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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REPLY BRIEF
FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

As an absconded parolee, the defendant, Thomas Julius, did not enjoy the same privacy expectations as those of an ordinary citizen. Thus, even if he might have been entitled to the privacy rights of a typical overnight social guest in other circumstances, he was in reality no more than a trespasser on society. As a result, the defendant did not have a legitimate expectation of privacy

in his girlfriend's home where he was hiding from his parole officer. The search underneath the mattress on which parole officers found him lying was therefore reasonable. The district court erred in suppressing the semi-automatic firearm found underneath that mattress.

The search underneath the mattress was also justified because the officers who arrested the defendant and conducted the search had reasonable suspicion to believe that the defendant possessed weapons or other contraband. Specifically, the defendant's recent history of committing narcotics and weapons offenses, as well as the fact that he had fled parole supervision after a month of being released from prison, combined with the ten-minute delay it took the defendant's girlfriend to answer the officers' knocking and announcing their presence at the front door, joined by the fact that the mattress the defendant was lying on backwards was significantly askew, in totality, created reasonable suspicion to support the search.

For the reasons set forth in the Government's opening brief, and for the reasons set forth below, the Government respectfully requests that this Court reverse the district court's order suppressing the firearm.

Argument

I. As an absconded parolee, the defendant had no legitimate expectation of privacy in his girlfriend's apartment, and did not have the same rights as those of an ordinary citizen.

The defendant does not dispute that at the time of the search in question in February of 2007, he had absconded from the supervision of the Board of Pardons and Paroles for approximately four months, he was not living in an approved residence, he had gone off electronic monitoring, and his whereabouts had been unknown to his parole officer since October 2006. In short, the defendant was "a fugitive." JA 140.

The defendant nevertheless argues that despite these facts, he enjoyed the same expectation of privacy in Moseley's home as that of an ordinary citizen – to wit, he enjoyed the Fourth Amendment's core protection "'to retreat into his own home and there be free from unreasonable governmental intrusion.'" Def. Br. 14 (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). The defendant's argument, however, is based upon the flawed assumption that he had a right to be an overnight guest in anyone's apartment, when he clearly did not. Instead, because of the Board of Pardons and Paroles' outstanding Warrant for Reimprisonment, the only place that the defendant had a right to be was in the Board's actual custody – i.e., in prison. *See United States v. Roy*, 734 F.2d 108, 110 (2d Cir. 1984) ("We consider an escapee to be in constructive custody for the purpose of

determining his legitimate expectations of privacy[.]"). Rather than retreat into his own home, the defendant had in fact fled from the custody of the Board into hiding.

The defendant's attempt to read *Roy* as standing for the proposition that he enjoyed the same privacy expectations in Moseley's home as he would have in his own home ignores the fact that the defendant himself had, in effect, terminated his special parole and diminished his privacy rights by absconding. In this regard, the defendant accords himself the same privacy rights as those enjoyed by an ordinary citizen, or at least, by special parolees in full compliance with the terms of their release. The defendant thus seeks to reap the benefits of absconding by evading his return to prison, while nonetheless enjoying the same privacy rights he would have had as a law-abiding citizen. The protections of the Fourth Amendment should not be stretched to such a perverse result. *See Roy*, 735 F.2d at 112 (cautioning that the recognition of privacy rights for an escapee "would offer judicial encouragement to the act of escape and would reward an escapee for his illegal conduct"); *United States v. Lucas*, 499 F.3d 769, 777 (8th Cir. 2007) (en banc) (concluding that a defendant could not expand his expectations of privacy by escaping from a work release program.)

The defendant characterizes his place on the privacy continuum as akin to that of a probationer or one on federal supervised release and in a different place on the continuum than those in prison or on parole. Thus, he argues, his escape from special parole did not make him

wrongfully present in Moseley's home. Def. Br. 15-16. This argument misses the point for two reasons.

First, Connecticut's system of special parole is closer in nature to parole or imprisonment than it is to probation or federal supervised release. The Connecticut Board of Pardons and Paroles maintains jurisdiction over an inmate released to special parole, Conn. Gen. Stat. § 54-125e(a), and it is the Board, not a court, that possesses "independent decision-making authority" to revoke special parole and return the inmate to actual custody. Conn. Gen. Stat. §§ 54-124a(f), 54-125e(d). Upon a violation of special parole, a defendant is not entitled to bail but instead is detained pending the decision of the Board, JA 274, and the defendant may be imprisoned for the duration of the unexpired portion of his special parole. Conn. Gen. Stat. §§ 54-125e(e), (f). As the Connecticut Supreme Court recently explained:

> [S]pecial parole was "intended to operate as a sentencing option in cases where the judge wanted additional supervision of a defendant after the completion of his prison sentence. . . . [T]he chairman of the Connecticut board of parole . . . described special parole as a 'sentencing option which ensures *intense supervision* of convicted felons after they're released to the community and *allows the imposition of parole stipulations* on the released inmate to ensure their successful incremental re-entry into society or if they violate their stipulations, *speedy re-incarceration* before they commit another crime.'"

State v. Tabone, 902 A.2d 1058, 1065-66 (Conn. 2006) (quoting *State v. Boyd*, 861 A.2d 1155, 1159 n.6 (2004) (quoting, in turn, Conn. Joint Standing Committee Hearings, Judiciary, Pt. 4, 1998 Sess., p. 1013)) (emphasis added).

In contrast, those on federal supervised release are subject to conditions imposed by the district court at the time of sentencing, and only the court may revoke supervised release. 18 U.S.C. § 3583(e)(3). There are specific procedures for presenting someone on supervised release before a judge, conducting a preliminary hearing to determine if there is probable cause that a violation has occurred, and for conducting a revocation hearing before the district court. *See* Fed. R. Crim. P. 32.1.

Second, the defendant's argument concerning his rightful presence in Moseley's home ignores the point that he had absconded from special parole supervision and was thus a fugitive from the Board of Pardons and Paroles. While the defendant suggests that his lapses were merely "technical violation[s]" of the terms of his release to special parole, Def. Br. 5, the undisputed evidence demonstrates that the defendant's conduct was far more egregious. The defendant failed to report to mandatory substance abuse counseling and to his parole officer soon after his release from prison. JA 26-27. He left his approved residence and went off electronic monitoring. JA 26-28. When Parole Officer Cartagena subsequently called the defendant on his cell phone and pleaded with him to turn himself in, the defendant refused. JA 26, 28-29. When Parole Officer Cartagena saw the defendant on

English Street the day before his arrest, he said that it appeared as though the defendant recognized the parole officer's car and that it seemed to the officer that "he was going to run." JA 32, 34. The defendant did not simply forget to ask permission to stay overnight at Moseley's house; instead, he was hiding out there, well aware that his parole officer was actively seeking his return.[1]

Accordingly, because the defendant had no legitimate expectation of privacy in Moseley's home, the district court's order suppressing the firearm must be reversed.

II. In the alternative, because the defendant was on special parole, the parole officers' search need only be supported by reasonable suspicion.

Even assuming that the defendant was an ordinary special parolee, in full compliance with the terms of his parole and living in his approved residence, the search would have been nonetheless permissible because it was supported by reasonable suspicion. As the defendant

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[1] The defendant reads *Rakas v. Illinois,* 439 U.S. 128 (1978), to require a showing that the defendant's presence was wrongful with respect to the homeowner, rather than society as a whole. Def. Br. 16. This Court, however, has not interpreted *Rakas* in this regard. Instead, as this Court made clear in *Roy,* the defendant's status as an escaped prisoner made his presence anywhere other than in prison "wrongful" because he was "no more than a trespasser on society." 734 F.2d at 111; *see also id.* at 111 n.3 ("[The defendant's] presence at the scene of the search was wrongful since he was supposed to be incarcerated and would have been but for his illegal escape.").

concedes, "a search that may be unreasonable with respect to an ordinary citizen may be reasonable with respect to a probationer or parolee." Def. Br. 18. This is because probationers and parolees enjoy only a "conditional liberty," rather than the "absolute liberty" afforded to ordinary citizens by the Fourth Amendment. *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987).

The defendant's reliance on *United States v. Rea*, 678 F.2d 382 (2d Cir. 1982), to suggest that the Fourth Amendment analysis should not change just because of a person's status as a parolee, is misplaced. Def. Br. 19. In *Rea*, this Court held that a probation officer needed a search warrant in order to conduct a search of a probationer's home, even if the probation officer had reasonable grounds to suspect criminal wrongdoing. *Id.* at 387. *Rea,* however*,* preceded the Supreme Court's decision in *Griffin*. In *Griffin*, the Court unambiguously concluded that the warrant requirement in the probation context was "impracticable," 483 U.S. at 876, and instead held that a state code permitting searches based upon "reasonable grounds" was constitutionally sufficient. *Id*. at 873-74. This Court's decisions after *Griffin* have made clear that a search warrant is not necessary to justify a probation search because "[i]nherent in authorized supervision is a diminution of the probationer's right to privacy." *United States v. Chirino*, 483 F.3d 141, 147 (2d Cir. 2007).[2]

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[2] In that connection, the defendant's reliance upon *United States v. Kone*, 591 F.Supp.2d 593 (S.D.N.Y. 2008), is (continued...)

Though recognizing that parole and probation searches may be conducted based upon standards of less than probable cause, the defendant nonetheless argues that the lack of a statutory or regulatory rule in Connecticut authorizing such searches makes the search here *per se* unreasonable. Def. Br. 22.[3] The defendant's argument,

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[2] (...continued)
unpersuasive. That decision concerned a defendant on federal supervised release. Probation officers obtained an "order" from the district court authorizing them to search the defendant's residence; however, the probation officers were not authorized under federal law to execute search warrants, nor had they alleged that there was probable cause to support the court's order. The district court, relying heavily on *Rea* as what it believed to be the controlling law of this circuit*, see id.* at 603-04, held that the absence of a law or condition of supervised release authorizing searches invalidated the order and subsequent search. *Id*. As with *Rea*, the Government submits that the *Kone* court's belief that a probation search must be supported by a warrant issued upon a showing of probable cause is squarely contradicted by this Court's post-*Griffin* holding in *Chirino*.

[3] Connecticut courts addressing the issue have identified the standard of reasonable suspicion as that governing the searches of probationers and parolees in the state. The defendant's attempt to distinguish the holdings of these cases (Def. Br. 20-21) is unpersuasive, as the courts in those decisions clearly identify the "reasonable suspicion" or "mere suspicion" as the governing standard applicable to such searches. *See State v. Smith*, 540 A.2d 679 (Conn. 1988); *State v. Whitfield*, 599 A.2d 21 (Conn. App. 1991); *Reid v.* (continued...)

however, does not consider this Court's conclusion in *Chirino* that, in the absence of an established state framework, or when a challenged search exceeds such a framework, a parole search need only meet the "reasonable suspicion" standard. 483 F.3d at 148-49. The Court explained that "[w]hile state-law rules and practices *may inform our evaluation*," the proper inquiry was whether or not the search violated the Fourth Amendment. *Id.* at 149-50 (emphasis added); *see also United States v. Giannetta*, 909 F.2d 571, 575 (1st Cir. 1990) ("[P]robation searches [not conducted pursuant to a regulatory scheme] based on reasonable suspicion are supported by the same 'special needs' justifications and have the same characteristics of reasonableness as the search upheld in *Griffin*.").

The cases relied upon by the defendant make clear that a state regulatory or statutory scheme may *further* diminish a parolee's expectation of privacy to permit parole searches *beyond* those conducted in a probation or parole context and supported by reasonable suspicion. For example, in *United States v. Newton*, 369 F.3d 659 (2d Cir. 2004) (Def. Br. 19), and *United States v. Grimes*, 225 F.3d 254 (2d Cir. 2000) (Def. Br. 20-21), the Court upheld searches conducted pursuant to a New York state parole regulation that permitted warrantless searches of parolees so long as the search bore a reasonable relationship to the performance of the parole officer's duties. In *United States v. Knights*, 534 U.S. 112 (2001) (Def. Br. 20), the

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[3] (...continued)
Commissioner of Correction, 887 A.2d 937, 943 n. 13 (Conn. App. 2006).

Supreme Court upheld a search pursuant to a California probation order that allowed for the search of a probationer by any probation officer or law enforcement officer because the search was supported by reasonable suspicion.[4]

In *Samson v. California*, 547 U.S. 843 (2006) (Def. Br. 20), the Court went one step further, concluding that a California statute authorizing all suspicionless searches of parolees by a parole officer or law enforcement officer was valid. The *Knights* and *Samson* decisions both make clear that the specific probation search condition at issue in those cases were "salient" in the Fourth Amendment totality of the circumstances evaluation, 534 U.S. at 118, 547 U.S. at 852, but they did not mandate that a parole search be authorized by or in compliance with a specific condition.[5]

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[4] Two years prior to the *Samson* decision, this Court explained that "[t]wo conclusion emerge from *Griffin* and *Knights*. Probationary searches – whether for law enforcement or probationary purposes – are acceptable under *Knights* if based upon reasonable suspicion (or potentially a lesser standard.) Furthermore, under the 'special needs' doctrine articulated in *Griffin*, searches for probationary purposes will be upheld if authorized by a law that is in itself reasonable." *United States v. Lifshitz*, 369 F.3d 173, 181 (2d Cir. 2004).

[5] The defendant's argument that notice to the parolee is the driving factor in determining the reasonableness of a search, Def. Br. 19, is unpersuasive. The decisions in *Knights* and *Samson* make clear that the existence of a search condition is

(continued...)

Thus, for the reasons explained above, even assuming that the defendant had some residual expectation of privacy in his girlfriend's home, a search based on reasonable suspicion would be justified under the Fourth Amendment.

III. The totality of the circumstances leading up to the search amply satisfy the reasonable suspicion standard.

The existence of reasonable suspicion turns on the totality of the circumstances surrounding the search, "through the eyes of a reasonable and cautious police officer on the scene," *United States v. Colon*, 250 F.3d 130, 134 (2d Cir. 2001) (internal quotation marks omitted), and drawing the reasonable inferences and deductions from that totality of information, *United States v. Arvizu*, 534 U.S. 266, 273 (2002). The district court below failed to do this, instead examining each factor individually rather than in conjunction. *See* JA 331-332.

The defendant seeks to discredit the Government's challenge to the divide-and-conquer analysis below by characterizing it as unfairly critical of the phrasing used by

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[5] (...continued)
an important factor in the totality of the circumstances analysis. However the Court's decision in *Griffin* did not turn on a concept of notice. Instead, *Griffin* was based upon the "special needs" attendant to a state's operation of its probation system which "may justify departures from the usual warrant and probable-cause requirements." 483 U.S. at 873-74.

the district court. Def. Br. 27. An examination of the district court's decision, however, reveals that the district court gave no consideration to how the various factors cited by the Government interacted with one another and collectively formed the basis of reasonable suspicion. For example, the district court did not consider how the ten-minute delay in opening the door, coupled with the presence of an absconded parolee with a criminal history of narcotics and weapon charges, would reasonably cause officers to suspect that the defendant was disposing of contraband or weapons.

The defendant's attempt to discount the individual factors supporting the search also fails.

First, the defendant's attempt to minimize his past convictions for narcotics and weapons is unpersuasive. The defendant argues that Deputy Wood himself did not mention the defendant's criminal history and that the Government failed to introduce the defendant's criminal record into evidence. Def. Br. 29. In fact, Deputy Wood testified that he was aware the morning of the search that the defendant "had prior arrests, violent offenses, narcotics offenses and also he was a sex offender." JA 87. This information was consistent with Parole Officer Cartagena's testimony, where he described what he told the officers about the defendant and his criminal history, including the fact that he was on parole for weapons charges. JA 81. The defendant faults the Government for not introducing certified copies of the defendant's criminal convictions at the suppression hearing, but it is clear from the officers' testimony that they had an accurate

understanding of the defendant's past convictions, and the defendant does not claim that their understanding was wrong.[6]

The defendant's reliance upon *United States v. Lifshitz*, 369 F.3d 173 (2d Cir. 2004), does not warrant a different result. In that case, the Court held that "it is not enough to suspect that someone has committed a particular crime *only* because of a prior criminal conduct." *Id*. at 181 (emphasis added). Instead, the Court explained that "[s]uspicion, to be reasonable . . . necessitates not only a focus upon a particular person, but also concentration on specific events." *Id.* Here, the search was reasonable because of the defendant's criminal history in light of the events surrounding the search, including his absconding from special parole, the lengthy time to answer the front door, the unusual manner in which the defendant was lying on the bed, and the skewed condition of the mattress.

Next, the defendant notes that he had not tested positive for using drugs while on special parole. Def. Br. 28-29. This assertion is true; however, the lack of a failed drug test is not all that surprising because the defendant stopped attending his drug treatment program after only a couple weeks of participation. JA 26. Certainly the

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[6] The defendant does not cite any support in the record for his statement that the officer did not search the defendant himself. Def. Br. 8. The record, however, does reflect that the defendant was not dressed at the time of his arrest, *see, e.g.*, JA 132, so that even if the officers did not search the defendant's person, such a fact would not be all that surprising.

defendant's failure to report to mandatory treatment should not inure to his benefit in the reasonable suspicion calculation. Instead, the more reasonable inference, in light of the defendant's past criminal history, was that the defendant had reverted to his drug abuse habits.

With respect to the lengthy delay in opening the front door, the defendant argues that the defendant did not delay in opening the door, his girlfriend did, and that the officers only inferred, rather than knew for a fact, that those inside the house had heard the knocking from the outset. Def. Br. 29-30. These arguments do not address the fact that Deputy Marshal Wood, "guided by his experience and training," *United States v. Colon*, 250 F.3d 130, 134 (2d Cir. 2001), viewed the failure to open the door and Moseley's excuse that she needed to put clothes on as a "stalling tactic" that caused him to believe Moseley and the defendant might have been hiding evidence. JA 152. Given the other factors surrounding the search, including the defendant's past narcotics and weapons convictions, it was reasonable for the officers to infer that something was amiss behind the closed door. Moreover, to the extent that the defendant now offers a competing, innocent explanation for the lengthy delay, the Supreme Court has made clear that "[a] determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct." *Arvizu*, 534 U.S. at 277. Of course, reasonable suspicion must also be measured at the time of the search from the perspective of the officers conducting the search, not in hindsight.

Next, the defendant argues that the manner in which he was found, lying backwards on a skewed mattress, with his arms extended out, did not contribute to the reasonable suspicion calculation. Def. Br. 30-31. While it may be that, on its own, this factor would not be enough to create reasonable suspicion, that does not mean that the fact can be ignored or discounted. *See United States v. Bayless*, 201 F.3d 116, 134 (2d Cir. 2000) (holding that reasonable suspicion can exist even when "[s]tanding alone, some of [the] factors would be innocuous"). In the context of the other circumstances surrounding the search, especially the lengthy delay that led officers to believe the defendant might be hiding something, the defendant's location and the mattress's odd positioning would reasonably arouse suspicion.

Finally, to the extent that the defendant suggests that the search in question had "overtones" of law enforcement officers usurping the role of the parole officers, Def. Br. 29 n.7, the record does not bear this out. Deputy Wood, who conducted the search, was not a parole officer, but instead was the sixth member of the team sent to arrest the defendant for violating his special parole. The other five members of the team were Connecticut parole officers. JA 37-38. There is nothing in the record to even remotely suggest that the parole officers were acting as a stalking horse for other law enforcement agents; instead, the uncontradicted evidence was that the parole team members asked Deputy Wood to accompany them because he was a member of a statewide fugitive task force. JA 84-86. *See United States v. Newton*, 369 F.3d 659, 667 (2d Cir. 2004) ("[B]ecause the [tip] suggested criminal conduct in

addition to that for which [defendant] had already been convicted and a not-insubstantial risk that [defendant's] response to any inquiry might be violent, it was entirely reasonable for the parole officers to solicit the assistance of the police in entering the residence.").

The defendant's statement that Parole Officer Barry was surprised by Deputy Wood's search under the mattress is a misstatement of Officer Barry's testimony. Officer Barry testified that he was aware that as he was handcuffing the defendant, Deputy Wood "was doing the quick search in this area [right around the bed.]" JA 180. Once the gun was found, Officer Barry thought it was appropriate to turn the investigation of the firearm over the New Haven Police Department because the fugitive task force members had secured the defendant. JA 184. Their decision to turn the investigation over to the police does not undermine the fact that there was ample suspicion to support the search in the first place.

In sum, the totality of the circumstances gave the officers reasonable suspicion that supported the search underneath the mattress.

Conclusion

For the reasons set forth above, and in the Government's opening brief, the Government respectfully requests that the Court reverse the district court's order suppressing the .45 caliber semi-automatic weapon.

Dated: March 11, 2009

Respectfully submitted,

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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 7,000 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 4,134 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

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