08-4267-cr

To Be Argued By:
SARAH P. KARWAN

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-4267-cr

UNITED STATES OF AMERICA,
Appellant,

-vs-

THOMAS JULIUS,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

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STATEMENT OF JURISDICTION

The district court (Robert N. Chatigny, Chief United States District Judge) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231.

On August 7, 2008, the district court granted the defendant's motion to suppress the firearm that formed the basis for Count One of the Indictment. JA 3, 309-32. On August 26, 2008, the government filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). JA 3, 333.

This Court has jurisdiction over the government's appeal from the district court's order suppressing evidence under 18 U.S.C. § 3731. Consistent with § 3731, the United States Attorney has filed a certification that this appeal is not taken for purpose of delay and that the evidence that has been suppressed is a substantial proof of a fact material in the proceeding.

The Solicitor General of the United States has personally authorized this appeal.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court err in granting the defendant's motion to suppress a gun when the defendant, who was on special parole with the State of Connecticut and had absconded from supervision for four months, had no reasonable expectation of privacy in the home of a third party, where he had been hiding?

2. In the alternative, did the district court err when it concluded that parole and law enforcement officers did not have reasonable suspicion that the defendant was in the possession of contraband or weapons to justify a search under the mattress where the defendant was found lying at the time of his arrest?

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Preliminary Statement

The defendant, Thomas Julius, was charged in a two-count indictment with being a previously convicted felon in possession of a .45 caliber semi-automatic pistol and in possession of ammunition. Both the firearm and ammunition were found by parole and law enforcement officers during the arrest of the defendant on an outstanding parole-remand warrant. The defendant was arrested at his girlfriend's house, where he had been hiding after absconding from parole supervision for

approximately four months. The firearm and ammunition were found underneath the mattress that the defendant had been lying on at the time of arrest.

The defendant moved to suppress both the firearm and ammunition, claiming that they were fruits of an illegal search. The district court granted the motion in part, suppressing the .45 caliber semi-automatic pistol.

This appeal concerns whether the defendant, as an absconded parolee, had any legitimate expectation of privacy in the home of the third party, where he had been hiding. In the alternative, this appeal raises the issue of whether the search underneath the mattress by parole and law enforcement officers was supported by reasonable suspicion that the defendant possessed contraband or weapons.

For the reasons set forth below, this Court should reverse the district court's order suppressing the firearm.

Statement of the Case

On October 23, 2007, a federal grand jury sitting in New Haven, Connecticut, returned a two-count indictment charging the defendant, Thomas Julius, with felon in possession of a .45 caliber semi-automatic firearm (Count One) and in possession of 24 .45 caliber cartridges (Count Two), all in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). JA 2, 4-6.

On December 21, 2007, the defendant moved to suppress both the firearm and the ammunition identified in the indictment. JA 2.

On April 7, 2008, the district court, the Hon. Robert N. Chatigny, Chief United States District Judge, conducted an evidentiary hearing on the defendant's motion to suppress. JA 2, 7-251. The district court took the matter under advisement and directed additional briefing from the parties. JA 249-50.

On May 16, 2008, the district court denied the motion to suppress as to the ammunition, holding that the defendant's girlfriend had voluntarily consented to the search of her apartment that led to the discovery of the extended magazine containing the ammunition. JA 276-79.

On August 7, 2008, the district court granted the motion to suppress as to the firearm. JA 309-32. On August 26, 2008, the government filed a timely notice of appeal. JA 333.

Statement of Facts and Proceedings Relevant to this Appeal

A. Julius is released on special parole, and absconds from supervision.

The defendant, Thomas Julius, was sentenced in the State of Connecticut, Superior Court, to four years in prison to be followed by four years of special parole. JA 24.

In Connecticut, at the time of sentencing, a court may impose a term of "special parole" for any defendant who receives a sentence of imprisonment of more than two years. *See* Conn Gen. Stat. § 54-125e(a). The term of special parole may not be less than one year or more than ten years, unless a greater term of special parole is specifically authorized by statute. *See* Conn. Gen. Stat. § 54-125e(c).

The Connecticut Board of Pardons and Paroles maintains jurisdiction over an inmate who has been released to special parole. *See* Conn. Gen. Stat. § 54-125e(a). That board possesses "independent decision-making authority" to establish conditions of special parole and to revoke special parole, in accordance with certain established procedures. Conn. Gen. Stat. §§ 54-124a(f), 54-125e(d).

In September of 2006, the defendant was released from prison to special parole, under the supervision of Parole Officer Jose Cartagena. JA 24. The defendant's special parole conditions required him to live with an approved sponsor in an approved residence, attend weekly substance abuse treatment meetings, meet regularly with his parole officer, participate in sex offender treatment, and be electronically monitored. JA 23-25; 252-53. The defendant was also barred from possessing any firearms, illegal drugs, or narcotics, from associating with any gang members, and from consuming alcohol. *Id.* In addition, because of his previous sexual assault convictions, the

defendant was required to register with the State of Connecticut Sex Offender Registry. *Id.*[1]

In mid-October of 2006, Parole Officer Cartagena learned that the defendant missed two substance abuse meetings, had not reported for sex offender treatment, and had failed to confirm his registration with the Connecticut Sex Offender Registry. JA 26-27. Parole Officer Cartagena contacted the defendant's sponsor, who told him that the defendant had left his approved residence, had gone off electronic monitoring, and that his whereabouts were unknown. JA 26-28. Parole Officer Cartagena made a number of phone calls to the defendant on his mobile phone in an effort to get the defendant to come into the parole office, but the defendant refused to turn himself in. JA 26, 28-29. Parole Officer Cartagena then received permission from his supervisor to bring the defendant into actual custody.[2]

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[1] Under Connecticut law, certain convicted sex offenders must register their home addresses with a public registry and confirm their residence every 90 days. *See* Conn. Gen. Stat. § 54-250 *et seq.* Failure to comply with the registration requirements is a Class D felony. *See* Conn. Gen. Stat. § 54-251(e).

[2] Upon learning of a violation of special parole, a parole officer may seek a Remand to Actual Custody Order, which directs any officer to return a parolee to the actual custody of the Board of Pardons and Paroles. *See* JA 273-74 (Dep't of Corrections Administrative Directive 11.3). The Board of Pardons and Paroles may also issue a Warrant for (continued...)

Shortly thereafter, while off-duty one night, Parole Officer Cartagena observed the defendant driving an automobile in the Fair Haven section of New Haven, Connecticut. JA 29-30. Parole Officer Cartagena did not attempt to take the defendant into custody that night because Officer Cartagena was alone and off-duty. *Id.* at 24. Parole Officer Cartagena later confirmed that, even though he had observed the defendant driving a car, the defendant's license had been suspended "for quite a long time." JA 31.

After Parole Officer Cartagena was unable to find the defendant for his remand back to custody, he requested that the defendant's case be transferred to the Fugitive Unit of the Board of Pardons and Paroles. JA 30. That request was accepted. On December 26, 2006, the Board

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[2] (...continued)
Reimprisonment, which directs an officer to arrest and hold a person for a parole violation. JA 272. Pursuant to Connecticut statutory law, the request of the Commissioner of Correction or the Board of Pardons and Paroles "shall be sufficient warrant to authorize" any law enforcement officer to arrest and hold a parolee "when so requested, without any written warrant." Conn. Gen. Stat. § 54-127. Parolees remanded to actual custody have no right to bail, but instead are detained pending a hearing and order of the Board of Pardons and Parole. JA 274.

If the Board of Pardons and Paroles finds that a special parolee has violated the conditions of his or her special parole, the board may revoke that special parole and direct "the commitment of the parolee to a correctional institution not to exceed the unexpired portion of the period of special parole." Conn. Gen. Stat. §§ 54-125e (e),(f).

of Pardons and Paroles issued a Warrant for Re-Imprisonment for the defendant. JA 31.

B. Parole officers and a Deputy U.S. Marshal participating in a statewide fugitive task force arrest the defendant in the bedroom of his girlfriend's house and find the .45 semi-automatic firearm and magazine under the skewed mattress where the defendant is lying, with his hands hanging over the edge of the mattress.

In February of 2007, when the defendant had been missing for approximately four months, Parole Officer Cartagena learned from a confidential informant that the defendant was staying with a woman in the Fair Haven section of New Haven and was driving a white Integra. JA 31. Parole Officer Cartagena proceeded to drive around Fair Haven. As he turned onto English Street, a white Integra pulled out in front of him. Parole Officer Cartagena followed the car to a house on English Street, where he saw the defendant come out of the front door of a multi-family house. JA 32, 34. The defendant paused, as if he recognized Officer Cartagena's government vehicle. JA 32. Officer Cartagena explained that the defendant looked "stunned, [] it kind of seemed like if I would have gotten out of the car, he was going to run." *Id.*

Parole Officer Cartagena immediately contacted Parole Officer Daniel Barry of the Fugitive Unit and gave him a description of the car and house. JA 32-34. In light of the defendant's violent criminal history, Officer Barry decided to act on the information quickly, and planned an attempt

to apprehend the defendant the next morning. JA 37, 166-67.

The following morning, February 21, 2007, Parole Officers Cartagena and Barry met with three other state parole officers and Deputy United States Marshal Charles Wood, who was a member of a statewide fugitive recovery task force. JA 37-38. Parole Officer Cartagena briefed the other officers on the defendant's physical appearance and his criminal history, specifically identifying that the defendant had previous weapons, narcotics, and sexual assault convictions. *Id.* at 81-82, 87-88, 167.

A little after 9:00 a.m., the officers proceeded to the home on English Street. Parole Officers Cartagena and Barry and Deputy Marshal Wood went to the front of the house, while the other parole officers took positions around the perimeter of the house. JA 39. The officers knocked on the front door of the first floor apartment for several minutes, but got no response. JA 42, 89. When there was no response, they announced, "police," and continued to knock. JA 89-90. While they were knocking, a resident of the second floor apartment came down to the officers, who showed her a picture of the defendant. JA 43, 90, 169-70. The resident indicated that the defendant was in the first floor apartment. *Id.* The officers continued to knock. JA 90.

After knocking for approximately ten minutes, JA 42, 152, 169, the officers heard a female voice behind the door asking, "Who is it?" JA 44, 51. The officers responded, "police, parole officers." *Id.* Without opening the door, the

female said that she had to get dressed. *Id.* After several additional minutes, Shana Moseley, the defendant's girlfriend, opened the door. JA 44-45. Parole Officer Barry showed her a picture of the defendant and asked her where he was. Ms. Moseley indicated that the defendant was in the back bedroom and expressed concern that her son was with him. JA 47, 93. Ms. Moseley then allowed the officers to enter the apartment. JA 44-47.

The apartment contained several rooms, including a living room, kitchen, bathroom, and two bedrooms. Parole Officer Cartagena stayed with Ms. Moseley in the living room area in the front of the house, while Parole Officer Barry and Deputy Marshal Wood drew their weapons and proceeded towards the back of the house. JA 48, 95. After passing through the kitchen, Deputy Marshal Wood saw a door leading to a bedroom, where he saw the defendant. JA 95. The defendant was lying backwards on a bed, with his head towards the foot of the bed, and his arms extended out, on the far side of the bed. JA 97. Lying next to the defendant in the same manner was a young child. *Id.* The bedroom was small (approximately ten feet by ten feet) and messy, with clothes strewn about. JA 99-100, 178. There was only a small perimeter around the mattress. 100-01; 259. Deputy Marshal Wood testified that "[t]here wasn't a lot of room in there. It was pretty tight." JA 99-100; *see also* JA 178 (Parole Officer Barry testifies that the bedroom was "extremely cluttered" and a "small space with a lot of stuff all over the place").

Deputy Marshal Wood called out the defendant's street name and told him not to move. JA 101. Deputy Marshal

Wood and Parole Officer Barry then entered the bedroom and walked towards the far side of the mattress, where the defendant was lying. The two officers removed the defendant from the bed to the area near the corner of the bed. JA 102. Parole Officer Barry then handcuffed the defendant behind his back and began to move him towards the dresser at the foot of the bed. JA 102, 128-29, 180, 259.

At the same time as Parole Officer Barry was handcuffing and securing the defendant at the foot of the bed, Deputy Marshal Wood noticed clothes strewn about the floor in the area next to the bed and that the mattress was "significantly" askew from the box spring. JA 103. Deputy Marshal Wood holstered his weapon and quickly felt through the clothes on the floor for weapons or contraband, and then lifted the edge of the mattress approximately 18 inches. JA 104, 128-29. He observed a firearm lying on the top of the box spring with its handle protruding out over the edge of the box spring. JA 104, 128-29, 260.

Deputy Marshal Wood testified that his search and discovery of the firearm was "instantaneous" with taking the defendant off the bed, JA 105, 144, 152-53, adding, "I immediately looked [for weapons.] [The defendant] eventually made it to the other side of the room. But I didn't wait for him [and Officer Barry] to get on the other side of the room to look . . . Everything was within a minute. I didn't physically look through all the boxes of clothes. I kind of felt around, did a cursory search through

the clothes on the floor and then lifted the mattress within a minute's time." JA 153.

Officer Barry then removed the defendant from the bedroom to the kitchen. JA 181. Moseley was allowed to enter the bedroom to collect her son. JA 183. Deputy Marshal Wood asked Moseley for consent to search her house. Moseley agreed. JA 110-12, 261. Law enforcement officials then located an extended, high-capacity magazine with ammunition underneath the mattress on the opposite side of the bed from where the gun had been found. JA 115.

C. The defendant is charged with possessing the seized firearm and ammunition, and there is an evidentiary hearing when he moves to suppress them.

On October 23, 2007, a federal grand jury sitting in New Haven, Connecticut, returned a two-count indictment charging the defendant with being a previously convicted felon in possession of the firearm (Count One) and of the ammunition contained in the extended magazine (Count Two), both in violation of 18 U.S.C. § 922(g). JA 4-6.

On December 21, 2007, the defendant moved to suppress the firearm and the magazine on the basis that: (1) the officers' entry into the home on the basis of the warrant issued by the Board of Pardons and Paroles was invalid because the warrant had not been issued by a neutral magistrate; (2) the search was invalid because the defendant was already handcuffed at the moment the gun

was found; and (3) Moseley's subsequent consent to search the apartment, which yielded the ammunition, was not voluntarily given.

In response, the government argued that law enforcement's entry into the home was proper because Moseley consented to the entry and because the officers had an outstanding parole warrant for the defendant's arrest. With respect to the search under the mattress, the government argued that defendant had no reasonable expectation of privacy in Moseley's home because of his status as an absconded parolee. In addition, the government argued that the search underneath the mattress was a valid "wingspan" search incident to arrest pursuant to *Chimel v. California*, 395 U.S. 752 (1969). Finally, the government pressed that Moseley's consent for the officers to search the rest of her home was voluntarily given and was not the product of coercion or force.

On April 7, 2008, the district court held an evidentiary hearing at which Parole Officers Barry and Cartagena and Deputy Marshal Wood testified. At the conclusion of the hearing, the district court remarked that it "thought the officers' testimony was credible. I thought it was reasonably consistent[.]" JA 248.

On May 16, 2008, and June 9, 2008, the district court held two additional conferences for oral argument. During the May 16, 2008, conference, the district court orally ruled that Moseley had consented to the officers' entry into the apartment. JA 278. In addition, the district court ruled that Moseley had voluntarily given her consent to the

search of the apartment after the firearm was found. JA 279. The court therefore denied the motion to suppress as to the magazine containing the ammunition. *Id.*

D. The district court suppresses the firearm, holding that the search under the mattress where the defendant was lying was neither a valid search incident to arrest nor supported by reasonable suspicion.

On August 7, 2008, the district court issued a written ruling granting the motion to suppress the firearm. JA 309-32. The court did not address the government's argument that the defendant, as an absconded parolee, had no expectation of privacy in the home of a third party. *See United States v. Roy*, 734 F.2d 108, 111 (2d Cir. 1984) (Gov't Supp. Mem. Law 4/21/08 at 18). The court did, however, agree with the government's related argument that the defendant's status as a parolee caused the defendant to have a "diminished expectation of privacy" under *Griffin v. Wisconsin*, 483 U.S. 868 (1987), and its progeny. *See* JA 328-29. The court assumed that this diminished expectation of privacy required a lesser standard of proof to search the home such that only "reasonable suspicion" was needed for the officers to conduct the search. JA 328. However, the court concluded that there was no reasonable suspicion for the officers to search for weapons or contraband, despite the defendant's criminal record for narcotics and weapons charges, the fact that he had absconded, the lengthy delay in Moseley's

answering the front door, and the fact that the mattress was skewed from the box spring. *See* JA 331-32.[3]

Summary of Argument

1. The district court erred in concluding that the defendant had a reasonable expectation of privacy in his girlfriend's apartment. The defendant had absconded from special parole under Connecticut law, which required him to live at an approved residence, with an approved sponsor, subject to electronic monitoring. It is undisputed that the defendant had spent four months as an absconder, and that there was an active warrant for his remand back to the custody of the Board of Pardons and Paroles. Because the defendant was not authorized to be at his girlfriend's house, where he was found hiding by law enforcement officers, his presence at that location was "wrongful." He therefore lacked a reasonable expectation of privacy in that location. *See United States v. Roy*, 734 F.2d 108 (2d Cir. 1984); *United States v. Lucas,* 499 F.3d 769 (8th Cir. 2007) (en banc). Accordingly, the search of that location did not violate his Fourth Amendment rights.

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[3] In addition, the district court rejected the government's argument that the search underneath the mattress was a valid search incident to arrest pursuant to *Chimel*. JA 318. The district court opined that it was "inconceivable" that the defendant could have successfully obtained the firearm while he was handcuffed behind his back. *Id.* In this appeal, the government does not challenge this basis for the district court's ruling.

2. In the alternative – assuming that the defendant had some reasonable expectation of privacy in the bedroom of his girlfriend's house – the district court erred in concluding that the search under the mattress was unreasonable. As the Supreme Court and this Court have repeatedly recognized, a parolee has a seriously diminished expectation of privacy due to his conditional release from incarceration. The special needs of state parole systems weigh heavily against a parolee's privacy interests under the Fourth Amendment, dictating that parolees may generally be subject to searches based on reasonable suspicion of the presence of contraband or weapons.

Reviewing the district court's assessment of the facts *de novo* as required by *Ornelas v. United States*, 517 U.S. 690, 699 (1996), several errors are apparent in its conclusion that the officers lacked reasonable suspicion here. *First,* the district court failed to consider the totality of circumstances surrounding the search, and instead considered those factors individually. *Second*, the district court improperly dismissed as irrelevant the delay by the defendant's girlfriend in opening the door, after the police had been knocking and announcing their presence for over ten minutes. Officers at the scene reasonably inferred that the delay could have been attributable to the defendant's desire to buy time to hide contraband that would otherwise have been seized from his person upon arrest. *Third*, the district court was too dismissive of the defendant's criminal history for, among other things, possession of weapons and narcotics. Reasonable officers could quite properly have considered (1) the recency of this criminal

history, which immediately preceded the defendant's recent release from prison, (2) its links to the possession of contraband, (3) its links to his present parole status, and (4) recidivism as a likely explanation for his absconder status, particularly in light of his failure to attend required drug treatment sessions. *Fourth*, the district court improperly discounted the fact that the officers noticed that the mattress upon which the defendant was found lying – upside down with his hands hanging over the edge – was askew. As the Supreme Court has held, reviewing courts must allow officers "to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" *United States v. Arvizu*, 534 U.S. 266, 273 (2002). The district court therefore erred in holding that there was no reasonable suspicion to justify the search.

Argument

I. The district court erred in failing to consider that, as an absconded parolee hiding out in an unauthorized location, the defendant had no legitimate expectation of privacy in his girlfriend's apartment.

A. Relevant facts

The relevant facts are set forth above in the "Statement of the Case" and the "Statement of Facts."

B. Governing law and standard of review

"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. Knights*, 534 U.S. 112, 118-19 (2001) (internal quotation marks omitted); *see also Terry v. Ohio*, 392 U.S. 1, 9 (1968) (concluding that the Fourth Amendment does not prohibit all searches and seizures, but only those that are "unreasonable"). "The Fourth Amendment protects the right of private citizens to be free from *unreasonable* government intrusions into areas where they have a *legitimate* expectation of privacy." *United States v. Newton*, 369 F.3d 659, 664 (2d Cir. 2004) (emphasis added). "Absent a reasonable expectation of privacy . . . the warrant requirement is inapplicable and the legitimacy of challenged police conduct is tested solely on the Fourth Amendment's requirement that any search or seizure be reasonable." *United States v. Gori*, 230 F.3d 44, 50 (2d Cir. 2000).

As more fully detailed below, in the context of a state's supervision of inmates, parolees, and probationers, the "special needs" of state correctional systems justifies the departure from the usual Fourth Amendment warrant requirements. *See, e.g.*, *Bell v. Wolfish*, 441 U.S. 520, 545-47 (1979) (holding that a state's need for institutional security at prisons necessarily infringes on some constitutional rights of inmates and detainees); *Samson v.*

California, 547 U.S. 843, 853 (2006) ("[A] State's interests in reducing recidivism and thereby promoting reintegration and positive citizenship among probationers and parolees warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment."); *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987) (holding that probationers do not enjoy the same scope of Fourth Amendment protections as ordinary citizens because "[a] state's operation of a probation system . . . presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements").

"What is reasonable, of course, depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *MacWade v. Kelly*, 460 F.3d 260, 268 (2d Cir. 2006) (internal quotation marks omitted); *see also United States v. Chirino*, 483 F.3d 141, 148 (2d Cir. 2007) (reviewing "the reasonableness of the search in light of the totality of the circumstances known to the officers at the time the search was begun"); *Gori*, 230 F.3d at 50 (explaining that the reasonableness of a search is determined by evaluating the "totality of circumstances" of the search).

In reviewing a district court's decision on a motion to suppress, this Court reviews the lower court's findings of fact for clear error and its conclusions of law *de novo*. *See United States v. Jenkins*, 452 F.3d 207, 211-12 (2d Cir. 2006).

C. Discussion

Here, the district court erred in assuming that the defendant, as an absconded parolee, had any legitimate expectation of privacy in his girlfriend's apartment because he was not supposed to be there: the apartment was not his approved residence and there was an outstanding warrant for his remand back into custody of the Board of Pardons and Paroles.

Indeed, the district court failed to address case law cited by the government demonstrating that an escapee or absconder, such as the defendant, has no expectation of privacy in the place where he is found if his presence there is "wrongful." For example, in *United States v. Roy*, 734 F.2d 108 (2d Cir. 1984), this Court reversed the suppression of items seized by police from a parked car that the defendant was sitting in because the defendant was an escaped felon from Chicago. Even though the police searched the car before learning he was a prison escapee, this Court held that "as an escaped felon . . . [the defendant] had no legitimate expectation of privacy in the passenger compartment or trunk of the [car]." *Id.* at 110. This Court further explained:

> In *Rakas v. Illinois*, the Supreme Court, citing *Jones v. United States*, 362 U.S. 257, 267 (1960), explicitly noted that society did not recognize as reasonable the privacy rights of a defendant whose presence at the scene of the search was "wrongful." 439 U.S. at 141 n.9. The Court noted two examples of persons who did not have legitimate

> expectations of privacy due to wrongful presence: a person present in a stolen automobile at the time of the search, *id.*, and "[a] burglar plying his trade in a summer cabin during the off season."
>
> Roy's presence [at the search of the automobile] was also wrongful, since he was an escapee . . . . At the time of the search and seizure, Roy was no more than a trespasser on society. . . . His position is not unlike that of the Supreme Court's hypothetical burglar or occupant of a stolen car. . . .
>
> This is not to say that Roy's escape deprived him of all expectations of privacy. We consider an escapee to be in constructive custody for the purpose of determining his legitimate expectations of privacy; he should have the same privacy expectations in property in his possession inside and outside the prison.
>
> Roy's legitimate privacy expectations were severely curtailed while he was incarcerated. . . . [Because unannounced searches are permitted in prison] Roy would not have a legitimate expectation of privacy against the government's intrusion while incarcerated, [and] we should not recognize such an expectation of privacy after he escapes.

734 F.2d at 110-11 (footnote omitted). The Court reasoned that "[a] contrary determination would offer judicial encouragement to the act of escape and would reward an

escapee for his illegal conduct." *Id.* at 112; *see also United States v. Thomas*, 729 F.2d 120, 124 (2d Cir. 1984) (holding that a New York parolee had diminished expectation of privacy; that the "rights diminished by parolee status include Fourth Amendment protections from intrusions by parole officers"; that these diminutions arise "from the necessity for effective parole supervision and the unique relationship of the parole officer and the parolee"; and upholding parole officer's request that the defendant roll up his sleeves and allow examination of his forearms in parole office).

Similarly, the district court's decision did not discuss an Eighth Circuit decision cited by the government, *United States v. Lucas,* 499 F.3d 769 (8th Cir. 2007) (en banc). In *Lucas*, the defendant had absconded from a state correctional work-release program. Acting on a tip that the defendant was staying in the apartment of a third party, members of a fugitive recovery team went to the apartment, entered, and arrested the defendant. During the arrest, the officers located $2,900 in cash and narcotics in the pockets of some pants in the apartment. Relying upon *Roy*, the Eighth Circuit held that the defendant had no legitimate expectation of privacy in the apartment:

> Lucas similarly had no right to be in [the] apartment . . . .
>
> As an escapee Lucas had only a minimal expectation of privacy in [the] apartment. Prisoners like Lucas who are on work release are subject to special restrictions just like probationers. Their

> liberty is legitimately constrained because probation, like incarceration, is a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty. The state has a duty to protect the community from harm when a probationer or escaped prisoner is at large.

499 F.3d at 777 (citations and internal quotation marks omitted). *See also People v. Hernandez*, 639 N.Y.S.2d 423, 424 (N.Y. App. Div. 1996) ("Society is not prepared to recognize as legitimate whatever subjective expectation of privacy an escaped felon might have with respect to the confines of the house or apartment in which he is being harbored by an obliging friend or relative."); *Robinson v. Mississippi*, 312 So.2d 15, 18-19 (Miss. 1975) (holding that the search of the motel room of an escaped convict was not unreasonable under the Fourth Amendment).

Here the defendant had no right to be at his girlfriend's apartment and his presence there was "wrongful." *Roy*, 734 F.2d at 110. Upon his release to special parole, the defendant was under the jurisdiction of the Board of Pardons and Paroles and had to comply with the restrictions and requirements placed on him by the Board. *See* Conn. Gen. Stat. § 54-125e(a). These conditions required the defendant to live with an approved sponsor at an approved residence (which was not Moseley's apartment), participate in electronic monitoring, and meet regularly with his parole officer, *see* JA 252-53, all of which the defendant failed to do. The Board of Pardons and Paroles had the authority to revoke the defendant's special parole and direct that he be brought back into its

physical custody, which the Board did. The defendant knew he was where he was not supposed to be and that his parole officer was actively seeking his return. The defendant was thus "no more than a trespasser on society[,]" *Roy*, 734 F.2d at 111, and he lacked any objectively reasonable expectation of privacy in Moseley's apartment. Instead, the defendant enjoyed only the minimal privacy rights he would have in the actual custody of the Board.

The district court's decision, which is premised on the idea that the defendant had a legitimate expectation of privacy in Moseley's apartment, improperly rewards the defendant's fleeing conduct. Had the defendant not successfully absconded for four months, he would have been returned to the physical custody of the Board of Pardons and Paroles until a final revocation hearing and afforded only the minimal privacy rights of a prison inmate. The defendant should not be assumed to have any greater privacy rights than those he would have in the Board's actual custody because "[a] contrary determination would offer judicial encouragement to the act of escape and would reward an escapee for his illegal conduct." *Roy*, 734 F.2d at 112*; see also Lucas*, 499 F.3d at 777 (holding that the defendant's escape from a work release program "could not expand the very restricted expectation of privacy he had while in the custody of prison officials").

In sum, the defendant was an absconded parolee who had been missing for months. Applying *Roy*, it is clear that the defendant had no reasonable expectation of privacy in

Moseley's apartment. The district court's suppression of the firearm must therefore be reversed.

II. Even if the search underneath the mattress had to be supported by reasonable suspicion, that standard was satisfied here.

A. Relevant facts

As set forth above, the government's opposition to the motion to suppress was premised upon the fact that the defendant did not have a reasonable expectation of privacy in his girlfriend's apartment because he was an absconded parolee.

The government also argued in the alternative to the district court that the search underneath the mattress was permitted because it was supported by "reasonable suspicion," the standard generally governing searches of parolees and probationers (who have not otherwise fled from supervision). The government cited a host of factors known to the officers the morning of the search, which collectively constituted "reasonable suspicion" that the defendant was in possession of a firearm or other contraband: the defendant's failure to attend substance abuse meetings; the defendant's failure to register with the Connecticut Sex Offender Registry; the defendant's refusal to Parole Officer Cartagena to turn himself in when the parole officer called him on his mobile phone; the defendant's previous criminal history which included two sexual assaults, narcotics and firearm convictions; the approximate 15-minute delay it took Ms. Moseley to

answer the door in response to the parole officers' knocks; and the fact that the defendant was lying on a mattress that was significantly askew from the box spring.

The district court concluded that the defendant's status as a parolee alone diminished his expectation of privacy pursuant to *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987), and assumed that the standard for justifying a search was reasonable suspicion. JA 326-29. The district court held, however, that reasonable suspicion for the search was lacking. First, the court focused on the fact that Deputy Marshal Wood himself "did not testify that he believed he had reasonable suspicion to search under the mattress for contraband. His testimony shows that he searched under the mattress simply because it was within the area of the defendant's immediate control just before arrest." JA 330. Next, the court noted that the searching officers had not received a tip or other information that the defendant was recently in possession of a firearm or narcotics. JA 331. Finally, the court spent one paragraph reviewing the factors cited by the government, but concluded that they did not give rise to reasonable suspicion to search under the mattress:

> The Government's argument that the officers had reasonable suspicion to search under the mattress boils down to this: (1) the defendant had a criminal record including convictions for possession of a firearm and narcotics; (2) the defendant was an absconder from parole; (3) Ms. Moseley took ten minutes to respond to the officers' knocking at her door; and (4) the mattress was askew. These

> factors, viewed collectively, did not provide reasonable suspicion that the defendant was hiding a weapon or narcotics under the mattress. The defendant's criminal record and status as an absconder provided no particularized basis for suspecting that he was presently in possession of a weapon or narcotics. *See United States v. Freeman*, 479 F.3d 743, 749 (10th Cir. 2007) (defendant's parolee status and criminal history, without other particularized and objective facts, insufficient to provide reasonable suspicion to conduct search of residence); *United States v. Payne*, 181 F.3d 781, 790-91 (6th Cir. 1999) (absconder's past drug offenses did not provide reasonable suspicion to search home); *People v. Lampitok*, 207 Ill.2d 231, 798 N.E.2d 91 (2002) (violation of reporting condition does not provide reasonable suspicion to search for drugs). Nor did the delay in opening the door. This leaves only the mattress being askew. The Government's theory appears to be that because the mattress was off-center, an experienced officer could reasonably infer that the defendant had hastily concealed a gun or narcotics under the mattress. In this case, the mattress being askew was insufficient to support such a reasonable inference because the bedroom itself was in a state of disarray and the defendant had ample time to conceal a gun or contraband elsewhere in the apartment.

JA 331-32.

B. Governing law and standard of review

1. Standard governing parole searches

In *Griffin v. Wisconsin*, 483 U.S. 868 (1987), and its progeny, the Supreme Court recognized that individuals on probation and parole do not enjoy the same scope of Fourth Amendment protections as ordinary citizens. In *Griffin*, where the Court upheld the warrantless search by a probation officer of a probationer's home pursuant to a state code that allowed searches supported by "reasonable grounds," the Court explained that"[a] state's operation of a probation system . . . presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." *Id.* at 873-74. Instead, then, of "the absolute liberty" afforded to ordinary citizens, the Court held that probationers enjoyed "only . . . conditional liberty properly dependent on observance of special probation restrictions." *Id.* at 874 (internal quotation marks and alterations omitted). *See also United States v. Knights*, 534 U.S. 112, 118 (2001) (upholding the warrantless search of a probationer's home by a police officer where the officer had reasonable suspicion to believe that the probationer was engaged in criminal activity and where the probationer was subject to a search condition in his terms of release); *Chirino*, 483 F.3d at 147 (affirming the warrantless search of probationer's apartment because "[i]nherent in authorized supervision is a diminution of the probationer's right to privacy").

In *Samson v. California*, 547 U.S. 843 (2006), the Court concluded that the reasoning of *Griffin* applied with equal, if not greater force, to those on parole: "[P]arolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment." *Id.* at 850. As this Court has explained, a parolee does not enjoy absolute liberty but only a "conditional liberty properly dependent on observance of special parole restrictions. . . . The rights diminished by parolee status include Fourth Amendment protections from intrusions by parole officers." *Thomas*, 729 F.2d at 123 (internal citations and quotation marks omitted). *See also United States v. Massey*, 461 F.3d 177, 179 (2d Cir. 2006) ("A parolee's reasonable expectations of privacy are less than those of ordinary citizens . . . .").

This diminished expectation of privacy is due to the fact that "[a] parolee is in the legal custody of a parole officer who monitors the parolee's adherence to the conditions of his or her parole[,]" *Thomas*, 729 F.2d at 723, and because parole, like federal supervised release, is given out in addition to, not in lieu of, incarceration. *See Samson*, 547 U.S. at 861 (quoting *United States v. Reyes*, 283 F.3d 446, 461 (2d Cir. 2002)). In *Samson*, the Supreme Court upheld a California statute that requires all inmates on parole to submit to suspicionless searches by a parole or police officer "at any time." 547 U.S. at 861 (quoting Cal. Penal Code. Ann. § 3067(a) (West 2000)).

While the *Griffin*, *Knights*, and *Samson* decisions all involved state regulatory schemes and/or parole conditions of release, case law demonstrates that in the absence of a

specific state regulatory framework, or in the context of a search that exceeds the bounds of that framework, a parole search need only meet the standard of "reasonable suspicion." Thus, in *Chirino*, 483 F.3d at 148-49, this Court rejected the defendant's argument that a probation search was invalid because it exceeded the search provisions set out in his conditions of probation. After concluding that the search "did not violate his rights under the Fourth Amendment because it was, *inter alia*, based on reasonable suspicion that Chirino was engaged in criminal activity[,]" the Court further explained:

> While state-law rules and practices may inform our evaluation of the totality of the circumstances, "the appropriate inquiry for a federal court considering a motion to suppress evidence seized by state police officers is whether the arrest, search, or seizure violated the Fourth Amendment . . . . because the exclusionary rule is only concerned with deterring Constitutional violations." . . .
>
> Thus, even assuming *arguendo* that the search of Chirino's bedroom exceeded the scope authorized by the Probation Order and New York law, that would not require the district court to find the search unreasonable in light of all the circumstances . . . .

Id. at 149-50. In *United States v. Payne*, 181 F.3d 781, 788 (6th Cir. 1999), the Court of Appeals stated in *dicta* that in the absence of a state regulatory scheme, it would "at minimum require that a search conducted without

statutory authorization meet the federal standard of reasonable suspicion." The Court explained:

> When the Supreme Court has held that, because of "special needs," less-than-probable-cause searches are "reasonable" in the absence of a detailed regulatory scheme, it has imposed the reasonable suspicion standard. *See O'Connor*, 480 U.S. at 725-26, 107 S. Ct. 1492 (citing *T.L.O.* and *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)); *T.L.O.*, 469 U.S. at 341-42, 105 S.Ct. 733. Even assuming that a state is free to create a different or lesser standard, we are not inclined to fashion yet another federal constitutional level of suspicion, something more than a vague hunch yet less than "reasonable suspicion" as we now understand it. *Cf. United States v. Montoya de Hernandez*, 473 U.S. 531, 540-41, 105 S.Ct. 3304, 87 L.Ed.2d 381 (1985) (rejecting lower court's attempt to create a new level of suspicion between "probable cause" and "reasonable suspicion").

181 F.3d at 788 n.5.[4] *See also United States v. Grimes*, 225 F.3d 254, 259 n.3 (2d Cir. 2000) (holding that search may be performed pursuant to legislatively or judicially crafted rules so long as they contained a "reasonableness" requirement); *United States v. Hill*, 967 F.2d 902, 908 (3d Cir. 1992) (concluding that a warrantless search of probationer's home was permissible under the Fourth Amendment even though there was no state statutory or regulatory scheme authorizing the search because the search complied with *Griffin's* "reasonable grounds" standard); *United States v. Giannetta*, 909 F.2d 571, 575 (1st Cir. 1990) ("[W]e do not read *Griffin* as approving only probation searches conducted pursuant to a legislative or administrative framework. . . . [P]robation searches based on reasonable suspicion are supported by the same 'special needs' justifications and have the same

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[4] The Connecticut state court decisions discussing the issue also have identified such a standard in the context of probation and parole searches. *See, e.g.*, *State v. Smith*, 540 A.2d 679, 691 (Conn. 1988) ("The standard required to justify the search here by a probation officer . . . is that which may be found in the emerging and now rather stabilized concept of 'reasonable suspicion,' that is used in other contexts in and about the criminal law.") (internal quotation marks omitted); *State v. Whitfield*, 599 A.2d 21, 24 (Conn. App. 1991) (concluding that a parole officer may search a parolee "when there is a mere suspicion that the individual may be violating the terms of his release"); *Reid v. Commissioner of Correction*, 887 A.2d 937, 943 n.13 (Conn. App. 2006) ("[A] parolee may be searched by his or her parole officer if there is a mere suspicion that the parolee is violating the terms of his or her release.").

characteristics of reasonableness as the search upheld in *Griffin*.").

2. Reasonable suspicion

"[R]easonable suspicion is determined based on the totality of the circumstances, but 'the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.'" *United States v. Elmore*, 482 F.3d 172, 179 (2d Cir. 2007) (quoting *United States v. Arvizu*, 534 U.S. 266, 273-74 (2002)). *See also United States v. Lawes*, 292 F.3d 123, 127 (2d Cir. 2002) ("Reasonable suspicion is not a high threshold, and the requisite level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence.") (internal quotation marks omitted).

In determining whether the information possessed by a law enforcement officer provided a sufficient basis to support a finding of reasonable suspicion, the court is required to look at the totality of the circumstances. *Arvizu*, 534 U.S. at 273. "[T]he court must evaluate those circumstances through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training." *United States v. Colon*, 250 F.3d 130, 134 (2d Cir. 2001) (internal quotation marks omitted). The "totality of the circumstances" inquiry permits police officers to "make inferences from and deductions about the cumulative information available to them that might well elude an untrained person." *Arvizu*, 534 U.S. at 273 (internal quotation marks omitted).

A district court's determination of whether or not reasonable suspicion existed is a legal question, reviewed *de novo*. *See Ornelas v. United States*, 517 U.S. 690, 699 (1996).

C. Discussion

The district court correctly recognized that the defendant's status as a parolee alone diminished his expectation of privacy pursuant to *Griffin,* and correctly assumed that the standard of "reasonable suspicion" would apply to the search underneath the mattress, if he had a legitimate expectation of privacy in his girlfriend's bedroom. *See* JA 326-28.

The district court erred, however, when it concluded that reasonable suspicion was lacking because the totality of circumstances known to the officers before the search created reasonable suspicion to justify the search.

1. The district court failed to view the factors supporting reasonable suspicion in their totality.

First, despite the district court's statement that it "viewed collectively" the proffered factors for the search, its analysis demonstrates that it considered those factors only individually, finding that each of them did not provide reasonable suspicion. *See* JA 331-32. It therefore erred in failing to consider the "totality of the circumstances" surrounding the search cited by the government and supported by the officers' testimony.

Arvizu, 534 U.S. at 274; *United States v. Bayless*, 201 F.3d 116, 133 (2d Cir. 2000).

Specifically, the district court brushed aside the fact of the defendant's previous weapons and narcotics convictions and status as an absconder (who absconded only one month after his release) as "provid[ing] no particularized basis for suspecting that he was presently in possession of a weapon or narcotics[,]" JA 331, adding "[n]or did the delay in opening the door," JA 332. The district court then concluded "[t]his leaves only the mattress being askew." *Id.* It is evident from the district court's "this leaves only" language that it wrongly considered the facts sequentially and individually, rather than in combination. *See United States v. Delossantos*, 536 F.3d 155, 161 (2d Cir. 2008) (successful government appeal challenging suppression ruling as committing the Ninth Circuit's *Arvizu* divide-and-conquer error; explaining, in the probable cause context, "not to consider individual facts in isolation but to examine the totality of the circumstances").

At no point did the district court's analysis explicitly consider how the facts might have had a cumulative impact in the mind of a reasonable officer in Deputy Wood's position at the moment of the search. The only point at which the court seemed to analyze any of the factors jointly was in its statement that Julius's "criminal record and status as an absconder" failed to provide a particularized basis for suspecting that he possessed a weapon or narcotics. JA 331 (citing two cases, from Sixth and Tenth Circuits, where parolee/absconder status and

criminal history did not amount to reasonable suspicion). As discussed more fully below, each factor was mutually reinforcing. Had the court properly considered the collective sum of all the facts, it should have concluded that reasonable suspicion existed. *See Bayless*, 201 F.3d at 134 (concluding that reasonable suspicion existed even when "[s]tanding alone, some of [the] factors would be innocuous").

2. The district court undervalued the significance of the long delay in answering the door after police announced their presence.

Second, the district court dismissed the delay in opening the door without any analysis; it therefore did not discuss the reasonable inference that the delay could have been attributable to the defendant's desire to buy time to hide contraband which would otherwise have been seized from his person upon his arrest.

There was approximately a ten-minute delay before Moseley responded to the officers' knocking on her front door and announcing their presence, and then another several-minute delay before she finally opened the door. JA 42, 44-45, 152, 169. As Deputy Marshal Wood testified, he believed Moseley was using the proffered excuse that she needed to get dressed as a "stalling tactic" to keep the officers from entering the house. Specifically, Deputy Marshal Woods testified that the lengthy amount of time that it took Moseley to answer the door created the risk that Moseley and the defendant had hidden evidence,

explaining "they had a lot of time. There was at least ten minutes before that door was opened. They had to put clothes on. That was another stalling tactic. So that they had time to secrete and hide items of evidence." JA 152; *see also* JA 147-148 (explaining his perceived risk "that the defendant may have hid evidence underneath the mattress, that he may have hid a firearm or hid narcotics to avoid detection when we entered the room to apprehend him").

At least one other circuit court has relied upon a probationer's delay in opening the door to authorities when assessing reasonable suspicion. In *United States v. Yuknavich*, 419 F.3d 1302 (11th Cir. 2005), the Circuit Court affirmed the denial of a motion to suppress evidence seized from the defendant by his probation officers from his home, relying in part upon the fact that it took the defendant ten minutes to open the door in response to the officers' knocks. *Id*. at 1311. (The defendant in that case was on probation for downloading child pornography, and when he finally answered his door after ten minutes, he was shirtless; later, probation officers walked past his bedroom and noticed a computer with a modem, which suggested that the defendant was violating a condition of probation that forbade internet access).

This Court has held more generally that a defendant's "evasive conduct" was a significant factor that "provided the objective manifestation that criminal activity was afoot" in the context of reasonable suspicion for a *Terry* stop. *United States v. Muhammad*, 463 F.3d 115, 123 (2d Cir. 2006). In that case, the "evasive conduct" was a

suspect "increas[ing] the speed of his bicycle in an effort to pass between [a] patrol car and the curb" in reaction to police activating their lights and shining a spotlight. *Id.*; *see also Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) ("Our cases have also recognized that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion.") (holding that police have reasonable suspicion to conduct *Terry* stop when the noticed presence of officers provokes a suspect's headlong flight in a high-crime area).[5]

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[5] Courts have consistently recognized the danger that contraband will be destroyed or hidden as a result of a delay between the time that police knock and announce their presence, and when the door is subsequently opened. The issue is most often litigated in cases where, after waiting a certain period of time after announcing their presence, police force an entry to execute a search or arrest warrant. The question before the courts is then whether police waited a reasonable period of time for purposes of the Fourth Amendment. For example, in *United States v. Banks*, 540 U.S. 31, 38 (2003), the Supreme Court concluded that it was reasonable for officers executing a search warrant for suspected drugs to enter an apartment after knocking for 15 to 20 seconds. *See id.* at 38 n.5 (collecting cases holding that delays ranging from 15 to 30 seconds supported reasonable belief that evidence was being destroyed). If in such cases a 20-second delay is reasonable to create a suspicion that evidence is being destroyed, than certainly the ten-minute-plus delay here, coupled with the other factors surrounding the search, supports a finding of reasonable suspicion that the destruction or hiding of contraband was occurring.

The delay in answering the door takes on special significance in the context of a parolee search. As the Supreme Court noted in *Knights*, 534 U.S. at 120, "probationers have even more of an incentive to conceal their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal." This greater incentive to "quickly dispose" of evidence was one of the justifications for approving California's system of subjecting probationers to searches based on reasonable suspicion. *Id.; see Samson*, 547 U.S. at 848 (discussing *Knights*).

3. The district court improperly dismissed consideration of the defendant's criminal history

Third, the district court overly discounted Julius's criminal history. It discounted (a) its recency, (b) its links to the possession of contraband, (c) its links to his present parole status, and (d) recidivism as a likely explanation for his absconder status, particularly in light of his failure to attend required drug treatment sessions.

Specifically, Julius had just been released from prison, where he had been serving concurrent prison terms for illegal possession of a firearm; illegal possession of narcotics; and sex offenses. He was on special parole for the narcotics offense. *Cf. United States v. Yuknavich*, 419 F.3d 1302, 1310 (11th Cir. 2005) (holding that probation officers had reasonable suspicion to search computer of convicted child molester; when evaluating level of

certainty needed to perform search, "we are mindful of the crime for which [the defendant] was on probation").

Moreover, his offenses were not especially distant in time; he had gone to jail for these offenses in 2002; he was released from prison in September 2006; he absconded in October 2006; and the search took place in February 2007. It would have been reasonable for the officers to suspect that when Julius absconded from parole, and refused to disclose his location to his parole officer, he had reverted to the criminal activities that had landed him in jail in the first place, and which had triggered his parole – namely, drug and gun possession.

In addition, Julius's absconder status had come to the attention of his parole officer when Julius failed to attend his weekly substance abuse counseling sessions. JA 312, 25-26. This fact added to a reasonable officer's suspicion that Julius had relapsed into his drug habits, and therefore was in possession of illegal narcotics. And as the Supreme Court noted in *Griffin*, "[i]n some cases – *especially those involving drugs or illegal weapons* – the probation agency must be able to act based upon a lesser degree of certainty than the Fourth Amendment would otherwise require in order to intervene before a probationer does damage to himself or society." 483 U.S. at 879 (emphasis added).

Case law from the *Terry* stop context supports the conclusion that Julius's criminal history for weapons and narcotics charges supported the officers' reasonable suspicion that he may have had drugs or weapons hidden in the house. The Tenth Circuit recently held that "in

conjunction with other factors, criminal history contributes powerfully to the reasonable suspicion calculus." *United States v. Santos*, 403 F.3d 1120, 1132 (10th Cir. 2005). In *United States v. Feliciano*, 45 F.3d 1070 (7th Cir. 1995), the Seventh Circuit affirmed the denial of a motion to suppress a firearm during a patdown search of a defendant, where one of the officers involved in the *Terry* stop recognized the defendant as a gang member who had just been released from prison for a robbery conviction. Suggesting that the fact of the defendant's criminal history "might appear to be the clincher of the government's case," the Court explained that knowledge of past criminal conduct "is a permissible component of the articulable suspicion required for a *Terry* stop." *Id.* at 1074. *See also United States v. Kimball*, 25 F.3d 1, 7 (1st Cir. 1994) ("A police officer's knowledge of an individual's prior criminal activity is material to whether the officer reasonably suspects that criminal activity has or may be occurring."); *Yuknavich*, 419 F.3d at 1311 (officers' knowledge of probationer's prior convictions for child molestation and downloading child pornography contributed to reasonable suspicion to search his computer for child pornography)

The district court's reliance on three cases (from the Sixth Circuit, the Tenth Circuit, and the Illinois Supreme Court) for the proposition that "the defendant's criminal record and status as an absconder provided no particularized basis for suspecting that he was presently in possession of a weapon or narcotics," JA 331-32, is not persuasive.

First, there was a much slimmer justification for a search in *United States v. Freeman*, 479 F.3d 743 (10th Cir. 2007), where police officers chose the defendant's house randomly, in order to see if Kansas state probationers were wearing their GPS ankle bracelets as required. The police had no previous information leading them to believe that the defendant was violating the conditions of his release, and Kansas law provided that only parole officials, known as "special enforcement officers," could conduct probation searches, and that such searches had to be supported by reasonable suspicion that evidence of a probation violation could be found. *Id.* at 745-46. The defendant had been on probation for over two years with only one minor curfew violation. Inside the house, the defendant became agitated when he learned of the police officers' intent to search his house, and objected that they had no right to do so; he went to his bedroom to inform his girlfriend that officers were there to perform a search; and the officers saw the girlfriend reach inside the dresser. As relevant here, the Court merely stated that the defendant's "parolee status and criminal history, without other particularized and objective facts," was insufficient to give rise to reasonable suspicion to support the police officers' search. *Id.* at 749-50.

Unlike in *Freeman*, the parole officers in this case had plenty of reason to believe that Julius had violated any number of the conditions of his parole and was purposefully hiding from them; indeed, the officers had a warrant for his remand back to custody of the Board of Pardons and Paroles for his utter failure to comply with any of the conditions of his release. Against this

background, the officers had specific knowledge about the nature of the defendant's previous convictions for weapons and narcotics charges. Moreover, the lengthy delay in answering the door and the fact that the defendant was lying on a mattress that was askew were additional "particularized and objective facts" that contributed to the reasonable-suspicion determination.

So too was the district court's reliance on *United States v. Payne*, 181 F.3d 781, 790-91 (6th Cir. 1999) misplaced. In *Payne*, the defendant was on state parole in Kentucky, moved to another county, and failed to report to his parole officer after their initial meeting. *Id.* at 783.[6] His criminal history included several felonies as well as parole violations. *Id.* Police received an anonymous tip that the defendant had a large quantity of methamphetamine in his car truck, but they could not develop any additional information. *Id.* at 783-84. Parole authorities obtained a warrant for Payne's arrest, and officers went to arrest him at his girlfriend's trailer. *Id.* at 784. When they arrived at the trailer, the girlfriend denied he was present, but they heard a noise inside, entered to perform a protective sweep, and found Payne hiding behind a bedroom door. *Id.* He was handcuffed and placed into a police car. *Id.* Meanwhile, another officer searched Payne's pickup truck, which was parked outside, and testified that he believed

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[6] While the decision notes that the defendant failed to report to his parole officer after the initial meeting, it also provides that the parole officer himself did not conduct any home visits at the defendant's residence, per the terms of the defendant's release. 181 F.3d at 783.

that he could search parolees' persons and homes "at any time." *Id.* (This conflicted with Kentucky law as well as the written conditions of parole upon which Payne had been released, which authorized parolee searches based on "reasonable suspicion." *Id.* at 783, 786.)

The Sixth Circuit rejected the government's primary reliance on the drug tip as the core of the reasonable-suspicion determination, and found that the remaining factors – the defendant's absconder status plus his criminal history – did not justify the search. First, the Court found that the tip itself was unreliable (since it was anonymous), garbled (it referred only to the trunk of the defendant's car, but was later relayed to the arresting officers as relating to the trailer), stale (six weeks old by the time of the search), and unrelated to the location searched (having spoken about the car, not the trailer that was searched). Having rejected the tip as virtually worthless, the Court quickly dispatched the notion that the remaining factors, coupled with the weak tip, provided reasonable suspicion:

> Even a less-than-reliable tip may add something to the totality of the circumstances for determining reasonable suspicion. Here, [the officer] had the additional information that Payne had absconded from supervision and had committed drug crimes in the past. Payne had a long and consistent history of violating parole. In contrast, his past drug offenses – both occurring while he was imprisoned – were quite different from the one alleged in the tip. A person reviewing Payne's record could have predicted that he would violate parole again and

> could have been almost as confident that he would cause some kind of trouble. But a person's criminal record alone does not justify a search of his or her home, and the tip in this case adds so little that it does not reach the level of reasonable suspicion.

Id. at 790-91. The narrow factual application of *Payne* was later recognized by the Sixth Circuit in *United States v. Loney*, 331 F.3d 516, 522-23 (6th Cir. 2003), where the Court recognized that the tip acted upon by the officers to justify the search was stale and where there were "overtones" that the police officers improperly "usurped" the parole officers' role because there was evidence that a police officer "viewed the arrest [for the probation violation] as an opportunity to have a probation/parole officer help him get into the defendant's trailer." *Id.* In *Loney*, the Sixth Circuit concluded that a parole officer had reasonable suspicion to search a parolee's residence where the parolee (who had a history of drug issues) had failed to report for parole meetings and substance abuse tests, which suggested that the parolee "has something to hide." *Id.* at 522.

Here, by contrast, there were ample facts other than the defendant's criminal history alone to support reasonable suspicion. Moreover, there has been no suggestion that Julius's arrest was a pretext for a search of Moseley's bedroom, or that Deputy Marshal Wood had planned the search in advance of finding Julius on the skewed mattress.

The third case cited by the district court, *People v. Lampitok*, 207 Ill.2d 231 (2003), is inapposite because it did not involve a defendant's criminal history at all. In that case, authorities searched a motel room while looking for a probationer named Bircher, who had reputedly changed her residence without prior approval to the motel, where she was reputedly cohabiting with the defendant, whom the authorities suspected of being a drug user. The Illinois Supreme Court held that one officer's vague suspicion that the defendant was a drug user – based only the fact that the defendant had been present once when drug paraphernalia were seized, and that he then seemed to be under the influence of narcotics – hardly supported reasonable suspicion that Bircher was in the presence of weapons or narcotics in the motel room. *Id.* at 256-57. The court cited *Payne*, and held that these vague hunches about prior drug use were "even less substantial than knowledge of criminal history." *Id.* at 256.

Here, by contrast, the defendant's criminal history was much clearer and starker than the vague suspicions about the defendant's prior drug use in *Lampitok*. Although the Illinois Supreme Court also discounted the "additional fact that defendant delayed opening the motel room door for an unspecified time period" as a factor in the reasonable-suspicion analysis, *id.* at 257, the extent of the delay is unclear from the record, *id.* at 235 ("Goodwin knocked repeatedly on the door; the officers could hear movement in the room. Eventually, defendant answered the door.") . In any event, *Lampitok* is also inapposite because the defendant was not a probationer, and hence it is not clear why any reduced expectation of privacy on the part of his

girlfriend, Bircher, should have reduced the defendant's own expectations of privacy in the motel room.

4. The district court improperly discounted the fact that the defendant was found lying upside down on a skewed mattress, with his hands hanging out over the edge.

Fourth, the district court improperly discounted the fact that the officers noticed the mattress askew. The district court rejected this factor on two grounds. First, it stated that "the bedroom itself was in a state of disarray . . . ." JA 332. Presumably, the district court was suggesting that the mattress being askew could not have appeared suspicious because it was consistent with the overall appearance of the room; or put another way, that only something out of the ordinary can look "suspicious," and that the skewed mattress therefore could not look suspicious in a messy room.

However, the Fourth Amendment should not entail this sort of second-guessing of an officer's need to make on-the-spot, common-sense assessments of a situation. Here, the defendant was found lying on the bed, in an odd position (head toward the bottom of the bed), with his arms hanging over the edge. Given those circumstances, it was sensible for an officer to focus on the mattress (and the clothing on the floor, near where the defendant's hands had been) rather than other portions of the room. In those circumstances, it is reasonable for a trained officer to suspect that the mattress's misalignment may have been caused by the defendant's effort to secrete contraband. *See*

Arvizu, 534 U.S. at 273 (reviewing courts must "allow[ ] officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person'") (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)); *Ornelas*, 517 U.S. at 700 ("[O]ur cases have recognized that a police officer may draw inferences based on his own experience in deciding whether probable cause exists.").

The court also relied on the ground that "the defendant had ample time to conceal a gun or contraband elsewhere in the apartment[,]" as evidenced by the delay in opening the door. JA 332. Yet the fact that the defendant was found on the bed (not elsewhere in the apartment), with the mattress askew, properly focused Deputy Marshal Wood's attention on that area. The Supreme Court has held that "[a] determination that reasonable suspicion exists, . . . need not rule out the possibility of innocent conduct." *Arvizu*, 534 U.S. at 277. If reasonable suspicion need not rule out the possibility of innocent conduct, then *a fortiori* it need not rule out the possibility of other culpable conduct (i.e., that the defendant leaped out of bed and hid contraband elsewhere) – particularly when the hypothesized alternative conduct is less likely than the conduct as to which an officer's suspicions have been aroused (here, that Julius had hidden contraband within arm's reach of where he was found). If the delay in answering the door would lead a reasonable officer to believe that the defendant was hiding something in the house, it would be quite logical to look underneath a

skewed mattress that the defendant was lying upon for such contraband.

* * *

Thus, for the reasons set forth above, the district court erred in failing to consider the totality of the circumstances that surrounded the search under the mattress, and which amply supported a finding of reasonable suspicion. The district court's order must therefore be reversed.

CONCLUSION

For the foregoing reasons, the district court's order suppressing the .45 caliber semi-automatic weapon should be reversed.

Dated: December 8, 2008

Respectfully submitted,

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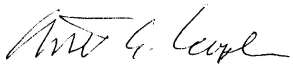

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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 11,780 words, exclusive of the Table of Contents, Table of Authorities and this Certification.

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