# ESTATE NOTICES

The Register of Wills has granted letters testamentary or of administration in the following estates. Notice is hereby given to all persons indebted thereto to make payment without delay and to those having claims or demands to present them for settlement to the Executors or Administrators or their attorneys.

## FIRST PUBLICATION

**CUMMINS**, **ALAN R.**, a/k/a **ALAN REED CUMMINS**, late of McDonald, Washington Co., PA; Executrix: Debra J. Miller, PO Box 38, Flinton, PA 16640; Attorney: Richard J. Amrhein, Peacock Keller, LLP, 70 East Beau St., Washington, PA 15301

**GALAJDA**, **JOHN MICHAEL**, a/k/a **JOHN MICHAEL CAMERSENI GALAJDA** a/k/a **JOHN GALAJDA**, late of Canonsburg, Washington Co., PA; Administratrices: Ellen E. Erikson, 2257 Buck Mountain Road, Weatherly, PA 18255; Bernadette Shickora, Rear 15 Oak Street, Tresckow, PA 18254; Attorney: Daniel A. Miscavige, Gillespie Miscavige, 67 North Church Street, Hazelton, PA 18201

**GENT**, **RUTH MAE**, a/k/a **RUTH MAE McADAMS HULL GENT** a/k/a **RUTH M. HULLL**, late of Amwell Township, Washington Co., PA; Executrix: Heather S. White, 221 East Shenango Street, Sharpsville, PA 16150; Attorney: Daniel P. Gustine, Peacock Keller, LLP, 70 East Beau St., Washington, PA 15301

**KOTECKI**, **MOLLIE A.**, late of Union Township, Washington Co., PA; Executrix: Donna R. Mitchell, 6303 Jack Street, Finleyville, PA 15332; Attorney: James W. Haines, Jr., 1202 West Main Street, Monongahela, PA 15063

**SIMS**, **PAUL L.**, late of Marianna, Washington Co., PA; Executor: David M. Sims, 481 Sugar Run Road, Eighty Four, PA 15330; Attorney: Daniel P. Gustine, Peacock Keller LLP, 70 East Beau St., Washington, PA 15301

**SPARKS**, **LORI A.**, late of Donegal Township, Washington Co., PA; Executrices: Megan Hammond, 1105 Grant Street, Bulger, PA 15019; Hollie Sparks, PO Box 665, 211 Main St., Rear, Claysville, PA 15323

**LOMBARDO, III**, **JOHN**, a/k/a **JOHN ROBERT LOMBARDO, III** a/k/a **JOHN R. LOMBARDO, III**, late of Washington Co., PA; Administratrix: Crystal Sandell, c/o George C. Entenmann; Attorney: George C. Entenmann, 300 Mt. Lebanon Blvd., Ste 208C, Pittsburgh, PA 15234

## SECOND PUBLICATION

**BRAUN, JR.**, **THOMAS M.**, a/k/a **THOMAS M. BRAUN**, late of South Strabane Township, Washington Co., PA; Executor: Eric T. Braun, 147 Chestnut Street, Brave, PA 15316; Attorney: Eva H. Ahern, Peacock Keller, LLP, 70 East Beau St., Washington, PA 15301

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**MARTIN**, **RALPH W.**, a/k/a **WILLIAM MARTIN** a/k/a **R. WILLIAM MARTIN**, late of Claysville, Washington Co., PA; Executrix: Christy Lynn Martin nka Christy Lynn Viveros, 98 Christman Avenue, Washington, PA 15301; Attorney: Jeffrey P. Derrico, Greenlee Derrico Posa, LLC, 60 East Beau St., Washington, PA 15301

**NICHOLS, SR.**, **LOUIS R.**, late of Charleroi, Washington Co., PA; Executor: Louis Nichols, Jr., 19 Vernon Drive, Charleroi, PA 15022; Attorney: Dennis R. Paluso, 230 Fallowfield Avenue, Charleroi, PA 15022

**PARTOZOTI**, **ALBERT W.**, a/k/a **ALBERT W. PARTOZOTI, JR.** a/k/a **ALBERT WILLIAM PARTOZOTI aka ALBERT PARTOZOTI, JR.**, late of Mt. Pleasant Township, Washington Co., PA; Executrix: Ramona M. Galbraith aka Ramona Mae Galbraith, 411 East Lincoln Avenue, McDonald, PA 15057

**POZZI**, **MARCELLA**, a/k/a **MARCELLA LOUISE POZZI**, late of Cecil, Washington Co., PA; Executrix: Kathy Cannon, 783 Dry Ridge Road, West Alexander, PA 15376; Attorney: Kristen Anders Bojarski, Shah Law Group, P.C., 5824 Library Road, Bethel Park, PA 15102

**STANISH**, **EMIL**, late of Washington, Washington Co., PA; Executrix: Connie D. Stanish, 5113 Long Pointe Road, Wilmington, NC 28404; Attorney: Robert J. Garvin, Goldberg, Kamin & Garvin, 1806 Frick Bldg., 437 Grant St., Pittsburgh, PA 15219

**WAGERS**, **RANDY LEE**, a/k/a **RANDY L. WAGERS**, late of Washington, Washington Co., PA; Executor: Randy Lee Wagers, Jr., c/o Kusturiss, Wolf & Kusturiss, 12 N. Jefferson Avenue, Canonsburg, PA 15317; Attorney: Steven R. Wolf, Kusturiss, Wolf & Kusturiss, 12 N. Jefferson Avenue, Canonsburg, PA 15317

**WILLIAMSON**, **DOLORES BERDINE**, a/k/a **DOLORES B. WILLIAMSON** a/k/a **DOLORES WILLIAMSON**, late of Jefferson Township, Washington Co., PA; Administrator CTA: Carlos James O'Brien, c/o Akman & Associates, LLC; Attorney: L. Dawn Haber, Akman & Associates, LLC, 345 Southpointe Blvd., Ste 100, Canonsburg, PA 15317

## THIRD PUBLICATION

**ACCETTURO**, **DANIEL JOHN**, late of Canonsburg, Washington Co., PA; Executrix: Janet A. Rice, c/o Frank C. Roney, Jr.; Attorney: Frank C. Roney, Jr., Edward C. Morascyzk, 382 W. Chestnut Street, Ste 102, Washington, PA 15301

**FRANZ**, **PATRICIA F.**, a/k/a **PATRICIA A. FRANZ**, late of Canonsburg, Washington Co., PA; Executrix: Krista A. Adzima fna Krista A. Franz, 5 Pristine Place, Canonsburg, PA 15317; Attorney: James P. Liekar, 38 West Pike Street, Canonsburg, PA 15317

**HARRIS, JR.**, **CARL**, late of Smith Township, Washington Co., PA; Administratrix: Donna H. Brenlove, 1326 Morrow Road, Pittsburgh, PA 15241; Attorney: Todd A. Fuller, Brenlove & Fuller, LLC, 401 Washington Avenue, Bridgeville, PA 15017

**INSANA**, **MARY LOU**, late of Washington, Washington Co., PA; Executrix: Cheryl Knestrick, 34 Guinn Drive, Washington, PA 15301; Attorney: Thomas O. Vreeland, Bassi, Vreeland & Associates, P.C., 62 East Wheeling Street, Washington, PA 15301

**KWIATKOWSKI**, **MICHAEL G.**, late of Finleyville, Washington Co., PA; Executrix: Dianne C. Kwiatkowski, c/o Kusturiss, Wolf & Kusturiss, 12 North Jefferson Ave., Canonsburg, PA 15317; Attorney: Steven R. Wolf, Kusturiss, Wolf & Kusturis, 12 North Jefferson Ave., Canonsburg, PA 15317

**NAVROTSKI**, **FLORENCE**, a/k/a **FLORENCE SILKO** a/k/a **FLORENCE IRENE NAVROTSKI** a/k/a

**FLORENCE SILKO NAVROTSKI aka FLORENCE I. NAVROTSKI**, late of Nottingham Township, Washington Co., PA; Executrix: Karen S. Owens, 1539 Center Road, Lancaster, PA; Attorney: Susan M. Key, Peacock Keller & Ecker, LLP, 70 East Beau St., Washington, PA 15301

**VITCHOFF**, **LORRAINE G.**, a/k/a **LORRAINE GAYLE VITCHOFF** a/k/a **LORRAINE VITCHOFF**, late of California Borough, Washington Co., PA; Executor: John Vitchoff, c/o Hajduk & Associates; Attorney: Mary Lenora Hajduk, 77 South Gallatin Avenue, PO Box 1206, Uniontown, PA 15401

A probation and parole officers may conduct a warrantless search of a probationer's or parolee's property when there is reasonable suspicion that the property contains contraband or other evidence of violations of the probation terms.

A probation officer's warrantless seizure and search for evidence is impermissible if the probation officer acts on behalf of a police officer. Essentially, the probation officer assists the police (stalking horse) by statutorily circumventing the warrant requirement, based on reasonable suspicion, instead of the heightened standard of probable cause.

Although police informed the probation officer that the Defendant/probationer was under investigation for new crimes and requested the seizure of the Defendant's phone if found in violation of his probation terms, the probation officer's seizure and search of the probationer's cell phone did not constitute a stalking horse for the police. The probation officer had independent reasonable suspicion to believe that the probationer's cell phone contained evidence of violations of the conditions of supervision because the probationer tested positive for marijuana at a compliance meeting scheduled prior to the probation officer knowing the probationer was under investigation by the police, the probation officer had recently received reports from law enforcement and from neighbors that traffic was going in and out of the probationer's house, and the probationer had a history of positive drug tests. The probation officer's search was reasonably related to her duty to investigate a suspected probation violation based upon her supervisory experience. *Riley v. California*, 134 S.Ct. 2473 (2014) is not applicable.

Parolees and probationers do not forego their Fifth Amendment rights against self-incrimination during a custodial interrogation simply because they were convicted of a crime.

A probationer must invoke his privilege against self-incrimination when questioned during routine probation interviews, as the privilege is not self-executing, and a probation requirement to appear at the meeting and be completely honest does not violate a probationer's Fifth Amendment rights.

The probationer Fifth Amendment rights were not violated when passcode to the cell phone was requested and provided without *Miranda* warnings. The meeting between the probation officer and probationer was not a custodial interrogation because no police officers took part in their meeting, the meeting was scheduled as a regular compliance check, the probation officer did not accuse the probationer of any new crimes as a result of the search, and the compliance check was related to his use and involvement with controlled substances (the exact nature of the charges in his probation case), and the probation officer did not persistently interrogate the Defendant about the contents of his phone or threaten the Defendant if he did not produce the passcode.

**ORDER**

**AND NOW**, this 11th day of June 2018, it is hereby ORDERED, ADJUDGED, and DECREED that the Defendant's Motion to Suppress Evidence is **DENIED**. There shall be a pre-trial conference on **June 29th, 2018 at 9:30 A.M.** in Courtroom # 4.

By way of further explanation, on June 26, 2017, Detective Chad Zelinsky of the Charleroi Regional Police Department filed a criminal complaint against the Defendant charging him with one count each of the following offenses: (1) Drug Delivery Resulting in Death (F-1); (2) Manufacture, Delivery, or Possession with Intent to Manufacture or Delivery a Controlled Substance or Drug; (3) Criminal Use of a Communication Facility (F-3); (4) Criminal Conspiracy (F); (5) Possession of a Controlled Substance; (6) Manufacture, Delivery, or Possession with Intent to Manufacture or Deliver a Controlled Substance or Drug; and (7) Possession of a Controlled Substance. The Defendant was also charged with three counts of Recklessly Endangering Another Person (M2). On August 4, 2017, Magisterial District Judge (MDJ) Larry Hopkins presided at a central court hearing and at the conclusion of that hearing, the MDJ granted the Defendant's request to dismiss counts 6 and 7 on the grounds that Washington County was not the proper venue. All other charges were held for court.

On August 17, 2017, the Commonwealth filed a Petition for Writ of Certiorari / Notice of Appeal from Minor Judiciary with the Washington County Court of Common Pleas. Therein, the Commonwealth argued that the MDJ exceeded his authority by dismissing counts 6 and 7 on the basis of improper venue. This Court scheduled a hearing on the matter for October 2, 2017, which was rescheduled to October 12, 2017, and gave the Defendant until October 5, 2017 to respond to the Commonwealth's request. After the scheduled hearing date, this Court issued an order granting the Commonwealth's request and reversed the minor judiciary's decision to dismiss counts 6 and 7, as well as directed the minor judiciary "to transmit an amended docket transcript reflecting that count 6 and count 7 of the criminal complaint are held for court."

On November 8, 2017, the Commonwealth filed a Bill of Information containing all ten of the aforementioned charges. Subsequently, on November 27, 2017, the Defendant was then formally arraigned. On December 27, 2017, the Defendant's counsel filed a Motion to Suppress Evidence and the Court scheduled a suppression hearing for March 8, 2018. The suppression hearing was rescheduled to April 6, 2018, however, and at the conclusion of that hearing, the parties requested that they be permitted to submit their final arguments via written briefs. The request was granted and the parties have timely submitted their briefs. Therefore, the matter is ripe for disposition.

The suppression hearing transcript reveals the following facts. On April 2, 2017, Mark Farrell ingested a fatal dose of heroin laced with fentanyl and died in Speers Borough. Suppression Hearing Transcript, 5–6, April 6, 2018 [hereinafter S.H.T.]. As part of Detective Zelinsky's investigation into Mr. Farrell's death, he seized and searched the electronic contents of the decedent's cell phone to determine who may have supplied the decedent with the fatal drugs. *See id.* at 6–7. The cell phone search indicated that the decedent had been communicating with Eugenio Tarquino, among others, in the days preceding his death. *See id.* at 7, 25. Detective Zelinsky decided to interview Mr. Tarquino, who acknowledged that he recently purchased heroin from the Defendant. *See id.* at 7–11. Further, Mr. Tarquino provided the cell phone number that he and Mr. Farrell used to contact the Defendant to make the purchase. *See id.* at 11.

During Detective Zelinsky's investigation into whether the Defendant actually utilized the cell phone number Mr. Tarquino provided, the Defendant was being supervised by the Washington County Adult Probation Office. *See id.* at 11–12. So, on the morning of April 20, 2017, Detective Zelinsky met with the Defendant's probation officer, Heather Testa, to verify the Defendant's cell phone number.[1] *See id.* As a result of this meeting, Detective Zelinsky learned that the cell phone number that the Defendant provided to P.O. Testa was the same number Mr. Tarquino gave for the Defendant when Detective Zelinsky questioned Mr. Tarquino. *See id.* at 12. Consequently, Detective Zelinsky advised P.O. Testa that the Defendant was under investigation for delivering a controlled substance that caused a person's death. *See id.* P.O. Testa informed Detective Zelinsky that she had a pre-scheduled meeting with the Defendant at approximately 11 A.M. on that same day at the Donora police station to determine the Defendant's probation compliance.[2] *See id.* at 13, 49, 50. Further, P.O. Testa informed Detective Zelinsky that she had already warned the Defendant that she would violate his parole if he failed a drug screen because he had provided "dirty urine" in the past. *See id.* at 13. In response, Detective Zelinsky "advised" P.O. Testa that if she were to violate the Defendant, to seize his cell phone. *See id.*

At around 11 A.M., P.O. Testa met with the Defendant at the Donora police station. *See id.* at 49, 51. Detective Zelinsky was not present during P.O. Testa's meeting with the Defendant. *See id.* at 14. Further, no Donora police officer was involved when P.O. Testa met with the Defendant, despite the fact that Donora police officers were present at the station working while P.O. Testa conducted the Defendant's compliance meeting. *See id.* at 15, 53, 56.

P.O. Testa testified that she told the Defendant that she wanted him to provide a urine sample. *See id.* at 54. The Defendant's urine sample came back positive and indicated that he had marijuana in his system. *See id.* at 58–59, 65, 79. As a result of the positive urine test on April 20th, as well as the reasons mentioned below, P.O. Testa requested to go through the Defendant's cell phone. *See id.* at 54. P.O. Testa stated that she requested the Defendant's cell phone to look for further evidence of probation violations for the following reasons:

1. The Defendant had 4 prior urine violations (December 7, 2016, January 9, 2017, April 6, 2017 and April 13, 2017) showing marijuana in his system;
2. A compliance check at the Defendant's residence on March 9, 2017 revealed a strong odor of marijuana;
3. At least two reports from Donora Police Chief, Jim Bryce, that there was drug activity going on in and out of the Defendant's house, as well as complaints from neighbors to law enforcement regarding said traffic;

1. On October 14, 2016, the Defendant pled guilty to possession of heroin (an ungraded misdemeanor), and was sentenced to probation for a period of 12 months.

2. P.O. Testa testified that she would regularly meet the Defendant, and other parolees and probationers, at the Donora police station for their convenience. *See* Suppression Hearing Transcript, 50, April 6, 2018. As P.O. Testa stated, it was much easier for her to travel to Donora to meet Donora-area parolees and probationers since many had difficulty finding transportation to the City of Washington. *See id.*

4. The Defendant was in a car accident on March 10, 2017 wherein it was revealed he was under the influence of marijuana, oxycodone, and benzodiazepine; and
5. The Defendant was passed out in his car at a Rostraver McDonald's drive-through on April 2, 2017.[3]

*See id.* at 57–62.

With respect to the cell phone, P.O. Testa testified that the Defendant was initially "argumentative" and did not want to provide her with the passcode to gain access to the phone. *See id.* at 55. However, once P.O. Testa informed the Defendant that he would have to "explain to his judge why he was not willing to cooperate and provide his cell phone," he complied and verbally provided her with the passcode. *Id.*

As a result of the dirty urine sample and apparent evidence of drug activity located on the Defendant's cell phone, P.O. Testa concluded that the Defendant violated his probation and detained him. *See id.* at 59, 65. Thereafter, P.O. Testa contacted Detective Zelinsky to inform him she had seized the Defendant's cell phone. *See id.* at 17, 66. Detective Zelinsky then came to the Donora police station to secure the Defendant's phone and placed it on "airplane mode" so that its contents could not be deleted or compromised remotely. *See id.* at 18, 66–67. After placing the phone on "airplane mode," Detective Zelinsky deposited it in a secured locker at the Charleroi police station. *See id.* at 33, 36. On May 19, 2017, a federal search warrant was effectuated to search the Defendant's cell phone. *See id.* at 21, 33. According to Detective Zelinsky, only thereafter did he conduct a search and learned of the contents therein. *See id.* at 23, 33–34.

As noted above, MDJ Hopkins held all of the charges for Court besides counts 6 and 7, which were later reinstated by the undersigned. On December 27, 2017, the Defendant's counsel filed a Motion to Suppress Evidence. Therein, the Defendant asserts that any evidence contained in the phone must be suppressed for the following reasons:

1) No probable cause existed to seize the cell phone because P.O. Testa was acting as a "stalking horse" for the police (i.e., that she was acting on the orders of law enforcement);
2) The illegal seizure tainted the subsequent search of the Defendant's cell phone;
3) P.O. Testa used coercive tactics to obtain the phone and its passcode to review the contents therein;
4) The Defendant was not *Mirandized* when his cellphone was seized because incriminating information was contained therein;
5) The Defendant was coerced into making certain remarks to P.O. Testa, who exceeded her authority as a probation officer, and acted as an agent for the Charleroi Police Department.

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3. At this time, it was suspected that the Defendant was under the influence of drugs or alcohol. When the police requested that the Defendant provide his identification, he handed them a McDonald's cup. No charges resulted from the McDonald's incident, however, because the Monessen Police Department answered the call as a courtesy to the Rostraver Police Department. *See id.* at 58–59. Additionally, P.O. Testa cited the same reasons for violating the Defendant at his probation revocation hearing on October 12, 2017. *See* Revocation Hearing Transcript, 5–6; 15–16, October 12, 2017.

*See* Defendant's Motion to Suppress Evidence ¶ 13.

The Court can only answer the Defendant's claims by first addressing the Defendant's status as a probationer and P.O. Testa's supervisory powers as it relates to a probationer. The statute governing a probation officer's powers, the supervisory relationship between probation officers and probationers, and a probationer's rights at the time of the search in this case reads as follows, in relevant part:

> § 9122. **Supervisory relationship to offenders**
> (a) General rule.—Officers are in a supervisory relationship with their offenders. The purpose of this supervision is to assist the offenders in their rehabilitation and reassimilation into the community and to protect the public.
> (b) Searches and seizures authorized.—
>
> (1) Officers and, where they are responsible for the supervision of county offenders, may search the person and property of offenders in accordance with the provisions of this section.
>
> * * *
>
> (c) Effect of violation.—No violation of this section shall constitute an independent ground for suppression of evidence in any probation and parole or criminal proceeding.
> (d) Grounds for personal search.—
>
> (1) A personal search of an offender may be conducted by an officer:
>
> (i) if there is a reasonable suspicion to believe that the offender possesses contraband or other evidence of violations of the conditions of supervision;
> (ii) when an offender is transported or taken into custody; or
> (iii) upon an offender entering or leaving the securing enclosure of a correctional institution, jail or detention facility.
>
> (2) A property search may be conducted by an officer if there is reasonable suspicion to believe that the real or other property in the possession of or under the control of the offender contains contraband or other evidence of violations of the conditions of supervision.
> (3) Prior approval of a supervisor shall be obtained for a property search absent exigent circumstances. No prior approval shall be required for a personal search.
> (4) A written report of every property search conducted without prior approval shall be prepared by the officer who conducted the search and filed in the offender's case record. The exigent circumstances shall be stated in the report.
> (5) The offender may be detained if he is present during a property search. If the offender is not present during a property search, the officer in charge of the search shall make a reasonable effort to provide the offender with notice of the search, including a list of the items seized, after the search is completed.
> (6) The existence of reasonable suspicion to search shall be determined in accordance with constitutional search and seizure provisions

> as applied by judicial decision. In accordance with such case law, the following factors, where applicable, may be taken into account:
>
> (i) The observations of officers.
> (ii) Information provided by others.
> (iii) The activities of the offender.
> (iv) Information provided by the offender.
> (v) The experience of the officers with the offender.
> (vi) The experience of officers in similar circumstances.
> (vii) The prior criminal and supervisory history of the offender
> (viii) The need to verify compliance with the conditions of supervision.
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> * * *

42 Pa.C.S.A. § 9912 (effective October 13, 2009 to September 18, 2016); *see also* 42 Pa.C.S.A. § 9913 (explaining that a probation officer is declared to be a peace officer and shall have police powers and authority to arrest, with or without warrant, writ, rule or process, any person on probation under supervision of court for failing to report as required by terms of that person's probation, or for any other violation of that person's probation).

Section 9912(d)(2) addresses the conditions under which a probation officer may "conduct a warrantless search, including a requirement that the probation officer must possess reasonable suspicion that the property contains contraband or other evidence of violations of the probationer's terms of probation." *Commonwealth v. Wilson*, 67 A.3d 736, 744 (Pa. 2013). "The policy behind [Section 9912] is to assist the offenders in their rehabilitation and reassimilation into the community and *to protect the public*." *Commonwealth v. Moore*, 805 A.2d 616, 620 (Pa. Super. Ct. 2002) (emphasis added in the original). "Essentially, Section 9912 authorizes county probation officers to search a probationer's person or property, if there is reasonable suspicion to believe the probationer possesses contraband or other evidence of violations of the conditions of supervision." *Commonwealth v. Chambers*, 55 A.3d 1208, 1214 (Pa. Super. Ct. 2012) (citing 42 Pa.C.S.A. § 9912(d)(1)(i), (d)(2)). "Reasonable suspicion to search must be determined consistent with constitutional search and seizure provisions as applied by judicial decisions; and in accordance with such case law, enumerated factors, where applicable, may be taken into account." *Id.* (citing 42 Pa.C.S.A. § 9912(d)(6)). Our Superior Court has stated:

> In establishing reasonable suspicion, the fundamental inquiry is an objective one, namely, whether the facts available to the officer at the moment of the intrusion warrant a [person] of reasonable caution in the belief that the action taken was appropriate. This assessment, like that applicable to the determination of probable cause, requires an evaluation of the totality of the circumstances, with a lesser showing needed to demonstrate reasonable suspicion in terms of both quantity or content and reliability.

*Moore*, 805 A.2d at 619–20 (internal citations and quotation marks omitted).

Pennsylvania courts have, however, invalidated a probation officer's seizure and search for evidence if the probation officer is effectively acting for a police officer. *See Commonwealth v. Altadonna*, 817 A.2d 1145 (Pa. Super. Ct. 2003). Under these circumstances, the courts have called the probation officer a "stalking horse." *Id*. Essentially, the probation officer assists the police by "statutorily circumventing the warrant requirement, based on reasonable suspicion, instead of the heightened standard of probable cause." *Commonwealth v. Parker*, 152 A.3d 309, 320 (Pa. Super. Ct. 2016) (citing *Altadonna*, 817 A.2d at 1152–53). *But see Commonwealth v. Brown*, 361 A.2d 846, 850 (Pa. Super. Ct. 1976) (holding that a parole officer was acting as a stalking horse for police where appellant's parole officer arrived at appellant's home along with two police officers and appellant's employer, without an arrest or search warrant, based on suspicion that appellant had stolen electronic goods from his employer; parole officer had asked police to assist him in arresting appellant). In *Altadonna*, the Superior Court found that the probation officers were not acting as a "stalking horse" when, after receiving information that the probationer was dealing drugs, they decided to stop and search appellant to determine whether appellant had violated his parole, and parole officers merely requested assistance from Bureau of Narcotics Investigation officers due to possible jurisdictional uncertainty that might have occurred during the investigation. *See Altadonna*, 817 A.2d.

The Court also finds instructive the case of *Commonwealth v. Murray*, 174 A.3d 1147 (Pa. Super. Ct. 2017), where the evidence established that a parole agent's search of a parolee's cell phone was based on reasonable suspicion that the parolee had committed a parole violation.[4] At the suppression hearing, the parole agent testified that the parolee admitted to possessing a firearm. *See id.* at 1156. The parole agent also testified that based on his prior experience, he believed the parolee's cell phone "could contain additional evidence of a parole violation, such as 'conversations in reference to the firearm that [Murray] was speaking about' or 'photographs of [Murray] with the firearm.'" *See id.* at 1156 (citations omitted). As a result, the Superior Court determined that the parole agent's search of the parolee's cell phone for "text messages and photos was reasonably related to his duty to investigate a suspected parole violation." *Id*. (citing *Commonwealth v. Colon*, 31 A.3d 309, 316 (Pa. Super. Ct. 2011); *Commonwealth v. Koehler*, 914 A.2d 427, 434 (Pa. Super. Ct. 2006)).

Herein, the Court finds that P.O. Testa was not acting at the behest of law enforcement as a "stalking horse." The Defendant's argument relies heavily on P.O. Testa's testimony during cross-examination by defense counsel, Attorney Ryan Tutera, at the Revocation Hearing regarding her role in the seizure of the Defendant's cell phone. The questioning went as follows:

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4. The statute defining authority of a state probation officer and his/her relationship to the probationers and parolees they supervise is 61 Pa.C.S.A. § 6153. This statute is identical in all material aspects to the statute governing the authority of county probation officers and their relationship to the probationers and parolees they supervise. *See* 42 Pa.C.S.A. § 9122.

Q. Were you ordered by the detectives in Charleroi or the United States government to make sure that you got [the Defendant's] phone?
A. was asked to go through his phone, yes.

Revocation Hearing Transcript, 16, October 12, 2017.

During the suppression hearing, however, P.O. Testa testified on direct examination that she was "never instructed to [seize the cell phone]." S.H.T., 51, April 6, 2018. Rather, P.O. Testa claimed that she "misspoke at the Gag II hearing," and acknowledged that a discussion took place about "if he was found to be in violation of his probation, to seize his phone and contact Detective Zelinsky." *Id.* Similarly, during P.O. Testa's cross-examination at the suppression hearing, she stated, "[Mr. Moschetta and Detective Zelinsky] told me that if he was in violation of probation, to seize his phone, and then contact them." *Id*. at 71.

P.O. Testa found the Defendant to be in violation because his urine sample came back positive for marijuana. *See id.* at 54, 65. Additionally, when P.O. Testa requested the Defendant to provide her with his cell phone, she found text messages evidencing drug activity, which also supported violating the Defendant. *See id.* at 65. Once the Defendant was violated and detained, P.O. Testa contacted Detective Zelinsky so that he could seize the Defendant's cell phone. *See id.* at 66. Consequently, the Court believes that P.O. Testa was not acting as a "stalking horse" for the Charleroi Police Department. Instead, the Court finds that P.O. Testa would only seize the Defendant's cell phone if he were found to be in violation of the terms of his probation. This conclusion is supported by the fact that the weekly supervisory/compliance meeting on April 20, 2017 between P.O. Testa and the Defendant was scheduled before P.O. Testa knew of Detective Zelinsky's investigation into Mr. Farrell's death. *See id.* at 49. Additionally, the compliance meeting only involved P.O. Testa and the Defendant; no police officers were included. *See id.* at 20, 53. Further, at this compliance meeting, P.O. Testa drug tested the Defendant, who tested positive for marijuana, and found additional evidence of a probation violation, that being apparent drug trafficking activity on the Defendant's cell phone. *See id.* at 59, 65. With respect to requesting the Defendant's cell phone and looking at its contents, P.O. Testa stated that she requested the phone because of the Defendant's "supervision history, positive drug tests, . . . reports from law enforcement and reports from neighbors that traffic was going in and out of [his] house." *See id.* at 56. The Court's conclusion is also supported by the fact that the affidavit of probable cause for the search/seizure warrant issued by Federal Magistrate Judge Lisa Lenihan never mentioned anything about P.O. Testa or what she found within the Defendant's cell phone. *See* Exhibit 1.[5] This lends credence to P.O. Testa's testimony that she did not

5. The Defendant's claim that the seizure of the cell phone was illegal because Detective Zelinsky held the cell phone without probable cause for approximately 29 days before procuring a search warrant is denied. *See Commonwealth v. Mosley*, 114 A.3d 1072, 1081 (Pa. Super. Ct. 2015) (where arresting police officer failed to obtain search warrant before viewing text messages on cell phone seized incident to the defendant's arrest, but a different officer prepared the warrant and he never discussed the contents with the arresting officer, any improper viewing of messages was harmless error "because a valid warrant was subsequently issued to search the phone[ ]").

share any information she gathered from the Defendant's cell phone with Detective Zelinsky. *See* S.H.T. at 80.

In conclusion, this Court finds that P.O. Testa was acting on her own, albeit with information provided by Detective Zelinsky, and that based upon her experiences, the warrantless search and seizure of the Defendant's cell phone was constitutional because her prior supervisory experience with the Defendant provided "reasonable suspicion to believe" that it "contain[ed]…evidence of violations of the conditions of supervision." 42 Pa. C.S.A. § 9122(d)(2); *Murray*, 174 A.3d at 1156. As the Superior Court concluded in *Murray*, P.O. Testa's search was "reasonably related to [her] duty to investigate a suspected … violation." *Murray*, 174 A.3d at 1156.

The Defendant also raised the defense that the government does not possess the authority to search a cell phone for data without a warrant during a search incident to arrest. *See Riley v. California*, 134 S.Ct. 2473 (2014). The Defendant herein, however, was a probationer; he was already convicted of crimes and subject to close court supervision and *Riley* is inapplicable where the Defendant's status is a parolee or probationer. *See Murray*, 174 A.3d at 1156.

Regarding the Defendant's claim that P.O. Testa should have read him his *Miranda* warnings prior to requesting the cell phone passcode, the Court must determine whether a probationer's Fifth Amendment rights are qualified in any manner. The Pennsylvania Supreme Court addressed this issue in *Commonwealth v. Cooley*, 118 A.3d 370 (Pa. 2015), and heavily relied upon the U.S. Supreme Court case of *Minnesota v. Murphy*, 465 U.S. 420 (1984). Importantly, in *Cooley*, the Pennsylvania Supreme Court first concluded that parolees and probationers do not forego their Fifth Amendment rights against self-incrimination simply because they were convicted of a crime. Our High Court found, "[They] like any other individual, must be given *Miranda* warnings when subject to custodial interrogation. Custodial interrogation is defined as 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way[.]'" *Cooley*, 118 A.3d at 376 (citing *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)). Custodial arrest is said to convey to a suspect the message that he or she has no choice but to submit to the officers' will and to confess. *See Miranda v. Arizona*, 384 U.S. 436, 456–57 (1966). The status of being a parolee or probationer is different from that of a suspect in custody. "The *Murphy* Court [] addressed the difference between custodial interrogation and a routine probation interview, determining a probationer must invoke his privilege against self-incrimination when questioned during the latter, as the privilege is not self-executing, and a probation requirement to appear at the meeting and be completely honest does not violate a probationer's Fifth Amendment rights." *Cooley*, 118 A.3d 378 (citing *Minnesota v. Murphy*, 465 U.S. 420, 429–37 (1984)).

Although the regularly scheduled interview was not at P.O. Testa's office, rather a police station, it was the same place that the Defendant and P.O. Testa had always met. As P.O. Testa explained, the Donora police station was much more convenient for the Defendant.[6] Additionally, no police officer took part in their meeting. Further, P.O. Testa did not accuse the Defendant of any new crimes as a result of the search, which was

conducted to determine the Defendant's compliance related to his use and involvement with controlled substances, the exact nature of the charges in his case. [7] Finally, P.O. Testa did not persistently interrogate the Defendant about the contents of his phone or threaten the Defendant if he did not produce the passcode. P.O. Testa merely told the Defendant that if he did not provide the passcode, he would have to "explain" his reasons for not providing it to the judge. S.H.T. at 55. [8]

For all of the above-mentioned reasons, the Defendant's Suppression Motion is denied.

BY THE COURT,
Gary Gilman, Judge

6. "It is unlikely that a probation interview, arranged by appointment at a mutually convenient time, would give rise to a similar impression. Moreover, custodial arrest thrusts an individual into 'an unfamiliar atmosphere' or 'an interrogation environment...created for no purpose other than to subjugate the individual to the will of his examiner.'" *Murphy*, 465 U.S. at 433 (citing *Miranda*, 384 U.S. at 457).

7. At CR–1577–2016, the bill of information filed against the Defendant contained the following counts: Criminal Use of Facility (F-3) (alleging the Defendant used his cell phone to arrange transactions of controlled substances); Possession of a Controlled Substance (M) (20 stamp bags of heroin). The Commonwealth and the Defendant entered into an agreement whereby the Defendant pled guilty to Possession of a Controlled Substance, 12 months of probation, a drug and alcohol evaluation, and follow through with all recommended treatment. The Criminal Use of Facility charge was *nolle prossed*.

8. "Finally, the coercion inherent in custodial interrogation derives in large measure from an interrogator's insinuations that the interrogation will continue until a confession is obtained." *Murphy*, 465 U.S. at 433.

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