images located on the cell phone during HSI's subsequent execution of the search warrant were the same six images originally discovered during its warrantless forensic examination. Importantly, no United States Probation officers were present for or participated in either HSI's first warrantless forensic search of the phone or the subsequent search of its contents that was conducted pursuant to the search warrant.

As noted, at the time of his arrest, Mr. Johnson's supervised release conditions included a condition that expressly authorized only United States Probation officers

to search his electronic communications devices or media. The specific terms of that search condition provided:

> The defendant shall submit his or her person, property, house, residence, vehicle, papers, computers (as defined in 18 § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition.

In his affidavit in support of the search warrant request, the HSI agent noted that HSI had conducted the initial warrantless forensic search of the cell phone at the request of United States Probation and pursuant to Mr. Johnson's supervised release search condition.

Mr. Johnson was charged with sexual exploitation of a child, under 18 U.S.C. § 2251(a), for producing the six images originally discovered through HSI's initial warrantless forensic search of the cell phone. Prior to trial, he moved to suppress these images, arguing that the warrantless forensic search of his cell phone conducted by HSI violated his rights under the Fourth Amendment. He specifically argued that HSI's warrantless search was not authorized by the plain terms of his search condition because it had not been conducted by a United States Probation officer. He further maintained that the subsequently obtained search warrant was tainted by the inclusion of the results of HSI's initial warrantless search of the cell phone.

The district court denied the motion to suppress, concluding that a different condition of Mr. Johnson's supervised release that permitted the monitoring of his electronic devices implicitly authorized United States

Probation to receive the assistance of law enforcement personnel with the means to retrieve the data from his phone. That other supervised release condition provided:

> The defendant shall comply with the requirements of the United States Probation Computer Monitoring Program as directed. The defendant shall consent to the United States Probation Office conducting ongoing monitoring of his computer(s) hardware, software, and other electronic devices/media. The monitoring may include the installation, at the defendant's expense, of hardware or software systems which allows evaluation of his computer use. Monitoring may also include the retrieval and copying of all data from his computer or other electronic devices/media. Monitoring may occur at any time with or without reasonable suspicion of violations of supervised release or probation.

The district court further held that Mr. Johnson's status as a supervised releasee alone resulted in him having no expectation of privacy in the phone.

Following his conviction, Mr. Johnson appealed the denial of his motion to suppress to the Ninth Circuit. The Ninth Circuit found no error in the district court's denial of the motion to suppress and affirmed the conviction. The Ninth Circuit found that the supervised release conditions authorizing the search of Mr. Johnson's "electronic communications or data storage devices or media" and permitting "the retrieval and copying of all data from his computer or other electronic devices/media" caused him to have "a significantly reduced expectation of privacy in his cell phone." That interest was outweighed by the government's "particularly high" interest in monitoring Mr. Johnson due to his status as a parolee and the information United States Probation had received that he had allegedly violated his conditions of supervised release. The court further ruled that United States Probation's request

for HSI's assistance in searching Mr. Johnson's phone was not improper and did not offend his Fourth Amendment rights.

Reasons for Granting the Petition

A. The Court Should Grant the Writ Because the Ninth Circuit's Ruling That Mr. Johnson's Search and Monitoring Supervised Release Conditions Significantly Reduced His Privacy Interests In His Cell Phone Decided An Important Federal Question in a Way That Conflicts With Relevant Decisions of This Court Regarding the Fourth Amendment Rights of Probationers and Parolees

The Ninth Circuit's conclusion that Mr. Johnson's supervised release conditions authorizing the search and ongoing monitoring of his computers and electronic communications devices significantly reduced his expectation of privacy in his cell phone conflicts with this Court's decisions in *United States v. Knights*, 534 U.S. 112 (2001) and *Samson v. California*, 547 U.S. 843 (2006). In its prior decisions, this Court found that Knights and Samson had substantially diminished expectations of privacy because they were both subject to clear and unambiguous statutory search conditions that broadly authorized the searches that were conducted by law enforcement officers. Furthermore, both Knights and Samson had been clearly informed of those search conditions.

In contrast, the plain terms of Mr. Johnson's supervised release conditions authorized only United States Probation officers to search and monitor his computers and electronic communication devices – those conditions did <u>not</u> extend that authority to any law enforcement officers. Because there was no clear and unambiguous search condition authorizing HSI's forensic search, Mr. Johnson retained significant privacy interests in his cell phone, which this Court has

recognized as being greater than the privacy interest in one's home, given that cell phones contain "[t]he sum of an individual's private life." *Riley v. California*, 573 U.S. 373, 394, 134 S. Ct. 2473, 2489, 189 L.Ed 2d 430 (2014).

1. The Court Emphasized That the Clear and Unambiguous Search Conditions Significantly Diminished Knights' and Samson's Expectation of Privacy

Three cases primarily established this Court's jurisprudence regarding the Fourth Amendment rights of probationers and parolees: *Griffin v Wisconsin, Knights* and *Samson*. In *Griffin v. Wisconsin*, 483 U.S. 868, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987), the Court upheld as reasonable probation officers' warrantless search of a probationer's home pursuant to a state administrative regulation permitting such searches if there were "reasonable grounds" to believe contraband was inside. *Id.* at 870–71, 107 S.Ct. 3164. The Court upheld this warrantless search under the "special needs" exception, reasoning that adhering to the warrant requirement would interfere with the probation system's substantial need to closely supervise and control the conduct of probationers to protect the community and promote rehabilitation. *Id.* at 874–75, 107 S.Ct. 3164.

More than a decade later, the Court declined to apply the "special needs" exception to the Fourth Amendment's warrant requirement when assessing the constitutionality of a law enforcement officer's search of a probationer's home. In *United States v. Knights*, 534 U.S. 112, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001), a California court sentenced Knights to probation for aa drug offense. The court's probation order contained a condition requiring Knights to submit his person,

property, and residence to a search of his home by any probation officer or law enforcement officer, without the need for a warrant or any reasonable cause. *Id.* at 114. A detective investigating an arson developed reasonable suspicion that Knights was involved in the incident. Aware that Knights was subject to the probation condition permitting warrantless searches of his residence, the detective searched Knights' apartment, where he found significant evidence implicating Knights in the arson.

The unanimous Court rejected Knights' argument that the warrantless search could only pass constitutional muster if it was like the search conducted in Griffin, specifically, a "special needs" search conducted by a probation officer tasked with monitoring a probationer's compliance with his or her probation conditions. *Id.* at 117. The Court noted that in Griffith, the Court's conclusion that the warrantless search was constitutional under the "special needs" exception did not mean that a search could not still be reasonable under the Fourth Amendment. *Id.* at 117-18.

The Court proceeded to apply its "general Fourth Amendment approach," under which it examines the totality of the circumstances to determine whether a search was permissible under the Fourth Amendment. *Id.* at 118. That requires the Court to assess "on the one hand, the degree to which [a search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." Id. at 118-119 (internal quotation marks omitted).

In conducting this Fourth Amendment balancing of interests, the Court observed that Knights' status as "a probationer subject to a search condition inform[ed] both sides of that balance." *Id.* at 119. The Court observed that probation is one point on a continuum of possible punishments for criminal offenses and that inherent in the nature of probation is the concept that probationers do not have the same absolute liberty as other citizens, since courts are allowed to impose conditions that restrict the probationer's freedom. *Id.*

In examining the totality of the circumstances to determine whether the law enforcement officer's search of Knights' apartment was reasonable, the Court emphasized the importance of the search condition that Knights was subject to as part of his probation order. The Court characterized the search condition as a "salient circumstance." *Id.* at 118. Furthermore, the Court specifically focused on and underscored the fact that Knights' probation order clearly set out the search condition and that Knights was unambiguously informed of it. Id. The Court concluded that *"[t]he probation condition thus significantly diminished Knights' reasonable expectation of privacy*." *Id.* at 119-20 (emphasis added). The Court never suggested in its ruling that Knights' status as a probationer alone would have permitted the warrantless search of his home.

The Court then examined the government interest side in the balancing of the competing interests. *Id.* at 120. Given that probationers presented a much more significant risk of reengaging in criminal activity, the Court concluded that "the

balance of these considerations requires no more than reasonable suspicion to conduct a search of this probationer's house." *Id.* at 121.

In *Samson v. California*, 547 U.S. 843, 846, 126 S.Ct. 2193, 165 L.Ed.2d 250 (2006), the Court considered whether a suspicionless and warrantless search of a parolee conducted pursuant to an applicable statutory search condition violated the Constitution. *Id.* As in *Knights*, the fact that Samson was subject to a clear and unambiguous statutory search condition authorizing the search factored prominently in the Court's conclusion that the search did not violate the Fourth Amendment.

The facts in the case involved a police officer who knew that Samson was on parole, subject to California's statutory search condition for parolees, which was set forth in California Penal Code Ann. §3067(a). The statute broadly required every prisoner eligible for release on state parole to "agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." Based solely on Samson's parolee status and this statutory search condition, the officer searched him and discovered that he had methamphetamine in his possession. *Id.* at 847.

Once again, the Court emphasized that this clear and unambiguous statutory search condition was central to its determination that the officer's search of Samson did not violate the Fourth Amendment. This is readily apparent in the manner in which the Court framed the question before it – "whether a condition of release can so diminish or eliminate a released prisoner's reasonable expectation of privacy that

a suspicionless search by a law enforcement officer would not offend the Fourth Amendment." *Id.*

In balancing Samson's privacy interests against the State's interests in conducting the search, the Court observed that on the "continuum of state-imposed punishments," parolees have fewer expectations of privacy than even probationers because parole is more similar to imprisonment. *Id.* at 850. However, the Court took pains in a footnote to note that it was not suggesting that parolees lacked all Fourth Amendment rights. *Id.* at 850, n.2. If Samson's parolee status had eliminated his Fourth Amendment rights entirely, the Court observed that it would not have been necessary to engage in the Fourth Amendment analysis of the totality of the circumstances. *Id.*

In comparison, the State's interests in reducing parolees' recidivism and promoting their reintegration were substantial. *Id.* at 853. Accordingly, the State's interests prevailed in the balancing of interests; therefore, the Court held that the Fourth Amendment did not prohibit the suspicionless search of a parolee.

As is plain from its unpublished disposition of the instant case, the Ninth Circuit failed to recognize the critical absence of a clear and unambiguous search condition authorizing the warrantless forensic examination of Mr. Johnson's cell phone. In comparison to the search conditions in *Griffin, Knights,* and *Samson*, Mr. Johnson's supervised release search condition restricted the authority to conduct any warrantless search of his electronic communications devices or computers to United States Probation officers.

The Supreme Court's trilogy of cases addressing the Fourth Amendment rights of probationers and parolees makes clear the importance of the contents of the applicable search condition. The Court could have concluded that an individual's status as a probationer, parolee (or supervised releasee) alone substantially diminished the expectation of privacy to the point that warrantless and suspicionless searches were permissible under the Fourth Amendment.

The Ninth Circuit's unpublished panel decision thus conflicts with this Court's precedent by effectively finding Mr. Johnson's substantial privacy interests in the contents of his cell phone to have been eliminated based on these search and monitoring conditions that did not clearly and unambiguously authorize the warrantless forensic examination of his cell phone. The Court should grant certiorari to clarify that the privacy interests of probationers and parolees under the Fourth Amendment will only be reduced where the scope of a search condition encompasses the warrantless and/or suspicionless search that is conducted clearly and unambiguously.

B. The Court Should Grant the Writ to Resolve the Split in the Circuit Courts Regarding the Importance of a Clear and Unambiguous Search Condition Authorizing Warrantless and Suspicionless Searches of Probationers and Parolees Under the Fourth Amendment

Since the Court's decisions in *Knights* and *Samson*, the circuit courts have split over the treatment of warrantless searches involving probationers and parolees where there is no clear and unambiguous condition directly authorizing the search, and the supervisee was not put on notice that he or she would be subject to such searches as part of the sentence. As discussed below, circuits have reached very

different interpretations of this Court's jurisprudence as established in the cases discussed above.

The Fifth, Seventh, and Eleventh Circuits have held that warrantless searches of probationers' homes are permissible, regardless of whether such searches are authorized in a clear and unambiguous search condition. In *United States v. Keith*, 375 F.3d 346, 350 (5th Cir. 2004), the court declined to read *Knights* or *Griffin* "as requiring either a written condition of probation or an explicit regulation permitting the search of a probationer's home on reasonable suspicion."

In *Keith,* the defendant was on probation for possessing a destructive device. The defendant's probation officer searched his home after receiving a tip that he had had purchased bomb-making materials. The search turned up said materials. Although there was no written condition of probation or state regulation explicitly authorizing warrantless searches of the defendant's home, the Fifth Circuit found the search permissible based on caselaw from Louisiana state courts that approved of the practice of searching probationers' homes based on reasonable suspicion. The court reasoned that the presence of such an explicit search condition was immaterial because under *Griffin* and *Knights*, "the needs of the probation system outweigh the privacy rights of the probationers" who do not enjoy the same expectations of privacy as ordinary citizens. *Id* at 350. In doing so, the court appears to have conflated the "special needs" test addressed in *Griffin* and the totality of the circumstances balancing of privacy interests tests in *Knights* and *Samson*. However, this Court's decisions made it very clear that these two tests or analytical frameworks are totally

distinct. By doing this, the Fifth Circuit improperly inflated the weight of the government's interests in conducting warrantless searches involving probationers.

The Eleventh Circuit has similarly upheld warrantless searches of probationers' homes under the Fourth Amendment despite the absence of a clear and unambiguous search condition expressly authorizing them. In United States v. Carter, 566 F.3d 970 (11th Cir. 2009), the defendant was on probation for possession with intent to distribute crack cocaine and possession of a firearm by a felon. His probation officer conducted a warrantless of his home based on his intuition that the defendant's recent "lifestyle," manifested in his relatively sudden purchase of his own home and several cars, could not be supported by his own legitimate business. *Id.* at 972. The defendant did not have a probation search condition authorizing warrantless searches; however, the court nevertheless held that reasonable suspicion sufficed to justify the search under the Fourth Amendment because his status as a probationer alone substantially diminished his expectation of privacy. *Id.* Furthermore, the defendant was subject to a probation condition that required him to submit to home visits by his probation officer. While it was far from clearly and unambiguously authorizing such a search, the Eleventh Circuit found this condition had reduced his expectation of privacy sufficiently such that the warrantless search of his residence was not unconstitutional. *Id.*

In *United States v. Wood,* 16 F.4th 529 (7th Cir. 2021), the defendant was on parole for a drug offense. After he violated conditions of his parole, he was arrested. His parole officer seized his cell phone at the time of Wood's arrest, and an

investigator later conducted a warrantless forensic examination of it. *Id.* at 532. Although there was no search condition specifically addressing search of cell phones, the Seventh Circuit upheld the search because one of Wood's parole conditions authorized the search of "property" under his control. *Id.* at 536. The court acknowledged that the search conditions have to be "clear"; however, it concluded that the condition need not contain an exhaustive list with granular detail. *Id.*

However, the Fourth Circuit reached a different conclusion regarding the constitutionality of warrantless searches when the probationer is not put on notice by a state statute or during sentencing. In *United States v. Hill*, 776 F.3d 243 (4th Cir. 2015), law enforcement officers searched the defendant's home without a search warrant or any explicit probation condition such warrantless searches. *Id.* at 245-46. The defendant was charged after the officers located narcotics. The supervision condition to which the defendant had agreed required him to submit to a probation officer's visits and allowed the officer to confiscate any "contraband observed in plain view." *Id.* at 246-47; however, none of the defendant's conditions specifically authorized warrantless searches. *Id.* at 248. The court found that central to the holdings in *Knights* and *Samson* was the fact that the search conditions had been "clearly expressed" and the defendants were "unambiguously aware" of them.

The Fourth Circuit's decision in *Hill* is consistent with this Court's rulings in *Knights* and *Samson*. This Court should grant Mr. Johnson's petition to correct the incorrect interpretation of those prior decisions reflected in these other circuits' decisions.

Conclusion

For the above reasons, Mr. Johnson respectfully asks the Court to grant a Writ of Certiorari.

Respectfully submitted on this 1st day of August 2022.

/s/ Thomas Monaghan
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SETH ANTHONY JOHNSON

 APPENDIX A

NOT FOR PUBLICATION

FILED

MAY 3 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SETH ANTHONY JOHNSON, Defendant-Appellant.	Nos. 20-30051 21-30138 21-30157 D.C. No. 1:18-cr-00214-DCN-1 MEMORANDUM*

Appeal from the United States District Court
for the District of Idaho
David C. Nye, Chief District Judge, Presiding

Argued and Submitted April 13, 2022
Seattle, Washington

Before: BOGGS,** HAWKINS, and FORREST, Circuit Judges.

We consider three appeals stemming from the conviction of defendant Seth Anthony Johnson ("Johnson") for production of child pornography, possession of child pornography, and production of child pornography while a registered sex offender. Johnson appeals the introduction of certain evidence during his trial ("trial

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Danny J. Boggs, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

appeal"), the court's award of $15,300 in restitution to the minor victim ("restitution appeal"), and the district court's order finding Johnson in criminal contempt for willfully disobeying a court order freezing his assets ("contempt appeal"). We affirm all three appeals.

I. Appeal No. 20-30051 ("Trial Appeal")

There was no error in denying Johnson's motion to suppress images found on his cell phone during a warrantless search of the phone. The reasonableness of a search under the Fourth Amendment is determined by the totality of the circumstances, balancing the privacy interests of the defendant against the government's interests. *United States v. Johnson*, 875 F.3d 1265, 1273 (9th Cir. 2017). In this case, Johnson was on supervised release, and the terms of that release included very specific authorizations for searches of his computers and any other "electronic communications or data storage devices or media." His supervised release conditions also expressly included allowing "the retrieval and copying of all data from his computer or other electronic devices/media" and that such retrieval and copying could occur with or without suspicion of violations. Thus, Johnson had a significantly reduced expectation of privacy in his cell phone. *See id.* at 1275; *cf. United States v. Lara*, 815 F.3d 605, 610 (9th Cir. 2016).

The government's interest in the search, which is already considered high when it comes to monitoring the behavior of parolees, was particularly high in this

case due to the information the Probation Office had received that suggested Johnson had violated multiple provisions of his supervised release by having unapproved contact with a minor, drinking alcohol, and possessing a prohibited firearm. Thus, in balancing these interests, the court did not err by concluding the government's interests significantly outweighed those of Johnson, and the search did not violate the Fourth Amendment. *See Johnson*, 875 F.3d at 1275–76.

Nor was the involvement of Homeland Security Investigations ("HSI") in the search of the phone improper. The Probation Office may enlist the help of other law enforcement agencies in conducting searches. *See United States v. Harper*, 928 F.2d 894, 897 (9th Cir. 1991), *overruled on other grounds by United States v. King*, 687 F.3d 1189 (9th Cir. 2012). The Probation Office conducted the initial search of the phone, viewed images that it identified as possible child erotica, and then enlisted the help of HSI in retrieving, copying, and preserving the data. *See United States v. Jarrad*, 754 F.2d 1451, 1454 (9th Cir. 1985) (no violation of Fourth Amendment where search was independently initiated by parole officer and other law enforcement became involved after the parole officer's request for assistance).

Nor was there error in admitting evidence of child erotica that was found on Johnson's cell phone in 2013, which had been later excluded from a state-court prosecution due to a Fourth Amendment violation. The prior exclusion does not necessarily preclude the introduction of the same evidence in this subsequent

prosecution; the exclusionary rule's goal is to deter illegal searches, so if suppression "does not result in appreciable deterrence," then the evidence should not be excluded. *United States v. Lopez-Martinez,* 725 F.2d 471, 476 (9th Cir. 1983) (citation omitted). We consider the nexus between the illegal evidence gathering and the later prosecution in which the evidence might be used, the length of time that had passed, whether the entity conducting the illegal search was the same seeking to use the evidence later, and whether the offending officers had already been sanctioned and deterred in another proceeding. *Id.* All these factors favor admission in this case.

Nor was there an abuse of discretion in admitting testimony regarding Johnson's 2007 rape conviction involving a fourteen-year-old girl. Johnson's prior child-molestation conviction was admissible under Federal Rule of Criminal Procedure 414. The court also considered the balancing requirement of Rule 403 and determined that the probative value of the prior incident—which also occurred with a young girl in a bathroom—outweighed any prejudice. It considered the similarity of the acts, the proximity in time, the frequency of the prior acts, and the need for the evidence at trial, *United States v. LeMay*, 260 F.3d 1018, 1027 (9th Cir. 2001), and concluded that most of these factors weighed in favor of admission. The court also heard the proposed testimony by the prior victim outside the presence of the jury to make sure it was very limited and not overly prejudicial before agreeing

the government could examine the witness in the presence of the jury. There was no abuse of discretion.

Johnson's conviction is **AFFIRMED.**

II. Appeal No. 21-30138 ("Restitution Appeal")

The district court retained jurisdiction to award restitution even though it did not determine the amount of restitution within ninety days after sentencing. The ninety-day period in 18 U.S.C. § 3664(d)(5) is not jurisdictional and the exact amount of restitution may be determined outside that time period so long as the court has sufficiently expressed an intent to award restitution. *Dolan v. United States*, 560 U.S. 605, 611 (2010). Here, because the crime involved child pornography, the court was required to award restitution. 18 U.S.C. § 2259. The court referenced a future hearing to determine the amount of this restitution multiple times during the sentencing hearing, and the minutes of the sentencing also reflect that the defendant was required to pay restitution. This was all sufficient to notify Johnson that a specific restitution award was forthcoming.

Nor was there an abuse of discretion by awarding estimated future costs of counseling to the minor victim. These losses were of the type that one would expect a child-pornography victim to suffer, as they are both foreseeable results of and within the scope of the risk created by child pornography production, distribution, and possession. *See Paroline v. United States,* 572 U.S. 434, 449–50 (2014). The

court reasonably relied on expert testimony from a mental-health professional about the extent and cost of recommended future therapy for the minor victim. *See United States v. Doe*, 488 F.3d 1154, 1160–61 (9th Cir. 2007); *United States v. Laney*, 189 F.3d 954, 966 (9th Cir. 1999).

The award of restitution is **AFFIRMED.**

III. Appeal No. 21-30157 ("Contempt Appeal")

The district court had jurisdiction to order Johnson not to dispose of his personal property without court permission in order to preserve his assets for restitution. Pursuant to the All Writs Act, federal courts may "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," 28 U.S.C.§ 1651(a), including preventing a convicted defendant from frustrating collection of restitution debt. *See United States v. Catoggio*, 698 F.3d 64, 67–68 (2d Cir. 2012) (per curiam); *United States v. Yielding*, 657 F.3d 722, 726–27 (8th Cir. 2011). Nor did the district court plainly err by failing to recuse itself sua sponte from determining whether Johnson had violated its order. *See* Fed. R. Crim P. 42(a)(3). The statements Johnson made on recorded jail conversations were not personal attacks on the judge himself, but expressions of disregard for the order. If there is no personal attack on the judge, disqualification is not required. *United States v. Rylander*, 714 F.2d 996, 1004 (9th Cir. 1983).

The criminal contempt order is **AFFIRMED.**

 APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, vs. SETH ANTHONY JOHNSON, Defendant.	Case No. 1:18-cr-00214-DCN **MEMORANDUM DECISION AND ORDER**

I. INTRODUCTION

This matter is before the Court on Johnson's Motion to Suppress. Dkt. 44. Seth Johnson asserts that his Fourth Amendment rights were violated by law enforcement during a warrantless search. Johnson seeks to suppress the evidence law enforcement collected during this allegedly unconstitutional search and seizure. The Court held oral argument on the Motion on August 9, 2019. For the reasons outlined below, the Court finds good cause to DENY the Motion.

II. BACKGROUND

A. 2013 Police Encounter

Officer Nay of the Twin Falls Police Department had an encounter with Johnson in the Lowe's parking lot in 2013. During that encounter, Nay allegedly observed child pornography on Johnson's cell phone. This 2013 incident is not part of the current Indictment against Johnson. It is not part of the criminal charges pending against Johnson. Instead, it is being offered by the Government under Rule 404(b). Evidence of this incident

is more appropriately addressed under a Motion in Limine and will not be addressed in this Decision.

B. 2017 Arrest Incident

Johnson was convicted of being a Felon in Possession of a Firearm in 2009.[1] *U.S. v. Johnson,* 1:09-cr-287-BLW. In 2017, while Johnson was still on supervised release from the 2009 conviction his probation officer spoke to two young ladies. One of the young ladies was Johnson's eighteen-year-old girlfriend. The other was the girlfriend's sixteen-year-old sister. Following that conversation, the probation officer filed a Petition to Revoke supervised probation. That petition alleged that Johnson had (1) unapproved contact with children under eighteen because the sixteen-year-old sister spent the night at Johnson's house; (2) possession or use of a computer without prior permission from probation; (3) consumed alcohol; and (4) possessed a firearm. *Id.*, 1:09-cr-287-BLW, ECF 96, at 1-2 (Nov. 29, 2017). Based on the Petition and its allegations, the Court issued an arrest warrant for Johnson. *Id.,* ECF 97 (Nov. 29, 2017).

The U.S. Probation Office and U.S. Marshal Service's Greater Idaho Fugitive Task Force arrested Johnson on November 29, 2017, pursuant to the arrest warrant. When arrested, Johnson had a black Samsung flip-phone in his possession. The U.S. Probation Office requested that Homeland Security Investigation ("HSI") search and preserve the Samsung flip-phone. HSI created an image of the phone's contents and an HSI Computer Forensics Agent, Brad Thrall, began a review of the contents of the phone. He immediately

[1] He was a felon because of his conviction for raping a fourteen-year-old girl in Oregon in 2007.

observed child pornography, so he ceased his review and sought a federal search warrant to do a more extensive analysis of the phone's contents. The Court issued a search warrant for his phone, an undeveloped roll of film, and a video camera. With the search warrants, HSI searched all three items but found only the six originally viewed illicit images.

On July 11, 2018, a Federal Grand Jury indicted Johnson for production of child pornography, possession of child pornography, and production of child pornography while a registered sex offender. Now, Johnson seeks to suppress all evidence collected from his phone, claiming the search was a violation of his Fourth Amendment rights.

III. STANDARD OF REVIEW

On a motion to suppress based upon the Fourth Amendment, the trial court must determine the reasonableness of the search under the totality of the circumstances. *Ohio v. Robinette*, 519 U.S. 33, 39 (1996). Johnson argues that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." Dkt 44-1, at 9-10, (quoting *California v. Acevedo,* 500 U.S. 565 (1991)). It is the Government's burden to establish that it was justified in conducting the warrantless search of the phone. *United States v. Jeffers,* 342 U.S. 48, 51 (1951).

IV. ANALYSIS

Johnson argues that the special conditions of supervision he was under at the time of his arrest narrowly limited the authority to conduct any search to a "United States probation officer." He then argues that the search of the phone done by HSI on November 30, 2016, was not permitted by that special condition and violated his Fourth Amendment

rights.

The facts in the record and as discussed by the parties leave it very unclear as to whether (1) the probation officer found child pornography on the cell phone; and (2) if so, whether HSI found any different or additional child pornography on the cell phone. Johnson's Motion to Suppress simply moves the Court to issue an order suppressing all evidence produced "from searches of a cell phone seized at the time of his [Johnson's] 2017 arrest." Dkt. 44. It does not indicate who did the initial search of the phone. Johnson's Memorandum in Support of Motion to Suppress states that the charges against Johnson "are based upon the discovery of six images of alleged child pornography on a cell phone recovered at the time of Mr. Johnson's arrest." Dkt. 44-1, at 1. The time of the arrest was November 29, 2017. The Memorandum goes on to say that "U.S. Probation Officer Robert Bradley turned over a Samsung cell phone recovered from Mr. Johnson to HSI Special Agent Chris Cutler." *Id.*, at 2-3. Next, the Memorandum states that on November 30, 2017, HSI did a forensic preview and recovered six images of suspected child pornography. Finally, the Memorandum states that two months later in January 2018, HSI did another search, pursuant to a new warrant, but did not find any new pictures. Johnson wants the Court to exclude the six images of suspected child pornography.

The "Additional Supervised Release Terms" imposed by Judge Winmill in Case No. 09-cr-00287-001-BLW include the following language quoted by the defense:

> The defendant shall submit his or her person, property, house, residence, vehicle, (as defined in 18 1030(e)(1)), other electronic communications or data storage devices or media, or office, to search conducted by a United States probation officer. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition.

Based upon this language, Johnson argues that the searches of his phone by HSI violated his constitutional rights because those searches were not performed by a United States probation officer as required by the above quoted language. However, another paragraph in the "Additional Supervised Release Terms" issued by Judge Winmill states:

> The defendant shall comply with the requirements of the United States Probation Computer Monitoring Program as directed. The defendant shall consent to the United States Probation Office conducting ongoing monitoring of his computer(s) hardware, software, and other electronic devices/media. The monitoring may include the installation, at the defendant's expense, of hardware or software systems which allows evaluation of his computer use. Monitoring may also include the retrieval and copying of all data from his computer or other electronic devices/media. Monitoring may occur at any time with or without reasonable suspicion of violations of supervised release or probation.

According to the Government, when arrested, on November 29, 2017, "Probation Officers discovered Johnson possessed a Samsung cellular telephone containing six images of child pornography." Dkt. 50, at 5. It is unclear if the probation officers knew on November 29, 2017, that the cell phone contained the six images or if those images were first discovered on November 30 when HSI did a preview search using specialized software.[2] Any discovery of illicit material during this initial arrest search on November 29, 2017, complied with the conditions of release and with the Fourth Amendment because it was a United States probation officer who conducted the search pursuant to Johnson's arrest and his terms of release. That evidence would clearly be admissible.

[2] The Government cites *Johnson,* 09-cr-287, Dkt. 87, p. 2, for the proposition that the probation officer found the six images on November 29, 2017. However, that document is the Judgment finding that Johnson violated the conditions of his release in 2016. It has nothing to do with the incident in November of 2017. Docket 96 in that same case is the Petition on Supervised Release that discusses the November 2017 incident. However, it simply alleges that Johnson had an electronic device in violation of his special terms of release. It does not allege that there were illicit images on that device.

Following the initial search, the US. Probation Office sought the assistance of Homeland Security Investigations (HSI) to further search and preserve the cell phone. HSI Computer Forensics Agent Thrall began a review of the phone's contents and immediately observed child pornography.[3] He stopped his review and obtained a federal search warrant for a more extensive analysis of the contents of the phone. Although the federal search warrant was obtained, a further search of the contents revealed no additional illicit photographs. It is these two searches by HSI that are subject to the motion to suppress, and then, only if probation did not discover the images first on November 29, 2017.

The Court holds that the language of the additional supervised release term quoted above, "[m]onitoring may also include the retrieval and copying of all data from his computer or other electronic devices/media," adequately covers this situation. The probation officer may retrieve data from the phone. It is reasonable to read into that language that the probation officer may elicit assistance from those law enforcement personnel who have the software and the knowledge to do the retrieval. This is consistent with the "monitoring" allowed for by the special terms and conditions.

Alternatively, as an additional basis for denying the motion to suppress, the law makes a clear distinction between individuals under arrest or on probation, and individuals on parole when it comes to Fourth Amendment rights. In support of his position, Johnson only cites cases involving persons under arrest or on probation. He does not cite any case that extends the rights afforded to such persons on parole. This is an important distinction

[3] Again, it is unclear if these six images were first found by probation on November 29, 2017. For purposes of this portion of the decision, the Court assumes these images were not found on November 29.

because, as a person on supervised release, Johnson cannot show that he had an expectation of privacy regarding his cell phone. In fact, the Ninth Circuit has held that "for purposes of an ex post facto analysis, there is absolutely no difference between parole and supervised release." *U.S. v. Paskow,* 11 F.3d 873 (9th Cir. 1993). Although this case does not involve a change in the law requiring an ex post fact analysis there is no reason to think the Ninth Circuit, in analyzing the issue here, would treat a person on supervised release any different than a parolee. Indeed, the Ninth Circuit later explained: "Supervised release and parole are virtually identical systems. Under each, a defendant serves a portion of a sentence in prison and a portion under supervision outside prison walls." *U.S. v. Gavilanes-Ocaranza,* 772 F.3d 624 (9th Cir. 2014).

The United States Supreme Court has explained that parolees (hence, persons on supervised release) have fewer expectations of privacy than probationers because parole is more akin to imprisonment than probation is to imprisonment. *Samson v. U.S.,* 547 U.S. 843, 850 (2006). The *Samson* court went on to hold: "We conclude that the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee." *Id.* at 856.

The cases relied upon by Johnson, *Riley v. California,* 573 U.S. 373 (2014) and *U.S. v. Lara,* 815 F.3d 605 (9th Cir. 2016), do not apply here. *Riley* involved a person under arrest. *Lara* involved a person on probation. Johnson is on supervised release and has less protected Fourth Amendment rights than in either of those two cases. Johnson knew that probation officers could search his phone without cause, as a special term of his supervised release. He had no expectation of privacy regarding his phone.

The fact that HSI did the forensic search and retrieval of images on the cell phone rather than a U.S. probation officer does not change the fact that the search was proper.[4] As stated by the Ninth Circuit, "police and parole officers are entitled to work together to achieve their objectives, concerted action does not in and of itself make a search constitutionally infirm." *U.S. v. Harper,* 928 F.2d 894, 897 (9th Cir. 1991), *overruled on other grounds by U.S. v. King,* 687 F.3d 1189 (9th Cir. 2012) (per curiam).[5] The real question is whether probation improperly used its authority to help police evade the Fourth Amendment or simply enlisted the police to assist probation's legitimate objectives. The facts of this case make it clear that probation brought in HSI to assist in probation's legitimate objectives. The fact that new charges arose out of HSI's assistance does not change the original legitimate objectives or make the search unconstitutional.

V. CONCLUSION

Any illicit evidence discovered on Johnson's phone during his arrest on November 29, 2017, is clearly admissible. Further, the probation officer's reliance on HSI for "the retrieval and copying of all data from his computer or other electronic devices/media" is reasonable under Johnson's release terms. In any event, Johnson did not have a reasonable

[4] The Government argues that the probation officers discovered the illicit images and then had HSI do the forensic search. As discussed above, this is not at all clear in the record. However, the analysis here does not change based upon whether probation found the six images or HSI found them. It was proper for probation to have HSI assist in the search.

[5] The grounds on which *Harper* was overruled are the grounds discussed above regarding the difference between Fourth Amendment rights of probationers and parolees. Prior to *King*, the Ninth Circuit held that there was no difference. In *King,* the Ninth Circuit recognized that *Samson* held that parolees have fewer expectations of privacy than probationers.

expectation of privacy regarding his phone because he was on supervised release. Thus, the motion to suppress is denied.[6]

VI. ORDER

IT IS HEREBY ORDERED THAT:

1. Johnson's Motion to Suppress (Dkt. 44) is DENIED.

DATED: October 4, 2019

David C. Nye
Chief U.S. District Court Judge

[6] The Court's decision that the search was constitutionally permissible makes it unnecessary to address the Government's alternative arguments of the Second Look Doctrine and the Good Faith Doctrine. However, the Court notes that the lack of evidence in the record that probation found the six images before turning the phone over to HSI makes the Second Look Doctrine inapplicable under the existing facts.