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SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

ARNOLD D. HOLLAND, III - PETITIONER

vs.

UNITED STATES OF AMERICA - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Arnold D. Holland, III, Reg # 54847-019

United States Penitentiary - Tucson

P.O. Box 24550

Tucson, Arizona 85734-4550

February 5th 2024

QUESTIONS PRESENTED

1. Whether the Fourth Amendment applies to the act of searching or the initial decision to search, based on an objective standard considering the totality of the circumstances of the officers, at the moment of the search?
2. Whether an inchoate and unparticularized suspicion or hunch of a supervised release violation communicated from one officer to the searching officer, collectively, is enough to satisfy the minimum level of objectivity required to search a supervised releasee's home?
3. Whether reasonable suspicion, under the totality of the circumstances, approach, once formed, can be negated, vitiated, or dispelled based on a Probation Officer's awareness of intervening circumstances and information that cause the suspicion to be nullified?

LIST OF PARTIES

- All parties appear in the caption of the case on the cover page.
- No other parties to the proceeding exist.

TABLE OF CONTENTS

Page #

Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Constitutional Provision	3
Statement of the Issue	4
Statement of the Case	5
A. Current Case Background	5
B. Factual Background	11
1. Prior Conviction and Imprisonment	12
2. Initial, 36-month term of Supervised Release	13
3. Second, 24-month term of Supervised Release	15
4. Unsubstantiated Link between Supervision and Investigation	25
Reasons For Granting the Petition	27
1. Whether the Fourth Amendment applies to the act of searching	27
2. Whether an inchoate and unparticularized suspicion	30
3. Whether reasonable suspicion can be negated	36
Conclusion	37
Proof of Service	38

INDEX TO APPENDICES

APPENDIX A - Eleventh Circuit Opinion of the Court (Appeals Court decision)

APPENDIX B - Opinion and Order on the Motion for Reconsideration (District Court decision)

APPENDIX C1 - Opinion and Order on the Motion to Suppress (District Court decision)

APPENDIX C2 - Report and Recommendation on Motion to Suppress (Magistrate Judge's district court report).

TABLE OF AUTHORITIES

CASES

Page

Adams v. Williams, 404 U.S. 143, 146-47 (1972)	30
Alabama v. White, 496 U.S. 325, 330 (1990)	30
Cozzi v. City of Birmingham, 892 F.3d 1288, 1295 (11 th Cir 2018)	35
District of Columbia v. Wesby, 138 S.Ct 577 (2018)	7
Evans v. Stephens, 407 F.3d 1272, 1280 (11 th Cir 2005)	28
Ornelas v. United States, 517 U.S. 690, 696 (1996)	36
Terry v. Ohio, 392 U.S. 1, 22-23 (1968)	27
United States v. Acosta, 363 F.3d 1141, 1145 (11 th 2004)	33
United States v. Edwards, 924 F.Supp 1191, 1207 n.18 (M.D. Ala 2010)	34
United States v. Fields, 178 F.App'x 890, 892 (11 th Cir 2006)	30
United States v. Hamilton, 591 F.3d 1017, 1023 (8 th Cir 2009)	29
United States v. Hensley, 469 U.S. 221, 230-31 (1985)	33
United States v. Holland, 214 F.App'x 957 (2007)	12
United States v. Knights, 534 U.S. 112, 121 (2001)	36
United States v. Nunez, 455 F.3d 1223, 1226 (11 th Cir 2006)	36
United States v. Ohoro, 577 F.2d 883, 895 (5 th Cir 1978)	35
United States v. Watson, 423 U.S. 411, 450 n.14 (1976)	36
United States v. Williams, 876 F.2d 1521, 1524 (11 th Cir 1989)	33
United States v. Yuknauch, 419 F.3d 1302, 1311 (11 th Cir 2005)	36
Whiteley v. Warden, 401 U.S. 560, 568-69 (1971)	33

STATUTES and Rules

18 U.S.C. § 1462	12
18 U.S.C. § 2251(a)	12
18 U.S.C. § 2252A(a)(2)(A)	12
28 U.S.C. § 1254(1)	2
Supreme Court Rules, 13.3 and 29	2; 38

OTHER Authorities

Criminal Action Number 1:03-cr-336 (NDGa)	5, 9, 10, 12, 13, 14
Criminal Action Number 1:19-cr-399 (NDGa)	5, 6, 9, 10, 14, 23
2 W. La Fave, Search and Seizure: A Treatise on the Fourth Amendment	34

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner, Arnold D. Holland, III, proceeding pro se, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit appears at Appendix A to the petition and is unpublished.

The opinion of the United States District Court for the Northern District of Georgia, as to Petitioner's Motion for Reconsideration, appears at Appendix B to the petition and is unpublished.

The opinion of the United States District Court for the Northern District of Georgia, as to Petitioner's Motion to Suppress, appears at Appendix C1 to the petition and is unpublished.

The Final report and recommendation of the magistrate judge in the United States District Court for the Northern District of Georgia, as to Petitioner's Motion to Suppress and Evidentiary Hearing, appears at Appendix C2 to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals for the Eleventh Circuit decided my case was November 7, 2023.

The court's jurisdiction is invoked under 28 U.S.C § 1254(1)

No petition for rehearing was timely filed in my case. See Supreme Court Rule 13.3 (setting forth the 90-day period of time after entry of judgment).

Accordingly, the instant petition for writ of certiorari is due on or before February 5th, 2024, and has been delivered to prison officials for mailing on said date.

CONSTITUTIONAL PROVISION INVOLVED

- The Fourth Amendment to the Constitution of the United States 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" U.S. Const. amend IV
- A warrantless search of a probationer's residence by probation officers does not pass constitutional muster where it is unreasonable or otherwise not based on a "reasonable suspicion" that the probationer is violating the conditions of his probation.
- In making the Fourth Amendment assessment, it is imperative that the facts be judged against an objective standard: would the facts available to the officer "at the moment" of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate?

Statement of the Issue

Even under a 'totality-of-the-circumstances' analysis and/or the 'collective Knowledge' doctrine, (fellow officer rule), the combination of a supervised releasee's sex offense history and his resolved technical violations, (occurring during an original term of supervision), coupled with law enforcement agent's independent, Cybertip investigation of uploaded images to an Instagram account and the limited communication with the Probation Officer, (occurring during a newly imposed subsequent term of supervision), reporting that the supervised releasee is possibly uploading the images, as his phone number is listed and merely present on an associated Google account - without more corroboration, such evidence is not only woefully insufficient, but amounts to an inchoate and unparticularized suspicion or hunch.

Indeed, such circumstances are too speculative, whether combined, or when viewed individually, to form a particularized and objective basis for suspecting legal wrongdoing. Moreover, such tenuous information does NOT rise to the level of specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant a full-blown rummaging search of a supervised releasee's home, looking for evidence of a supervised release violation.

Accordingly, the district court's denial of the Motion to Suppress was clearly erroneous and must be VACATED, as the totality of the circumstances did not establish the belief that a violation was occurring at the time of the search.

Statement of the Case

A. Current Case Background

On January 14, 2019, US Probation Officers, in conjunction with GBI Agents conducted a rummaging warrantless search at the home of Arnold D. Holland, (hereinafter 'Holland'), to determine whether he was in compliance with his Supervised Release conditions after they collectively surmised that there was a reasonable suspicion to believe Holland was possessing unapproved cellphones, accessing the Internet without approval, and possessing sexually oriented material, including erotic images of minor males on Instagram. Probation Officers found and seized four (4) unapproved cellphones, while an Agent interviewed Holland during the search. The seized cellphones led to a Petition to Revoke Supervised Release and an Arrest warrant filed on January 15, 2019, (later amended on March 1, 2019), in Criminal Action Number 1:03-CR-336. The confiscated phones also contained evidence used for the original, fourteen (14) new charges brought against Holland and filed on October 8, 2019 in Criminal Action Number 1:19-CR-399.

On November 26, 2019, appointed, (though inept), counsel moved to suppress the evidence obtained from the search and seizure. Counsel incompetently challenged the search on the general theory that there was no reasonable suspicion because the flagged Instagram images did not rise to the level of child pornography or sexually oriented material. Better qualified counsel would have tactically and competently litigated, instead, the well-defined legal principle and more meritorious claim that Officers, collectively, lacked specific and articulable facts regarding a current, supervised release violation, which taken together with rational inferences from the absence of those facts, could not have warranted the search. On December 19, 2019 a hearing was held, where Officer Brewer and Agent Bigham testified. Briefing followed the evidentiary hearing.

On March 26, 2020, the Magistrate issued his Final Report and Recommendation. The judge agreed wholly with the factors cited within the government's brief, determined that the totality-of-the-circumstances set forth, therein, established a reasonable suspicion that Holland had violated the terms of his Supervised Release, and recommended DENYING the Motion to Suppress. On May 1, 2020, Holland filed objections to the factual conclusions in the report as having incorrectly blurred the facts where the facts provided by the government had completely re-imagined the stated basis upon which the Officer suspected Holland had violated. On June 11, 2020, the District court overruled Holland's objections, adopted the Report and Recommendation and DENIED the Motion to Suppress on the exact same grounds as cited in the Report - reasonable suspicion under the totality!

On June 25, 2020, in a pro se motion prepared by Holland, after then-appointed counsel's bungling of the Suppression hearing became apparent, Holland moved for substitution of his legal representative based on counsel's ineffectiveness. Still represented by that attorney on July 10, 2020, and in an irreconcilable conflict, Holland prepared and mailed another pro se motion to the court in which he sought additional time to file a Motion for Reconsideration of the district court's June 11, 2020 Order denying the counseled motion to suppress.

On July 14, 2020, in the midst of Holland's pro se requests and his pursuit of justice, the government spitefully filed a First Superseding Indictment drastically increasing the number of charges that Holland faced from fourteen (14) to thirty (30) counts in Criminal Action No. 1:19-CR-399. On July 30, 2020, Holland's pro se motion to substitute counsel was granted. Notably at the hearing, the magistrate judge parced words by stating that his "Order has absolutely no bearing on the quality of representation" counsel had provided. The judge continued by stating that all he was doing was determining that Holland had "shown good cause" that he needed a NEW lawyer. When Holland inquired as to the "good cause", the judge informed Holland that the good cause was that Holland had an irreconcilable difference with his lawyer based on what Holland put in his Motion to Substitute, with absolutely no previously written or orally expressed objections from then-counsel. Interestingly, Holland had put in his motion undisputed facts regarding the deficiencies in counsel's quality of representation.

Notwithstanding the magistrate judge's complicity regarding former counsel's poor quality of representation, that was provided to Holland during the proceedings up to this point, on July 31, 2020 a new attorney was appointed. Newly appointed counsel immediately began effectively representing Holland. After reviewing the discovery and familiarizing herself with the case, counsel met with Holland who demanded that a Motion for Reconsideration be filed, as the district court had denied Holland's earlier pro se submission.

By June 27, 2021, newly appointed counsel filed a Motion to Reconsider and Reopen the Evidence on Holland's Motion to Suppress with Exhibits. On June 29, 2021, a status conference was held to discuss 1) the pending Motion for Reconsideration, 2) Plea Negotiations, and 3) the status of the case. The government was ordered to Respond to the Motion for Reconsideration, though the court initially was prepared to deny it. Holland was allowed time to file a Reply. All briefing was concluded by August 9, 2021.

Exactly sixty (60) days later, on October 8, 2021, instead of being at all times ready to correct a legal or factual error, where that error was made despite a clear presentation of the issue by the party seeking reconsideration, the district court denied Holland's counseled Motion for Reconsideration. The court held, among other grounds, that a "motion for reconsideration is not an opportunity to present the court with arguments already heard and dismissed, or to repackage familiar arguments to test whether the court will change its mind." The court basically concluded that the arguments raised by Holland exhibited "a fundamental misunderstanding of the totality of the circumstances." The court, then, stood by its clearly erroneous and irrational holding that was contrary to Supreme Court precedence that states courts must weigh circumstances for and against reasonable suspicion. See District of Columbia v. Wesby, 138 S.Ct. 577, 199 L.Ed 2d 453 (2018) (court must weigh circumstances "for and against" reasonable suspicion). The court opined, in dismissing, disregarding and wholly discounting all significant facts weighing against reasonable suspicion that, "the totality of the facts, (and the inferences that follow), including these facts weighing against reasonable suspicion provided Officer Brewer a reasonable suspicion Defendant was violating conditions of his supervised release at the time of the search."

But, the Court's clearly erroneous holdings would not stop there. Holland's counseled Motion for Reconsideration also included a non-frivolous claim regarding Suppression-Hearing Counsel's inadequate quality of representation and being ineffective in litigating Holland's Fourth Amendment issue. The court, in denying Holland relief, again adversely opined that "counsel cannot be labeled ineffective for failing to raise issues which have no merit." In reaching its decision, the court did not sufficiently develop the record by holding an evidentiary hearing at anytime during its sixty-day period of consideration, even where it was obvious from the three (3) Exhibits attached to Holland's counseled Motion for Reconsideration that there was new evidence that might support the non-frivolous assertions of attorney misconduct demonstrating counsel's lack of competence which prejudiced Holland's case.

For instance, notwithstanding the errors and other deficiencies committed by Suppression Hearing counsel, such as counsel conceding Holland's guilt and failing to adequately prepare and investigate all of the facts or become familiar with the discovery materials, counsel's defective performance and the resulting prejudice regarding the necessity to effectively impeach the two main witnesses concerning their collective lack of reasonable suspicion, under the totality of the circumstances, was blatantly obvious. Indeed, record evidence, dismissed in the district court's overall consideration, contradicted witness testimony or cast doubt on testimony in two instances, thereby bearing on the witnesses' lack of credibility.

First, eventually-obtained transcripts from the July 26th Revocation Hearing, as well as T-Mobile Telephone Service/Billing Records for Holland's contact phone number, [404 914 4767], assigned to his approved mobile device, both conflicted with or belied: 1) the explicit statements made by Officer Brewer about Holland's prior 2017 violations, and 2) Officer Brewer's purported contact with Holland in the parking lot of his job on January 10th to verify his employment.

The Revocation Hearing transcripts bore heavily on Officer Brewer's misleading testimony concerning what she knew about pornography involving "ages 16 and up" as the transcripts were devoid of and completely contradicted such a fallacious detail. Additionally, the T-Mobile Billing records for Holland's phone number on the January 10th date of Officer Brewer's so-called employment verification, reveal no incoming or outgoing communications to or from Officer Brewer to corroborate that Holland saw or spoke to her when he randomly "stepped out to verify his employment" without somehow being previously alerted to step out to talk to her in the parking lot.

Second, misdirected, bolstered and greatly exaggerated erotic descriptions of minor males wearing speedos or underwear in photos on Instagram as being suspected child pornography were made by Agent Bigham - mentioned, not merely in passing at the Suppression Hearing, but alluded to multiple times in the Agent's investigation of a cyber tip - in order to provide a misleading impression that the viewed images contained child sexual abuse materials or sexual oriented material that focused on the outlines of the boy's penises, despite contrary evidence in the intelligence report that revealed the Agent knew the images were not child pornography, at all.

Accordingly, neither Officer Brewer, nor Agent Bigham's testimony served as credible, overwhelming pieces of evidence against Holland which would fully support reasonable suspicion under a totality of the circumstances approach to justify the belief that Holland was in violation of his current, 24-month term of Supervised Release at the time of the search. Hence, counsel's defective performance, in regards to credibility challenges of the main witnesses, all but affected the outcome of the Suppression hearing proceedings in an adverse way. Moreover, the inadequacy of representation by Suppression-hearing counsel had been a specific, unresolved issue which Holland raised in his Motion to Substitute counsel. Because there were numerous unresolved factual allegations, that either occurred outside the record, (or not at all), which if true might support Holland's Sixth Amendment claim, a hearing was required to be held on Suppression-hearing counsel's dereliction.

In spite of the district court's denial of the Motion for Reconsideration, on October 26, 2021, (22 days later), Holland with the assistance of newly appointed counsel decided to enter into a negotiated plea agreement with the government. Holland entered a guilty plea to just eight (8) counts of producing child pornography, in violation of 18 U.S.C. § 2251(a), in Criminal Action No. 1:19-CR-399. In exchange, the government agreed to dismiss all of the remaining charges in both the original 14-count Indictment and the 30-count superseding Indictment. The government also agreed to recommend a sentence of 39 years (468 months) in prison, while Holland agreed to recommend that he be sentenced to not less than 29 years (348 months) imprisonment on the new criminal case.

Additionally, and explicitly included as part of the written, negotiated plea agreement, as it pertained to the pending proceeding to revoke Supervised Release in the prior Criminal Action No. 1:03-CR-336, Holland agreed to admit the violations as they were based on the same conduct that formed the basis of the eight (8) charges he was pleading guilty to in Criminal Action No. 1:19-CR-399. Furthermore, the government and Holland expressly agreed to jointly recommend that the court impose a sentence of twelve (12) months imprisonment for the violations which would run consecutively to any sentence imposed in the new criminal case.

Also, as part of the October 26th negotiated plea agreement, Holland reserved the right to appeal the court's adverse determination of his Motion to Suppress with regard to whether under the totality of the circumstances there was reasonable suspicion to search his residence on January 14, 2019. The exception would also encompass not only the adverse determination of the district court's ultimate ruling on the Motion to Suppress which was entered on June 11, 2020, but also the court's underlying refusal to reconsider and reopen the motion to suppress which was entered on October 8, 2021.

On May 19, 2022, four (4) months after Holland had signed the negotiated plea agreement, and following U.S. Probation's preparation of a Pre-Sentence Report, at a joint sentencing and revocation hearing, the district court accepted the government's recommendation and imposed on Holland a sentence of 39 years in prison and a lifetime of supervised release. The district court also revoked Holland's second, 24-month term of Supervised Release which had been previously imposed on July 26, 2017 following the initial revocation of Holland's original 36-month term of Supervised Release that followed the 2004 receipt of child pornography conviction and 151-month sentence of imprisonment. The court sentenced Holland on the instant revocation, not, to a sentence of 12 months as the government and Holland jointly recommended, in the plea agreement, but rather, to an arbitrary, doubled sanction at the statutory maximum resulting in the imposition of 23 months and 29 days in prison to run consecutively to the 39-year sentence of imprisonment on the new charges.

On May 25, 2022, Holland timely filed a pro se Notice of Appeal challenging both the new judgment in Criminal Action No 1:19-CR-399, as well as the Order revoking his second, 24-month term of Supervised Release in Criminal Action No 1:03-CR-336, based on the unreasonable sentence.

On August 5, 2022, the Eleventh Circuit consolidated Holland's appeals. A briefing Notice was issued and after appointment of new Appellate Counsel, Holland's appeal brief was submitted. Appellate counsel challenged the district court's denial of Holland's motion to suppress on the sole ground that the Probation officer relied on state information to form reasonable suspicion for the search, rather than the district court erred in finding that reasonable suspicion existed under the circumstances.

On November 7, 2023, the Eleventh Circuit affirmed the district court's judgment citing two (2) rationales. The Court held that the district court did not err in denying Holland's Motion to Suppress because: 1) the totality of the circumstances and 2) the collective knowledge of the officers supported a reasonable suspicion that Holland was violating the conditions of his supervised release at the time the search was executed.

B. FACTUAL DETAILS

Though in many respects, and seemingly repetitive of the details provided in the Case Background section, above, the facts as set forth in this section have always been in dispute. Indeed, such information has never painted the whole, accurate picture, in that, the district court's findings of fact, blatantly dismiss or otherwise do not address U.S. Probation Officer's full knowledge of Holland. That knowledge, ironically, is fully contained in both the Court's own record and in Holland's easily accessible, but excluded, probation file prepared by officers who serve as an investigatory and supervisory arm of the Court.

Relying heavily on the mantra, "the totality of the circumstances," the district court unrealistically refused to conduct an in-camera review of Holland's probation file and further chose to depend on only select, limited facts of the case in an imbalanced fashion that disclosed only circumstances that were favorable to the prosecution. However, properly taking stock of the whole record, coupled with an accurate chronological narrative of ALL the circumstances undeniably shows that the court's biased presentation of facts to be clearly erroneous, implausible and therefore otherwise lacking. Strong dependence on the phrase, 'the totality of the circumstances' cannot metamorphose the selected facts cited by the Court into reasonable suspicion. Nor should the Court be allowed to engage in what seems to be an overly broad line of reasoning in its totality of the circumstances analysis.

Numerous facts and circumstances that are most salient and crucial to an appropriate 'totality of the circumstances' examination, including extant critical information, should not be dismissed, discounted, or disregarded on the decisional scale. Rather such details should be included in the court's consideration and given their proper weight based on 1) contextual and temporal relevancy, 2) to set a foundation, and 3) for the sake of clarity. These factual determinations are important to resolution of this case.

1. Prior Conviction and Imprisonment

Holland was a convicted sex offender compliantly residing in Cobb County, Austell, Georgia at the time of his current arrest in January, 2019. According to his criminal history, in June, 2003 a 21-count Indictment was filed in federal court charging Holland in Criminal Action No. 1:03-CR-336 with import or transport of obscene matter, in violation of 18 U.S.C. § 1462. Holland was arrested in July, 2003 and would remain in custody for the next eleven (11) years.

In August, 2003, an eleven-count Superseding Indictment was filed, now charging Holland with ten (10) counts of receipt of child pornography and one (1) count of producing child pornography, in violation of 18 U.S.C. §§ 2252A(a)(2)(A) and 2251(a). Holland, through appointed counsel, entered a negotiated guilty plea on November 7, 2003, to only the receipt charges. In exchange, the government agreed to dismiss all remaining charges brought against Holland. As part of the negotiated plea agreement, Holland agreed to waive his appellate rights, except he could appeal certain sentence enhancements.

On January 15, 2004, the district court imposed a sentence of 151 months imprisonment on each of the ten (10) counts to run concurrently, followed by three (3) years of Supervised Release. The court recommended that Holland be designated to serve his sentence at USP-Butner and to participate in the Sex Offender Treatment Program. In April/May 2006, after the court found appointed counsel to be ineffective, Holland eventually appealed his 151-month sentence. The Eleventh Circuit upheld the sentence in the case *United States v. Holland*, 214 F.Appx 957 (11th Cir 2007).

Holland served his term of imprisonment at Butner-Low Security Correctional Institute. Although his behavior while in confinement was not perfect, Holland was only cited for six (6) disciplinary reports from 2004 to 2014 and he only received a loss of seven (7) days of good credit time. Holland also kept busy during his incarceration by accumulating over 600 credit hours of prison educational and psychological programming, despite a June, 2012 cancer diagnosis and radiation treatments. In April, 2014, Holland was released to Dismas Halfway House to serve the remaining portion of his sentence and to assist in re-entry.

In July, 2014, Holland was released from BOP custody and began serving his original 36-month term of Supervised Release under U.S. Probation Officer Bruce Murphy. As discussed earlier (and throughout), Holland's original 36-month term of release was revoked in July, 2017. That same day a new 24-month term was imposed. The facts relevant to the reasonable suspicion determination should stem from that second ten

2. Initial, 36-Month Term of Supervised Release

As to Holland's initial 36-month term of supervised release, as stated above, Holland began supervision in July, 2014. Holland had been pre-released by the BOP to the custody of Dismas House for the last few months of his incarceration to aid in his successful reentry and he would be required to reside at Dismas House during the first 12 months of his supervised release. (See Docket 130, Case #1:03-cr-336) Holland would also be subjected to modified conditions of his original 36-month term of supervision, including 12 months of GPS electronic monitoring. *Id.* Holland's original term of supervised release was projected to expire on July 10, 2017, but other circumstances involving non-compliance of the conditions would surface during the period between July 12, 2014 and July 26, 2017.

For instance, after taking a psychosexual evaluation in 2014, Holland was deemed a high risk to reoffend. In February, 2015, Holland was expelled from Dismas house for possessing a cellphone with photo capabilities, which violated house rules. Holland was instructed by US Probation to locate approved housing and to comply with Georgia's Sex Offender residency requirements, which he did. Holland had also begun taking polygraph exams in February, 2015 and failed the initial test after disclosing that he had contact with minors and had scrolled through other people's phones looking for images of minors. In May, 2015, Holland was re-tested on the polygraph and the results were inconclusive as he admitted trading sexual images with men from prison and had sent money in exchange for videos. Holland was, now, also subjected to weekly, Individual and Group sex offender therapy sessions at Highland Institute. Yet, despite the problems and alleged violations occurring during the first year of Holland's original 36-month term of supervision, US Probation did not take any action against Holland at that time, and in July 2015, officers removed the GPS leg monitor.

Two years after being kicked out of Dismas House and only six (6) months before Holland's original 36-month term of Supervised Release was set to expire, a new Officer (John Moran), conducted an unannounced visit to Holland's residence in Austell, Georgia and found seven unapproved cell phones. At the December 2019 hearing in the new criminal case, the current Officer testified that when Officer Moran asked Holland if the phones contained pornography, Holland said that "there would be ages 16 and up". Holland vehemently disputes making such a statement. More importantly, the testifying Officer's statement about Holland would be completely belied by the predecessor Officer's written revocation petition and the actual hearing transcript

In fact, after the predecessor officer seized and confiscated the cellphones, he searched the devices and initiated proceedings in May, 2017, just two (2) months shy of the July, 2017 termination date of Holland's original, 36-month term of supervision. That officer then alleged in a Petition to Revoke Supervision that Holland breached his compliance contract, not by possessing images of persons aged "16 and up" or by accessing the Internet without permission, but rather Holland was accused of violating supervised release by possessing seven (7) unauthorized cell phones with internet capabilities, and two (2) phones (of the seven) contained sexually oriented material or pornography.

On July 26, 2017, a hearing was held to revoke Holland's original 36-month term of supervision that had been imposed in 2004 following his conviction for receipt of child pornography. Holland admitted to the violations and the court found him in violation of his Supervised Release. (See Dockets 134, case #1:03-cr-336 and Docket #90-3, Case #1:19-cr-399). Defense counsel spoke on Holland's behalf explaining the joint recommendation reached between the government and Holland. *Id.* The predecessor Officer (Moran), informed the court that Holland's 36-month term of supervised release would have expired on July 10, 2017 had that officer not sought to revoke Holland and further stated that Holland had the full term technically not completed but he had served the full 36 months of allotted time.

After the district court allowed defense counsel for Holland to address the violations and present Holland's case with a mention of the type of Adult pornography discovered, the government stated that it agreed with everything Holland's counsel said. The government's counsel then remarked that Holland was making progress and that the government was willing to work out something short of prison, where Holland remained on supervision longer. The court, again, stated that it found Holland was in violation and revoked Supervised Release. Most notably, the court sentenced Holland after revoking his original 36-month term of supervision to: one (1) day imprisonment. The court then gave Holland credit for time-served since he came to court and missed work. The court also imposed a new, 24-month term of Supervised release, with six (6) months to be served in Dismas halfway house as soon as space became available. The court then ordered that Holland be placed immediately on Electronic Location Monitor until his placement at the Halfway house, with all other general and special conditions of supervised release that were previously imposed from the 2004 Judgment and Commitment, to be applied.

3. Second, 24-month Term of Supervised Release

On July 26, 2017, following the hearing, Holland was released from custody and his new, 24-month term of supervised release commenced, with a presumptive expiration date of July 26, 2019. US Probation Officer Moran resumed supervision of Holland and fitted him with an electronic leg monitor after which Holland returned to his home in Austell, Georgia (Cobb County). Officer Moran would continue supervision of Holland until March, 2018.

On August 16, 2017, Holland and Officer Moran signed a document entitled "Sex Offender Compliance Contract" which was the new contract acknowledging the newly imposed conditions that applied to Holland's newly imposed 24-month term of supervised release.

Although the Sex Offender Compliance Contract and all other general and special conditions of supervised release applied from the original 2004 Judgment and Commitment, Holland agreed "not to possess, purchase or subscribe to any sexually oriented material or pornography to include mail, computer, telephone (900 telephone numbers), video, or television nor patronize any place where such material or entertainment is available." (Condition #3)

- "to actively attend and actively participate in sex offender evaluation and at a treatment program approved by my U.S. Probation Officer." (Condition #5)
- "to submit to any program of psychological or physiological assessment at the direction of the U.S. Probation Officer or treatment provider. This includes the polygraph and/or plethysmograph to assist in treatment, treatment planning and case monitoring." (Condition #6)
- "to not have any contact with the victim(s) in the case, including correspondence, telephone contact, any form of electronic communication or communication through a third party unless approved by my US Probation Officer and treatment provider." (Condition #11).
- "to provide all personal/business phone records to the U.S. Probation Officer upon request. ... to provide written authorization to request a record of all outgoing or incoming phone calls from any phone service provider. ... to obtain written approval from US Probation Officer to use an electronic bulletin board system, services that provide access to the Internet, or any public or private computer network, ... to obtain written approval from my US Probation Officer to possess or use any computer at any location including employment, ... to permit routine inspection of any computer systems, harddrives ... to confirm compliance..." (Condition #13).

In short, according to the conditions outlined in the August, 2017 Sex Offender Compliance Contract, during the new, 24-month term of supervised release, Holland could not 1) possess any sexually oriented material, 2) use services that provide access to the Internet without written approval, or 3) possess or use any computer (i.e. a cellphone capable of accessing the internet) without written approval.

From August, 2017 to October 12, 2017, Officer Moran presumably continued to supervise Holland and conduct home visits with no adverse monitoring reports being received related to the electronic leg monitor. Then, on October 12, 2017, bedspace became available at Dismas House and Holland returned to that placement and the leg monitor was removed.

During the next 6-month period of court-ordered community confinement at Dismas House, Holland was subject to the terms and conditions of his current 24-month term of Supervised Release, as well as his Sex Offender Compliance Contract, dated August, 2017. Holland was also prohibited by Dismas rules from possessing a cellphone without approval or possessing any other device that could access the Internet. Holland also was never alleged to have violated any of the Rules of the Dismas House Resident Handbook during his 6-month placement. Supervising Probation Officers also had no information in their notes indicating that Holland was attempting to use any computer Internet service, despite asking several times for permission which Officers had denied and Dismas House never authorized. In fact, Officers had no evidence that Holland had violated that specific condition (i.e., use of the Internet with an unapproved device), or that he had violated any other condition while confined at Dismas House from October 12, 2017 to April 12, 2018, the date he was successfully released without incident.

Notably, too, as part of Holland's new supervised release conditions he was still required to attend and participate in his weekly Individual and Group Therapy sessions in the Sex Offender Treatment program at Highland Institute which he continued doing until his arrest in January, 2019. Holland also, during this time, continued regularly taking the required polygraph exams as a condition of his newly imposed 24-month term of Supervision, in order to assist in treatment, treatment planning and most importantly, case monitoring, based on his high risk of reoffending and criminal history.

As mentioned above, Holland failed his initial polygraph in February, 2015 and received an inconclusive result on the re-test in May, 2015. Yet, all subsequent polygraphs were passed during both Holland's initial 36-month term of supervision (from July, 2015 to July, 2017), and his second 24-month term of supervision, (from July 26, 2017 to January, 2019). In fact, a close review of the Probation Officer's case file on Holland will show that No Deception was indicated as Holland provided favorable responses and passed each of the required polygraphs in July, 2017 (before entering Dismas House), in March, 2018 (while confined at Dismas House), and later in August, 2018 (months after his release from Dismas House).

The requirement of a polygraph, as a part of Holland's new, 24-month term of Supervised Release, was used as a tool for U.S. Probation so that the Officers could make sure Holland was following conditions of supervision, including: not having contact with minors; not going places where minors were located; not possessing pornography; and not accessing the Internet. It would make no sense to routinely require and enforce the polygraph condition but then dismissively conclude that an examinee's responses and polygraph results are meaningless.

By March 12, 2018, after eight (8) additional months of supervision under Officer Moran, Holland's case was transferred to Officer Shannon Brewer, who took over the case file. Officer Brewer reviewed the pre-sentence report, Holland's 2004 Judgment and Commitment and the 2017 Revocation Order, as well as any documents regarding the case. Brewer also reviewed any notes from the three (3) previous probation officers, (B. Murphy, D. Davis, and J. Moran), who each had supervised Holland during the first, 36-month term of supervised release. Brewer also reviewed the most recent notes from Officer Moran who had remained Holland's supervising officer for the first eight (8) months of the current, newly imposed 24-month term of supervision.

Officer Brewer learned from her review that Holland had prior charges from the 1990's related to hands-on sexual offenses against minor males. Brewer learned of a MISTRIAL in a 1996 state case, where the jury was unable to reach a unanimous verdict in a case alleging numerous indecent liberties offenses and a second degree sex offense by force against the will of victim. Brewer also learned of a TRIAL in a state case in 1999 that was DISMISSED by the presiding Judge during a pre-trial motions hearing, when the accusing minor recanted his allegations after learning that Holland did not have HIV which conflicted with the minor's assertions that he had been forcefully, anally raped, twice by Holland and given HIV in the process. Brewer also learned of a jail diary written by Holland in the 1999 case, later recovered by Federal agents.

Brewer learned that in February, 2003, Federal agents obtained and executed a search warrant of Holland's Atlanta residence related to Holland's 2004 federal child pornography case, (discussed below). Brewer learned that agents seized, among other items, a personal diary written by Holland over four (4) years earlier in the 1999 dismissed state case, while he was detained for ten (10) months in the county jail (from September 1998 to July 1999). The recovered jail diary revealed entries about Holland's relationship with the 15-year-old, accuser and efforts Holland attempted to take while locked up, (but instead only wrote down), to convince the alleged victim into recanting the accusations of statutory rape against Holland. Brewer learned that one of Holland's 1999 jail diary entries, related to his dismissed charges, indicated that the accuser had lied on the stand where the Presentence Report included the following details from Holland's diary: "He got on the witness stand and LIED to save me. He said nothing happened!" Keep in mind that the predecessor officers were also aware of all of these details.

Brewer also learned that at the time of the 1996 and 1999 cases, Holland was or had just resigned as a Juvenile Probation Officer in the State of North Carolina. Officer Brewer's review of Holland's case file also revealed that neither of the 20+ year-old state cases were still active or pending in the State of North Carolina when she took over the case in March, 2018, as both cases had been dismissed and closed, long ago. Brewer also learned from studying Holland's file that after the closure of the criminal cases in North Carolina, Holland relocated to Atlanta, Georgia to take up residency. Brewer learned that based on his specific fields of employment, that Holland no longer worked jobs that involved or provided access to minors or anyone under the age of 18 years old. Brewer learned that Holland worked at Office Depot as a delivery driver in 1999 and then at Webvan in 2000, also as a delivery driver. Brewer also learned that Holland's last job before being arrested on Federal charges in 2003 was at Orkin Pest Control.

Brewer's review of Holland's file also revealed that he had lived alone in Atlanta at the following addresses: 631-C Thurmond St (from 1999 to March 2001); 231-A Elm St (from March 2001 to August 2001), and 565-B and E Langhorn St (from August 2001 to July 2003). Brewer also learned that Holland had no criminal accusations against him until the accusations of sexual offending behavior on the Internet that led to the 2004 case.

Further review of Holland's case file by Officer Brewer ~~thys~~ revealed a 2002 cybertip from NCMEC concerning possession, manufacture and distribution of child pornography that identified Holland's IP address. Such identifying information about Holland led to execution of a judicially-obtained search warrant, federal charges being brought and Holland's 2003 plea of guilty to ten (10) counts of receipt of child pornography, with a 151-month sentence imposed in 2004, for which he served time. Officer Brewer also learned that when Holland was released from BOP custody, he was initially homeless, so six (6) months before the end of his federal sentence, he was technically still in BOP custody when he was pre-released to the custody of Dismas House, which would last until July 11, 2014 - the date actual supervision began with U.S. Probation. Brewer also knew that Holland had signed a consent waiver to extend his stay for up to a year at Dismas House while also wearing an electronic ankle monitor, but that he would be kicked out in February, 2015 for having a cellular device with photo capability, although at that time NO actions were taken by US Probation to revoke Holland's supervised release, or to even search his home and seize the devices.

Numerous other events occurred during the original, 36-month term of Holland's supervision and could be cited as information that Officer Brewer learned from reviewing his case file, including: ① the 2014 fitting and 2015 removal of the GPS ankle monitor; ② Holland's known approved flip-phone, mobile device corresponding to his contact phone number of 404 914 4767; ③ Holland's approved place of employment at both Diaz Foods and Tie Down Engineering; ④ Holland's approved residences: at Woodlawn Ave in Atlanta from December 2014 to December 2015; at Hasty Place in Atlanta from January, 2016 to July 2016; and at Six Flags Rd, Lot 230 in Austell from August 2016 to the date of arrest in 2019; ⑤ Holland's Georgia-compliant sex offender registry status; ⑥ Holland's ongoing weekly sex offender treatment including the 2014 psychosexual evaluation indicating Holland had a high risk of reoffending; and ⑦ Holland's consistent submission of his Monthly Supervision Reports by mail. However, the next relevant circumstance that Brewer learned about was that a few months before assuming supervision of the case, on July 26, 2017 Holland had the original 36-month term of supervised release revoked. Holland was now serving a new 24-month term of supervision when Officer Brewer assumed supervision on March 12, 2018, and Holland was at Dismas House.

When Officer Brewer took over supervision of Holland in March 2018 she knew he had initially had problems at the start of his original 36-month term of Supervised Release. She also knew that at the end of that original term, Holland's supervision was revoked for possessing seven unapproved cellphones with internet capabilities and two (of the seven) contained sexually oriented material and/or pornography. Officer Brewer knew that all contraband devices were seized, searched and never returned from their acquisition on January 21, 2017 and that Holland only possessed a non-internet capable mobile device assigned to his known contact number of 404.914.4767, which Officer Moran had left with Holland during the seizure.

Officer Brewer also knew that Officer Moran was intensively supervising Holland after the discovery of the contraband, but that Officer Moran did not discover any additional devices or violations between the date of the unannounced visit on January 21, 2017 and the date of the revocation hearing on July 26, 2017. Officer Brewer was also aware of the difficulty that Holland faced in obtaining another contraband device because his movements were being monitored by GPS ankle monitor from the date of the revocation hearing on July 26, 2017 to the date he would return to Dismas House on October 12, 2017.

Importantly, Officer Brewer knew (via the predecessor Officer Moran's notes), that according to defense counsel's presentation at the Revocation Hearing, that the seven confiscated cellphones were dead items and not internet active, although having them in his possession at all violated Holland's supervised release. Brewer also knew from the Revocation Hearing presentation by Holland's defense counsel that the images in the two phones were images of Holland with a person he was in a relationship with and there were other images of adults from other adult pornography images that Holland possessed but there was NO pornography or sexually oriented images involving persons aged "16 and up," or any other depictions of children, (sexual or otherwise).

After a complete review of the file to familiarize herself with Holland, Officer Brewer made a couple of unsuccessful attempts to reach Holland at Dismas House, between March 12, 2018 and April 12, 2018. But, Brewer did not actually encounter Holland until April 12th on the day he was released, without incident, from Dismas, Brewer met Holland at his approved residence in Austell, Georgia.

As part of her intensive monitoring of Holland, a high-risk sex offender serving the remaining portion of his newly imposed 24-month term of Supervised Release, that was the result of his July, 2017 Revocation Hearing, Officer Brewer began visiting Holland, on a monthly basis, (mostly unannounced), for the next eight (8) months at his home - from April, 2018 to January, 2019 - with the last noted unannounced visit occurring on December 31, 2018. Brewer's visits involved in-person check-ins with Holland. Brewer would conduct a walk-through, visual inspection and plain-view search of Holland's mobile home in Austell, Georgia, where he lived alone.

During her visits, Officer Brewer would look for any contraband such as Internet-capable devices, children's clothing, or anything that would raise alarms. Brewer, on a regular basis, would also visually inspect Holland's approved, non-internet capable mobile device, (flip phone), that was assigned to his contact phone number. Brewer would view Holland's approved device to ensure that he was in compliance with the conditions of his newly imposed 24-month term of Supervised Release, that prohibited him from accessing the Internet without approval; possessing a smartphone without approval, or possessing sexually-oriented material or pornography.

Other than seeing a box of Girl Scout Cookies during her first visit in April, 2018, Officer Brewer never observed anything in plain-view that would be obvious contraband or ^{arouse} ~~arouse~~ even the slightest suspicion, (reasonable or otherwise), of Holland's non-compliance with the terms of his current 24-month term of Supervised Release.

Officer Brewer would also make similar face-to-face contact with Holland at his place of work, with the last purported visit taking place on January 10, 2019. Apparently during the January 10th employment visit, Officer Brewer just saw Holland in the parking lot of his job. Holland had been, somehow, previously notified, presumably via a call/text to his contact phone number from Brewer, which alerted him, and he "stepped out to verify his employment and set up a meeting at his home" for January 14, 2019. The announced meeting and scheduled visit with Holland was really an unannounced planned, warrantless search which had previously been approved several days earlier by Brewer's Supervisor and Chief Probation Officer on the basis of a written Request for a Search that Officer Brewer had submitted on January 3, 2019.

Additionally, as part of her supervision of Holland during the new, 24-month term of release, Officer Brewer would, at least monthly, make contact with Holland's Sex Offender Treatment provider at Highland Institute, with the last reported contact taking place on January 8, 2019. Holland's treatment providers told Officer Brewer that he would tell the treatment staff what they wanted to hear so that he could be done with supervision, which was an issue noted by Brewer. Officer Brewer also was aware that Holland had been continuously in treatment at Highland Institute since his release from Federal prison in 2014 and that Holland continued regularly attending as well as actively participating in weekly Individual and Group Therapy sessions until his arrest in January 2019.

Finally, under her supervision for the last eight (8) months, Officer Brewer knew that as a client, Holland was, generally speaking, compliant. Brewer was aware that Holland did anything she asked him to do, such as provide any documents, step out from work, submit paperwork, and give her his proof of income. Brewer also knew that Holland did not give her any trouble. In fact, during the last eleven (11) unannounced home visits made by Brewer and the previous probation officer—going back from January 14, 2019, (date of the search), there was only one visit made by the former officer, during the original, 36-month term of release, in January, 2017 where her predecessor found the aforementioned seven (7) unapproved cellphones, two of which contained adult pornography and that former officer initiated the July, 2017 Revocation Hearing. Other than that 2-year-old, unannounced 2017 visit, Officer Brewer had received absolutely no indication that Holland had violated the terms of the Supervised Release or violated the conditions of his Sex Offender Compliance Contract, particularly during his newly imposed 24-month term of Supervised Release. The distinction in conduct during Holland's first term and second is important.

Then, on January 3, 2019, with just six (6) months remaining before the expiration of Holland's 24-month term of supervision in July, 2019, and only four (4) days since the last unannounced and unremarkable home visit was conducted by Officer Brewer, she received a phone call from the Georgia Bureau of Investigations. Special Agent Bigham reported that the GBI had received a cybertip that Holland was uploading erotic images of minor males onto Instagram.

Additional information and facts pertaining to the GBI Agent's receipt of the Instagram cyber tip from NCMEC and the steps taken by the Agent to identify the person suspected of uploading the erotic images of minor males, as well as the Agent's communication with the Probation Officer will be explained in more detail, below, in the next section. As that information pertains to Holland's current, 24-month term of Supervised Release, however, no further inquiry, investigation, or additional surveillance was conducted by Officer Brewer, who as a U.S. Probation Officer, served as the investigatory arm of the district court.

Here, based apparently on nothing more than rank speculation and unsupported, generalized concerns, (hunches), Officer Brewer - even after intensively monitoring Holland for the past several months, (since March 2018), - was now suddenly worried that Holland: 1) could have unapproved cellphones in his possession, 2) could possibly be using and accessing social media with those cell phones, and 3) could possibly be possessing sexually oriented materials. Thus, the next step taken on January 3rd (besides Brewer and Bigham coordinating their schedules to coincide with a planned search), was for Officer Brewer to immediately call her Supervisor, following her conversation with Agent Bigham about Holland.

Officer Brewer advised her Supervisor of the information she had received from Agent Bigham and was then instructed to complete a 'Request For Search' form, (See Docket #24-11, Case # 1:19-CR-399). The contents of the search form expressly indicated that the "Basis of Search" was that Officer Brewer "received a call from GBI investigator on 1/3/19 stating they received a cyber hit that offender has been uploading erotic images of minor males onto an Instagram account which has not been approved." Such information clearly established that Officer Brewer's initial decision to search was not based on the totality of the circumstances. Instead, Brewer's initial decision to search was based, presumably, on a pre-determination of reasonable suspicion made several days before the warrantless search took place, rather than the determination of reasonable suspicion being made at the time and on the scene of the search, where it is ~~improper~~ improper to assess reasonable suspicion as of the time the decision to search was made. In short, the Fourth Amendment applies to the act of searching, not the initial decision to search, and it applies an objective standard based on the totality of information known by the searching officers.

Besides Officer Brewer making the improper reasonable suspicion determination on January 3rd, two (2) other noteworthy, intervening events took place prior to the planned Search. First, as mentioned above, on January 8, 2019, six (6) days before the search and only five (5) days after the Agent's call to Officer Brewer, Holland's treatment provider at Highland Institute communicated with Brewer by sharing that Holland had voluntarily discussed during a recent session (held within the last seven days), that he saw one of his prior victims, who was now a 30-year old adult, at a Goodwill Store, where their encounter was happenstance. Officer Brewer illogically believed that Holland should have directly reported such contact to her, despite clear evidence that he promptly reported the incidental contact directly to treatment staff as soon as it happened, as required by his release condition. Second, as also stated above, on January 10, 2019, just four (4) days before the planned January 14th search, Brewer purportedly saw Holland, in person, at his workplace in the parking lot. Although she was fully aware that everyone, including Agent Bigham, would be coming to search Holland's mobile home for violations, based on the Agent's January 3rd call, Brewer did not do anything or take any reasonable preliminary actions during the January 10th parking lot meeting. In fact, Brewer did not subject Holland to a pat-search or plain-view inspection of his vehicle for contraband cellphones; she did not make any inquiries about Holland's phone number or the assigned flip phone; she did not reportedly observe Holland as being nervous, or displaying any suspicious behavior or furtive gestures that would support her generalized suspicions about any supervised release violations; she did not even check to see if Holland's approved cellphone or if his employer had internet access, especially in regards to the alleged violations recently made by Agent Bigham. But more importantly, Brewer informed Holland about the upcoming announced visit but not the planned search. Then, on January 14, 2019, exactly six (6) months before the scheduled July, 2019 termination date of Holland's current, 24-month term of supervised release, numerous Probation Officers and GBI Agents (excluding Brewer), arrived at Holland's home as planned on January 3rd. Upon entry, searching officers immediately began executing a rummaging search of all areas, looking for any violation of supervised release. During the hour-long search, Agent Bigham attempted to interview Holland at his Kitchen table, but she terminated the questioning when Holland invoked his right to an attorney. Officers eventually confiscated Holland's one flipphone and found four unapproved cellphones which provided evidence for the Revocation Petition and led to the current new charges.

4. Unsubstantiated Link between Supervision and Cybertip Investigation

As stated above, a detailed explanation pertaining to the GBI's receipt of the Instagram cybertip will be provided, here, in this section. In previous sections, Holland outlined facts directly pertaining to events surrounding his prior criminal history, his initial 36-month term of supervision, as well as his, second, 24-month term of supervision. Here, Holland aptly differentiates U.S. Probation's supervision of him from the events related to GBI's investigation of the Instagram cybertip.

Thus, to comprehend why Officer Brewer became worried that Holland was violating the conditions of his current, 24-month term of supervised release, additional information about the Cybertip investigation is crucial. Curiously, when setting forth the facts of Holland's case, both, the government and the reviewing court, (possibly for their convenience), misleadingly juxtapositioned chronological events occurring in March, 2018 regarding separate, independent events pertaining to the GBI's cybertip investigation, as if those events directly related to Holland's newly, imposed term of supervised release, although absolutely no basis for such a side-by-side placement had been established.

Notwithstanding the erroneous placement, on March 31, 2018, in totally, separate investigatory events simultaneously occurring, yet, unknown to Officer Brewer and completely independent of that Officer's intensive supervision of Holland during his newly imposed, 24-month term of supervised release, the following happened, elsewhere:

As required by law, Instagram reported a Cybertip to NCMEC involving the uploads of suspected child pornography, child sex trafficking or online exploitation of a child. That same day, (March 31st), NCMEC received the cybertip which provided that on December 17, 2017, December 31, 2017, January 6, 2018 and January 13, 2018 an unknown individual accessed the Instagram account with the username "yungcoollz and uploaded four images of minor boys (clothed) to that account. Instagram disclosed that the account's display name was "Yung in ATL"; had no other personally identifying information, such as a physical address, date of birth, or phone number but, there was an associated email address of branbarn90@gmail.com, for the user or person being reported, that was listed on the Instagram account.

NCMEC did a workup of the information provided, but did not discover any leads or suspects related to the information provided by Instagram's cybertip. NCMEC passed the tip along to the GBI that same day (March 31st) and on April 26, 2018 the case was assigned to Special Agent Bigham to investigate.

The vital information provided to the GBI included the IP address used to upload one of the images, all of which were viewed by Bigham. The Agent described them as Instagram uploads of young boys wearing underwear and noted the images were not C P [child pornography] but odd behavior for sure. SA Bigham, using public data, determined T-Mobile owned the IP address, suggesting the uploads came from an internet capable mobile device. But when she subpoenaed T-Mobile the company could not provide her with information on the IP address as it was no longer retrievable thereby squelching any direct lead to a particular uploading suspect or T-Mobile subscriber. A subpoena to Google for subscriber information related to the g-mail address revealed the following: NAME - Bran Barn; Email - branbarn90@gmail.com; SERVICES - Android, Gmail, Google Calendar Google Hangouts, Google Keep, Google Photos, Has Google Profile, Has Plusone, Location History, Minutemaid, Web & App Activity, YouTube; CREATED ON - 11/30/2015 at 7:58:23 UTC; TERMS OF SERVICE IP - 2607:xxxx:xxxx:.... at 7:58:23 UTC; SMS - +14049144767 [US]; GOOGLE ACCOUNT ID - 163938261117; LAST LOGINS - showing times and dates, and IP addresses. Of all the information provided from this subpoena, the listed phone number, at most provided (allowed), the Agent a lead in identifying a suspect, but did not establish who uploaded the images, assessed the internet, or possessed an internet capable mobile device for use at Instagram. Further investigation thus, uncovered that Holland had listed this phone number on his Georgia driver's license.

Diving deeper into Holland's background, while only verifying publicly available information that was presently observable (the phone number), Bigham discovered Holland's past criminal history, including a previous conviction for child exploitation and that he was on the sex offender registry. Speculation and conjecture, by Bigham, began and would lead the Agent to quickly contact Holland's federal probation officer and recklessly provide conclusory allegations about her investigation of the Instagram cybertip, including reporting ~~salacious~~ ^{salacious} untruths about Holland uploading the images.

On January 3, 2019, as already detailed above, Agent Bigham notified Officer Brewer that the GBI had received a Cybertip on Holland. If this is what Bigham stated, it is far from the truth and unequivocally not supported by the evidence. Bigham's fallacious inference was made in reckless disregard for the truth and clearly told to manipulate the suspicions that Officer Brewer would draw as to Holland.

But most importantly, up to this point in Holland's supervision, there had been no evidence or suspicious activity observed, reported, or investigated by Brewer that would come even close to corroborating the overexaggerated suppositions made by Agent Bigham. Nevertheless, on January 14, 2019, Holland's home was searched based on the Agent's call to ~~Brewer~~ ^{Brewer}.

Reasons for Granting the Petition

Question 1. Whether the Fourth Amendment applies to the act of searching or the initial decision to search, based on an objective standard considering the totality of the circumstances and collective knowledge of the officers at the moment of the search on January 14, 2019?

Holland argues that, in his case, there was an improper reasonable suspicion assessment. The magistrate judge determined that the totality of the circumstances established reasonable suspicion that Holland had violated the conditions of his release and recommended denying Holland's motion to suppress. The district court errantly adopted the magistrate judge's recommendations, verbatim. The court held that, "ultimately, taken together, the totality of the facts (and the obvious inferences that follow), provided Officer Brewer a reasonable suspicion that Defendant Holland was violating the conditions of his supervised release at the time of the search."

However, and vitally important, both the magistrate judge and the district court judge accepted the government's briefed, responsive pleading and incorrectly assessed reasonable suspicion - not at the time of the search, but - as of the time the decision was made - when Officer Brewer initially decided to immediately complete a 'Request For Search form' to search Holland's home based solely on speculative information received from the GBI Agent who contacted her on January 3, 2019 about the investigation of an Instagram Cybertip, where the Agent dubiously conveyed that it appeared that Holland is the person utilizing the Instagram account.

Indeed, the Fourth Amendment applies to the act of searching, not the initial decision to search, and it applies an objective standard based on the totality of the information known by the officers searching at the time of the search. See Terry v. Ohio, 392 U.S. 1, 22-23 (1968). ("And in making [the Fourth Amendment] assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or search warrant a man of reasonable caution in the belief that the action taken was appropriate?

see also *Evans v. Stephens*, 407 F.3d 1272, 1280 (11th Cir 2005) ("Whether an officer has a reasonable suspicion is an objective question viewed from the standpoint of a reasonable [] officer at the scene.").

Here, the court assessed reasonable suspicion, under the totality of the circumstances, based on the initial decision Officer Brewer made to search, on January 3, 2019 after she received the call from Agent Bigham. The exact details of their conversation could not be recalled by either Officer Brewer or Agent Bigham, presumably to deceitfully frustrate the evidentiary hearing fact-finding process in their favor.

In fact, the Agent's reported conversation with the Officer reflects Agent Bigham providing less than the total story by admittedly presenting a synopsis of the Agent's case to further manipulate the inferences that Holland's Probation Officer (or the reviewing court) would draw. Indeed, Agent Bigham knowingly and intentionally shared speculative information surmised during the Agent's nine-month investigation of the Instagram Cybertip, including:

- that the Agent received an Instagram Cybertip from NCMEC;
- that the Instagram Cybertip has these images on it;
- that it appears Holland is the person utilizing the Instagram account; and
- that Holland is uploading images of suspected child pornography to Instagram, potentially committing crimes.

Both inconsistent and irreconcilable with what was conveyed to her, Officer Brewer construed what she was told by adding more conjecture to the Agent's synopsis and reckless disregard of the whole truth of the Cybertip investigation, when Officer Brewer stated she was told:

- that the GBI received a Cybertip on Holland;
- that Holland uploaded erotic images photos to Instagram;
- that Holland used his own phone number to establish an Instagram account; and
- that the boys in the photos appeared to be aged 10 to 12 years old and were not entirely nude but outlines of their covered genitals were visible.

Notably, Bigham's call about the Cybertip was the only allegation of misconduct occurring during this term.

Despite the Agent's lack of reference to a particular unapproved cell phone associated with Holland, the absence, in the Agent's report, of contemporaneous Instagram access; plus, the Agent's mere verification of only presently observable facts, including public information such as Holland's phone number and his criminal record, after speaking with Bigham, who by implication served as an imprimatur of credibility and reliability based on her law enforcement background Officer Brewer became concerned. Brewer was worried that Holland could be violating the terms of his newly imposed 24-month term of supervised release, but that worry did not absolve her of her own investigatory duties. Yet, Brewer still believed/suspected that Holland: 1) might have an unauthorized cell phone in his possession; 2) possibly be possessing sexually oriented material, and 3) possibly be using the devices to access social media to share the questionable images.

The next step taken by Officer Brewer was to immediately call her supervisor to advise her of the information she received from Bigham. Then, Brewer was instructed to complete a Request for search form based on a, presumably, predetermination of reasonable suspicion. Here, it is clear that Officer Brewer had no other information she could rely upon to establish reasonable suspicion of a violation that had occurred during Holland's current term of supervision. Nor did Brewer - who was not present at the scene of the search - have a totality of information suggesting a reasonable suspicion of a violation to justify the search. Plus, the Agent and the Officer's testimonies did not match perfectly on the issues. One can infer from the inconsistencies that the two manufactured and basically concocted the basis of the search, post hoc, while the government padded the circumstances in its brief by delving into Holland's sex offending past.

Hence, the timing of the current accusations by Agent Bigham deserved further discussion. Unfortunately, the court refused to recognize or even consider in its totality of the circumstances analysis, that it should have found that any violation of Holland's current term of supervision, would have had to occur after the most recent term of supervision commenced on July 26, 2017. Holland could not have been suspected of a violation of supervised release, such as possession of unapproved cell phones containing sexually oriented material and unapproved access to social media, if those violations occurred during his prior term of supervision. That term had ended on July 26, 2017 after it was duly revoked!

Yet, a full review of the record suggests that the government constructed in lego-like fashion reasonable suspicion by grabbing multiple factors from Holland's initial term of supervision in order to reimagine the actual, express basis upon which Officer Brewer suspected that Holland was violating his current term. The court's assessment, therefore, relied on the totality of the select circumstances cited by the government and must be rejected. A review of the decision indicates that the court looked at only facts known to Brewer when she decided to Request a search of Holland's home, when the determination of reasonable suspicion should have been made based on the Officer's knowledge at the scene of the search. Cf. United States v. Hamilton, 591 F.3d 1017, 1023 (8th Cir. 2009) (we proceed to determine whether officers violated Hamilton's rights under the Fourth Amendment based on officers' knowledge at the scene of the search).

Question 2. Whether an inchoate and unparticularized suspicion or hunch of a supervised release violation communicated from an Agent to the searching probation officer is enough to satisfy the minimum level of objectivity required to search a supervisee's home?

Although reasonable suspicion may be based on information supplied by a third party, such as in this case, a fellow law enforcement officer/Agent, the information must still bear sufficient indicia of reliability. *United States v. Fields*, 178 Fed Appx 890, 892 (11th Cir 2006). Here, Officer Brewer testified that Agent Bigham told her that "Holland was uploading ~~sexual~~ erotic images of minor males to Instagram and used his phone number to establish the account." However, there was insufficient evidence before the court to demonstrate the reliability of the Agent's information. See *Adams v. Williams*, 404 U.S. 143, 146-47 (1972); *Alabama v. White*, 496 U.S. 325, 330 (1990) (Reasonable suspicion, like probable cause, 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 -- the whole picture' that must be taken into account when evaluating whether there is reasonable suspicion).

While it is permissible for Officer Brewer to rely on information provided by Agent Bigham, some evidence had to be presented as to what information the Agent had, when the Agent received it, and from whom it was received. The only evidence presented at the Suppression hearing demonstrates summarized details about Bigham's investigation of a cyber tip conveyed to Brewer on January 3rd 2019. And, Bigham's information was unverified and speculative.

The court is not blind to the difficulties faced by law enforcement in collecting and distributing competent information immediately following reports of criminal activity, or in this case, supervised release violations; however, the Fourth Amendment's requirement for particularized reasonable and articulable suspicion is not onerous, nor is it toothless, either. And, here, Agent Bigham had a hunch after seeing the phone number and passed the hunch on to Brewer.

Individualized, rather than generalized suspicion, was required. In Holland's case, there was only a hunch, or generalized suspicion that the owner of the phone number listed on the associated Google account's subscriber information was the uploader of the four (4) images to the Instagram account. Lacking, however, was the individualized suspicion, or reasonable inferences, required by the Fourth Amendment. There needed to be a reasonable belief or suspicion directed at the person, (Holland), to be searched. Inferences based upon speculation and guesswork are not reasonable.

As Holland gave absolutely no indication of possessing an unapproved, internet capable mobile device or that his phone number was serviced by an Internet Service Provider; as Holland gave no indication that he had accessed the Internet, at the time in question; as Holland provided no information that he was possessing erotic images of minor males; and as Holland acted, generally, in a manner that was demonstrative of his overall compliance with his current, 24-month term of supervised release, there was no reasonable suspicion to believe that he had violated any conditions or that he exhibited non-compliance with his sex offender compliance contract, at the time of the January 14, 2019 search.

The Fourth Amendment requires reasonable suspicion, that is individualized, before a search for supervised release violations can be conducted. Some absence of individualized suspicion characterizes Holland's case. To be sure, the suspected conduct here, (possession of unapproved cellphones; unapproved internet access; and possession of sexually oriented materials), all involved the Internet or Internet access, as well as possessing an unapproved device. Such suspected conduct and violations support a search only if Holland was reasonably suspected of possessing, (or hiding in his possession), an unapproved cellphone containing prohibited, erotic images, at the time Holland resided at Dismas House, or any time thereafter. Other suspected violations support a search if Holland was reasonably suspected of involvement on the Internet at the time he was at Dismas House, or anytime, thereafter. Holland, notably, resided at Dismas House between October 2017 and April, 2018, where there was no evidence Holland violated the rules.

If the evidence that triggered the search showed that in December, 2017 and January 2018, at a time when Holland was housed at Dismas, someone uploaded with a mobile device, erotic images of minor males to an Instagram account, which was associated with a g-mail address, and the Google email information merely listed Holland's phone number, then a link must be substantiated between the phone number and the uploads.

There was no evidence before the court, except, speculative, conclusory allegations, as to how the Agent attributed the uploading of the images at Instagram to Holland, or how she determined that Holland was possessing unapproved cellphones containing erotic images. There was absolutely no evidence as to whether the Agent even knew who had uploaded the images, although she conveniently credited the acts to Holland, generally; there was a dearth of evidence as to what type of mobile device was used for the uploads or for possessing (storing) the erotic photos; there was an absence of evidence as to who owned or used the g-mail address that was associated with the Instagram account; and most importantly there was a lack of evidence as to how the Agent substantiated a "tie" or link between - Holland's phone number listed on the g-mail account, the g-mail address listed on the Instagram account and the phone number presumably "tied to" the Instagram account. And despite contrary evidence demonstrating that the T-mobile IP addresses for both the Instagram account (related to the images) and the Google account (related to log-in activity), failed to reveal the identity of the account subscriber, the Agent ascribed the source of the uploads to Holland.

In sum, this is not a case where the Agent observed a suspect in possession of a smartphone or traced an IP address to a particular account holder's physical address. Moreover, there is insufficient evidence, overall, as to how the Agent baldly imputed the uploading activity and the possessing of a smartphone containing erotic images of minor males to Holland, simply by observing the mere presence of Holland's phone number - not on the Instagram account - but, on the associated Google account. Clearly, the Google account, itself, was associated with the Instagram account, by the listing of the gmail address. Yet, Holland's phone number was only present on the Google account, as an SMS/text number for that account and not the Instagram account.

At most, the information about Holland's phone number allowed the Agent to have a lead in identifying a suspect. But, the phone number, alone, did not establish or even aid in providing the necessary reasonable suspicion, as to who uploaded the images at Instagram, accessed the internet in 2017, or possessed unapproved cellphones at the time of the uploads. In fact, (nevermind the Instagram account), the mere listing of the phone number on the associated Google account, does not, without more, even substantiate a link, trace or tie to the Google account without detailed text/call log evidence indicating receipt or the sending of a confirmation code to register the Google account. No minimal level of objectivity was established in Holland's case.

Finally, in order for the collective Knowledge doctrine to apply, there must be some degree of communication between the officers. This requirement serves to distinguish between officers functioning as a search team and officers acting as independent actors who merely happen to be investigating (or supervising) the same subject. The Eleventh Circuit has explained over several decades that the collective Knowledge doctrine or fellow-officer rule considers only the "collective Knowledge of the officers involved in the [] search" when determining if the totality of the circumstances establishes reasonable suspicion. United States v. Acosta, 363 F.3d 1141, 1145 (11th Cir 2004) (quoting United States v. Williams, 876 F.2d 1521, 1524 (11th Cir 1989)). Agent Bigham interviewed Holland at his kitchen table and was not involved in the search of his home. Bigham's involvement was limited to communicating and conveying information about the Instagram cyber tip to Officer Brewer.

Importantly, reasonable suspicion can be imputed to the officer conducting a search if the searching officer acts in accordance with the direction of another officer who has reasonable suspicion. Here, Agent Bigham had a hunch, not reasonable suspicion, and she passed her hunch onto Officer Brewer who requested a search. Even in affirming the district court's denial of Holland's Motion to Suppress, it appears the Eleven Circuit panel imputed more Knowledge to Officer Brewer than it should have and than was supported by the evidence.

Thus, a primary focus on the imputed Knowledge cases is whether the law enforcement officers initiating the search or arrest, on whose instructions or information the actual searching or arresting officers relied, had information that would provide reasonable suspicion or probable cause to search or arrest the suspect. United States v. Hensley, 469 U.S. 221, 230-31 (1985); Whiteley v. Warden, 401 U.S. 560, 568-69 (1971) ("If the directing officer does not have probable cause, [or reasonable suspicion], the government may not bootstrap probable cause [reasonable suspicion] from the innocent act of a police officer following an erroneous direction"). The common lesson of Hensley and Whiteley is that the collective Knowledge of all the officers involved must provide sufficient grounds to justify a reasonable suspicion of criminal activity, or in Holland's case, reasonable suspicion of a supervised release violation.

In other words, for the collective knowledge doctrine/fellow-officer-rule to work, the "laminated total" of the information known by officers who are in communication with one another must amount to a reasonable suspicion to search. See, e.g., United States v. Edwards, 577 F.2d 883, 895 (5th Cir. 1978). Although, an officer is entitled to rely upon information provided by other officers the collective information known to all officers involved must be sufficient to amount to a reasonable suspicion. See, generally 2 W. LaFare, Search and Seizure: A Treatise on the Fourth Amendment § 3.5(b) (2d ed. 1987); 3 id. § 9.3(f) at 487-89.

The idea that facts about Holland known by Officer Brewer that were learned from reviewing his probation case file while under Federal supervision, when added to the collective knowledge of the Agent who was investigating a Cyber tip, constituted reasonable suspicion to search Holland's home, under the totality of the circumstances, such an idea must be rejected emphatically. The only additional facts known by Officer Brewer before receiving the Instagram cyber tip prior to the search, that conceivably bore on the reasonable suspicion question are that: 1) Holland had a known history of receiving child pornography, based on his 2004 conviction, and he had a sexual interest in minor males; 2) Holland was known to have a high risk of reoffending as shown by his 2014 psychosexual evaluation and a 20⁺-year old criminal history; 3) in 2015, Holland was known to have used unauthorized devices and had exchanged pornography with men from prison, and 4) in January, 2017, Holland was known to have possessed seven unapproved cellphones, leading to a July 2017 revocation of his original term of supervised release and the imposition of his new, current term of supervision.

Because Officer Brewer was reasonably familiar with each of the aforementioned facts, yet she never searched Holland's home, the difficult question remains - whether Officer Brewer had been given that minimum quantum of reliable information necessary to application of the collective knowledge doctrine when she spoke to Agent Bigham on January 3, 2019. Even if answered in Brewer's favor, anyone viewing the case would still be faced with a search - occurring during Holland's new term of supervision - triggered by and based solely on: 1) Brewer knowing (via Agent Bigham), that four erotic images of minor boys were uploaded to an Instagram account dubiously claimed by the Agent and misconstrued by the Officer as being "tied to" or "established with" the use of the phone number on Holland's driver's license and that the Instagram account's username "Yung in Atl" suggested that the user lived in Atlanta where Holland had lived.

With the Agent's unsubstantiated "tie" to the Instagram account by the discovery of Holland's phone number, and nothing else, one cannot generally conclude that the laminated total of the stated facts, without more of an investigation by the Agent or inquiry by the Officer, constitutes reasonable suspicion to search Holland's home in January, 2019. It is well-settled that law enforcement's corroboration of innocent and presently observable facts may be insufficient to establish reasonable suspicion, much less probable cause. Cozzi v. City of Birmingham, 892 F.3d 1288, 1295 (11th Cir 2018); United States v. Ohoro, 724 F. Supp. 1191, 1207 n.18 (M.D. Ala 2010) ("merely verifying public information such as addresses, phone numbers, and even criminal records is not sufficient" in and of themselves to lend credence to information in a tip to create a reasonable suspicion of wrongdoing).

In conclusion, Agent Bigham's inchoate and unparticularized suspicion or hunch that Holland was uploading images of erotic depictions of minor males to Instagram which she, then, communicated to Probation Officer Brewer was not enough to satisfy the minimal level of objectivity required to search Holland's home, based on neither the totality of the circumstances, nor the collective knowledge doctrine. The details that were actually conveyed and transmitted to Officer Brewer, in a summarized manner during Agent Bigham's call about the Agent's investigation of the Instagram cybertip, did not constitute the minimum quantum of reliable information necessary for the application of the collective knowledge doctrine; Nor did the totality of the circumstances, known by Brewer, create at least some minimal level of objective justification for the belief that Holland was violating the current, 24-month term of supervised release by having unauthorized cellphones in his possession, and was using them to store sexually oriented material and access social media.

Question 3. Whether reasonable suspicion, under the totality of the circumstances approach, once formed, can be negated, vitiated, or dispelled based on a Probation Officer's awareness of intervening circumstances and information that cause the suspicion to be nullified?

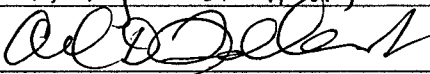
Reasonable suspicion to search once formed will continue to exist for the indefinite future, at least if no intervening exculpatory facts come to light. United States v. Watson, 423 U.S. 411, 450 n.14 (1976) (Marshall, J. dissenting). There may be development of intervening information that weakens the reasonable suspicion, rather than information emerging that actually strengthens the basis for a search. Here, in Holland's case, Officer Brewer had a variety of intervening facts before her that negated and dispelled any reasonable suspicion that she formed prior to the January 14, 2019 search.

It must be remembered that reasonable suspicion exists when there is a "sufficiently high probability that criminal conduct [or conduct in violation of supervised release] is occurring to make the intrusion on the individual's privacy reasonable." United States v. Knights, 534 U.S. 112, 121 (2001). The court "must look at the totality of the circumstances of each case and determine whether the officer had a particularized and objective basis for suspecting legal wrongdoing." United States v. Yuknavich, 419 F.3d 1302, 1311 (11th Cir. 2005). The analysis is objective and should be viewed from the standpoint of a reasonable officer. Ornelas v. United States, 517 U.S. 690, 696 (1996); United States v. Nunez, 455 F.3d 1223, 1226 (11th Cir. 2006) ("[T]he question... is not whether a specific arresting officer... actually and subjectively had the pertinent reasonable suspicion, but whether, given the circumstances, reasonable suspicion objectively existed to justify such a search.").

Judging Officer Brewer's actions, under the above-cited standards, demonstrates that with all the information known to her on the day of the search; on January 10, 2019, on January 8, 2019, and even just three days before receiving the call from the Agent, her actions were unreasonable.

CONCLUSION

For all the factual reasons present and the legal authorities cited within this filing by pro se Petitioner, Arnold D. Holland, the petition for a writ of certiorari should be promptly granted.

Respectfully Submitted,


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