[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 22-11817

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARNOLD D. HOLLAND,
a.k.a. manboy12,

Defendant-Appellant.

Appeals from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:03-cr-00336-CAP-AJB-1

Appendix A

No. 22-11819

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARNOLD D. HOLLAND,
a.k.a. Threezy3Three,
a.k.a. A.D.,

Defendant-Appellant.

Appeals from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:19-cr-00399-MLB-JKL-1

Before LAGOA, BRASHER, and TJOFLAT, Circuit Judges.

PER CURIAM:

Arnold Holland appeals his 468-month sentence and the revocation of his supervised release after pleading guilty to eight counts of producing child pornography. Holland challenges the District Court's denial of his motion to suppress evidence. He argues that his probation officer did not have reasonable suspicion to search his home because the information prompting the search was stale. Holland also claims that the District Court committed plain error by not finding a term of his supervised release unconstitutionally vague.

We hold that the District Court did not err. The totality of the circumstances and collective knowledge of the officers supported a reasonable suspicion to search Holland's home, and the information supporting their reasonable suspicion was not stale about a year later. Nor need we address Holland's vagueness claim because the exact definition of "sexually oriented material" as a violation of his compliance contract is irrelevant to whether reasonable suspicion existed. Accordingly, we affirm.

I.

In 2004, Defendant Holland was sentenced to 151 months' imprisonment after pleading guilty to ten counts of receiving child pornography. He was released from custody in July 2014 and commenced a three-year term of supervised release. Before and during his supervised release, Holland resided at Dismas House, a halfway house. In February 2015, he was expelled from Dismas House for possessing a cell phone with photo capabilities, violating house rules.

About two years later, Holland's probation officer visited Holland at his residence. Inside, the officer discovered multiple unauthorized cell phones in Holland's possession. When asked if the phones contained pornography, Holland said that "there would be ages 16 and up." After confiscating and searching the phones, the officer initiated proceedings to revoke Holland's supervised release for breaching his compliance contract. The violations included possessing seven unauthorized cell phones with internet capabilities and two phones (of the seven) containing sexually oriented material or pornography.

Holland admitted to these violations. The District Court revoked his supervised release and sentenced him to one day in prison and two years of supervised release, six months to be served at Dismas House. All other general and special conditions of Holland's supervised release applied from the original judgment and commitment.

Holland entered a new sex offender compliance contract as part of his supervised release terms. He agreed not to possess, purchase, or subscribe to any sexually oriented material or pornography, including through mail, computer, telephone (900 numbers), video, or television; and not to visit any venues offering it. He had to obtain written approval from his probation officer before using any electronic bulletin board system, internet services, or computer networks, which included allowing routine inspections of his computer systems and media storage. Holland also agreed that any computer system he could access was subject to inspection and

permitted confiscation and disposal of any contraband found. In short, Holland could not (1) possess any sexually oriented material, (2) use the internet without prior authorization, or (3) possess any internet-accessible cell phones.

In March 2018, Shannon Brewer, a Senior U.S. Probation Officer, assumed Holland's supervision. In preparation, she reviewed Holland's prior case materials, such as his presentence investigation report, judgment and commitment documents, case-related records, notes from previous officers, and his compliance contract. Officer Brewer learned that Holland had prior charges related to sexual offenses against minors, including a mistrial in 1996 and the dismissal of a 1999 case. She also learned that federal agents recovered Holland's diary after the 1996 case's dismissal, revealing entries about his relationship with the victim and efforts to coerce the victim into recanting his accusations against Holland. Officer Brewer's review also revealed Holland's 2004 federal conviction, 2015 expulsion from Dismas House, and 2017 revocation of his supervised release. Further, she learned that, according to a psychosexual evaluation in 2014, Holland had a high risk of reoffending.

On March 31, 2018, the National Center for Missing and Exploited Children (NCMEC) received a cybertip[1] that, in December

[1] Special Agent Elizabeth Bigham clarified that cybertips are mandated by federal law, requiring internet service providers to report any form of child pornography, child sex trafficking, or online exploitation of a child to the NCMEC. *See* 18 U.S.C. § 2258A. This obligation extends to all platforms, like Google, Instagram, Snapchat, and other online services. The information is reported to the NCMEC in the form of a cybertip.

2017 and January 2018, an individual under the username "yungcool1s" uploaded four images of prepubescent boys to Instagram. Instagram disclosed that the account's display name was "Yung In Atl" and provided the associated email address, branbarn90@gmail.com. NCMEC passed this tip along to the Georgia Bureau of Investigation (GBI), which assigned the case to Special Agent (SA) Bigham on April 26, 2018.

The information provided to the GBI included the IP address used to upload one of the images. SA Bigham, using public data, determined that T-Mobile owned the IP address, suggesting that the upload came from a mobile device. But when she subpoenaed T-Mobile, it no longer had information on that address. A subpoena to Google for information on the Gmail account, however, revealed that the account was linked to the phone number (404) 914-4767. Further investigation uncovered that Holland had listed this number on his Georgia driver's license.

Delving deeper into Holland's background, SA Bigham discovered his criminal history, including a previous conviction for child exploitation and sex offender registration. SA Bigham reached out to the NCMEC for information on the username "yungcool1s," revealing a December 2018 cybertip from Tumblr, a platform often exploited by offenders for the distribution and exchange of child pornography.[2] The tip documented many broken links alleged to have contained child pornography.

On January 3, 2019, SA Bigham notified Officer Brewer that the GBI had received intelligence about Holland. The exact details

[2] SA Bigham described Tumblr as a "website that you can blog on," "post pictures [and] videos," and "chat with people."

of the conversation were not fully recalled but SA Bigham shared the findings of her investigation: Holland was seemingly posting erotic images of ten- to twelve-year-old boys to Instagram. SA Bigham explained that the boys in the photographs were not fully unclothed but that outlines of their genitals were visible. She also confirmed that the phone number on Holland's driver's license was associated with the Instagram account. Neither Officer Brewer nor SA Bigham recalled whether SA Bigham shared the specific upload dates of the four images.

After speaking with SA Bigham, Officer Brewer worried that Holland was violating the terms of his release. She suspected that Holland might have had unauthorized cell phones in his possession and was using them to store sexually explicit material and access social media.

On January 14, 2019, Officer Brewer and other probation officers searched Holland's residence. They discovered four unauthorized cell phones, which contained the evidence used in the criminal charges now brought against Holland. SA Bigham was present during the search but she did not participate; instead, she waited outside with other GBI officers while interviewing Holland.

Holland moved to suppress the search of his home, the seizure of the phones, and, in turn, the search of the phones. The Magistrate Judge determined that the totality of the circumstances established reasonable suspicion that Holland had breached the conditions of his release and recommended denying Holland's motion. The District Court adopted the Magistrate Judge's recommendation, leading to this appeal.

II.

Holland claims that the District Court erred in concluding that Officer Brewer had reasonable suspicion that he was violating his supervised release terms. He says Officer Brewer's suspicion was based on stale information because the Instagram photos were posted a year before the search. He also contends that the "sexually oriented material" clause rendered his compliance contract overly broad and void for vagueness.

The Government responds that the officers' collective knowledge before the search provided reasonable suspicion. It asserts that Holland's staleness argument overlooks the totality of the circumstances known to the officers.

In reply, Holland concedes that Officer Brewer only needed reasonable suspicion of a violation or a new crime but attacks the use of the officers' collective knowledge. Holland maintains that the collective knowledge doctrine applies only if officers act as a team and request action from one another, which, per Holland, was not the case here.

III.

This Court reviews a district court's denial of a motion to suppress *de novo*. *United States v. Carter*, 566 F.3d 970, 973 (11th Cir. 2009) (per curiam). We view all evidence in the light most favorable to the prevailing party. *Id.*

"The touchstone of the Fourth Amendment is reasonableness . . . ." *United States v. Knights*, 534 U.S. 112, 118, 122 S. Ct. 587, 591 (2001). We assess the reasonableness of a search by balancing

its intrusion upon an individual's privacy against its necessity for advancing legitimate government interests. *See id.* at 118–19, 122 S. Ct. at 591. A search may be supported by reasonable suspicion "[w]hen a probationer has a condition of probation reducing his expectation of privacy, and the government has a higher interest in monitoring the probationer due to the nature of his criminal history." *Carter*, 566 F.3d at 975. "Such limitations are permitted because probationers have been convicted of crimes and have thereby given the state a compelling interest in limiting their liberty in order to effectuate their rehabilitation and to protect society." *Owens v. Kelley*, 681 F.2d 1362, 1367 (11th Cir. 1982).

"Reasonable suspicion consists of a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable." *United States v. Yuknavich*, 419 F.3d 1302, 1311 (11th Cir. 2005) (quoting *Knights*, 534 U.S. at 121, 122 S. Ct. at 592). Courts will look to the totality of the circumstances of each case and determine whether the officer had a "particularized and objective basis for suspecting legal wrongdoing." *Id.* (quoting *United States v. Perkins*, 348 F.3d 965, 970 (11th Cir. 2003)). "The officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant'" the search. *Id.* (quoting *United States v. Boyce*, 351 F.3d 1102, 1107 (11th Cir. 2003)).

Reasonable suspicion is also determined from the collective knowledge of the officers. *See United States v. Nunez*, 455 F.3d 1223, 1226 (11th Cir. 2006) (per curiam). To examine collective

knowledge, the officers must have at least maintained "a minimal level of communication during their investigation." *United States v. Willis*, 759 F.2d 1486, 1494 (11th Cir. 1985). In *United States v. Esle*, this Court held that there was ample communication to apply the collective knowledge principle where one officer, who had probable cause for a search, was in contact with a second officer in setting up the search and was present in the vicinity at the time of the search, and the second officer testified that another agent told him about the basis for the probable cause. 743 F.2d 1465, 1476 (11th Cir. 1984) (per curiam), *overruled on other grounds by United States v. Blankenship*, 382 F.3d 1110, 1122 n.23 (11th Cir. 2004).

Moreover, reasonable suspicion "does not require officers to catch the suspect in a crime. Instead, [a] reasonable suspicion of criminal activity may be formed by observing exclusively legal activity." *United States v. Harris*, 526 F.3d 1334, 1337 (11th Cir. 2008) (per curiam) (alteration in original) (quoting *United States v. Acosta*, 363 F.3d 1141, 1145 (11th Cir. 2004)).

Here, Officer Brewer and SA Bigham had a "particularized and objective basis for suspecting" that Holland was violating the conditions of his release. When the search occurred, they knew that four erotic images of minor boys were uploaded from an Instagram account traced to the phone number on Holland's driver's license and that the Instagram account's username, "Yung In Atl," signified that the user lived in Atlanta, where Holland lives. They also knew that Holland had a history of possessing child pornography and a sexual interest in minor boys; that he had a high risk of

reoffending, as shown by his psychosexual evaluation and criminal history; that in 2015 he used unauthorized devices and exchanged pornography with men from prison; and that in January 2017 he possessed seven unauthorized cell phones. Together, these facts reasonably warranted the search.

As to the collective knowledge doctrine, sufficient communication existed between SA Bigham and Officer Brewer to examine their collective knowledge. Once SA Bigham believed Holland uploaded the images, she provided Officer Brewer with a synopsis of her investigation. Officer Brewer then gave SA Bigham information about Holland's criminal history. Like the officers in *Else*, Officer Brewer and SA Bigham then had several follow-up conversations to coordinate the search, which SA Bigham was on-site for. *See Esle*, 743 F.2d at 1476.

Holland's argument that the Instagram images are not sexually oriented material prohibited by his conditions of supervised release fails. The images posted to Instagram, even if not themselves sexually oriented, supported a reasonable suspicion that Holland possessed other material that was sexually oriented and that he was violating the terms of his supervised release.

Holland's staleness argument also fails. The staleness doctrine requires that information supporting reasonable suspicion exist at the time of the search. *United States v. Touset*, 890 F.3d 1227, 1237–38 (11th Cir. 2018). That said, there is no rule or set time limit for when information becomes stale. *Id.* at 1238. We determine staleness by evaluating a case's particular facts, including the time,

the suspected crime's nature, the accused's habits, the character of the items sought, and the nature and function of the premises to be searched. *Id.*

In child pornography cases, we have recognized that evidence is less susceptible to staleness. *See id.* This is so for two reasons. First, given the challenges in obtaining it, collectors of child pornography tend to hold onto their sexually explicit materials, rarely if ever disposing of them. *See id.* Second, because the material is stored electronically, it does not spoil or get consumed like other evidence and can remain on a device after deletion. *See Touset*, 890 F.3d at 1237–38. In *Touset*, we held that evidence of the defendant's payments to a Western Union account linked to a phone number that was associated with an email address containing child pornography "was not stale about a year and a half later." *See id.*

We are persuaded that the above reasoning applies here. The information connecting the Instagram account used to upload explicit images of prepubescent boys and the phone number on Holland's driver's license was not stale over a year later when Officer Brewer searched Holland's home.

IV.

Holland also argues for the first time on appeal that the term of his supervised release prohibiting him from possessing sexually oriented material is void for vagueness. Even so, the very nature of the photographs uploaded to Instagram—independent of their status as a violation of that term of his supervised release—

combined with the other factors discussed above, does not negate reasonable suspicion that Holland was violating other terms of his supervised release, like accessing the internet and possessing unauthorized cellphones. So, the exact definition of "sexually oriented material" as a violation of Holland's compliance contract is irrelevant to whether the officers had reasonable suspicion. Thus, this Court need not consider Holland's argument that the term "sexually oriented material" is unconstitutionally vague.

V.

Because the totality of circumstances and collective knowledge of the officers support a reasonable suspicion that Holland was violating the conditions of his supervised release at the time the search was executed, the District Court's judgment is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

United States of America,

v. Case No. 1:19-cr-399-MLB

Arnold Dewitt Holland,

Defendant.

_____/

OPINION & ORDER

Defendant Arnold Dewitt Holland is charged with four counts each of production of child pornography, enticement of a minor, and committing a felony offense involving a minor as a convicted sex offender, as well as one count each of possession of and distribution of child pornography. (Dkt. 1.) In January 2019, while Defendant was on federal supervised release, U.S. Probation searched his house. During the search, U.S. Probation found and seized four cell phones prohibited by Defendant's conditions of release. Defendant moved to suppress evidence obtained from the search. (Dkts. 13; 16.) The Court denied that motion. (Dkts. 36; 43.) Defendant now moves for reconsideration. (Dkt. 90.) The Court denies that motion.

Appendix B

I. Background

A. Factual Background

In 2004, Defendant was sentenced to 151 months imprisonment after pleadings guilty to ten counts of receiving child pornography. (Dkt. 24-6.) He was released from custody in July 2014 and began serving a three-year term of supervised release. (Dkts. 24-6; 28 at 48:16–23.) Before his release from custody and when he began serving his term of supervised release, Defendant resided at a halfway house called Dismas House. (Dkt. 28 at 48:24–49:19.) In February 2015, he was expelled from Dismas House for having a cell phone with photo capabilities—a violation of house rules. (*Id.* at 49:18–20.)

On January 21, 2017, Defendant's probation officer visited him at his residence and discovered several unauthorized cell phones. (*Id.* at 50:2–9.) The officer asked Defendant if they contained pornography, and he said, "there would be ages 16 and up." (*Id.* at 50:4–6.) After confiscating the phones and searching them, the probation officer moved to revoke Defendant's supervised release in May 2017. (Dkts. 28 at 50:7–12; 24-7.) The Court revoked his supervised release and sentenced him to one day imprisonment and twenty-four months of supervised release,

with six months to be served at Dismas House. (Dkt. 24-8.) On August 3, 2017, Defendant entered into a new sex offender compliance contract. (Dkt. 24-9.) In short, the contract prohibited Defendant from possessing any sexually oriented material, using the internet without permission, or possessing any cell phone capable of accessing the internet. (*Id.*) Defendant resided at Dismas House again from October 2017 until April 12, 2018. (Dkt. 28 at 52:16–20, 54:7–11, 67:24–68:1.) Though Defendant requested approval to possess internet-capable devices, Dismas House never gave its authorization. (*Id.* at 53:21–54:1.)

In March 2018, Senior U.S. Probation Officer Shannon Brewer began supervising Defendant. (*Id.* at 43:1–2.) Upon receiving the assignment, she reviewed Defendant's presentence investigation report, the judgment and commitment materials, documents about the case, notes from supervising officers, and his compliance contract. (*Id.* at 44:2–45:20.)

On March 31, 2018, the National Center for Missing and Exploited Children ("NCMEC") received a cyber tip indicating, in December 2017 and January 2018, someone using the name "yungcool1s" uploaded four

On April 26, 2018 Agent Bigham of the GBI was assigned to investigate an IG cybertip from NCMEC dated March 31, 2018, indicating on December 17, December 31 2017, Jan 6 and Jan 13, 2018, someone uploaded 4 images of boys in underwear to an Instagram acct called yungcool1s with a display name of Yung in Atl and an email address of branbarn90@gmail.com.

images of prepubescent boys to Instagram.[1] (*Id.* at 12:15–13:8, 28:4–5.) Instagram reported that the display name for the account was "Yung In Atl" and that the associated email was branbarn90@gmail.com. (*Id.* at 13:3, 15:19–21.) NCMEC forwarded the information to the GBI, which assigned it to Special Agent Elizabeth Bigham in April 2018. (*Id.* at 10:6–8, 14:7, 27:22–24.) The information included an IP address associated with one of the uploads. (*Id.* at 14:12–15:8.) Agent Bigham determined T-Mobile owned the IP address, suggesting the image had been uploaded from a mobile device. (*Id.* at 1423–15:8, 34:19–24.) Agent Bigham also sent a subpoena to Google for subscriber information on the "branbarn90" Gmail account and received the linked phone number. (Dkts. 28 at 15:17–18:5; 24-3.) Agent Bigham then learned Defendant had listed the same number on his Georgia driver's license. (Dkt. 28 at 18:3–5.) Agent Bigham then submitted an intelligence request, with the phone number and email address, to GBI's intel analyst, and asked her to find what she could. (*Id.* at 17:17–20.) Agent Bigham received the intelligence report

[1] The law requires internet service providers to report suspected child pornography, child sex trafficking, or online exploitation of a child to NCMEC in the form of a cyber tip. (Dkt. 28 at 9:17–10:8.); *see also* 18 U.S.C. § 2258A. Cyber tips pertaining to Georgia are forwarded to and handled by a GBI task force. (Dkt. 28 at 10:6–8.)

on December 26, 2018. (*Id.* at 17:21–25.) The report states, "Instagram uploads of young boys wearing underwear. Not CP but off behavior for sure. All I have is phone number for now." (Dkt. 90-1.) Agent Bigham also learned Defendant had a criminal history, had been convicted of child exploitations, and was a registered sex offender. (Dkt. 28 at 18:6–9.) Agent Bigham queried NCMEC for any other cyber tips including "yungcool1s" and obtained a separate NCMEC cyber tip from Tumblr with what appeared to be hundreds of links to suspected child pornography. (Dkts. 28 at 18:10–20; 24-4.)

On January 3, 2019, Agent Bigham called Officer Brewer and reported that the GBI had received a cyber tip that Defendant was uploading erotic images of ten- to twelve-year-old boys to Instagram. (Dkts. 28 at 20:18–22:5, 26:3–27:9, 60:4–19.) Agent Bigham told Officer Brewer the boys were not entirely nude, but an outline of their penises could be seen in the photographs. (*Id.* at 60:15–17.) Agent Bigham also reported that Defendant's phone number had been used to establish the Instagram account. (*Id.* at 21:13–15.) Agent Bigham could not recall the specifics of the conversation, but testified she provided Officer Brewer the information she learned from her investigation. (*Id.* at 21:5–15.) On

January 14, 2019, Officer Brewer and other Probation Officers searched Defendant's residence and seized four cell phones containing evidence used to file criminal charges in this case. (*Id.* at 24:5–21, 80:17–81:17.)

B. Procedural Background

On November 26, 2019, Defendant filed a motion to suppress all evidence obtained and derived from the January 2019 search. (Dkt. 13.) On December 3, 2019, Defendant filed an amended motion to suppress, acknowledging he was on probation and under a sex offender contract which prevented him from possessing child pornography at the time of the search. (Dkt. 16.) Defendant argued reasonable suspicion did not exist because the photographs he was alleged to have possessed were not child pornography. (*Id.*)

The Magistrate Judge set an evidentiary hearing for December 19, 2010. (Dkt. 17.) On December 17, 2019, Defendant filed a motion for discovery requesting the Magistrate Judge order U.S. Probation produce its file on Defendant to him or for U.S. Probation to produce its file to the Magistrate Judge for an *in camera* review. (Dkt. 21.) Defendant filed a supplemental motion for discovery contending he should be entitled to review U.S. Probation's entire file. (Dkt. 22.) At the beginning of the

evidentiary hearing, the Magistrate Judge denied the motions for discovery. (Dkts. 23; 28 at 4:21.) After the Court denied Defendant's motions, the United States called two witnesses, Agent Bigham and Officer Brewer, who testified about the events leading up to U.S. Probation's search of Defendant's house. (Dkt. 28.) At the end of the hearing, Defendant's counsel requested the evidence be left open in case he could obtain records showing Defendant had been given permission by the Highland Institute to access the internet. (*Id.* at 82:15–83:10.) The Court denied the request. (*Id.* at 83:22–84:15.)

On February 5, 202, Defendant filed a post-hearing brief arguing U.S. Probation lacked reasonable suspicion to search his house. (Dkt. 29.) On March 26, 2020, Magistrate Judge Larkins issued a report recommending Defendant's motion to suppress be denied, finding the totality of the circumstances established reasonable suspicion to believe Defendant had violated the terms of his supervised release at the time of the search. (Dkt. 36.) On May 1, 2020, Defendant filed objections. (Dkt. 40.) On June 11, 2020, the Court overruled Defendant's objections and adopted the report and recommendation ("R&R"). (Dkt. 43.)

On July 2, 2020, Defendant filed a pro se motion requesting new counsel arguing his counsel was ineffective. (Dkt. 51.) Magistrate Judge Larkins granted the motion and appointed new counsel. (Dkts. 63; 64.) While Defendant's motion for new counsel was pending, on July 15, 2019, he filed another pro se motion seeking a 45-day extension of time to file a motion for reconsideration of the Court's order denying his motion to suppress. (Dkt. 57.) The Court denied the motion. (Dkt. 66.) On June 27, 2021, Defendant's counsel filed a motion for reconsideration. (Dkt. 90.) The Court held a status conference. (Dkt. 91.) The Court now rules on the motion for reconsideration.

II. Legal Standard

Motions for reconsideration, assuming they are even appropriate in criminal case, "should be reserved for certain limited situations, namely the discovery of new evidence, an intervening development or change in the law, or the need to correct a clear error or prevent a manifest injustice." *Brinson v. United States*, No. 1:04-cr-0128, 2009 WL 2058168, at *1 (N.D. Ga. July 14, 2009) (quoting *Deerskin Trading Post, Inc. v. United Parcel Serv. of Am., Inc.*, 972 F. Supp. 665, 674 (N.D. Ga. 1997)). "Given the narrow scope of motions for reconsideration, they may not be

used in a variety of circumstances." *Id.* "They may not offer new legal theories or evidence that could have been presented in a previously filed motion or response, unless a reason is given for failing to raise the issue at an earlier stage in the litigation." *United States v. Kight*, No. 1:16-cr-99, 2017 WL 5664590, at *2 (N.D. Ga. Nov. 27, 2017). They may not be used to "present the court with arguments already heard and dismissed or to repackage familiar arguments to test whether the court will change its mind." *Brinson*, 2009 WL 2058168, at *1 (quoting *Bryan v. Murphy*, 246 F. Supp. 2d 1256, 1259 (N.D. Ga. 2003)). A motion for reconsideration also "is not an opportunity for the moving party . . . to instruct the court on how the court 'could have done it better' the first time." *Id.* (quoting *Pres. Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs*, 916 F. Supp. 1557, 1560 (N.D. Ga. 1995)).

III. Discussion

Defendant moves to reconsider and reopen the evidence on his motion to suppress for three reasons: "(1) this Court incorrectly found that reasonable suspicion existed at the time of the search such that a manifest injustice would result if not corrected; (2) [Defendant's] counsel was ineffective; and (3) [Defendant] was unconstitutionally prevented

from effectively litigating the issues surrounding this search." (Dkt. 90 at 14.) Defendant contends his motion should be granted "to prevent a manifest injustice by permitting the introduction of the new evidence undersigned counsel has obtained and to correct clear error that would otherwise occur." (*Id.* at 14–15.)

A. Reasonable Suspicion

Defendant enumerates four "clear errors" the Court allegedly committed in finding U.S. Probation had reasonable suspicion to search his house. (Dkt. 90 at 15.)

First, Defendant contends the facts do not establish a sufficient nexus or link between the Instagram images and Defendant to support reasonable suspicion. (*Id.* at 15–16.) This argument is old. In Defendant's post-hearing brief, he argued there was no evidence he was the person who posted the images and there was only a circumstantial connection between the Instagram account and Defendant's access of the same. (Dkt. 29 at 11–12, 14–15.) In his objections to the R&R, Defendant posited seven questions about the link between the images and Defendant which he contended the Magistrate Judge did not answer.

(Dkt. 40 at 15.) In the Court's order adopting the R&R, the Court found there was a link because Officer Brewer

> knew that, in December 2017 and in January 2018, someone using an Instagram account linked to a phone number Defendant Holland used for his Georgia drivers' license uploaded four erotic images of minor boys. She knew the Instagram account also appeared linked to Atlanta — where Defendant Holland lived – as it had the name "Yung in Atl." She knew that name also suggested an interest in minors.

(Dkt. 43 at 16–17.) 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." *Brinson*, 2009 WL 2058168, at *1.

Second, Defendant argues the tip information relied upon by Officer Brewer to initiate the search was unverified and unreliable. (Dkt. 90 at 15–17.) This argument is also old. In Defendant's objections to the R&R, he argued Officer Brewer "could not consider Agent Bigham's hunch or speculative information about Mr. Holland's phone number as sufficient." (Dkt. 40 at 17.) Defendant contended Officer Brewer based her decision to search his home only on a "vague cybertip." (*Id.* at 16.) The Court found that while the "additional information from the cyber tip pointing to specific images linked to his phone number may have been the

proverbial straw that broke the camel's back," the tip was not all Officer Brewer had to consider. (Dkt. 43 at 18.) The Court also noted as long as Officer Brewer did not turn a blind eye to avoid evidence pointing away from Defendant, "other things the officers could have done as part of their investigation does not negate reasonable suspicion that existed to form the totality of the circumstances known at the time." (*Id.* at 19.)

Third, Defendant contends the Court improperly relied upon stale information to find reasonable suspicion. (Dkt. 90 at 15, 17.) To determine whether an officer has a particularized and objective basis for suspected wrongdoing, the court must examine the totality of the circumstances and "take stock of everything [officers] knew before searching." *United States v. Yuknavich*, 419 F.3d 1302, 1311 (11th Cir. 2005). The Court found Defendant's history, the cyber tip, and his recent failure to report an incident to probation as required, all together, gave rise to reasonable suspicion. (Dkt. 43 at 13–20.) Defendant's argument about stale information "exhibits a fundamental misunderstanding of the totality of the circumstances." (*Id.* at 18–19.)

Fourth, Defendant argues though the Court made a detailed finding of facts listing the factors that support reasonable suspicion, the

Court ignored the factors that weigh against. (Dkt. 90 at 15, 18–19.) The Court addressed this argument in its previous order. (Dkt. 43 at 19–21.) In Defendant's objections to the R&R, he argued the Magistrate Judge wrongfully ignored the significance of the fact he passed several polygraph examinations, he was living at Dismas House in December 2017 and January 2018 when the images were posted, was not permitted to have internet access while there, and was not accused of having violated the terms of his residency. (Dkt. 40 at 9–10, 12–13.) The Court found that the Magistrate Judge considered those facts and properly concluded the mere fact Defendant was not caught using an internet capable device does not mean he did not do so. (Dkt. 43 at 20.) Defendant now argues the Court ignored facts such as (1) no violation occurred while he was at Dismas House, (2) he was never directly accused of accessing the internet without permission, (3) probation officers were directly in contact with him while at the Dismas House, (4) he passed several polygraph examinations, (5) probation officers visited his home in 2017 and 2018, (6) probation officers visited his employment, (7) he was receiving mental health treatment, and (8) he was described as generally compliant with his probation. (Dkt. 90 at 18–19.) First, the Court

considered and explicitly discussed many of these factors in its previous order. (Dkt. 43 at 19–21.) Second, the Court stands by its holding 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. The Court finds no clear error in that holding.

B. Ineffective Counsel

Defendant next argues his motion to suppress should be reconsidered and the evidence should be reopened because his prior counsel was ineffective in litigating the suppression issue. (Dkt. 90 at 19–21.) He contends his counsel's ineffective assistance warrants reconsideration for three reasons: (1) counsel failed to adequately challenge and impeach the witnesses, (2) counsel admitted that Defendant had impermissibly accessed the internet, and (3) counsel was unable to adequately litigate the motion without obtaining the probation officer's complete file, the Dismas House records, and the Highland Institute records. (*Id.* at 19.)

To show ineffective assistance of counsel, a defendant must establish that (1) counsel's representation was deficient and (2) counsel's deficient representation prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). As to the first prong, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689 (internal quotation marks omitted). As to the second prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Counsel also "cannot be labeled ineffective for failing to raise issues which have no merit." *Card v. Dugger*, 911 F.2d 1494, 1520 (11th Cir. 1990).

First, Defendant argues prior counsel did not adequately challenge and impeach the witnesses during the suppression hearing. (Dkt. 90 at 19–20.) He contends counsel did not admit phone records to show Officer Brewer did not contact him on January 10, 2019. (*Id.* at 20.) Officer

Brewer testified that on January 10, she saw and spoke with Defendant in the parking lot of his workplace. (Dkt. 28 at 63:16–21.) She never testified that she called Defendant or talked to him on the phone. The proffered phone records thus have no bearing on Officer Brewer's credibility.

Defendant also argues counsel failed to impeach Agent Bigham after she testified that the images were "suspected child pornography" even though her report said the images were not child pornography. (Dkt. 90 at 20.) Agent Bigham testified that in her role she receives and investigates cyber tips from NCMEC. (Dkt. 28 at 8:3–10.) She testified her general practice when she receives a tip is to review it when she has time, review the images, video, content, or chats that came with the cyber tip, and then determine the urgency of that tip. (*Id.* at 10:15–20.) If follow-up subpoenas need to be sent or search warrants need to be done, she will then do those. (*Id.* at 10:20–22.)

Agent Bigham then began testifying about the first cyber tip in this case. She testified that Instagram located the four images and submitted a cyber tip to NCMEC on March 31, 2018. (*Id.* at 12:13–23.) The images were attached to the tip. (*Id.* at 13:6–8.) Agent Bigham testified that "in

one of the photos it depicts what appears to be a prepubescent or pubescent male child standing in some rocks." (*Id.* at 13:11–15.) The tip was assigned to Agent Bigham on April 26, 2018. (*Id.* at 14:7.) Agent Bigham testified in detail about her investigation of the tip which included subpoenaing information and requesting NCMEC query through their cyber tips. (*Id.* at 14:10–21:3.) Agent Bigham testified that next in her investigation she called Officer Brewer and although Agent Bigham did not recall the exact conversation, she testified that generally when she calls someone to get involved, she gives them a synopsis of the case. (*Id.* at 21:5–8.) Agent Bigham testified that she likely would have said she received a tip with images, and it appears Defendant is the person using the Instagram account. (*Id.* at 21:9–12.) When asked whether she told Officer Brewer specific upload and login dates, she testified specific dates were unimportant pieces of information at that time because "they were images depicting suspected child pornography that were uploaded to an account." (*Id.* at 21:16–22:5.) Agent Bigham then testified about setting up the search and being present at the search. (*Id.* at 23:23–21.) On cross-examination, when Agent Bigham was asked about the focus of her original phone call with Officer Brewer, she

5th mentioned not CP

testified the focus was to say she "believe[s] that [Defendant] is uploading images of suspected child pornography to Instagram" and "potentially committing crimes." (*Id.* at 26:23–25, 27:9.) Defendant contends his prior counsel failed to impeach Agent Bigham because she testified the images were suspected child pornography but "her report"[2] said the images were not child pornography. (Dkt. 90 at 20.) The Court has doubts Agent Bingham's passing references to the photos as "suspected child pornography" were impeachable, inconsistent statements. But even if Agent Bigham's statements could be impeached by the intelligence report, Magistrate Judge Larkins had ample opportunity to assess Agent Bingham's credibility, including her characterization of the images since the images and cyber tip were admitted as exhibits during the hearing. (Dkt. 28 at 11:1–12:4.) Officer Brewer's testimony also corroborated Agent Bigham's testimony since she testified that during the January 3 call, Agent Bigham told her "that they had received a cybertip on Holland that he's unloading erotic photos to Instagram. That he used his own phone number to establish the Instagram account, and that the photos

[2] The document Defendant contends is Agent Bigham's report appears to be the intelligence report Agent Bigham received from GBI's intel analyst. (Dkt. 90-1.)

appeared to be boys ages 10 to 12." (*Id.* at 60:8–15.) Officer Brewer also testified that Agent Bigham stated the boys were not entirely nude, "but definite outline of the boys penis' could be noted." (*Id.* at 60:15–17.) Defendant has not shown "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Defendant also contends prior counsel's admission that he improperly and impermissibly accessed the internet was improper. (Dkt. 90 at 20.) Defendant does not state what admission he is referring to. But even if counsel admitted during the suppression hearing that Defendant had impermissibly accessed the internet on a prior occasion, it is irrelevant. The issue at the suppression hearing was what Officer Brewer knew at the time of the search. *See Yuknavich*, 419 F.3d at 1311 (to determine whether an officer has a particularized and objective basis for suspected wrongdoing, the court must "take stock of everything [officers] knew before searching"). Defendant's counsel's statements at the suppression hearing are irrelevant to that determination.

Defendant finally argues his counsel was ineffective because he did not effectively obtain the necessary documentation to permit him to

litigate issues about Defendant's prior misbehaviors and criminal misconduct. (Dkt. 90 at 20–21.) Defendant focuses on prior counsel's failure to obtain the transcript from his prior revocation which would have established that his prior conduct was not similar to the facts here.[3] (*Id.*) Officer Brewer testified that when she began supervising Defendant, she reviewed his presentence report, judgment and commitment, any documents regarding his case, and any notes from the prior probation officers. (Dkt. 28 at 43:2, 44:2–5.) This included review of Defendant's violation report and petition filed in 2017. (*Id.* at 45:2–9.) When Officer Brewer reviewed the documents, she became generally familiar with the contents and Defendant's personal background and criminal history. (*Id.* at 46:1–8.) Officer Brewer testified that she learned, in early 2017, Defendant's probation officer made an unannounced visit and noticed several unpermitted cell phones. (*Id.* at 50:2–6.) The phones were taken, and a revocation petition was filed. (*Id.* at 50: 8–12.) The violations alleged in that revocation petition included Defendant (1) possessing seven cell phones capable of accessing the

comments made by Holland

[3] Defendant also makes passing reference to files from U.S. Probation, Dismas House, and the Highland Institute, which the Court addresses below. (*See* III.C.)

internet without obtaining permission and (2) possessing two cell phones that contained sexually oriented material or pornography. (*Id.* at 51:12–24.) Officer Brewer also testified that Defendant ultimately admitted the violations alleged in the petition. (*Id.* at 51:6–11.) This is the information Officer Brewer knew. Nothing in the revocation hearing bears on what Officer Brewer testified she knew at the time of the search which is what is relevant. *See Yuknavich*, 419 F.3d at 1311 (to determine whether an officer has a particularized and objective basis for suspected wrongdoing, the court must "take stock of everything [officers] knew before searching"). Even if prior counsel did not obtain the revocation transcript, there is no indication Defendant suffered any prejudice.

she testified about 16 year olds

incredible statements bolstering

reasonable probability of a different result

C. Litigation Prevention

Velez-Scott v. US 890 F.3d 1239 (11th Cir 2018)

Defendant finally argues his motion to suppress should be reconsidered and the evidence should be reopened because he was consistently denied access to files from U.S. Probation, Dismas House, and the Highland Institute. (Dkt. 90 at 21.) Defendant asks the Court to issue an order directing U.S. Probation, Dismas House, and the Highland Institute to turn over all files and records. (*Id.* at 22.) Defendant contends the Court "heavily relied on" his prior conduct and

My case exemplifies how our current evidence procedures during suppression hearings, post-revocation hearings, incentivizes and rewards bad faith on the part of BOP prosecutors and clearly some biased judges, in so cases.

Rewards state actors guilty of Brady violations for committing additional violations in order to subject the Brady claim to a higher standard of review.

alleged misbehavior outlined by Officer Brewer, but he was unable to access the U.S. Probation file which was imperative for challenging the allegations in Officer Brewer's testimony. (*Id.* at 21.) Defendant also argues Officer Brewer provided very specific testimony about Defendant's plan of action requests at the Highland Institute, testifying that if granted internet access, a plan of action would be held by the Highland Institute. (*Id.* at 22.) But Defendant was precluded from obtaining the plans of action. (*Id.*)

Defendant doesn't have to scavenge for hints of undisclosed Brady material

As to U.S. Probation's file, Defendant has identified no information he thinks may be in the file that could change the reasonable suspicion analysis and courts have consistently determined Federal Rule of Criminal Procedure 16, *Jencks*, *Giglio*, and *Brady* "do not apply to probation officers." *United States v. Suarez-Flores*, No. 1:07-CR-279, 2009 WL 10677573, at *1 (N.D. Ga. July 16, 2009). Defendant cites *United States v. Alvarez*[4] contending the Court erred by specifically withholding the full scope of the probationary file as it may have contained exculpatory evidence. (Dkt. 95 at 5.) In *Alvarez*, the Ninth Circuit held that a district court errs when the court "fails to conduct an

- monthly reports
- Home visits
- contact w/ PO
- Polygraph results
- Paystubs
- sex offender reports
- Travel requests

[4] 358 F.3d 1194 (9th Cir. 2004).

in camera review of the probation files of significant witnesses pursuant to a timely defense request for *Brady* materials." 358 F.3d at 1209. The *Alvarez* holding is witnesses. Defendant fails to identify, and the Court is unaware of, any case in which a court ordered U.S. Probation to produce a *defendant's file* to the defendant. why wouldn't the court review the file in camera?

As to records from the Highland Institute, Defendant contends they could help him challenge Officer Brewer's testimony that Defendant never received permission to use the internet. (Dkt. 90 at 21–22.) But Officer Brewer unequivocally testified Defendant never had permission to use the internet. (Dkt. 28 at 70:6–14, 71:14–73:24, 83:15–16.) So even if the Highland Institute had granted Defendant permission, it was irrelevant because Officer Brewer did not know that at the time of the search. And Defendant did not have permission to use Instagram or possess sexually oriented material. (Dkt. 24-9.) The Highland Institute records are thus irrelevant. Defendant also never specifically addresses the Dismas House records, and the Court sees no reason why those records would change the reasonable suspicion analysis. Holland was at Dismas when the alleged violation occurred. His conduct and records pertaining to his stay would support his claim of compliance at the time of the uploads and negate reasonable suspicion.

IV. Conclusion

The Court **DENIES** Defendant Holland's Motion to Reconsider and Reopen the Evidence on his Motion to Suppress Evidence Obtained from the Search and Seizure that Took Place on January 14, 2019. (Dkt. 90.)

SO ORDERED this 8th day of October, 2021.

MICHAEL L. BROWN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

United States of America,

v. Case No. 1:19-cr-00399

Arnold Dewitt Holland, Michael L. Brown
United States District Judge

Defendant.

_____/

OPINION & ORDER

The United States charged Defendant Arnold Dewitt Holland with producing child pornography, enticing a minor, committing a felony offense involving a minor as a convicted sex offender, and possessing and distributing child pornography. (Dkt. 1.) The Government claims he committed these crimes while on supervised release after a prior conviction for the receipt of child pornography, the revocation of his supervised release in that case, and the imposition of another term of supervised release. (*Id.*) Defendant Holland moved to suppress evidence from four cell phones United States Probation Officers seized from his residence. (Dkts. 13; 16.) Magistrate Judge Larkins held an evidentiary hearing and heard testimony from Georgia Bureau of Investigation

Appendix C1

Special Agent Elizabeth Bigham and Senior U.S. Probation Officer Shannon Brewer. (Dkts. 23; 28.) He issued a Report and Recommendation saying this Court should deny Defendant Holland's motion. (Dkt. 36.) The Court adopts that recommendation.

I. Background

In 2004, Defendant Holland was sentenced to 151 months imprisonment after pleading guilty to ten counts of receiving child pornography. (Dkt. 24-6.) He was released from custody in July 2014 and began serving a three-year term of supervised release. (*Id.*; Dkt. 28 at 48–49.) Both before his release from custody and when he began serving his term of supervised release, Defendant Holland resided at a halfway house known as Dismas House. In February 2015, he was expelled from Dismas House for having a cell phone with photo capabilities — a violation of house rules. (Dkt. 28 at 48.)

On January 21, 2017, Defendant Holland's probation officer visited him at his residence and discovered several unauthorized cell phones. (*Id.* at 50.) The officer asked Defendant Holland if they contained

pornography, and he said "there would be ages 16 and up." (*Id.*)[1] After confiscating the phones and searching them, the probation officer moved to revoke Defendant Holland's supervised release in May 2017 claiming he had failed to follow the instructions of a compliance contract that was part of his supervised release by (1) possessing seven cell phones (capable of accessing the internet, and having done so without first obtaining written permission from his supervising officer) and (2) possessing two phones that contained sexually oriented material or pornography. (Dkts. 28 at 51; 24-7.) Defendant Holland admitted these violations. (Dkts. 28 at 51; 24-8.) The Court revoked his supervised release and sentenced him to one day imprisonment and twenty-four months of supervised release, with six months to be served at Dismas House. (Dkt. 24-8.)

On August 3, 2017, Holland entered into a new sex offender compliance contract as part of the conditions of his supervised release. (Dkt. 24-9.) The compliance contract stated that he could not "possess, purchase or subscribe to any sexually oriented material or pornography

[1] During the evidentiary hearing before Magistrate Judge Larkins, Officer Brewer explained that she did not monitor Defendant Holland in January 2017. She began monitoring him in March 2018 and, at that time, familiarized herself with his probation file and learned of his statement to her predecessor officer in January 2017. (Dkt. 28 at 42–43.)

to include mail, computer, telephone (900 telephone numbers), video or television, nor patronize any place where such material or entertainment is available." (*Id.* at 1.) He was also required to "obtain written approval from [his] U.S. Probation Officer to use an electronic bulletin board system, services that provide access to the Internet, or any public or private computer network" and to "permit routine inspection of any computer systems, hard drives, and other media storage materials to confirm compliance with this condition," with such inspection "to be no more intrusive than is necessary to ensure compliance with this condition." (*Id.* at 2.) He additionally agreed that "[a]ny computer system which is accessible to [him] is subject to inspection" and that he would "permit confiscation and/or disposal of any material considered contraband." (*Id.*) In short, during his supervised release, Defendant Holland was not allowed to (1) possess any sexually oriented material, (2) use the internet without permission, or (3) possess any cell phone capable of accessing the internet. (*Id.*)

Defendant Holland resided at Dismas House again from October 2017 until April 12, 2018. (Dkt. 28 at 52, 54, 67–68.) As explained above, Dismas House rules prohibited him from possessing a cell phone without

approval or possessing any other device that could access the internet. (*Id.* at 68.) Though Holland requested approval to possess internet-capable devices, Dismas House never gave its authorization. (*Id.* at 53.) Defendant Holland criticizes Magistrate Judge Larkins for not including the fact that he passed a polygraph test in early 2018 (while at Dismas House) indicating (he says) he was not accessing the internet, possessing cell phones, or viewing pornography. (Dkt. 9.) He took and passed another polygraph examination in August 2018. (Dkt. 28 at 76.) He also asked his probation officer several times for permission to have a cell phone with internet capabilities but received no such approval. (*Id.* at 53, 72.)

As explained above, Officer Brewer began supervising Defendant Holland in March 2018. (*Id.* at 43.) Upon receiving the assignment, she reviewed Defendant Holland's presentence investigation report, the judgment and commitment materials, documents regarding his case, notes from previous supervising officers, and his compliance contract. (*Id.* at 44–45.) Officer Brewer learned that Defendant Holland had previously been charged with sex offenses involving minors, including the 1996 case that resulted in a mistrial and the 1999 case involving a minor

boy that was dismissed after the victim recanted. (*Id.* at 46–47.) She also learned that, after dismissal of the 1996 case, federal agents recovered Defendant Holland's diary, which showed he had written extensively about his relationship with the victim and urged the victim to recant his earlier allegations against Defendant Holland. (*Id.* at 47.) Officer Brewer also learned details concerning the charges underlying Defendant Holland's 2004 federal conviction, his 2015 dismissal from Dismas House for having an unauthorized cell phone, and the 2017 revocation of his supervised release. (*Id.* at 48.) She also knew that, as part of his sex offender treatment in 2014, he had taken a psychosexual evaluation which scored him as having a high risk of reoffending. (*Id.* at 52.)

On March 31, 2018, the National Center for Missing and Exploited Children ("NCMEC") received a cybertip indicating that, in December 2017 and January 2018, someone using the name "yungcool1s" uploaded four images of prepubescent boys to Instagram. (Dkt. 28 at 12–13, 28; Gov't Ex. 1.)[2] Instagram reported that the display name for the account

[2] The law requires internet service providers to report suspected child pornography, child sex trafficking, or online exploitation of a child to

was "Yung In Atl" and that the associated email address was branbarn90@gmail.com. (Dkt. 28 at 13, 28.) NCMEC forwarded the information to the GBI, which assigned it to SA Bigham in April 2018. (*Id.* at 10, 27.) The information she received from NCMEC include an IP address associated with one of the uploads. (*Id.* at 14–16.) From publicly available information, SA Bigham determined T-Mobile owned the IP address, suggesting the image had been uploaded from a mobile device. (*Id.* at 14–15, 34.) Unfortunately, T-Mobile no longer had any information about the IP address. (*Id.*) She also sent a subpoena to Google for subscriber information on the "branbarn90" Gmail account. (*Id.*) Google provided information linking that email with the phone number 404-914-4767. (*Id.* at 15–18; Dkt. 24-3.) SA Bigham then learned that Defendant Holland had listed that phone number on his Georgia driver's license. (Dkt. 28 at 16–18.)

NCMEC in the form of a "cybertip." (Dkt. 28 at 9); *see also* 18 U.S.C. § 2258A (reporting requirements for providers to reduce and prevent "online child sexual exploitation"; providing further that NCMEC may forward reports to state and federal law enforcement). Cybertips pertaining to Georgia are forwarded to and handled by a GBI task force. (*Id.*)

SA Bigham looked into Defendant Holland and learned that he had a criminal history, had been convicted of child exploitations, and was a registered sex offender. (*Id.* at 18.) SA Bigham queried NCMEC for any other cybertips including "yungcool1s" and, in December 2018, obtained a separate NCMEC cybertip from Tumblr with what appeared to be hundreds of links to suspected child pornography; however, she was unable to view the images because the links no longer functioned. (*Id.*; *see also* Dkt. 24-4.)

On January 3, 2019, SA Bigham called Officer Brewer and reported that the GBI had received a cybertip that Holland was uploading erotic images of ten- to twelve-year-old boys to Instagram. (Dkt. 28 at 21, 25, 60.) SA Bigham told Officer Brewer that the boys were not entirely nude, but that an outline of their penises could be seen in the photographs. (*Id.*) SA Bigham also reported that Defendant Holland's phone number had been used to establish the Instagram account. (*Id.*) Neither Officer Brewer nor SA Bigham recalled whether SA Bigham told Officer Brewer the dates on which the four images had been uploaded to Instagram. (*Id.* at 21, 60–65.) SA Bigham could not recall the specifics of the conversation but testified that she provided Officer Brewer the

information she had learned from her investigation of the NCMEC lead. (*Id.*)

Based on the information she received from SA Bigham, as well as her other knowledge of Defendant Holland's behavior and criminal activity (including the revocation of his prior supervised release and dismissal from Dismas House for having an unauthorized cell phone), Officer Brewer was concerned that Defendant Holland had violated his compliance contract.[3] (*Id.* at 60–61.) On January 14, 2019, she and other Probation Officers searched Defendant Holland's residence and seized four cell phones containing evidence used to file criminal charges in this case. (*Id.* at 24, 80–81.)

Defendant Holland moved to suppress the search of his home, the seizure of the phones, and (as a result) the search of the phones. The Magistrate Judge concluded that the totality of the circumstances

[3] Officer Brewer testified that before the search, she did not know when the four images had been uploaded to Instagram. (Dkt 28 at 65.) But, according to Officer Brewer, even if SA Bigham had told her that the images had been uploaded approximately a year before the search, Officer Brewer would still have had the same concerns because "all the risks were still present" — namely, that Defendant Holland had unauthorized access to the internet and possession of sexually oriented material. (*Id.* at 61–62, 65.)

established a reasonable suspicion that Defendant Holland had violated the conditions of his release. He thus recommended denial of Defendant Holland's motion to suppress. (Dkt. 36 at 15–16.) Defendant Holland filed objections to that recommendation. (Dkt. 40.)

II. Legal Standard

After conducting a careful and complete review of the findings and recommendations, a district judge may accept, reject, or modify a magistrate judge's report and recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Crim. P. 59; *Williams v. Wainwright*, 681 F.2d 732, 732 (11th Cir. 1982) (per curiam). A district judge "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). The district judge should "give fresh consideration to those issues to which specific objection has been made by a party." *Jeffrey S. v. State Bd. of Educ. of Ga.*, 896 F.2d 507, 512 (11th Cir. 1990) (citation omitted). For those findings and recommendations to which a party has not asserted objections, the court must conduct a plain error review of the record. *United States v. Slay*, 714 F.2d 1093, 1095 (11th Cir. 1983).

Parties filing objections to a magistrate judge's report and recommendation must specifically identify those findings to which they object. *Marsden v. Moore*, 847 F.2d 1536, 1548 (11th Cir. 1988). "Frivolous, conclusive, or general objections need not be considered by the district court." *Id.* The Court has conducted a de novo review of Defendant Holland's motions to suppress.

III. Analysis

Defendant Holland claims the Magistrate Judge erred in finding the information Officer Brewer had on the day of the search was sufficient to create a reasonable suspicion to believe he had violated the terms of his supervised release. (Dkt. 40 at 13, 17.) He claims Officer Brewer based her search only on "the mention of Mr. Holland's phone number being associated with a vague cybertip (that did not contain child pornography)." (*Id.* at 16.) He claims that information was insufficient to pass constitutional muster. This Court disagrees.

Probationers are entitled to protection from unreasonable searches and seizures under the Fourth Amendment. *See Owens v. Kelley*, 681 F.2d 1362, 1367–68 (11th Cir. 1982). Their expectation of privacy, however, is diminished. *Id.* "Such limitations are permitted because

probationers have been convicted of crimes and have thereby given the state a compelling interest in limiting their liberty in order to effectuate their rehabilitation and to protect society." *Id.* at 1367. The Eleventh Circuit has held that a warrantless search of a probationer's residence by probation officers is constitutionally permissible where it is based on a "reasonable suspicion" that the probationer is in violation of his probation conditions or engaged in criminal conduct. *See United States v. Carter*, 566 F.3d 970, 975 (11th Cir. 2009); *see also United States v. Riley*, 706 F. App'x 956, 960 (11th Cir. 2017) ("[P]robation officers are required to have reasonable suspicion of criminal conduct in order to search a probationer's residence when the terms of probation do not require him to submit to warrantless searches."), *cert. denied*, 138 S. Ct. 699 (2018); *United States v. Wasser*, 586 F. App'x 501, 505 (11th Cir. 2014) (concluding that, after probation officers lawfully entered a probationer's residence, they developed reasonable suspicion that probationer had violated the terms of his probation, justifying a search of the residence for additional violations); *United States v. Gomes*, 279 F. App'x 861, 869 (11th Cir. 2008) ("A probationer's house may be searched based upon reasonable suspicion."); *United States v. Denton*, No. 1:11-CR-00546-AT-RGV, 2012

WL 3871929, at *7–8 (N.D. Ga. June 19, 2012) (all that was required to search a probationer's computer was reasonable suspicion, even where the probation agreement did not require him to submit to warrantless searches), *report and recommendation adopted*, 2012 WL 3871927 (N.D. Ga. Sept. 5, 2012). Reasonable suspicion consists of a sufficiently high probability that criminal conduct (or conduct in violation of probation conditions) is occurring to make the intrusion on the individual's privacy interest reasonable. *United States v. Yuknavich*, 419 F.3d 1302, 1311 (11th Cir. 2005). To determine whether the officer has a particularized and objective basis for suspected wrongdoing, the court must examine the totality of the circumstances and "take stock of everything [officers] knew before searching." *Id.*

Having reviewed the evidence presented de novo, this Court agrees with Magistrate Judge Larkin's conclusion that the totality of the circumstances gave Officer Brewer reasonable suspicion to believe Defendant Holland violated the conditions of his release, including his compliance contract. At the time of the search, Officer Brewer knew Defendant Holland had a lengthy criminal history involving sexual offenses against minors, including the receipt of child pornography, and

a sexual proclivity for minor boys. She knew of the 1996 mistrial on sex offenses involving minors, the dismissal of the 1999 case involving a minor boy, and the diary entries in which Defendant Holland wrote about convincing the boy to recant his allegations. She knew he had a psychosexual evaluation at the time of his release in 2014 and that it determined he was a high risk for reoffending. She knew that in 2015, Dismas House expelled him for possession of an unapproved cell phone. She knew that he had previously admitted violating conditions of supervised release for his 2004 conviction by possessing seven cell phones capable of internet access and two phones that contained pornography. She knew that, when asked if the phones contained pornography, Defendant Holland said "there would be ages 16 and up." (Dkt. 28 at 50.) In his objections to the Report and Recommendation, Defendant Holland says the Magistrate Judge erred in characterizing this testimony as an admission by him that there would be child pornography on the phones. (Dkt. 40 at 6.) He recognizes the Magistrate Judge did not expressly state this but insists "it was implied by the [M]agistrate [J]udge." (*Id.*) The Magistrate Judge accurately summarized the testimony and made no inaccurate "implications." Keep in mind Defendant Holland did not say

the phones would only contain adult pornography or something like that. He said "there would be ages 16 and up."[4]

The fact that he was not prosecuted for possessing child pornography on that occasion (or even that no such images were found on the phones in 2017) is irrelevant. Regardless of what might have been found, Defendant Holland said there would be images of people as young as 16 years old. The presence or absence of child pornography was not the issue — he violated the conditions of his supervised release

[4] Defendant Holland raises several other objections to the Magistrate Judge's recitation of facts. The Magistrate Judge, for example, wrote that, after Dismas House expelled Defendant Holland in February 2015 for possessing an unauthorized cellular telephone, probation took no action to revoke his supervision. (Dkt. 36 at 4.) Defendant Holland says this reference "implies that [Defendant Holland] may have been in violation" of the terms of his supervised release by having the cell phone when his conditions did not prevent him from doing so. (*Id.*) The Magistrate Judge, however, never said that and made it clear that his possession of the phone was a violation of Dismas House rules. That was why the halfway house expelled him. (Dkt. 36 at 4.) Defendant Holland ignores the salient fact – that he possess a cell phone when he was not authorized to do so. The Court notes Defendant Holland's point and understands which rules he violated. Defendant Holland further argues that the R&R improperly found he was "removed" from a sex offender treatment group for making excuses and attempting to manipulate the group. (Dkt. 40 at 7.) Defendant Holland explains that he was not "removed" but rather was "voted out" of the group for being manipulative. (*Id.*) To the extent there is a difference, the Court accepts Defendant Holland's version of the facts.

by possessing the phones and any pornography. Officer Brewer knew he had admitted to possessing pornography and said he thought it might include photos of people 16 and up at the time she decided to search his house in 2019.

She also knew that he had access to the internet in early 2017 as he said something to his treatment provider at the time about having seen a message on Snapchat. (Dkt. 28 at 50–51.) She also knew that he had been ejected from his sex offender treatment group at about the same time for being manipulative. (*Id.*) All of this means that Officer Brewer knew Defendant Holland had not complied with the conditions of his supervised release in significant ways. On cross examination, she testified that she knew Defendant Holland "had made several comments to polygraphers [and] to treatment providers about having used internet capable devices" while on supervised release. (Dkt 28 at 67.) This included knowing that, in 2015 after failing a polygraph examination, Defendant Holland admitted using another person's phone to look at images, fantasizing about minors, and trading images with two men he had met in prison. (*Id.* at 57–59.)

She also knew that, in December 2017 and January 2018, someone

using an Instagram account linked to a phone number Defendant Holland used for his Georgia drivers' license uploaded four erotic images of minor boys. She knew the Instagram account also appeared linked to Atlanta — where Defendant Holland lived — as it had the name "Yung in Atl." She knew that name also suggested an interest in minors. She also knew Defendant Holland wanted to have an internet capable device as he had repeatedly requested permission to do so. (*Id.* at 71–72.) "Taken together, the facts and the rational inferences that follow indicate the high probability that [Defendant Holland] was violating the conditions of his supervised release at the time of the search," including his possession of unauthorized internet-capable devices and sexually oriented material/pornography. *United States v. Collins*, 683 F. App'x 776, 779 (11th Cir. 2017).

In support of his claim that Officer Brewer based her decision to search his home ***only*** on a "vague cybertip," Defendant Holland says Officer Brewer was aware of much of this information before the cyber tip. (Dkt. 40 at 16.) He says "the only significant event between the time that Officer Brewer began supervising [Defendant] Holland in March 2018 and the time she executed the search of his home . . . was

the communication by phone from Agent Bigham" about the cybertip. (*Id.*) He claims the fact Officer Brewer acted quickly to conduct the search after speaking with Agent Bigham indicates the information Agent Bigham provided was the "actual deciding factor" for Officer Brewer to conduct the search. (*Id.* at 17.) That may be. But, it does not mean it was all she had. She received that information in the context of all the other information she had about him, his prior convictions and arrests, his prior violation of supervised release by possessing internet capable phones and pornography, his admissions at the time of his prior violation, and his desire to access the internet. The additional information from the cyber tip pointing to specific images linked to his phone number may have been the proverbial straw that broke the camel's back but it was not all Officer Brewer had to consider.[5] Defendant Holland's argument exhibits a fundamental

[5] Defendant Holland's suggestion that the Instagram images did not contain child pornography is irrelevant. The Compliance Contract precluded Defendant Holland from possessing — not just pornography — but any sexually oriented material. The Instagram posts certainly crossed that line. (Dkt. 30 at 17–18.) That the genitalia of the boys depicted in the photographs was not fully exposed does not negate reasonable suspicion that Holland had violated the terms of his supervised release.

misunderstanding of the totality of the circumstances.

Defendant Holland also argues the Magistrate Judge failed to consider "many questions raised by the cybertip." (Dkt. 40 at 15.) He claims, for example, the Magistrate Judge should have considered who owned the phone number at time it was "tied" to the email, what device was used at the time the number and the Gmail account were "tied together," and what ISP was used when the number and email were "tied together." (*Id.*) The law, however, looks to what Officer Brewer knew at the time. Absent evidence that she (or Agent Bigham) turned a blind eye to this information in order to avoid evidence pointing away from Defendant Holland, other things the officers could have done as part of their investigation does not negate reasonable suspicion that existed to form the totality of the circumstances known at the time.

Defendant Holland also says the Magistrate Judge wrongfully ignored the fact that he passed several polygraph examinations. He knew this fact. The Magistrate Judge also knew that, during an examination in 2018 that Defendant Holland passed, he admitted to accessing the internet when he was not allowed to and then later tried to pull that admission back. (Dkt. 28 at 70–71.) The Magistrate Judge

knew that in January 2019 he told his treatment provider he had run into a prior victim by accident — a fact he failed to report to Officer Brewer despite his obligation to do so. (*Id.* at 57.) And, as explained above, the Magistrate Judge also knew that, in 2015, he failed a polygraph test and admitted to using another person's phone to scroll through images and have fantasies about minors, and to having accessed the internet to trade images with men he had met while in prison. (*Id.* at 58-59.). The testimony about Defendant Holland's polygraph examination does not support his argument.

Finally, he argues that the Magistrate Judge wrongfully ignored the significance of the fact he was living at Dismas House in December 2017 and January 2018 when the images were posted to Instagram, was not permitted to have internet access while living there, and was not accused of having violated the terms of his residency. (Dkt. 40 at 13.) Indeed, Defendant Holland passed a polygraph test at that time. The Magistrate Judge considered these facts and properly concluded the mere fact he was not caught using an internet capable device does not mean he did not do so. (Dkt. 36 at 17–18.) After all, mobile devices are portable and relatively easy to conceal. And, during his prior stay at

Dismas House he ignored the rules and had an unauthorized cell phone. (Dkt. 28 at 49.) Defendant Holland undoubtably demonstrated a penchant for possessing unauthorized mobile devices while on supervised release.

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.

IV. Conclusion

The Court **OVERRULES** Defendant Holland's Objections to the Report and Recommendation (Dkts. 40), **ADOPTS** the Magistrate Judge's Report and Recommendation (Dkt. 36), and **DENIES** Defendant Holland's Motions to Suppress (Dkts. 13; 16).

SO ORDERED this 11th day of June, 2020.

MICHAEL L. BROWN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA v. ARNOLD DEWITT HOLLAND	CRIMINAL ACTION FILE NO. 1:19-CR-399-MLB-JKL

FINAL REPORT AND RECOMMENDATION

Defendant Arnold Dewitt Holland is charged in this case with four counts each of production of child pornography, enticement of a minor, and committing a felony offense involving a minor as a convicted sex offender, as well as one count each of possession of and distribution of child pornography. [Doc. 1.] Holland is alleged to have committed the underlying acts while on supervised release following an earlier conviction for receipt of child pornography. [*Id.*] The case is before the Court on Holland's Amended Motion to Suppress Tangible and Derivative Evidence [Doc. 16 (the "Motion"); *see also* Doc. 13 (original motion)], in which he moves to suppress evidence extracted from four cell phones seized following a search of his residence by Probation Officers on January 14, 2019. Holland contends that the officers lacked reasonable suspicion to search his

Appendix C2

residence and, thus, the cell phones and their contents should be suppressed as fruit of the poisonous tree. [*Id.*]

On December 19, 2019, I held an evidentiary hearing at which Georgia Bureau of Investigation ("GBI") Special Agent ("SA") Elizabeth Bigham and Senior U.S. Probation Officer Shannon Brewer testified. [*See* Doc. 28 (hearing transcript, hereinafter "Hr'g Tr.").[1]] On February 5, 2020, Holland filed his post-hearing brief in support of the motion [Doc. 29], and on February 20, the government filed its response [Doc. 30]. Holland filed a reply on March 12. [Doc. 34.] The Motion is now ripe for review.

For the reasons that follow, the Court concludes that based on the totality of the circumstances, the U.S. Probation officers who searched Holland's residence had reasonable suspicion to believe that he had violated the terms of his supervised release, and therefore did not infringe upon his Fourth Amendment rights in conducting the search. Since the search was not unlawful, neither was the seizure

[1] Government's exhibits 2 through 9, which were admitted at the evidentiary hearing, are available at docket entry 24. Exhibit 1, which—as explained in more detail below—depicts sexually evocative images of minor boys and contains information that could be used to identify the boys, is under seal.

of Holland's cell phones. Accordingly, it is **RECOMMENDED** that Holland's Motion be **DENIED**.[2]

I. BACKGROUND

In January 2004, Holland was sentenced to 151 months imprisonment and three years' supervised release after pleading guilty to ten counts of receiving child pornography. (Gov't Ex. 5 [Doc. 24-6] at 1-2.) The conditions of his supervised release required, among other things, that he "permit a probation officer to visit him . . . at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer." (*Id.* at 4; *see also id.* at 3 ("The defendant shall submit to a search of his person, property, real or personal, residence, place of business or employment, and/or vehicle(s) at the request of the United States Probation Officer.")). Holland was also required to participate in a treatment program for sex offenders and abide by the conditions of a compliance contract as directed by his U.S. Probation Officer. (*Id.* at 3.)

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[2] Holland initially filed his motion to suppress and attached the images of the minors mentioned above. [Doc. 13.] The Court ordered that the motion be sealed due to the nature of the images and out of concern of the privacy interests of the minors, and ordered Holland to file an amended motion to suppress that omitted the images. [Doc. 14.] The initial motion—which is substantively identical to the amended motion—should also be **DENIED**.

On July 11, 2014, Holland was released from custody. (Hr'g Tr. at 48-49.) He resided at Dismas House Charities ("Dismas"), a halfway house in Atlanta, Georgia, until February 2015, when he was expelled for possessing an unauthorized cellular device in violation of Dismas's rules. (*Id.* at 49.) U.S. Probation did not take any action to revoke his supervised release at that time. (*Id.*)

On January 21, 2017, Holland's probation officer made an unannounced visit to his residence and discovered several unauthorized cell phones in violation of his compliance contract. (Hr'g Tr. at 50.) The officer seized the devices and asked Holland if they contained pornography; Holland told the officer that there would be some pornography of persons aged 16 years and older. (*Id.*) Ten days later, during a session with his sex offender treatment provider, Highland Institute, Holland mentioned that he had seen a message on Snapchat, thus indicating that Holland was accessing the internet, also in violation of his compliance contract. (*Id.*; *see also id.* at 69 (identifying Highland Institute as Holland's treatment provider).)[3]

[3] The following month, Holland was also removed from his treatment group for making excuses and attempting to manipulate the group. (Hr'g Tr. at 50-51.)

In May 2017, Holland's supervising officer moved to revoke his supervised release, alleging that Holland had failed to follow the instructions of the compliance contract by (1) possessing the seven cell phones (capable of accessing the internet, and having done so without first obtaining written permission from his supervising officer); and (2) possessing two phones that contained sexually oriented material or pornography. (Hr'g Tr. at 51; Gov't Ex. 6 [Doc. 24-7] (Violation Report and Petition for Summons).) Holland admitted the allegations in the petition; and in July 2017, the Court revoked his supervised release and sentenced him to one day imprisonment and twenty-four months of supervised release, with six months to be served at Dismas. (Hr'g Tr. at 51; Gov't Ex. 7 [Doc. 24-8] (Amended Order/Judgment).)

On August 3, 2017, Holland entered into a new compliance contract pursuant to the original and amended conditions of his supervised release. (Gov't Ex. 8 [Doc. 24-9] (Sex Offender Compliance Contract); *see also* Gov't Ex. 5 at 3; Gov't Ex. 7 at 2 (imposing "all other general and special conditions of supervised release apply from the original Judgment and Commitment").) The Sex Offender Compliance Contract (the "Compliance Contract") required Holland 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." (Gov't Ex. 8 at 1.) He was also required to "obtain written approval from my U.S. Probation Officer to use an electronic bulletin board system, services that provide access to the Internet, or any public or private computer network" and to "permit routine inspection of any computer systems, hard drives, and other media storage materials to confirm compliance with this condition," with such inspection "to be no more intrusive than is necessary to ensure compliance with this condition." (*Id.* at 2.) He additionally agreed that "[a]ny computer system which is accessible to me is subject to inspection" and that he would "permit confiscation and/or disposal of any material considered contraband." (*Id.*) In short, during his supervised release, Holland was not allowed to (1) possess any sexually oriented material, (2) use the internet without permission, or (3) possess any cell phone capable of accessing the internet. (*Id.* at 2-3; *see also* Hr'g Tr. at 53.)

On October 12, 2017, Holland, having been released from prison, returned to Dismas, where he resided until April 12, 2018. (Hr'g Tr. at 52, 54, 67-68.) During his stay there, he was prohibited by Dismas rules from possessing a cell phone without approval or possessing any other device that could access the

internet. (*Id.* at 68.) Though Holland requested approval to possess internet-capable devices, it was never granted. (*Id.* at 53.)

On March 12, 2018, Officer Brewer began supervising Holland. (Tr. 43.) Upon receiving the assignment, she reviewed Holland's presentence investigation report ("PSR"), the judgment and commitment materials, documents regarding his case, any notes from previous supervising officers, and his Compliance Contract. (Hr'g Tr. at 44-45.) From the PSR, Officer Brewer learned that Holland had previously been tried on sex offenses involving minors, including a 1996 case that resulted in a mistrial and a 1999 case involving a minor boy, which was dismissed after the victim recanted. (*Id.* at 46-47.) She also learned that after the 1999 case was dismissed, federal agents recovered Holland's diary, which revealed that Holland had written extensively about his relationship with the victim and that the victim, at Holland's urging, had lied on the stand. (*Id.* at 47.) Officer Brewer also learned details concerning the charges underlying Holland's 2004 federal conviction. (*Id.* at 48.)

On March 31, 2018, the National Center for Missing and Exploited Children ("NCMEC") received a cybertip[4] that in December 2017 and January 2018, four images of prepubescent boys were uploaded to Instagram by account user "yungcool1s." (Hr'g Tr. at 12-13, 28; Gov't Ex. 1.) Instagram reported that the display name for the account was "Yung In Atl" and that the associated email address was branbarn90@gmail.com. (Hr'g Tr. at 13, 28.) NCMEC forwarded the information to the GBI, and in April 2018, SA Bigham was assigned to the cybertip. (*Id.* at 10, 27.)

SA Bigham investigated the cybertip and determined that the images had been uploaded from a T-Mobile IP address, indicating that the images had likely been uploaded to Instagram using a mobile device. (*Id.* at 14-15, 34.) A subpoena was issued to Google in September 2018, and SA Bigham obtained subscriber information from Google in November 2018, which in turn indicated that the phone

[4] By law, internet service providers are required to report suspected child pornography, child sex trafficking, or online exploitation of a child to NCMEC in the form of a "cybertip." (Hr'g Tr. at 9.) *See also* 18 U.S.C. § 2258A (reporting requirements for providers to reduce and prevent "online child sexual exploitation"; providing further that NCMEC may forward reports to state and federal law enforcement). NCMEC then determines the jurisdiction to which the cybertip should be referred for further investigation. (Hr'g Tr. at 10.) Cybertips pertaining to Georgia are forwarded to and handled by a GBI task force. (*Id.*)

number 404-914-4767 was associated with the "branbarn90@gmail.com" email account. (*Id.* at 15-18; Gov't Ex. 2 [Doc. 24-3] (Google subpoena and response).) SA Bigham was then able to match the phone number with the one Holland listed on his current Georgia driver's license. (Hr'g Tr. at 16-18.) During her investigation, SA Bigham also learned that Holland had a criminal history that included child exploitation crimes and that he was a registered sex offender. (*Id.* at 18.) Finally, SA Bigham queried NCMEC for any other cybertips including "yungcool1s," and in December 2018, obtained a separate NCMEC cybertip from Tumblr with what appeared to be hundreds of links to suspected child pornography; however, she was unable to view the images because the links were no longer functioning. (*Id.* at 18-20; Gov't Ex. 3 [Doc. 24-4] at 9.)

On January 3, 2019, SA Bigham called Officer Brewer and reported that the GBI had received a cybertip that Holland was uploading erotic images of ten- to twelve-year-old boys to Instagram. (Hr'g Tr. at 21, 25, 60.) SA Bigham told Officer Brewer that the boys were not entirely nude, but that an outline of their penises could be seen in the photographs. (*Id.*) SA Bigham also reported that Holland's phone number had been used to establish the Instagram account. (*Id.*) Neither Officer Brewer nor SA Bigham recalls whether SA Bigham told Officer

Brewer the dates that the four images had been uploaded to Instagram. (*Id.* at 21, 61, 65.)

On January 8, 2019, Officer Brewer learned from Holland's sex offender treatment provider that earlier that month, Holland encountered one of his prior victims (who was then 30 years old) at a Goodwill store. (Tr. 57.) Though the encounter appeared to have been happenstance, Holland did not report it to Officer Brewer. (*Id.* at 57-58.)

Based on the information that SA Bigham relayed, as well as Officer Brewer's knowledge that Holland was not allowed to have an internet connection and that his prior supervised release had been revoked for possessing contraband cell phones and pornography, Officer Brewer was concerned that Holland had violated the Compliance Contract.[5] (Hr'g Tr. at 60-61.) On January 14, 2019, U.S. Probation, including Officer Brewer, searched Holland's residence and seized four

[5] Officer Brewer testified that before the search, she did not know when the four images had been uploaded to Instagram. (Hr'g Tr. at 65.) But, according to Officer Brewer, even if SA Bigham had told her that the images had been uploaded approximately a year before the search, Officer Brewer would still have had the same concerns because "all the risks were still present"—namely, that Holland had unauthorized access to the internet and possession of sexually oriented material. (*Id.* at 61-62, 65.)

cell phones that contained evidence that led to the charges in this case. (*Id.* at 24, 80-81.)

Additional necessary facts are discussed in context below.

II. DISCUSSION

A. The Parties' Arguments

Holland argues that "there was no reasonable suspicion at the time GBI agents and U.S. Probation Officer entered his residence because (1) the evidence is lacking that [he] 'used' Instagram[] and (2) the flagged social media pictures were in fact photos not rising to the level of child pornography or sexually oriented material." [Doc. 29 at 11-12 (footnotes omitted).[6]] He contends that "there is no evidence" that he actually uploaded the images of the boys, and that at the time that the images were uploaded, he was residing at Dismas and was not allowed to use the internet. [*Id.* at 12; *see also id.* at 9 ("Mr. Holland was a resident of the Dismas House, where access to the Internet was largely prohibited.").] According to Holland, the "sole justification of a potential violation of [his] supervised release

[6] It bears mentioning that contrary to Holland's argument, only U.S. Probation Officers entered the residence, not GBI agents. (*See* Hr'g Tr. at 80-81.) While GBI agents were on site, they waited outside the residence. (*Id.* at 80.)

was his possession of th[o]se photos," and since the evidence that he posted the images was "questionable," no reasonable suspicion exists. [*Id.* at 12-13.]

In response, the government argues that, taking stock of the information known to Officer Brewer as of January 14, 2019, there was reasonable suspicion that Holland possessed electronic devices capable of accessing the internet and child pornography (and had used the internet) in violation of his conditions of his conditions of release and the Compliance Contract, justifying the search of his residence. [Doc. 30 at 12-15.] The government additionally argues that there was ample evidence that Holland had in fact used Instagram to upload the images that were the subject of the NCMEC cybertip and that the images themselves were sufficiently graphic to raise concern that Holland—who had been convicted for receipt of child pornography and whose prior supervised release had been revoked for possessing contraband phones with sexual explicit material—possessed more sexually explicit photographs. [*Id.* at 15-18.]

On reply, in an attempt to undercut the government's argument that reasonable suspicion existed for the search, Holland points out that before January 2018, he was not "directly accused of accessing the internet without permission while on supervised release"; no unauthorized cell phones were seized from him

after January 2017; he resided at Dismas from October 2017 to April 2018 without being accused of any violations of Dismas rules or conditions of supervised release; he passed polygraph examinations in March and August 2018; probation officers who visited his home and place of employment in 2017 and 2018 did not find any violations of supervised release conditions; and he received mental health treatment in 2017 and 2018. [Doc. 34 at 1-2.] He additionally argues that as of January 14, 2019, the investigation into the cybertip had not "reveal[ed]" to Officer Brewer that Holland was in fact "connect[ed]" to the images, instead showing only that someone had used Holland's telephone number in establishing the Instagram account. [*Id.* at 3-4.] He contends that SA Bigham's investigation did not reveal who established the Instagram account, who accessed it, who uploaded the images, how they were uploaded, where the device (or devices) were located at the times the images were uploaded, or that the email address was associated with Holland. [*Id.* at 3.] According to Holland, the only new information the government had to justify the search in January 2019 was "that a telephone number inputted by the Instagram account user was associated with Mr. Holland," which is insufficient for reasonable suspicion. [*Id.* at 4.]

B. Analysis

Probationers are entitled to protection from unreasonable searches and seizures under the Fourth Amendment; however, their expectation of privacy is diminished. *See Owens v. Kelley*, 681 F.2d 1362, 1367-68 (11th Cir. 1982). "Such limitations are permitted because probationers have been convicted of crimes and have thereby given the state a compelling interest in limiting their liberty in order to effectuate their rehabilitation and to protect society." *Id.* at 1367. The Eleventh Circuit has held that a warrantless search of a probationer's residence by probation officers is constitutionally permissible where it is based on a "reasonable suspicion" that the probationer is in violation of his probation conditions or engaged in criminal conduct. *See United States v. Carter*, 566 F.3d 970, 975 (11th Cir. 2009); *see also United States v. Riley*, 706 F. App'x 956, 960 (11th Cir. 2017) ("[P]robation officers are required to have reasonable suspicion of criminal conduct in order to search a probationer's residence when the terms of probation do not require him to submit to warrantless searches."), *cert. denied*, 138 S. Ct. 699 (2018); *United States v. Wasser*, 586 F. App'x 501, 505 (11th Cir. 2014) (concluding that, after probation officers lawfully entered a probationer's residence, they developed reasonable suspicion that probationer had violated the terms of his probation, justifying a search of the residence for additional

violations); *United States v. Gomes*, 279 F. App'x 861, 869 (11th Cir. 2008) ("A probationer's house may be searched based upon reasonable suspicion."); *United States v. Denton*, No. 1:11-CR-00546-AT-RGV, 2012 WL 3871929, at *7-8 (N.D. Ga. June 19, 2012) (all that was required to search a probationer's computer was reasonable suspicion, even where the probation agreement did not require him to submit to warrantless searches), *report and recommendation adopted*, 2012 WL 3871927 (N.D. Ga. Sept. 5, 2012). Reasonable suspicion consists of a sufficiently high probability that criminal conduct (or conduct in violation of probation conditions) is occurring to make the intrusion on the individual's privacy interest reasonable. *United States v. Yuknavich*, 419 F.3d 1302, 1311 (11th Cir. 2005). To determine whether the officer has a particularized and objective basis for suspected wrongdoing, the court must examine the totality of the circumstances and "take stock of everything [officers] knew before searching." *Id.*

The totality of the circumstances here amply demonstrates that the search of Holland's residence was supported by reasonable suspicion that he was in violation of his conditions of release. At the time of the search, Officer Brewer was aware that Holland had a lengthy criminal history involving sexual offenses against minors, including receipt of child pornography, and a sexual proclivity for minor

boys; that in 2015, he was expelled from Dismas for possession of an unapproved cell phone; that in January 2017, he possessed seven unapproved devices capable of accessing the internet, some of which contained pornography involving individuals as young as 16 years old; that in December 2017 and January 2018, four erotic images of minor boys were uploaded to an Instagram account that was traced to a phone number associated with his current driver's license; that the Instagram account display name, "Yung in Atl," demonstrated a connection to Atlanta, where Holland lived, and was suggestive of Holland's history of involvement with minors. "Taken together, the facts and the rational inferences that follow indicate the high probability that [Holland] was violating the conditions of his supervised release at the time of the search," including his possession of unauthorized internet-capable devices and sexually oriented material/pornography. *United States v. Collins*, 683 F. App'x 776, 779 (11th Cir. 2017).

Holland's arguments to the contrary are without merit. His contention that there is no evidence that he uploaded the four images overlooks the record. As discussed above, SA Bigham's investigation of the cybertip revealed evidence linking Holland to the Instagram account "yungcool1s" where the images were uploaded. To recap, SA Bigham determined that the Instagram account was

associated with a Gmail account, which, in turn, was associated with the telephone number for Holland's current driver's license. In addition, the display name for the Instagram account could reasonably be understood to refer to Atlanta, where Holland lived, as well as his apparent history of having a sexual preference for minors.[7]

Similarly, the Court is not persuaded by Holland's assertion that he could not be the individual who uploaded the images because he resided at Dismas at the time they were uploaded. Although the Dismas rules prohibited him from

[7] In making his argument, Holland implies that anyone could have input his telephone number into Instagram, and concludes that any connection between his telephone number and the images is therefore meaningless. This conclusion, however, ignores the unlikelihood that someone using Instagram to upload sexual imagery of prepubescent boys would randomly pick the telephone number associated with a person recently convicted of receiving child pornography.

Though not used in the Court's analysis (as testimony was not offered on the point), the Court also notes that contrary to Holland's position, the Instagram account was not associated directly with his telephone number, but rather, with a Gmail account. The Gmail account, in turn, was associated with Holland's number. Along these lines, the Court is aware that Gmail requires email users to provide a telephone number to set up and maintain an account, and only allows a new account to be opened once the user verifies the telephone number by providing a code texted to the number. While Holland suggests that anyone could have "associated" his number with the account connected to the illicit images, such an inference becomes reasonable only if one presumes that the alleged third party has the capacity to spoof Holland's number and, again, by mere chance chose Holland's telephone number to spoof.

accessing the internet, and although there were no reports of Holland violating Dismas's rules during his present stay, it is still reasonable to infer based on the totality of the circumstances that he used an internet-capable mobile device in violation of the Dismas rules and simply was not caught. After all, not only are mobile devices portable and relatively easy to conceal, Holland has a demonstrated penchant for possessing unauthorized mobile devices while on supervised release.[8]

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[8] In support his argument that there is no evidence that he used Instagram, Holland comes dangerously close to misrepresenting a statement that the Court made from the bench at the evidentiary hearing. Specifically, in support of his assertion that "the evidence is lacking that [he] 'used' Instagram," Holland cites to the Court's statement that: "So regardless of whether he had permission to use the internet or not, there's nothing that would suggest that he had the ability to use Instagram." [Doc. 29 at 12 n.2 (citing Hr'g Tr. at 84).]

Viewing the Court's statement in context, it is clear the Court was not commenting on the sufficiency of the evidence that Holland has used Instagram to upload the pictures. Rather, the Court made the statement in response to defense counsel's request to keep the evidentiary hearing open so he could subpoena records from Holland's sex offender treatment provider because counsel believed that the treatment provider may have records showing that it gave Holland approval to access the internet. The Court's point was that regardless of whether the treatment provider had approved his use of the internet (a dubious claim, because U.S. Probation must give the approval), there was still no evidence that Holland had ever been allowed to use Instagram. At the end of the day, whether or not Highland purported to give Holland permission to use the internet is beside the point because Holland was prohibited by the terms of his Compliance Contract from possessing or using any services that provided access to the internet without express written permission from U.S. Probation, and there is no evidence that he ever obtained that permission. (*See* Gov't Ex. 8 at 2.)

Holland's next assertion that the images of the minor boys are not sexually oriented material is also a complete nonstarter. Those photographs—which the government has accurately (and graphically) described in its brief—are unquestionably erotic. [*See* Doc. 30 at 17-18.] What's more, the text accompanying one of the photographs–"yungonesagain" and "them cute boys"—is sexually suggestive when viewed in context of the accompanying images. (*See* Hr'g Tr. at 13.) Again, given the totality of the circumstances, the fact that the genitalia of the boys depicted in the photographs was not fully exposed does not negate reasonable suspicion that Holland had violated the terms of his supervised release.[9]

Finally, in Holland's reply, he identifies numerous facts that, in his view, undermine the existence of reasonable suspicion. Among these are facts indicating that in 2017 and 2018, he was not accused of violating the terms of his supervised release or the Dismas rules; but, of course, the fact that he was not accused of

[9] Holland cites *United States v. Gomes*, 279 F. App'x 861 (11th Cir. 2008) and *United States v. Yuknavich*, 419 F.3d 1202 (11th Cir. 2005), as examples of cases in which the Court of Appeals has found reasonable suspicion of a probation violation existed to justify a warrantless search. [*See* Doc. 29 at 13-15.] Even if *Gomes* and *Yuknavich* presented more compelling facts to support a finding of reasonable suspicion, those cases do not represent the outer limits of what constitutes reasonable suspicion.

violations does not mean that he had no involvement in the posting of the images to Instagram, merely that he was not discovered doing so at the time. He also points out that in 2018 he passed polygraph examinations (*see* Hr'g Tr. 70); however, the fact that he passed those examinations does not negate reasonable suspicion given the totality of the circumstances. His contention that Officer Brewer was not aware of the details of SA Bigham's investigation is of no moment either, since the results of that investigation, linking Holland to the account on which uploaded images appeared, was shared with Officer Brewer.

Ultimately, taken together, the totality of the facts (and the obvious inferences that follow) provided U.S. Probation officers with reasonable suspicion that Holland was violating the conditions of his supervised release at the time of his residence was search, and his argument that the search was unlawful is without merit.[10]

[10] To the extent that Holland challenges the search of the contraband cellphones themselves, that argument was not raised in his motion to suppress or at the evidentiary hearing. Again, Holland's theory is that the evidence seized from the phones should be suppressed because the phones were seized as a result of an unlawful search.

III. CONCLUSION

For the foregoing reasons, it is **RECOMMENDED** that Holland's motion to suppress [Doc. 13] and amended motion to suppress [Doc. 16] be **DENIED**.

I have now addressed all referred pretrial matters relating to this defendant and have not been advised of any impediments to the scheduling of a trial. Accordingly, this case is **CERTIFIED READY FOR TRIAL.**

IT IS SO RECOMMENDED this 26th day of March, 2020.

JOHN K. LARKINS III
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

United States of America,

v. Case No. 1:03-cr-336-CAP

Arnold D. Holland,

Defendant.

_____/

ORDER

Before the Court is the Probation Officer's Amended Violation Report and Petition for Warrant for Offender Under Supervision (Dkt. 150). Defendant Arnold D. Holland appeared in person and with his attorney, Crystal Harmon Bice, at the Revocation Hearing held May 19, 2022. The government was represented by Libby Skye Davis. Defendant admitted to the allegations in the Amended Petition and the Court found by a preponderance of the evidence that Defendant violated the conditions of supervised release.

The Court provided its judgment and reasons on the record during the hearing but provides this written order as well. Having considered the argument of counsel and the factors in 18 U.S.C. § 3553(a) outlined

in 18 U.S.C. § 3583(e), the Court **REVOKES** Defendant's supervised release. Defendant is sentenced to a term of imprisonment of **TWENTY-THREE (23) MONTHS AND TWENTY-NINE (29) DAYS** with no term of supervised release to follow. Defendant's term of imprisonment shall be served **CONSECUTIVELY** to the term of imprisonment imposed in Criminal Action No. 1:19-CR-399.

The Court **REMANDS** Defendant to the custody of the United States Marshals Service.

The Court **ORDERS** the Clerk to deliver a copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of Defendant.

SO ORDERED this 20th day of May, 2022.

MICHAEL L. BROWN
UNITED STATES DISTRICT JUDGE