No._____

IN THE

# Supreme Court of the United States

MICHAEL ELDER,
*Petitioner,*

v.

THE UNITED STATES OF AMERICA,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

1. Whether the Second Circuit violated the party presentation principle articulated in *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020) when, in affirming the district court's decision denying a motion to suppress, it held that the exclusionary rule is inapplicable, even though the government waived the argument and neither party briefed or raised the issue at any stage.

2. Whether this Court's exclusionary rule jurisprudence requires evidence to be suppressed when it is found during a suspicionless search of a federal supervisee's home, and the officer conducting the search knew that at least reasonable suspicion was required but deliberately disregarded that requirement and conducted the search anyway.

## PARTIES TO THE PROCEEDINGS AND RELATED PROCEEDINGS

The Petitioner is Michael Elder, an individual. Petitioner was the defendant and appellant below.

The Respondent is the United States of America, prosecutor and appellee below.

The related proceedings are:

1) *United States v. Elder*, No. 17-CR-05-A, 2018 WL 833132 (W.D.N.Y. Feb. 13, 2018) – Judgment entered February 13, 2018; and

2) *Elder v. United States*, 805 Fed. App'x 19 (2d Cir. 2020) – Judgment entered March 9, 2020.

3) *Elder v. United States*, No. 18-3713 (2d Cir.) (en banc) – Judgment entered May 7, 2020.

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## INTRODUCTION

On the same day this Court decided *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020), reaffirming the party presentation principle, the Second Circuit denied the petition for rehearing en banc in this case, effectively sanctioning an even more egregious example of the conduct this Court decried in *Sineneng-Smith*. Despite chiding the government for not raising an exclusionary rule issue in the district court or on appeal, the Second Circuit affirmed the Petitioner's conviction—based solely on that issue—*without even giving Petitioner an opportunity to address it*.

1. Petitioner Michael Elder, previously a federal supervisee, signed an agreement with the government when he began his term of supervised release. The agreement permitted probation officers to search his home, but only where they had reasonable suspicion of illicit activity. Despite their knowledge of this requirement, a phalanx of probation and other federal officers raided Elder's home without reasonable suspicion. The government then used the poisonous fruits of that search to charge Elder with additional crimes.

2. The district court correctly found that the officers lacked reasonable suspicion to search Elder's home. But the court upheld the search, concluding that, because the release conditions do not expressly require reasonable suspicion, and given Elder's status as a federal supervisee, no suspicion was needed to conduct the search. On appeal, the Second Circuit accepted the district court's finding that the search lacked reasonable suspicion. It also acknowledged that neither it nor this Court has ever "addressed the

issue of the reasonableness of a suspicionless search of a supervised releasee's home when the supervisee did not explicitly consent to such a search." App. 7a. The Second Circuit sidestepped the issue, however, while also declining to adopt the district court's holding that no suspicion was needed. Instead, in a puzzling turn of events, the Second Circuit held that, even assuming Elder's Fourth Amendment rights were violated, suppression was not warranted because the search did not involve "the kind of flagrant or abusive police conduct that warrants application of the exclusionary rule." App. 8a.

3. But neither party briefed or argued the exclusionary rule issue in the district court or on appeal. Indeed, the government neglected to raise the issue even after prompting from the Magistrate Judge that it had failed to meet its burden in proving that "the exclusionary rule is not a proper remedy" in this case. App. 29a. Because the Second Circuit's decision rests upon a premise that it would reject if given the opportunity for consideration of this Court's reaffirming precedent, and it appears that such a redetermination may determine the ultimate outcome, this Court should grant the petition, vacate the Second Circuit's judgment, and remand for further consideration in light of *Sineneng-Smith*.

4. Even if this Court determines that a GVR order is not appropriate here, the petition should be decided on the merits. This case also presents a variation of the question this Court left open in *United States v. Knights*, 534 U.S. 112, 120, n.6 (2001): whether a condition of release that does not expressly allow for suspicionless searches can so diminish or eliminate a federal supervisee's reasonable expectation of privacy

such that a suspicionless search of his home by a probation officer would not offend the Fourth Amendment.[1]

5. This case is an ideal vehicle to resolve the questions presented because (i) it permits this Court an opportunity to correct the Second Circuit's error in deciding an important question of law that conflicts with this Court's recent decision in *Sineneng-Smith*; and (ii) it squarely presents the issue whether the Fourth Amendment protects a federal supervisee from suspicionless searches of his home—an issue that has not been, but should be, settled by this Court. When rights and procedures as basic as those in this case are openly flouted, both by appellate judges and federal officers, it becomes this Court's duty to step in and right those wrongs.

For these reasons and those that follow, this Court should grant certiorari, vacate the Second Circuit's decision, and remand for further proceedings in light of *Sineneng-Smith*, or grant certiorari on the merits and reverse the Second Circuit's decision.

## PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Elder respectfully petitions this Court for writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

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[1] *Knights*, 534 U.S. at 120 n.6 ("We do not decide whether the probation condition so diminished, or completely eliminated, Knights' reasonable expectation of privacy . . . that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment."

## OPINIONS BELOW

The Second Circuit's denial of the petition for rehearing en banc is currently unreported and is reproduced at page 1a of the Appendix ("App.") to this petition. Elder appealed the decision of the District Court for the Western District of New York, reproduced at page 10a of the Appendix to this petition and is available at No. 17-CR-05-A, 2018 WL 833132 (W.D.N.Y. Feb. 13, 2018). The Second Circuit's unpublished summary order is reproduced at page 2a of the Appendix to this petition and is available at 805 F. App'x 19 (2d Cir. 2020).

## STATEMENT OF JURISDICTION

The judgment of the Second Circuit denying Elder's petition for rehearing was entered on May 7, 2020. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

In light of the public health concerns surrounding the COVID-19 pandemic, this Court issued an order on March 19, 2020, granting an extension of time to file any petition for writ of certiorari to 150 days from the date of an order denying a timely petition for rehearing. Thus, this Petition is timely under Rule 13.1 of this Court.

## CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

> affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

## STATEMENT OF THE CASE

***Elder begins his term of supervised release with conditions that require reasonable suspicion for a search.*** In July 2016, Michael Elder began a five-year term of supervised release after serving time for non-drug-related offenses. App. 10a. The supervision agreement laid out the standard conditions and special conditions for release. App. 23a. One of the special conditions stated: "[t]he defendant shall submit to a search of his person, property, vehicle, place of residence or any other property under his control and permit confiscation of any evidence or contraband discovered." App. 23a. The statute defining the terms of federal supervision, 18 U.S.C. § 3583, and pertinent guidance material, U.S. SENTENCING GUIDELINES MANUAL § 5D1.3(d)(7)(C) (U.S. SENTENCING COMM'N 2016), clarify that officers must demonstrate reasonable suspicion that the supervisee has violated his terms of release before they may conduct a search under this condition.[2] The sample language for search conditions

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[2] Although Section 3583 and the U.S. Sentencing Guidelines reference the Sex Offender Registration and Notification Act (SORNA), every circuit to consider the issue has held that § 3583(d) provides appropriate guidance for *all* federal supervisee searches, not just SORNA-registered supervisees. *See, e.g.*, *United States v. Winston*, 850 F.3d 377, 379 (8th Cir. 2017) ("There is nothing in the language of § 3583(d) limiting the search condition only to felons who are required to registered under SONRA."); *United States v. Flaugher*, 805 F.3d 1249, 1252 (10th Cir. 2015) ("The text of § 3583(d) does not limit the possibility of a

provided by both the Administrative Office of the U.S. Court and the U.S. Parole Commission also require reasonable suspicion for warrantless searches. *See* Admin. Office of United States Courts Prob. and Pretrial Servs. Office, *Overview of Prob. and Supervised Release Conditions* 78–79 (2016) (warrantless searches permitted "only when reasonable suspicion exists"); U.S. Parole Comm'n R. & Proc. Man. § 2.204-18(b)(3) (2010) (releasee shall submit to searches "based upon reasonable suspicion").

Officer James Dyckman was assigned as Elder's probation officer. App. 23a. Over the next few months, Officer Dyckman visited Elder's residence on two to three occasions. App. 23a. On no occasion did Dyckman ever report that Elder had violated any condition of his supervised release. App. 23a. Elder, who had no prior drug-related offenses, was employed and consistently passed drug tests during this period. App. 23a.

***The Drug Enforcement Administration receives anonymous, uncorroborated tips alleging that Elder is selling drugs.*** From August to October 2016, the DEA received four anonymous online tips alleging that Elder was distributing narcotics from his home. App. 24a. The government elected to put only two of the four tips into evidence. App. 24a. The first tip, made on August 31, 2016, stated: "federal probation officer James Dyckman to

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warrantless search condition to felons required to register under SONRA."); *United States v. Dean*, 717 F. App'x 925, 933 (11th Cir. 2017) (collecting cases and rejecting the argument that § 3583(D) applies only to sex offenders).

tap this phone number 917 957 [****], if you want heroin off the buffalo streets." App. 24a. A few weeks later, the second tip came in: "Michael Elder 143 Edgewood tondowanda [*sic*] ny, this guy is dealing heroin to our neighborhood. I live on this street, expensive cars in and out of this address, large boxes being delivered stuffed with heroin. How many overdoses must occur before my street is safe from a well-known fentanyl dealer?" App. 24a. Despite the anonymous nature of these tips, DEA agents took no steps to confirm their veracity. App. 24a. Instead, the DEA chose to forward the tips to Dyckman on November 2, 2016. App. 24–25a. More than 60 days had elapsed since the DEA first received the first tips. Like the DEA, Dyckman also made no effort to confirm or corroborate the tips. App. 24–25a. Dyckman even testified that the anonymous tips could have been submitted by the same person and could have been nothing more than a prank. App. 25a. Nevertheless, based solely on the tips, Dyckman immediately scheduled a search of Elder's home for the next day. App. 25a.

***Nine federal agents raid Elder's home.*** The following morning, Officer Dyckman, three DEA agents, and five additional probation officers conducted an extensive search of Elder's home. App. 25a. The search revealed currency, controlled substances, and drug paraphernalia. App. 11a, 25a.

***The Magistrate Judge Recommends that the evidence seized be suppressed.*** Elder moved to suppress the evidence obtained from the November 3rd search at trial. App. 22a. The Magistrate Judge recommended that the evidence be suppressed because (i) "[t]he tipsters were anonymous and did not

reveal the basis of their knowledge" App. 27a; (ii) "Dyckman did not attempt to corroborate the information or to otherwise vet the reliability of the tips" App. 27–28a; and (iii) "'[w]hile there were multiple tips, this is not an instance where two independent but anonymous sources corroborate each other to supply reasonable suspicion[;] Indeed PO Dyckman never verified whether the tips came from one individual or separate individuals." App. 28a. The Magistrate Judge also explained that, because the government had "made no attempt to satisfy" its "burden to prove that the exclusionary rule is not a proper remedy" for Dyckman's Fourth Amendment violation, he would determine whether the rule was inapplicable. App. 29a. Moreover, he noted that (i) the government would waive "any right to further judicial review of [his] decision if it did not file a timely objection; and (ii) "the district judge will ordinarily refuse to consider *de novo* arguments, case law and/or evidentiary material which could have been, but were not presented to the magistrate judge in the first instance." App. 32a. Perhaps realizing that it had waived the argument, the government filed its Objections to the Magistrate Judge's Report and Recommendation without raising the exclusionary rule issue. *See* ECF No. 33.[3]

***The District Judge denies Elder's Motion to Suppress, despite the Magistrate's contrary recommendation.*** The District Judge agreed that no reasonable suspicion existed, App. 12a, but he rejected the Magistrate's recommendation that the evidence be

[3] The citation refers to the ECF number of the Government's Objections to the Magistrate's Judge's Report and Recommendation in the district court's docket.

suppressed, for two reasons. First, the District Judge found that because the release conditions do not expressly require reasonable suspicion, the search condition authorized suspicionless searches. App. 13a. Second, he reasoned that, although "the law is not clear on whether the Fourth Amendment permits a person on federal supervised release to be subject to suspicionless searches," *Samson v. California*, 547 U.S. 843 (2006) suggests that a federal supervisee is similarly situated to a parolee, and the former therefore has no expectation of privacy that society would recognize as legitimate. App. 13a. With the admitted evidence, Elder was found guilty at trial.

***Elder appeals to the Second Circuit.*** On appeal to the Second Circuit, Elder argued that the federal officers' actions were unreasonable under the Fourth Amendment because no federal statute authorized such a suspicionless search, and Elder did not expressly consent to such a search. ECF No. 43 at 15–20.[4] The government's sole argument on appeal was that the totality of the circumstances permitted the suspicionless home search. ECF No. 61 at 16.[5] At no time did the government so much as hint that it was relying on the inapplicability of the exclusionary rule in its argument. Indeed, when the panel inquired of the government why it had failed to argue that the exclusionary should not apply to this case, the government replied: "I do not know. And . . . standing

[4] The citation refers to the ECF number and PDF page number of Appellant's Brief in the Second Circuit's docket.

[5] The citation refers to the ECF number and PDF page number of Appellee's Brief in the Second Circuit's docket.

as the appellate attorney here, I wish that they did." Record of Oral Argument at 14:28–15:04.

The Second Circuit affirmed the district court's decision anyway. App. 2a. Notably, the panel accepted Elder's argument that federal officers lacked reasonable suspicion and even assumed that Elder did not validly consent to the suspicionless search. App. 7–8a. Nevertheless, the Second Circuit held that the illegal home search did not amount to the "kind of flagrant or abusive police misconduct that warrants application of the exclusionary rule." App. 8a. Thus, even though the government waived the argument and neither party argued or briefed the exclusionary issue in the district court or on appeal, the court still based its decision entirely upon its conclusion that the exclusionary rule should not apply. App. 7–8a. A few weeks later, the Second Circuit denied Elder's petition for rehearing en banc. App. 1a.

## REASONS FOR GRANTING THE WRIT

### I. An order granting certiorari, vacating the judgment below, and remanding for further consideration is an appropriate remedy in this case.

The Second Circuit's decision to raise *sua sponte*—and rely solely on—an exclusionary rule issue that was waived and neither briefed nor argued by the government (or Petitioner) is inconsistent with this Court's precedent and long-standing principles of appellate decision-making. In light of this Court's recent decision reaffirming the party presentation principle in *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020), this Court should grant the petition,

vacate the Second Circuit's judgment, and remand the case for further consideration.

### A. The Second Circuit violated the party presentation principle by considering the exclusionary rule's applicability to this case *sua sponte*.

In our adversarial system, it is a generally accepted rule "that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). This rule is "more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one." *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring). Indeed, "in both civil and criminal cases, in the first instance and on appeal . . . , we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008). Consequently, this Court has avowed that appellate courts should only consider unraised issues in exceptional cases where "injustice might otherwise result." *Singleton*, 428 U.S. at 121 (internal quotation marks omitted).

This Court has repeatedly reaffirmed this principle. *E.g.*, *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 n.3 (1999) ("Because this argument was neither raised nor considered below, we decline to consider it."); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38 (1989) ("We decline to address this argument because respondent failed to raise it below and because the

question it poses has not been adequately briefed and argued."); *Youakim v. Miller*, 425 U.S. 231, 234 (1975) ("It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed."); *Giordenello v. United States*, 357 U.S. 480, 488 (1958) (holding, in the Fourth Amendment context, that "[t]o permit the Government to inject its new theory into the case at this stage would unfairly deprive petitioner of an adequate opportunity to respond"). Most recently, this Court reaffirmed the party presentation principle in *United States v. Sineneng-Smith*—on the very same day the Second Circuit effectively sanctioned the panel's decision to rule on an exclusionary rule issue that was waived and that neither party raised. 140 S. Ct. at 1579.

In *Sineneng-Smith*, this Court held that the Ninth Circuit departed from the principle of party presentation by inviting amici to brief an unraised First Amendment issue. *Id.* *Sineneng-Smith* dictates the rule this Court should follow here. Federal courts are passive instruments of government, and they "do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties. *Id.* (quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring in denial of reh'g en banc)).

What makes this case far worse than *Sineneng-Smith*, however, is the fact that Elder was never even given an opportunity to address the relevant issue. It is precisely for that reason that "appellate courts ordinarily abstain from entertaining issues that have

not been raised and preserved in the court of first instance." *Wood v. Milyard*, 566 U.S. 463, 473 (2012). Undoubtedly, "[t]hat restraint is all the more appropriate when the appellate court itself spots an issue the parties did not air below, and therefore would not have anticipated in developing their arguments on appeal." *Id.* Moreover, this matter is hardly the type of "exceptional case" that has traditionally warranted such extraordinary judicial activism. *See Greenlaw*, 554 U.S. at 243-44 ("To the extent courts have approved departures from the party presentation principle in criminal cases, *the justification has usually been to protect a pro se litigant's rights*.") (emphasis added).

Any argument that the government did not waive the exclusionary rule issue is belied by the record. "Waiver is the intentional relinquishment or abandonment of a known right." *Wood*, 566 U.S. at 474 (internal quotation marks omitted). The government's conduct in this case fits that description. The government made no attempt to meet its burden in proving that the exclusionary rule is not a proper remedy in this case. Even after prompting from the Magistrate Judge and a warning that the failure to object to the specifics of his recommendation would constitute a waiver of "any right to further judicial review," App. 32a, the government still neglected to challenge the applicability of exclusionary rule. At bottom, the government knew that it could have argued the inapplicability of the exclusionary rule, yet it chose to refrain from doing so.

It is all the more galling, then, that, instead of adjudicating the arguments presented by the parties, the panel devised and implemented its own legal

argument, summarily concluding that this case did not involve "the kind of flagrant or abusive police misconduct that warrants application of the exclusionary rule." *See* App. 8a. This Court has deemed it "essential . . . that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Hormel v. Helvering*, 312 U.S. 552, 556 (1941); *see also United States v. Black*, 918 F.3d 243, 255 (2d Cir. 2019) (explaining that courts will not consider unraised arguments unless "manifest injustice" otherwise would result). Yet the panel never even bothered to explain the "manifest injustice" it was seeking to avoid.

While the federal courts of appeals may have discretion to address an unargued issue, *see, e.g.*, *Day v. McDonough*, 547 U.S. 198, 202 (2006) (holding that a federal court had "authority, on its own initiative," to correct a party's "evident miscalculation of the elapsed time under a statute [of limitations]" absent "intelligent waiver"), it was particularly misplaced to do so here with a novel exception to the exclusionary rule. As this Court explained in *Singleton*: "The issue resolved by the Court of Appeals has never been passed upon in any decision of this Court. This being so, injustice was more likely to be caused than avoided by deciding the issue without petitioners having had an opportunity to be heard." 428 U.S. at 121.

The injustice is palpable here. Elder faces permanent deprivations of liberty because the Second Circuit violated basic tenets of appellate decision-making. And while this Court acknowledged in *Sineneng-Smith* that the party presentation principle is "supple, not ironclad," deviations from the general

rule typically call for supplemental briefing—something that was conspicuously absent here. 140 S. Ct. at 1579 n.4. If the panel wanted to consider the exclusionary rule or formulate a new exception, it should have, at the very minimum, required fully-briefed arguments on the matter.

### B. There is a reasonable probability the Second Circuit would rule differently in light of *Sineneng-Smith*.

As this Court explained in *Lawrence v. Chater*, 516 U.S. 163 (1996), "the GVR order has, over the past 50 years, become an integral part of this Court's practice, accepted and employed by all sitting and recent Justices. We have GVR'd in light of a wide range of developments, including our own decisions." *Id.* at 166. This Court has made clear that a GVR order is appropriate where, as here, "recent developments that . . . the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome." *Id.* at 167.

This case fits that bill and also falls within the first category of GVR orders recognized in *Lawrence*—"intervening factors"—because it includes "at least Supreme Court decisions rendered so shortly before the lower court's decision that the lower court had no 'opportunity' to apply them." *Id.* at 169. Here, *Sineneng-Smith* was decided on the same day the Second Circuit rejected Elder's petition for rehearing en banc. *Sineneng-Smith* is a stern reminder of the

party presentation principle—which federal courts of appeals all-too-frequently ignore—and this Court's decision in *Sineneng-Smith* "cast[s] substantial doubt on the correctness of the lower court's summary disposition." *Lawrence*, 516 U.S. at 170. Given this recent denouncement of judicial intermeddling, it seems all but certain that the Second Circuit would have refrained from addressing the exclusionary rule's applicability in retrospect. An opportunity for reconsideration would allow the Second Circuit to rule on the case actually presented by the parties.

Significant prudential concerns also weigh in favor of granting a GVR order in this matter. As this Court emphasized in *Lawrence*, "ambiguous summary dispositions below tend, by their very nature, to lack the precedential significance that we generally look for in deciding whether to exercise our discretion to grant plenary review." *Id.* at 170. This is particularly relevant where, as here, a panel of judges created a novel exception to the exclusionary rule, premised on cursory analysis totaling just over three hundred words. Given the magnitude of the legal issue at stake, a far more robust analysis was required.

Moreover, exercise of this Court's discretionary certiorari jurisdiction to issue a GVR order in this case will also "conserve[] the scarce resources of this Court that might otherwise be expended on plenary consideration, assist[] the court below by flagging a particular issue that it does not appear to have fully considered, and alleviate[] the '[p]otential for unequal treatment' . . . inherent in [this Court's] inability to grant plenary review." *Id.* at 167. The record is clear—raising a waived issue *sua sponte*, the cursory analysis, and the novelty of the exception created—

that the exclusionary rule issue was not adequately considered by the Second Circuit. A GVR order in this case will help "improve the fairness and accuracy of judicial outcomes" by giving district courts a coherent exclusionary rule framework, "while at the same time serving as a cautious and deferential alternative to summary reversal." *Id.* at 168.

## II. The Second Circuit's ruling contravenes long-standing Fourth Amendment jurisprudence by holding that a knowing violation of a supervisee's rights does not constitute flagrant conduct.

Even if this Court determines that a GVR order is not appropriate here, the petition should be decided on the merits. The Second Circuit erred in holding that the exclusionary rule does not apply to this case. The officers here knew that reasonable suspicion was required to search Elder's home and yet chose to conduct the search anyway. Such action constitutes a deliberate disregard for Elder's Fourth Amendment rights. Disallowing application of the exclusionary rule even in the face of flagrant conduct creates an entirely new exception to the rule. This new exception all but abrogates the Fourth Amendment in the supervisee context, sanctioning precisely the type of conduct against which the exclusionary rule was meant to protect. *See Herring v. United States*, 555 U.S. 135, 144 (2009) ("[T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct."). As a result, the Second Circuit's decision must be reversed.

### A. The Fourth Amendment prohibits suspicionless searches in the absence of express consent.

This Court has stated that "[a supervisee's] home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be "reasonable." *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987). And while supervisees are subjected to a lesser constitutional standard, the state may not endlessly diminish their uniquely balanced rights by acting beyond the scope of the supervisee's consent. *See id.* at 875, 880. Supervisees retain their constitutional rights, and any limitations on those rights must be clearly stated. The *Griffin* and *Knights* line of cases illustrates the scope of a supervisee's consent through statute and terms of supervision.

In *Griffin*, the Court examined the validity of a search that officers undertook pursuant to a Wisconsin statute that specifically authorized the warrantless search of those living under state supervision and regulations that expressly addressed consent. 483 U.S. at 870 (citing Wis. Stat. § 973.10(1) (1985–1986)). Wisconsin issued regulations permitting probation officers to search supervisees and their places of residence when officers had "reasonable grounds" to believe that contraband existed there. *Id.* at 870–71 (citing Wis. Admin. Code HSS §§ 328.21(4), 328.16(1) (1981)).

This Court provided lower courts with multiple factors for determining whether an officer had "reasonable grounds" to search. *Id.* These factors paralleled the requirements of the federal "reasonable suspicion" standard, and included analyzing any tips

received for "the reliability and specificity of that information, the reliability of the informant (including whether the informant has any incentive to supply inaccurate information), the officer's own experience with the probationer, and the 'need to verify compliance with rules of supervision and state and federal law.'" *Id.* at 871 (citing Wis. Admin. Code HSS § 328.21(7) (1981)).

This Court held that officers satisfied Fourth Amendment requirements in *Griffin* because Wisconsin had specific regulations authorizing officers to search supervisees and their residences. *Id.* at 880. Officers could not have used their search power arbitrarily because they were restrained by the "reasonable grounds" requirement provided in the regulations. *See id.* The search was only reasonable because it was pursuant to an otherwise reasonable statute—one that balanced the individual's interests against the state's special needs and contemplated the consent of the probationer. *See id.*

Building on *Griffin*, this Court explained in *Knights* that supervision agreements and the notice that each supervisee receives when signing the agreement, defines the scope of the state's power over that supervisee. *See Knights*, 534 U.S. at 114. In *Knights*, this Court considered a California law that imposed a search condition on those living under government supervision. *Id.* That law required every probationer to "submit his . . . person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." *Id.* Knights signed an agreement including that condition. *Id.* He indicated

that he had "received a copy, read and underst[ood] the above terms and conditions of probation and agree[d] to abide by the same." *Id.* This Court, reading the explicit language of the supervision agreement, held that Knights' Fourth Amendment privacy rights were not abrogated because he consented to those terms. *Id.*

This Court examined the scope of supervisees' Fourth Amendment rights further in *Samson*. There, the California legislature acted statutorily to mandate that parolees agree to be subject to suspicionless searches before they would be released. 547 U.S. at 846; *see also* Cal. Penal Code Ann. § 3067(a) (West 2000). The statute specifically required parolees to "agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant *and with or without cause*." *Samson*, 547 U.S. at 846 (quoting Cal. Penal Code Ann. § 3067(a) (West 2000) (emphasis added)). By signing a supervision agreement under this specific circumstance, a parolee would be consenting to a suspicionless search. Because Samson had signed and agreed to this term, the Court held that there was no constitutional issue with subjecting him, based on that consent, to suspicionless searches. *Id.* at 851–52.

As illustrated by these cases, the terms that each supervisee explicitly consents to—and only those terms—define the conditions under which officers may search him.

### B. Dyckman deliberately chose to flout the Fourth Amendment and conduct a suspicionless search of Elder's home.

Dyckman's suspicionless search of Elder's home was a flagrant violation of the Fourth Amendment because he knew that Elder had not expressly consented to suspicionless searches. Indeed, Dyckman admitted that he had interpreted the release conditions (as any reasonable officer would) as requiring reasonable suspicion to conduct a search, yet he chose to proceed without it. Under *Herring*, evidence should be suppressed if it is obtained by a "flagrant or deliberate violation of [Fourth Amendment] rights." 555 U.S. at 143. Conduct is flagrant "if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Id.* (internal quotations omitted).

Dyckman may be charged with knowledge that anonymous tips, on their own, do not give rise to reasonable suspicion. *See Florida v. J.L.*, 529 U.S. 266, 271 (2000) (noting that reasonable suspicion cannot arise from "the bare report of an unknown, unaccountable informant"). Moreover, Dyckman testified that he knew he needed reasonable suspicion before conducting a search of Elder's home, implicitly acknowledging that Elder had not expressly consented to suspicionless searches. App. 12-13a.

The Second Circuit's holding cannot, therefore, be squared with this Court's precedents and the extant record. Put differently, if a knowingly illegal,

suspicionless search by nine federal officers, based on anonymous and unverified online tips does not constitute "flagrant or abusive police misconduct" sufficient to warrant exclusion, it is difficult to conceive of what would.

### C. The exclusionary rule was meant to deter precisely the kind of flagrant official misconduct at play in this case.

The Second Circuit's holding that a knowingly illegal search, conducted by officers, is not subject to the exclusionary rule flies in the face of this Court's exclusionary rule jurisprudence. "[T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct." *Herring*, 555 U.S. at 144. "[T]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Id.* at 140, 144.

This Court has commonly applied the exclusionary rule to deliberate police misconduct. *See, e.g.*, *Davis v. United States*, 564 U.S. 229, 238 (2011) (noting that in cases where officer conduct is deliberate, reckless, or grossly negligent, the value of deterrence is high and commonly outweighs the resulting costs of exclusion); *Kaupp v. Texas*, 538 U.S. 626, 628 (2003) (applying the exclusionary rule to a confession where officers flagrantly violated an arrestee's rights by knowingly arresting him without probable cause). Here, Officer Dyckman intentionally chose to search Elder's home without reasonable suspicion. This sort

of deliberate police misconduct outweighs the costs of exclusion and should be deterred.

Moreover, the officers in this case cannot avail themselves of the good faith exception to the exclusionary rule.[6] Unlike prior applications of the good faith exception, this case does not involve good faith reliance on an administrative error. *See Herring*, 555 U.S. at 137; *United States v. Leon*, 468 U.S. 897, 922 (1984). In *United States v. Leon*, this Court created an exception to the exclusionary rule for "minor" transgressions made in good faith. 468 U.S. at 908 (declining to apply the exclusionary rule to evidence obtained under a facially valid warrant that later turned out to be invalid due to a magistrate's error because exclusion would provide only incremental deterrent value). Similarly, in *Herring*, this Court applied the good faith exception to "innocent" officers who relied mistakenly but in good faith upon sheriff's records that had not been updated. 555 U.S. at 139. The search at issue in this case is different in-kind from these types of innocuous, good faith mistakes. Here, officers intentionally and deliberately disregarded the need for reasonable suspicion and conducted an illegal home search anyway. This Court has never applied the good faith

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[6] It should also be noted that "[t]he burden is on the government to demonstrate the objective reasonableness of the officers' good faith reliance." *United States v. Bershchansky*, 788 F.3d 102, 114 (2d Cir. 2015) (finding that the government failed its burden where a warrant erroneously listed "Apartment 2" instead of "Apartment 1" and officers executed a search of Apartment 1 anyway). At no point in the current litigation has the government attempted to satisfy that burden.

exception to such blatant and intentional misconduct and should not do so here.

Moreover, this Court's exclusionary rule jurisprudence suggests that the rule's deterrent value reaches its apogee where, as here, the flagrant conduct involves an invasion or search of the home. *See, e.g.*, *Kaupp*, 538 U.S. at 628, 633 (finding flagrant violation where a warrantless arrest was made in the arrestee's home after police were denied a warrant and at least some officers knew they lacked probable cause); *Weeks v. United States*, 232 U.S. 383, 386, 393–94 (1914) (flagrant conduct where officers lacking in sworn and particularized information broke into defendant's home, confiscated incriminating papers, then returned with U.S. Marshal to confiscate even more); *Mapp v. Ohio*, 367 U.S. 643, 644–45 (1961) (flagrant conduct existed where officers forced open a door to Ms. Mapp's house, kept her lawyer from entering, brandished what the court concluded was a false warrant, then forced her into handcuffs and canvassed the house for obscenity). This pattern is hardly surprising, given that, at the very core of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion." *Silverman v. United States*, 365 U.S. 505, 512 (1961); *see also Florida v. Jardines*, 569 U.S. 1 (2013) ("When it comes to the Fourth Amendment, the home is first among equals.").

Similarly, several Circuits have recognized the strong deterrent value in excluding evidence obtained through intentional police misconduct. For example, in *United States v. Julius*, the Second Circuit acknowledged that a "warrantless search . . . entails

different concerns about deterrence of police misconduct." 610 F.3d 60, 67 (2d Cir. 2010). Indeed, "[u]nlike in *Herring*, in which the alleged error was attenuated from the search, the error here was made *by the searching officer*." *Id.* (emphasis added). The Tenth Circuit has also noted the importance of deterring unlawful police conduct. *See United States v. Loera*, 923 F.3d 907, 925 (10th Cir. 2019) (holding that "the good faith exception does not apply . . . because the illegality at issue stems from unlawful police conduct, rather than magistrate error, and therefore the deterrence purposes of the Fourth Amendment are best served by applying the exclusionary rule.") (emphasis in original). Likewise, the Ninth Circuit recently suppressed evidence discovered through police, rather than administrative, misconduct. *See United States v. Artis*, 919 F.3d 1123, 1134 (9th Cir. 2019) (refusing to apply the good faith exception because "the police discovered the evidence through conduct that . . . is plainly unconstitutional, in contrast to the 'isolated negligence' at issue in *Herring*."). Under the Second Circuit's decision, however, innocuous bookkeeping errors and intentional suspicionless searches are equally immune from exclusion. Surely this type of intentional officer misconduct is not the sort of "minor" transgression this Court intended to immunize from exclusion under *Leon*. *See* 468 U.S. at 908.

## III. This case presents issues of extraordinary importance.

A GVR order is needed in this case to give district courts a coherent exclusionary rule framework that incentivizes law enforcement's scrupulous compliance

with the Fourth Amendment's mandates—which is of particular importance in light of recent calls for an increase in police accountability.

In addition to concerns about the propriety of the Second Circuit's novel exception to the exclusionary rule, the Second Circuit's brazen disregard for the party presentation principle is unjustified and undercuts the legitimacy of appellate determination. Failure to provide advocate input necessarily results in loss of litigant and public acceptance of the judiciary's integrity. *See* Paul D. Carrington, *A Critical Assessment of the Cultural and Institutional Roles of Appellate Courts*, 9 J. App. Prac. & Process 231, 236 (2007) ("Judges sitting on appellate benches . . . [must] give serious attention to appellate procedures and structures established to ensure the measures of accountability and transparency required to assure litigants, and the public, that the job is being done, and being done by those whose job it is to do it.").

Moreover, due process concerns are implicated where an appellate court decides an issue not raised or briefed, as the parties have been deprived of notice and an opportunity to be heard. *See id.* ("If American law is to play the traditional and expected role of holding together a vast, diverse, and conflicted population by assuring adequately shared trust in law and its institutions, litigants must perceive that they are getting the personal attention of judges that is the heart of . . . Due Process."). In deviating from the party presentation principle here, the Second Circuit not only deprived Elder of an opportunity to be noticed and heard on the exclusionary rule issue, but it also cast a shadow of doubt upon the integrity of appellate determinations throughout the country.

Given the large number of suppression motions regularly filed, it is critical that district courts have a workable exclusionary rule standard to employ moving forward. District courts now face the unenviable task of making sense of a malleable new exclusionary rule framework that is at odds with this Court's and the Second Circuit's Fourth Amendment jurisprudence. What—if anything—constitutes "the kind of flagrant or abusive police misconduct that warrants application of the exclusionary rule" under the Second Circuit's new framework is unclear, to say the least. *See* App. 8a. District courts should not be asked to apply such an amorphous standard. *See* 1 Wayne LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 1.3(g) (5th ed. 2019) ("Extension of the good faith exception beyond warrant cases would . . . impose upon suppression judges the heavy burden—indeed, intolerable burden—of frequently making exceedingly difficult decisions.").

Moreover, the Second Circuit's new approach to suppression all but gives law enforcement the green light to disregard the Fourth Amendment. If evidence seized from searches similar to the suspicionless home search at issue here is nonetheless immune from the exclusionary rule, it is difficult to deduce why law enforcement would ever bother to comply with the Fourth Amendment in the first place. Indeed, "an across-the-board good faith exception would mean in practice that appellate courts defer to trial courts and trial courts defer to the police." LaFave, *supra*, 1.3(g) (internal quotation marks omitted).

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDICES

**APPENDIX A**
Case No. 18-3713

**UNPUBLISHED**
**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

**UNITED STATES OF AMERICA,**
**Appellee,**

**v.**

**DECIDED**
May 7, 2020

**MICHAEL ELDER,**
**Defendant-Appellant.**

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Appellant, Michael Elder, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

**APPENDIX B**
Case No. 18-3713-cr

**UNPUBLISHED**
**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

**UNITED STATES OF AMERICA,**
**Appellee,**

**v.**

**DECIDED**
March 9, 2020

**MICHAEL ELDER,**
**Defendant-Appellant.**

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**SUMMARY ORDER**

Before JACOBS, CHIN, and BIANCO, Circuit Judges.

Appeal from the United States District Court for the Western District of New York (Arcara, J.).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of the district court is **AFFIRMED**.

Defendant-appellant Michael Elder appeals a judgment, entered November 30, 2018, following his conviction at a jury trial, sentencing him principally to 210 months′ imprisonment for possession with intent to distribute cocaine and fentanyl in violation of 21 U.S.C. § 841(a)(1), 841(b)(1)(B), and 841(b)(1)(C), as well as maintaining a drug-involved premises in violation of 21 U.S.C. § 856(a)(1) and 856(b). On

appeal, Elder challenges the district court's denial of his motion to suppress the physical evidence found during a warrantless search of his home. Specifically, Elder, who was on supervised release for a prior conviction at the time of the search, argues that the search was not supported by reasonable suspicion and thus violated the Fourth Amendment. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

In 2005, Elder was sentenced to a term of imprisonment and supervised release for firearms offenses and bank robbery. After completing his prison term, he began his supervised released under the supervision of U.S. Probation Officer James Dyckman. As a supervisee, Elder was subject to the following special search condition: "[Elder] shall submit to a search of his person, property, vehicle, place of residence or any other property under his control and permit confiscation of any evidence or contraband discovered." App'x at 19. Elder indicated by his signature that he consented to the search condition.[7] During the course of Elder's supervision, Dyckman received an email from the Drug Enforcement Agency ("DEA") advising that it had received four anonymous emails over the course of two months alleging that Elder was selling drugs from his home. On the basis of these tips, Dyckman, along with

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[7] It is not clear whether Elder understood the search condition to permit suspicionless searches. Indeed, when describing Elder's signing of the special conditions, Dyckman testified that he (Dyckman) understood the condition as "allow[ing] us to search his property, his residence that he reports to us, any property under his control upon reasonable suspicion to exercise that right." Dist. Ct. Dkt. No. 24 at 19-20.

eight other probation officers and DEA agents, searched Elder's home and discovered drugs, cash, and drug paraphernalia. Following the filing of charges, Elder moved to suppress the evidence seized during the search. The district court denied the motion, holding that although the search was not supported by reasonable suspicion, Elder's special search condition authorized suspicionless searches.

## *DISCUSSION*

### *I. Standard of Review*

"On appeal from a district court's ruling on a motion to suppress evidence, we review legal conclusions de novo and findings of fact for clear error." *United States v. Berschansky*, 788 F.3d 102, 108 (2d Cir. 2015). Mixed questions of fact and law are reviewed de novo. *Id.*

### *II. Applicable Law*

The Fourth Amendment protects the right of the people to be free from unreasonable government intrusion into areas where they have "a legitimate expectation of privacy." *United States v. Newton*, 369 F.3d 659, 664-65 (2d Cir. 2004). Persons on supervised release have a diminished expectation of privacy. *See United States v. Edelman*, 726 F.3d 305, 310 (2d Cir. 2013) (noting that supervisees "who sign [waivers] manifest an awareness that supervision can include intrusions into their residence and, thus, have a severely diminished expectation of privacy" (quoting *Newton*, 369 F.3d at 665)); *United States v. Balon*, 384

F.3d 38, 44 (2d Cir. 2004) (noting that an individual on supervised release has a "diminished expectation of privacy that is inherent in the very term '*supervised release*'").

With few exceptions, a search is "not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause." *Skinner v. Ry. Labor Exec.'s Ass'n*, 489 U.S. 602, 619 (1989). One exception to this general rule is when "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable." *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987). Supervision is one such special need. *Id.* at 875.

Suspicionless searches of a parolee do not violate the Fourth Amendment if the parolee has expressly consented to them. *See Samson v. California*, 547 U.S. 843, 846 (2006) (holding that a suspicionless search did not violate the Fourth Amendment where the defendant was a state parolee and California law required that parolees "agree in writing to be subject to search . . . with or without cause"). Though we have upheld a search premised on a search condition that did not explicitly provide for searches without reasonable suspicion, *see United States v. Massey*, there we noted that the search was in fact supported by reasonable suspicion. 461 F.3d 177, 178-79 (2d Cir. 2006).[8] We have recognized that in monitoring

[8] We observe that the language of the search condition here deviates from the sample language for such conditions provided by both the Administrative Office of the U.S. Courts and the U.S. Parole Commission, which require reasonable suspicion for warrantless searches. *See* Admin. Office of United States Courts Prob. and Pretrial Servs. Office, Overview of Prob. And Supervised Release Conditions 78-79 (2016) (warrantless

individuals on supervised release, probation officers must be given "considerable investigative leeway," *United States v. Reyes*, 283 F.3d 446, 457 (2d Cir. 2002), for in bringing a supervisee's offending conduct to the attention of the court, they act as the "eyes and ears" of the court, *id.* at 455.

The fact that the Fourth Amendment has been violated does not mean that the exclusionary rule must be invoked, for exclusion is not a necessary consequence of a Fourth Amendment violation, but rather is intended to deter "intentional conduct that was patently unconstitutional." *Herring v. United States*, 555 U.S. 135, 143-44 (2009); *see also Davis v. United States*, 564 U.S. 229, 237 (2011) (noting that while "real deterrent value is a necessary condition for exclusion . . . it is not a sufficient one"). Accordingly, "exclusion 'has always been our last resort, not our first impulse,'" and thus "to trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Herring*, 555 U.S. at 140, 144 (internal quotation marks omitted).

### *III. Analysis*

As a preliminary matter, we accept for the purposes of this appeal the district court's finding that

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searches permitted "only when reasonable suspicion exists"); U.S. Parole Comm'n R. & Proc. Man. § 2.204-18(b)(3) (2010) (releasee shall submit to searches "based upon reasonable suspicion"). The absence of such language would surely increase the risk of abuse

the anonymous tips did not provide reasonable suspicion for the search.

While the Supreme Court has held that the suspicionless search of a parolee does not violate the Fourth Amendment, there the operative statute clearly stated that the parolee consented to search "with or without cause." *See Samson*, 547 U.S. at 846. Here, however, Elder's search condition does not explicitly state that he is subject to search without reasonable suspicion. Neither the Supreme Court nor our Court has addressed the issue of the reasonableness of a suspicionless search of a supervised releasee's home where the supervisee did not explicitly consent to such a search.

We need not, however, decide the issue here. Even assuming that Elder's Fourth Amendment rights were violated because he did not validly consent to the suspicionless search, suppression was not warranted in light of the totality of the circumstances. Weighing the "incremental deterrent" of excluding the evidence found in Elder's home against "the substantial social costs extracted by the exclusionary rule," we conclude that, even absent reasonable suspicion and assuming a Fourth Amendment violation, the district court did not err in denying the motion to suppress. *Illinois v. Krull*, 480 U.S. 340, 352-53 (1987).

As a supervisee, Elder had a "severely diminished expectation of privacy." *Edelman*, 726 F.3d at 310. In contrast, the government's interests were substantial. The government has an "overwhelming interest" in supervising those on supervised release to "reduc[e] recividism and thereby promoting reintegration and positive citizenship" among supervisees. *Samson*, 547 U.S. at 853. Moreover, while the anonymous tips did

not support reasonable suspicion, Dyckman's conduct "was rationally and reasonably related to the performance of [his] duty. *See Newton*, 369 F.3d at 666. Indeed, another law enforcement agency -- the DEA -- reported that there were four tips over the course of two months that Elder, who was under federal supervision, was engaging in the illegal distribution of drugs. Even assuming Dyckman acted unreasonably in failing to conduct further investigation before executing the search, this is not the kind of flagrant or abusive police misconduct that warrants application of the exclusionary rule. Bearing in mind that the exclusionary rule "applies only where it 'results in appreciable deterrence,'" *Herring*, 555 U.S. at 141 (alteration omitted) (quoting *United States v. Leon*, 468 U.S. 897, 909 (1984), and weighing the deterrent effect against the serious cost of "letting guilty and possibly dangerous defendants go free," *United States v. Julius*, 610 F.3d 60, 66 (2d Cir. 2010) (quoting Herring, 555 U.S. at 141), we conclude that, in the circumstances here, the substantial social costs of suppressing the evidence obtained during the search of Elder's home outweigh the incremental deterrent value of granting it. Accordingly, we conclude that the district court did not err when it denied Elder's motion to suppress.

* * *

We have considered Elder's remaining arguments and conclude they are without merit. For the foregoing reasons, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

**APPENDIX C**
Case No. 17-CR-05-A

**UNPUBLISHED**
**UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF NEW YORK**

**UNITED STATES OF AMERICA,**

**v.**

**MICHAEL ELDER,**
**Defendant.**

**DECIDED**
February 13, 2018

This case is before the Court on the Government's objections to Magistrate Judge Jeremiah J. McCarthy's Report and Recommendation, which recommends suppressing evidence recovered from a warrantless search of the Defendant's home. For the reasons stated below, the Court adopts the Report and Recommendation in some respects and declines to adopt the Report and Recommendation in other respects. The Court therefore denies the Defendant's motion to suppress.

## DISCUSSION

The Court assumes familiarity with the facts of this case, which Judge McCarthy's Report and Recommendation sets forth in detail. In brief, the Defendant began serving a five-year term of federal supervised release in July 2016. Within two months of his release, the Drug Enforcement Administration (DEA) began receiving anonymous tips alleging that

the Defendant was selling heroin and fentanyl from his home. Each of the tips DEA received was relatively vague, none contained any predictive information, and neither the DEA nor the Defendant's Probation Officer attempted to verify any of the information in the tips.

[1] Based on the tips, several U.S. Probation Officers and DEA agents searched the Defendant's home and found a digital scale, "multiple bags of compressed powder," and three "kilo presses."[2]

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[1] The first tip stated: "federal probation officer James Dyckman to tap this phone number 917 957 [xxxx], if you want heroin off the buffalo streets." Ex. 1. James Dyckman is the Defendant's Probation Officer. Officer Dyckman testified that the phone number in the tip was not the phone number the Defendant had provided to the Probation Office.

The second tip stated: "Michael Elder 143 Edgewood tondowanda ny [sic], this guy is dealing heroin to our neighborhood. I live on this street, expensive cars in and out of this address, large boxes being delivered stuffed with heroin. How many overdoses must occur before my street is safe from a well-known fentanyl dealer?" Ex. 3.

The third tip stated: "I live in this community. The government pretends to care about people's well-being. How many overdoses need to occur before something is done? I guess I shouldn't care either." Tr. 52:9-12.

And the fourth tip stated: "If you raid Michael Elder residence at 143 Edgewood, you'll find drugs, heroin, Fentanyl underneath the cabinets next to the stove." Tr. 52:13-16.

[2] According to one of the DEA agents who conducted the search, a "kilo press" is "basically a hydraulic floor jack connected to a collar that's the shape of a small box." Tr. 69:13-16. The user "put[s] powder in" the jack, "put[s] the top on and jack[s] [the] jack up [to] make . . . a block of drugs." Tr. 69:16-18.

The Court agrees with Judge McCarthy that the anonymous tips did not, individually or collectively, support a finding of reasonable suspicion. This is a close question—for instance, one tip references the name of the Defendant's Probation Officer, suggesting a familiarity with the Defendant and his activities. However, none of the information contained in the tips was verified and none of it was predictive. Moreover, none of the tipper's identities is known, and there is therefore was no way of knowing whether four people sent four tips, or if, instead, one person sent four tips. And, finally, nothing in the Defendant's background or history of supervision suggested that he might, upon release, become involved in drug trafficking.[3] Thus, either individually or collectively, these tips do not amount to reasonable suspicion.[4]

The Court disagrees, however, with Judge McCarthy's conclusion that the search needed to have been supported by reasonable suspicion. The Probation Officer testified that he was only permitted to search the Defendant's house if he had reasonable

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[3] The Defendant's underlying conviction was for bank robbery, and he has no prior charges or convictions related to narcotics. While on supervised release, the Defendant was employed, he did not test positive for drugs, and, to the Probation Officer's knowledge, he had not violated any condition of his supervised release. Finally, the Probation Officer had visited the Defendant's house on two or three occasions before the search at issue, and the record does not suggest that the Probation Officer found any contraband during those visits.

[4] "That the allegation[s]" in the tips "turned out to be correct does not suggest that the officers, prior to the [search], had a reasonable basis for suspecting [the Defendant] of engaging in unlawful conduct: The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search." *Florida v. J.L.*, 529 U.S. 266, 271 (2000).

suspicion to do so. That conclusion was incorrect. The terms of the Defendant's supervised release include a search condition, but that search condition does not require reasonable suspicion. Instead, the search condition states, in its entirety, that "[t]he defendant shall submit to a search of his person, property, vehicle, place of residence or any other property under his control and permit the confiscation of any evidence or contraband discovered." Docket No. 23-1 at 4. Thus, the search condition in this case authorizes suspicionless searches.

The law is not clear on whether the Fourth Amendment permits a person on federal supervised release to be subject to suspicionless searches.[5] In *United States v. Knights*, the Supreme Court held that, "[w]hen an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable." 534 U.S. 112, 121 (2001). *Knights*, however, expressly reserved decision on the question whether a search that is unsupported by "any individualized suspicion" would satisfy the Fourth Amendment. *Id.* at 120 n.6. Like *Knights*, the Second Circuit has held that "[p]robationary searches—whether for law enforcement or probationary purposes—are acceptable . . . if based

[5] While the search in this case was not supported by reasonable suspicion, the search was not entirely without suspicion. The anonymous tips suggested, at the very least, that the Defendant was engaged in conduct that others either knew or believed was criminal. However, the Government has justified the search based largely on the terms of the Defendant's supervised release, which require no suspicion.

upon reasonable suspicion (or potentially a lesser standard)." *United States v. Lifshitz*, 369 F.3d 173, 181 (2d Cir. 2004). But the Second Circuit has not yet clarified whether a search of a federal supervisee may be based on a "lesser standard" than reasonable suspicion. *See United States v. Chirino*, 483 F.3d 141, 150 (2d Cir. 2007) (McLaughlin, J., concurring) (arguing that "something less than reasonable suspicion may support a search of the dwelling of a felon on probation," and urging the Second Circuit to resolve the question). *See also United States v. Washington*, No. 12 Cr. 146(JPO), 2012 WL 5438909, at *6 n.4 (S.D.N.Y. Nov. 7, 2012) (concluding that search was supported by reasonable suspicion and, as a result, declining to address "the open question whether a lesser standard may be appropriate in the supervised release context"). Thus, at present, there appears to be no binding authority addressing whether a federal probation officer may search a supervisee's home based on something less than reasonable suspicion.

In a closely-related context, however, the Supreme Court has provided guidance that helps resolve this case. In *Samson v. California*, 547 U.S. 843 (2006), the Court considered whether a California statute permitting suspicionless searches of parolees was consistent with the Fourth Amendment.[6] This required the Court to assess "'the totality of the

[6] *Samson* was decided on the understanding that the California statute did not permit "'arbitrary, capricious or harassing' searches." *Samson*, 547 U.S. at 856. Although the search in this case was not supported by reasonable suspicion, there is absolutely no suggestion that it was arbitrary, capricious, or harassing.

circumstances'" surrounding the search "by assessing, on the one hand, the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which [the search] is needed for the promotion of legitimate governmental interests.'" *Id.* at 848 (quoting *Knights*, 534 U.S. at 118-19). Parolees, the Court observed, "have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment." *Id.* at 850 (quoting *Knights*, 534 U.S. at 119). After balancing that diminished expectation of privacy against the state's "substantial" interest in supervising parolees, *id.* at 853, the Court concluded that "the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee." *Id.* at 857.

*Samson* is particularly relevant to this case because of how the Supreme Court treated parole for Fourth Amendment purposes. The Court observed that, on the "'continuum' of state-imposed punishments," parole "is more akin to imprisonment" than it is to probation. *Id.* at 850. Then—as is critical here—the Supreme Court cited the Second Circuit's decision in *United States v. Reyes*, 283 F.3d 446, 461 (2d Cir. 2002), for the proposition that "federal supervised release, . . . in contrast to probation, is meted out in addition to, not in lieu of, incarceration." (quotation marks omitted). Parole, the Court observed, is similar: "'The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence.'" *Samson*, 547 U.S. at 850 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972)).

*Samson* therefore appears to suggest that a federal supervisee is, for Fourth Amendment purposes, little different than a parolee. Supervised release and parole are, in many ways, both an extension of prison. "Like parole, supervised release is a term of supervision following incarceration." *Reyes*, 283 F.3d at 458. But supervised release also "differs from parole in an important respect: 'unlike parole, supervised release does not replace a part of a term of incarceration, but instead is . . . given in addition to any term of imprisonment imposed by a court.'" *Id.* (quoting 1 Neil P. Cohen, *The Law of Probation and Parole* § 5:11, at 5-22 (2d ed. 1999)) (ellipsis and emphasis in Reyes). Thus, the "totality of the circumstances pertaining" to a person's "status" as a federal supervisee demonstrates that a supervisee's expectations of privacy are not ones "that society would recognize as legitimate." *Samson*, 547 U.S. 851. In particular, "[i]t is beyond doubt that [a supervisee's] actual expectation of privacy in the environs of his home [is] necessarily and significantly diminished because [he] [is] a convicted person serving a court-imposed term of federal supervised release that mandate[s] home visits 'at any time' from his federal probation officer." *Reyes*, 283 F.3d at 457.[7]

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[7] The United States Sentencing Commission "recommend[s]" that a sentencing court impose, among other conditions of supervised release, the condition that the defendant "allow the probation officer to visit the defendant at any time at his or her home or elsewhere," and that the defendant "permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view." U.S.S.G. § 5B1.3(c)(6) (2016). *See also* U.S.S.G. § 5B1.3(c)(9) (2005) (recommending substantively identical condition at time of Defendant's sentencing); *In the Matter of*

This limited expectation of privacy is even further reduced where—as in this case—a defendant's term of supervised release includes, in addition to a home-visit condition, a condition permitting the Probation Officer to search the defendant's home for contraband.[8] Taken together, this means that the average federal supervisee has a "diminished expectation of privacy that is inherent in the very term '*supervised* release.'" *Id.* at 461 (emphasis in original).

Balanced against a supervisee's lowered expectation of privacy is the Probation Officer's "responsibilit[y] . . . to ensure that a convicted person under supervision does not again commit a crime." *Id.* at 459. Indeed, a Probation Officer is "*required* to investigate the 'conduct and condition' of a supervisee by, *inter alia*, undertaking 'at any time' a home visit to determine whether the supervisee is violating the terms of his supervised release, including the condition that he not commit any further crimes." *Id.* at 460 (citing 18 U.S.C. § 3603(2)) (emphasis added). And a Probation Officer has a "duty . . . to investigate whether a [supervisee] is violating the conditions of his" supervised release, *Reyes*, 283 F.3d at 459, one of which is the mandatory condition that a supervisee "not unlawfully possess a controlled substance." 18 U.S.C. § 3583(d). A Probation Officer, in other words, has an affirmative responsibility to ensure that a

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*Revised Standard Conditions of Probation and Supervised Release* (W.D.N.Y. Apr. 4, 2017) (on file with Clerk of Court) (establishing home-visit condition as one of the "standard conditions of probation and supervised release in the Western District of New York").

[8] The Court only considers the privacy expectations of a supervisee whose supervised release includes a search condition.

person under his supervision is complying with both the law and the conditions of supervised release. *See also* 18 U.S.C. § 3603(3) ("A probation officer shall use all suitable methods, not inconsistent with the conditions specified by the court, to aid a probationer or a person on supervised release who is under this supervision, and to bring about improvements in his conduct and conditions.")

To effectively fulfill this responsibility, a Probation Officer needs, in the vast majority of cases, the ability to conduct searches like the one in this case. If a search "is to be effective and serve as a credible deterrent, unannounced . . . inspections are essential," and if a Probation Officer must wait until he has reasonable suspicion to perform a search, his ability to do his job "could easily [be] frustrate[d]." *United States v. Biswell*, 406 U.S. 311, 316 (1972) (addressing Fourth Amendment implications of regulatory searches). This is because "[i]mposing a reasonable suspicion requirement would give" supervisees "greater opportunity to anticipate searches and conceal criminality." *Samson*, 547 U.S. at 854. After all, like parolees, supervisees are "'more likely to commit future criminal offenses.'" *Samson*, 547 U.S. at 853 (quoting *Pa. Bd. of Probation and Parole v. Scott*, 534 U.S. 357, 365 (1998). In other words, it is important to not lose sight of the fact that, if a Probation Officer is supervising someone whose sentence includes a search condition, the Probation Officer is likely not supervising a petty criminal. This reality must be factored into the Court's assessment of a Probation Officer's interest in conducting suspicionless searches.

Thus, although the search in this case was not supported by reasonable suspicion, the Court concludes that the Probation Officer needed no suspicion to conduct the search. This conclusion "follows from *Samson*," *United States v. Jackson*, 866 F.3d 982, 985 (8th Cir. 2017), and *Reyes*: *Samson* approved suspicionless searches of parolees, and *Reyes* recognized that federal supervision is functionally no different than parole. *See also id.* at 985 ("[The Eighth Circuit] ha[s] said that supervised release is a more severe punishment than parole and probation, and involves the most circumscribed expectation of privacy.") (quotation marks omitted). Several courts of appeals have relied on *Samson* to reach this or a similar conclusion. *See id.* at 984-85 (relying on *Samson* to allow search of supervisee's cell phone without regard to whether reasonable suspicion existed). *Cf. United States v. Taylor*, 482 F.3d 315, 319 n.2 (5th Cir. 2007) (in case involving state supervisee, noting that Samson may have "eliminated" the "reasonableness requirement" in a supervised release search).[9] The Court therefore concludes that the

[9] The Court recognizes that *Reyes* was limited to home visits—"a far less invasive form of supervision than a search." *Reyes*, 283 F.3d at 462. Specifically, *Reyes* held that, "[b]ecause home visits 'at any time' are conducted pursuant to a *court-imposed condition* of federal supervised release of which the supervisee is aware, and because a home visit is far less intrusive than a *probation search*, probation officers conducting a *home visit* are not subject to the reasonable suspicion standard applicable to probation searches under *Knights.*" *Id.* at 462 (all emphasis in original). This case is, of course, different than *Reyes*: Although the Defendant is subject to the same home-visit condition that was imposed in *Reyes*, the Government has not attempted to justify the search on that basis. *Samson*, however—which was decided

search in this case complied with the Fourth Amendment.

In addition to considering whether the search in this case complied with the Fourth Amendment, Judge McCarthy also concluded (1) that the Defendant's "stalking horse" argument is "'not a valid defense in this Circuit,'" Docket No. 29 at 8 (quoting *Reyes*, 283 F.3d at 463); and (2) that the public-safety exception to *Miranda* permitted a DEA agent to ask the Defendant, after recovering suspected drugs from the Defendant's kitchen, whether "anything in [suspected drugs] [is] going to hurt [the agent]?"

The Court adopts both of these recommendations, and it would do so regardless of the standard of review.[10] As Judge McCarthy observed, *Reyes* foreclosed the "stalking horse" theory in the Second Circuit. In addition, the agent's un-Mirandized question to the Defendant was entirely justified given (1) that the Defendant's home was being searched, in part, because DEA agents believed it contained fentanyl; (2) the agent's descriptions of the dangers posed by merely coming into contact with fentanyl, Tr. 64:1 – 65:22; and (3) the fact that the agent asked a focused question, about evidence he had just recovered, that was designed to elicit a simple answer, rather than incriminating evidence. *See generally*

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after *Reyes*—seems to eliminate *Reyes'* distinction, for Fourth Amendment purposes, between home visits and searches.

[10] The Defendant does not object to either of these recommendations. A district court "may adopt those portions of a report and recommendation to which no objections have been made, as long as no clear error is apparent from the face of the record." *United States v. Preston*, 635 F. Supp. 2d 267, 269 (W.D.N.Y. 2009).

*New York v. Quarles*, 467 U.S. 649 (1984); *United States v. Reyes*, 353 F.3d 148 (2d Cir. 2003).

## CONCLUSION

For the reasons stated above, the Court adopts Judge McCarthy's Report and Recommendation in part and declines to adopt the Report and Recommendation in part. The Defendant's motion to suppress (Docket No. 6) is therefore denied in its entirety. The parties shall appear on February 15, 2018 at 9:00 a.m. for a meeting to set a date for a trial or plea.

**SO ORDERED.**

Dated: February 13, 2018
Buffalo, New York

s/Richard J. Arcara
HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT JUDGE

**APPENDIX D**
Case No. 1:17-cr-00005-RJA-JJM

**UNPUBLISHED**
**UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF NEW YORK**

**UNITED STATES OF AMERICA,**

**ISSUED:**
**v.** October 31, 2017

**MICHAEL ELDER,**
**Defendant.**

## REPORT AND RECOMMENDATION

Defendant Michael Elder is charged in a three-count Indictment[1] with possession of cocaine base and fentanyl with intent to distribute in violation of 21 U.S.C. §841(a)(1), and maintaining a drug-involved premises in violation of 21 U.S.C. §856(a)(1). Indictment [1].[2] These charges arise from a November 3, 2016 search of his residence at 143 Edgewood Avenue in Tonawanda, New York, conducted while defendant was on supervised release.

Before the court is defendant's motion to suppress evidence and statements arising from that search (defendant's Memorandum of Law [6-5], Point III), which has been referred to me by District Judge

[1] The Indictment [1] also contains a Forfeiture Allegation.
[2] Bracketed references are to the CM/ECF docket entries.

Richard J. Arcara for initial consideration [3]. An evidentiary hearing was conducted on August 10, 2017, at which United States Probation Officer ("PO") James Dyckman and DEA Special Agent ("SA") David Turner testified. After reviewing the parties' submissions on this motion [6, 7, 8, 26, 27, 28], as well as the hearing transcript [24] and exhibits [23], I recommend that the motion be granted.[3]

**BACKGROUND**

On July 7, 2016, defendant began his supervised release arising from a conviction for bank robbery. *See* Gov. Ex. 1 [23-1], pp. 1-2 of 6; hearing transcript [24], pp. 7, 20. He was supervised by PO Dyckman of the United States Probation and Pretrial Services Office. Hearing transcript [24], p. 6. As a special condition of his supervised release, defendant was required to "submit to a search of his person, property, vehicle, place of residence or any other property under his control and permit confiscation of any evidence or contraband discovered." Gov. Ex. 1 [23-1], p. 4 of 6. PO Dyckman testified that the search condition required reasonable suspicion. Hearing transcript [24], pp. 20, 35.

Prior to the search, PO Dyckman had been to defendant's residence on two to three occasions and was unaware of any violations by defendant of the terms of his supervised release. *Id.*, pp. 34-36. Defendant was employed, had no prior drug-related charges or convictions, and had not tested positive for drugs. *Id.*, pp. 35-37.

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[3] Although defendant's pretrial motion [6] sought other relief, defendant's counsel acknowledged that suppression was the only issue remaining in dispute.

Toward the end of October or in early November 2016, PO Dyckman received an e-mail from the DEA that it had received four anonymous tips "from the community about [defendant] potentially involved in drug trafficking activities". *Id.*, pp. 22-23, 37-38, 50. The tips were attached to the DEA's e-mail. *Id.*, pp. 27, 38. Two of the tips received online were entered into evidence. The first, made on August 31, 2016 to the DEA tip line, stated: "federal probation officer James Dyckman to tap this phone number 917 957 [****], if you want heroin off the buffalo streets". Gov. Ex. 2 [23-2]. The second, made on September 18, 2016 stated: "Michael Elder 143 Edgewood tondowanda [sic] ny, this guy is dealing heroin to our neighborhood. I live on this street, expensive cars in and out of this address, large boxes being delivered stuffed with heroin. How many overdoses must occur before my street is safe from a well-known fentanyl dealer?" Gov. Ex. 3 [23-3]. Although the tip as transmitted to PO Dyckman was not entered into evidence, SA Turner testified that one of the tips stated, "If you raid [defendant's] residence at 143 Edgewood, you'll find drugs, heroin, Fentanyl underneath the cabinets next to the stove". Hearing transcript [24], pp. 52, 57-58, 67.

PO Dyckman testified that the tips were the sole reason he initiated the search. *Id.*, pp. 41, 43. However, he acknowledged that he did not determine who sent the e-mailed tips, did not verify whether the tips came from more than one person, did not take measures to determine the veracity and credibility of the anonymous tips, and did not verify whether the telephone number identified in the August 31, 2016 tip was assigned or attributed to defendant. *Id.*, pp.

39-41. He conceded that the tips could have been nothing more than a prank, but stated that a prankster tip could justify a search of the premises. *Id.*, pp. 43-44. He denied that the search was conducted at the behest of the DEA. *Id.*, p. 41. He testified that the DEA was invited along on the search because the Probation Office was "not equipped to handle dangerous substances that potentially can contain heroin or Fentanyl." *Id.* p. 43.

On November 3, 2016, POs Dyckman and Gavin Lorenz knocked on the door of defendant's residence. *Id.*, p. 29. When defendant answered the door, he was handcuffed and taken to the dining room, where he remained during the search. *Id.*, pp. 29-30, 31, 44. Defendant was informed what was occurring, but he did not object or make any statements at that time. *Id.*, p. 31. Four other POs entered and cleared defendant's residence. *Id.*, pp. 31, 42. Once the residence was secured, three DEA members, including SA Turner, followed to assist with the search. *Id.*, pp. 31, 42, 60-62.

SA Turner testified that the DEA has special protocols for handling fentanyl, which can be difficult to recognize, because of the harm presented to officers in the field from that drug. Id., pp. 64-67. After substances were located during the search, for purposes of officer safety arising from the "seriousness of Fentanyl", Agent Turner asked defendant, "Is there anything in there that's going to hurt me"?. *Id.*, pp. 68, 79. In response, defendant said "nothing's going to hurt you" *Id.* When SA Turner continued, defendant requested a lawyer, and the questioning ceased. *Id.*, pp. 68-69.

## ANALYSIS

### A. Motion to Suppress Physical Evidence

### 1. Was the Search Justified by Reasonable Suspicion?

Defendant argues, and the government concedes, that the search condition permitted the Probation Office to search his residence upon reasonable suspicion. Defendant's Post-Hearing Memorandum of Law [26], p. 3; government's Post-Hearing Memorandum of Law [27], p. 2 (citing PO Dyckman's testimony [24], p. 20). The government bears the burden of establishing, by a preponderance of the evidence, that reasonable suspicion existed for the search. *See United States v. Goines*, 604 F.Supp.2d 533, 539 (E.D.N.Y. 2009); *United States v. Harris*, 2013 WL 6728136, *4 (S.D.N.Y. 2013). Based upon PO Dyckman's testimony that the search was prompted solely by the anonymous tips ([24], pp. 41, 43), suppression turns on "whether such anonymous tips can provide the 'reasonable suspicion' required to validate the search of the [d]efendant's residence". Defendant's Post-Hearing Memorandum of Law [26], p. 3.

"Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause." *Alabama v. White*, 496 U.S. 325, 330 (1990). Nevertheless, "[r]easonable suspicion must be based on specific and articulable facts and not on an inchoate suspicion or mere hunch."

*United States v. Bailey*, 743 F.3d 322, 346-47 (2d Cir 2014). Like probable cause, reasonable suspicion is "dependent upon both the content of information possessed by police and its degree of reliability. Both factors - quantity and quality - are considered in the totality of the circumstances". *White*, 496 U.S. at 330. Thus, "if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable." *Id.*

"Courts look to several factors to determine the reliability of an informant's tip. First, a known informant's tip is thought to be more reliable than an anonymous informant's tip. Second, an informant with a proven track record of reliability is considered more reliable than an unproven informant. Third, the informant's tip is considered more reliable if the informant reveals the basis of knowledge of the tip - how the informant came to know the information. Finally, a tip that provides detailed predictive information about future events that is corroborated by police observation may be considered reliable, even if the tip comes from an anonymous source." *United States v. Rowland*, 464 F.3d 899, 907–08 (9th Cir. 2006) (citations omitted). "Even a tip from a completely anonymous informant - though it will seldom demonstrate basis of knowledge and the veracity of an anonymous informant is largely unknowable - can form the basis of reasonable suspicion . . . if it is sufficiently corroborated." *United States v. Elmore*, 482 F.3d 172, 179 (2d Cir. 2007).

Here, none of the indicia of reliability were present. The tipsters were anonymous and did not reveal the basis of their knowledge. PO Dyckman did

not attempt to corroborate the information or to otherwise vet the reliability of the tips. While there were multiple tips, "[t]his is not an instance where two, independent but anonymous sources corroborate each other to supply reasonable suspicion". *United States v. Parker*, 2007 WL 4373448, *8 (W.D.N.Y. 2007). Indeed, PO Dyckman never verified whether the tips came from one individual or separate individuals. Hearing transcript [24], p. 34.

Although the government elected to put only two of the four tips into evidence, those two do little to support its position. For example, the August 31, 2016 tip did not mention defendant and no evidence was introduced linking defendant to the telephone number it contained. The September 18, 2016 tip is equally unreliable. As defendant notes, "it purports to be from a neighbor who can't even properly spell the municipality in which he resides and who apparently possesses x-ray vision utilized to see the contents of sealed boxes". Defendant's Post-Hearing Memorandum of Law [26], p. 5. Given the arguments raised by defendant and the lack of any rebuttal by the government, I conclude that the government failed to meet its burden of proof of establishing, by a preponderance of the evidence, that reasonable suspicion existed for the search. Therefore, I recommend that defendant's motion to suppress evidence be granted.[4]

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[4] "The fact that a Fourth Amendment violation occurred i.e., that a search or arrest was unreasonable does not necessarily mean that the exclusionary rule applies." *Herring v. United States*, 555 U.S. 135, 140 (2009); *United States v. Julius*, 610 F.3d 60, 66 (2d Cir. 2010) ("application of the exclusionary rule is not a matter of right upon a finding that an improper search has taken place"). "To trigger the exclusionary rule, police conduct must be

Defendant also argues that his statements must be suppressed as fruit of the poisonous tree. Defendant's Post-Hearing Memorandum of Law [26], p. 7. The fruit of the poisonous tree doctrine requires the exclusion of illegally obtained evidence, unless it was derived "by means sufficiently distinguishable to be purged of the primary taint". *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). "The Government bears the burden of proving a break in the causal chain." *United States v. Murphy*, 778 F.Supp.2d 237, 255 (N.D.N.Y.2011), *aff'd*, 703 F.3d 182 (2d Cir. 2012). *See United States v. Guzman*, 724 F.Supp.2d 434, 444 (S.D.N.Y.2010) ("The burden of proving that the statements were sufficiently attenuated to remove the taint from the unlawful search is on the government"). Since the government makes no effort to establish such a break, I recommend that defendant's statements be suppressed as fruit of the poisonous tree. Defendant's Post-Hearing Memorandum of Law [26], p. 7.

However, in the event that my recommendations are not adopted, I have addressed the other grounds for suppression raised by defendant.

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sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system . . . . [T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct." *Id.* at 144. While it is not evident whether *Herring* applies to these circumstances, I need not resolve that issue. It is the government's "burden [to prove] that the exclusionary rule is not 'a proper remedy for the violation' of the Fourth Amendment" (*United States v. Anderson*, 2012 WL 3535771, *6 (W.D.N.Y.), adopted 2012 WL 3528971 (W.D.N.Y.2012) (citing *Julius*, 610 F.3d at 66), and it has made no attempt to satisfy that burden.

**2. Was the Probation Office's Search Authority Used to Circumvent the Warrant Requirements Applicable to the DEA?**

Alternatively, defendant argues that the search was "initiated by the DEA by virtue of their receipt of the tips . . . and that agency's attempt to circumvent any warrant requirements, by utilizing [d]efendant's probation officer as a back door method of gaining entry into the premises". Defendant's Post-Hearing Memorandum of Law [26], p. 6. Such arguments have been referred to as the "stalking horse" theory, whereby "a probation officer may not use his authority to conduct a home visit to help law enforcement officers evade the Fourth Amendment's usual warrant and probable cause requirements for police searches and seizures." *United States v. Reyes*, 283 F.3d 446, 463 (2d Cir. 2002).

Although the government offers no opposing legally authority, defendant's argument, which relies solely on non-controlling authority from outside the Second Circuit, fails as a matter of law. *See* Defendant's Post-Hearing Memorandum of Law [26], p. 6. This Circuit has recognized that since "the duties and objectives of probation/parole officers and other law enforcement officials, although distinct, may frequently be intertwined and responsibly require coordinated efforts . . . . it is difficult to imagine a situation in which a probation/parole officer who entered a residence with other law enforcement officials based on information about a supervisee's illegal activities would not be pursuing legitimate supervision objectives." *United States v. Newton*, 369 F.3d 659, 667 (2d Cir. 2004).

Therefore, the stalking horse "doctrine is not a valid defense in this Circuit", and I would recommend denying suppression on that ground. *Reyes*, 283 F.3d at 463. *See also United States v. Washington*, 2012 WL 5438909, *7 (S.D.N.Y. 2012) ("it is crystal clear that the stalking horse theory is not a valid defense to warrantless searches of . . . individuals on supervised release in this Circuit"); *United States v. Chandler*, 164 F. Supp. 3d 368, 381 (E.D.N.Y. 2016).

**B. Motion for Suppression of Statements**

Defendant also seeks suppression of his statements on the grounds that he was questioned without being Mirandized. Defendant's Post-Hearing Memorandum of Law [26], p. 7. The government concedes that defendant was not Mirandized, but argues that "the public safety exception authorized the questioning of the defendant with respect to the suspected fentanyl and its dangers". Government's Post-Hearing Memorandum of Law [27], p. 6 (citing *New York v. Quarles*, 467 U.S. 649 (1984)).

The "public safety" doctrine is "a narrow exception to the Miranda rule", *Quarles*, 467 U.S. 658, which applies only "so long as the questioning relates to an objectively reasonable need to protect the police or the public from any immediate danger." *United States v. Newton*, 369 F.3d 659, 677 (2d Cir. 2004). In its post-hearing response, defendant makes no attempt to demonstrate why this doctrine would not apply to SA Turner's brief questioning of defendant concerning the possible dangers posed by the recovered substances. Therefore, I would not

recommend that defendant's statements be suppressed on this ground.

## CONCLUSION

For these reasons, defendant' motion for suppression (defendant's Memorandum of Law [6-5], Point III) is granted. Unless otherwise ordered by Judge Arcara, any objections to this Report and Recommendation must be filed with the clerk of this court by November 14, 2017. Any requests for extension of this deadline must be made to Judge Arcara. A party who "fails to object timely . . . waives any right to further judicial review of [this] decision". *Wesolek v. Canadair Ltd.*, 838 F. 2d 55, 58 (2d Cir. 1988); *Thomas v. Arn*, 474 U.S. 140, 155 (1985).

Moreover, the district judge will ordinarily refuse to consider de novo arguments, case law and/or evidentiary material which could have been, but were not, presented to the magistrate judge in the first instance. *Patterson-Leitch Co. v. Massachusetts Municipal Wholesale Electric Co.*, 840 F. 2d 985, 990-91 (1st Cir. 1988).

The parties are reminded that, pursuant to Rule 59(c)(2) of this Court's Local Rules of Criminal Procedure, "[w]ritten objections . . . shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for each objection, and shall be supported by legal authority", and pursuant to Local Rule 59(c)(3), the objections must include "a written statement either certifying that the objections do not raise new legal/factual arguments, or identifying the new arguments and explaining why they were not raised to the Magistrate Judge". Failure to comply with these

provisions may result in the district judge's refusal to consider the objection.

Dated: October 31, 2017

/s/ Jeremiah J. McCarthy
JEREMIAH J. MCCARTHY
United States Magistrate Judge