No. 16-____

IN THE

Supreme Court of the United States

MARC KEATING,

Petitioner,

v.

FRANK COSLETT, JUSTIN TOKAR, AND MAIVAUN HOUSSEIN,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The 2–1 decision below upheld a grant of summary judgment rejecting petitioner's claim that his Fourth Amendment rights were violated by a warrantless, non-custodial strip search and body-cavity inspection conducted with disputed justification, under the gaze of two observers, and in absence of the safety concerns of the prison setting. It did so based almost entirely on disputed testimony by petitioner's parole officer that petitioner had tested positive for morphine and had ignored the officer's order to remain downstairs during the search of a home. Petitioner had testified, to the contrary, that he had neither taken nor tested positive for morphine, and that there had been no order to remain downstairs.

The questions presented are:

1. Whether the court below improperly failed to view the evidence at summary judgment in the light most favorable to petitioner.

2. Whether, under *Samson v. California*, 547 U.S. 843 (2006), a parolee may be subjected to a warrantless strip search and body-cavity inspection based on a parole condition authorizing a warrantless "personal search."

3. Whether, viewing the facts in the light most favorable to petitioner, the strip search and body-cavity inspection were constitutionally reasonable.

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The Third Circuit's opinion (Pet. App. 1a–23a) is at --- F. App'x ---, 2016 WL 929285. The district court's opinion (Pet. App. 24a–50a) is at 2014 WL 1095951.

JURISDICTION

The Third Circuit entered judgment on March 10, 2016, Pet. App. 77a–78a, and denied rehearing on April 22, 2016, Pet. App. 75a–76a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The Fourth Amendment to the U.S. Constitution provides:

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

Rule 56(a) of the Federal Rules of Civil Procedure provides, in relevant part:

> …. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law….

Section 6153(d)(1) of title 61 of the Pennsylvania Consolidated Statutes provides, in relevant part:

> A personal search of an offender may be conducted by an agent: (i) if there is a reasonable suspicion to believe that the offender possesses contraband or

other evidence of violations of the conditions of supervision ….

STATEMENT OF THE CASE

Petitioner Marc Keating was, at the time of the events at issue, a Pennsylvania parolee. Respondents are Keating's parole officer and two local police officers. As part of a parole search, respondents subjected Keating to an embarrassing and humiliating warrantless strip search that included a visual body-cavity inspection. Keating sued, pursuant to 42 U.S.C. § 1983, for violation of his Fourth Amendment rights. In a 2–1 decision, the Third Circuit upheld a grant of summary judgment for respondents on the constitutional reasonableness of the strip search, but only after improperly making credibility determinations and resolving against Keating genuinely disputed issues of material fact concerning the bases for the search, including the results of a drug test and whether Keating disobeyed an instruction to remain downstairs during a search of the premises.

A. Factual Background

Keating's Living Arrangements and Drug Test — In October 2009, Marc Keating, the son of the former mayor of Pittston, Pennsylvania, was nearing the end of a five-year term of parole following his incarceration for a conspiracy to distribute offense. Pet. App. 99a, 101a–102a. During his time on parole, Keating had been repeatedly harassed by city police officers, who bore him retaliatory animus based on reforms that his father had pushed through as mayor. Pet. App. 99a–101a. Respondent Frank Coslett was Keating's parole officer. Pet. App. 3a.

Shortly after the events at issue here, another parolee supervised by Coslett told Keating that Coslett has "got it out for you." Pet. App. 113a.

At the time, Keating was living with his parents at their home on 3 James Street in Pittston. Pet. App. 81a. The James Street home was Keating's "primary residence" and where he primarily slept at night. Pet. App. 81a, 110a; *see also* Pet. App. 128a (Keating "was still living" at the James Street home). It was identified and approved as his residence on a home provider agreement he had signed when he began serving his parole. Pet. App. 115a–116a.

Keating's father also owned another home, located a few houses away from the James Street residence, at 90 Market Street, where Keating's grandmother had lived before her death. Pet. App. 81a–82a, 115a–116a; 3d Cir. App. A106. Keating was remodeling and fixing up the Market Street house, Pet. App. 82a–83a, and would stay overnight there "once, maybe twice at the most" per week. Pet. App. 126a; *see also* Pet. App. 110a ("I would … stay there once in a while. I would crash there."). Keating's cousin Fran Lombardo, nicknamed "Gupper," was helping with the renovations and occasionally stayed overnight when working late into the evening. Pet. App. 82a, 109a, 160a–161a.

On the morning of October 14, 2009, Keating received a phone call from Agent Coslett, who requested that Keating submit to a random urinalysis. Pet. App. 104a. Keating was at his James Street residence, so Coslett met him there. Pet. App. 104a, 129a. Keating submitted to a urinalysis test, Pet. App. 105a, but the parties

disagree about the results. Coslett claimed at his deposition that the urine "was positive for morphine," that he and Keating "had a conversation about that," and that Keating admitted "that he had taken his mother's prescription without her permission." Pet. App. 145a. By contrast, Keating testified at his deposition that he was not taking morphine, that he was not confronted with any positive test results, and that Coslett's testimony—that Keating had tested positive for morphine and "was getting it off [his] mother"—was "crazy." Pet. App. 105a–107a. The record contains no documentation of any test results.

Coslett asked Keating about the status of the Market Street property, and Keating replied that he was remodeling it. Pet. App. 129a. Although Keating had been telling Coslett the same thing about the Market Street property all summer, "this time [Coslett] just took an interest in it." *Id.* The parties disagree over whether Keating told Coslett that he had been staying there overnight. *Compare* Pet. App. 144a (Coslett Dep.) ("He said that he's living at 90 Market Street."), *with* Pet. App. 127a (Keating Dep.) ("Q. [D]id you tell Agent Coslett that you had been staying overnight there at the 90 Street address on occasion? A. No. I don't recall that I ever told him that."). Keating and Coslett then went to the Market Street premises. Pet. App. 143a–144a.

Coslett's Initial Entry Into and Search of the Market Street Premises — Agent Coslett entered the Market Street premises and conducted a full-blown search during which he "tore the place apart." Pet. App. 87a. During the search, Coslett looked "under a physics book," where he found a number of personal checks that Keating had found up the street on the

side of the road a few days earlier. Pet. App. 87a, 98a–99a. Coslett also observed Keating's cousin Lombardo asleep on a couch. Pet. App. 88a. Sometime after Coslett had concluded his search, he suggested that Keating sign a new home provider agreement, identifying 90 Market Street as his residence, so that Keating would not "get jammed up." Pet. App. 110a, 117a–118a, 124a, 128a. Because he was spending a lot of time at the Market Street property and did not want any problems if Coslett were to look for him while he was working there late at night, Keating signed the agreement. Pet. App. 128a–129a; *see also* Pet. App. 130a–132a (Home Provider Agreement Letter). Keating and Coslett then exited the house. Pet. App. 87a.

While Keating and Coslett were standing on the deck outside the house, Coslett placed a call to the Pittston police department and determined that there had been no report of a burglary under the name on the checks. *Id.* A few minutes later, respondents Justin Tokar and Maivaun Houssein, two officers of the Pittston police department, arrived. Pet. App. 88a. The three agents conversed on the back porch, where Coslett told the officers about the checks and that Lombardo, whom the officers knew, was inside sleeping on a couch. Pet. App. 88a, 95a.

The Second Entry and the Strip Search — The parties disagree over what happened next. According to Coslett, he led the police officers inside, instructed Keating to sit on a chair under the supervision of one of those officers, proceeded to search the second floor, heard a toilet flush in the second-floor bathroom, and found Keating "standing at the bathroom when he was advised to stay downstairs." Pet. App. 149a–

150a. At that point, Coslett initiated a strip search. Pet. App. 150a.

Keating's version of the events differs, and does not include a disobeyed instruction to remain downstairs. According to Keating, the two police officers entered the house first in an attempt to harass Lombardo, yelling, "Gupper's gone, Gupper's gone," causing Keating and Coslett to look at each other in surprise. Pet. App. 88a. Coslett and Keating followed inside, where they saw the officers with their guns drawn and for a few seconds pointed at Keating, as they swept the house looking for Lombardo and trampling over the newly laid kitchen tile. Pet. App. 88a–90a, 96a. As Keating described it, "They went nuts." Pet. App. 88a. The officers descended into the basement of the house for less than a minute. Pet. App. 89a–90a. After the officers came up from the basement, all three "approached" Keating and "ordered" him into a small upstairs bathroom for a strip search. Pet. App. 90a. The two police officers also testified that Keating had not disobeyed an order to remain downstairs. Pet. App. 166a (Houssein Dep.) ("Q: Did he [Coslett] order Mr. Keating to stay downstairs? A: No."); Pet. App. 161a (Tokar Dep.) ("Q: Was Mr. Keating, if you recollect, under any orders to stay downstairs? A: Not that I recall, no.").

Keating asked Coslett to conduct the strip search alone, but all three officers denied that request. Pet. App. 90a, 122a. Coslett entered the bathroom with Keating, while Tokar stood inside the bathroom past the threshold and Houssein stood at the threshold. Pet. App. 91a. Keating then followed Coslett's orders to undress, bend over, spread his buttocks to display his anal cavity, and display and lift his genitals. Pet.

App. 91a–92a, 123a. Officers Tokar and Houssein stood and watched. Pet. App. 92a, 123a. The search took five or ten minutes; nothing was found. Pet. App. 92a.

The Handcuffing and Further Premises Search — After the strip search, the officers allowed Keating to get dressed and searched the bathroom, finding nothing. *Id.* Coslett then handcuffed Keating, and ordered Houssein to take Keating downstairs and seat him in a chair. Pet. App. 93a. Houssein did so, and watched over Keating while Coslett and Tokar "ransack[ed]" the upstairs, "dumping boxes out [and] opening things up." *Id.* Keating remained handcuffed on the chair for about a half hour, until Coslett and Tokar called for him to be brought upstairs to the back bedroom, where they were searching through possessions owned by Lombardo, including his diary. Pet. App. 94a. The search revealed medication and an air gun owned by Lombardo. *Id.* The officers then searched downstairs for about fifteen minutes, with Coslett searching in kitchen cabinets, Tokar combing through garbage, and Houssein going through Keating's telephone. Pet. App. 97a. Finally, the officers released Keating from the handcuffs and left the premises. Pet. App. 98a. Later that day, Coslett called Keating and asked whether he was all right, suggesting that Coslett knew the officers' behavior was improper. Pet. App. 103a.

B. The Proceedings Below

On March 3, 2011, Keating filed an action under section 1979 of the Revised Statutes, 42 U.S.C. § 1983, in the U.S. District Court for the Middle

District of Pennsylvania against the city of Pittston and Officers Tokar and Houssein. Pet. App. 25a n.1. The district court dismissed the complaint for failure to state a claim, but the Third Circuit reversed in part and remanded to permit Keating to amend his complaint. *Id.*

On October 14, 2011, Keating filed an amended complaint, adding Agent Coslett as a defendant and alleging that all three officers violated his Fourth Amendment rights by unlawfully entering and searching the Market Street residence and unlawfully searching and seizing Keating. Pet. App. 24a–25a; 3d Cir. App. A104–A120. On March 19, 2014, following discovery, the district court granted respondents' motions for summary judgment. Pet. App. 24a–50a.

Keating appealed to the Third Circuit, which affirmed. The court began by stating that a warrantless search of a parolee's premises is constitutionally reasonable if the agent has a reasonable suspicion that the premises contain evidence of a parole violation. Pet. App. 10a. The court then held that there were no genuine issues of fact regarding the reasonableness of Coslett's initial entry into 90 Market Street because "Keating volunteered that he was living there" in violation of the conditions of his parole, thereby giving Coslett reasonable suspicion of a parole violation, Pet. App. 11a; the court dismissed Keating's contrary testimony—*e.g.*, Pet. App. 127a ("No. I don't recall that I ever told him that.")—as "qualified with equivocations" and thus "insufficient to create a genuine dispute of material fact," Pet. App. 12a–13a. The court also held reasonable Coslett's initial search

of the property and the officers' reentry and further search, in part because "Keating's urine tested positive for morphine." Pet. App. 13a–14a n.7; *see also* Pet. App. 15a (relying on "Keating's positive urine test that day").

The warrantless strip search was also reasonable, the court held, because the conditions of Keating's parole allowed for a warrantless "personal search" on reasonable suspicion of contraband or a parole violation, and Coslett reasonably believed that Keating was attempting to destroy or hide contraband or drugs because "Keating had already tested positive for morphine," "had disobeyed an instruction to remain downstairs," and "had revealed an unauthorized change of address." Pet. App. 16a. The court also concluded that the strip search and body-cavity inspection had been conducted in a reasonable manner because no officer touched Keating and the search occurred in the privacy of Keating's home. Pet. App. 17a. Finally, the court concluded that the "brief" handcuffing of Keating "for thirty minutes" was reasonable because, *inter alia*, Coslett had found evidence of "several" parole violations and "believed that Keating had previously disregarded an instruction to remain downstairs." Pet. App. 18a–19a.

Dissenting in part, Judge Roth would have allowed Keating's strip-search claim to go to a jury. Given the "considerable dispute" over whether Coslett had ordered Keating to remain downstairs, "the record [is] too murky to warrant summary judgment." Pet. App. 20a–21a. Judge Roth explained that each of the four factors used by this Court to evaluate the reasonableness of strip searches in *Bell v. Wolfish*,

441 U.S. 520 (1979), "militate against a finding of reasonableness here." Pet. App. 21a. First, the visual body-cavity inspection made the search particularly intrusive. *Id.* Second, the manner of the search—with the two police officers "facing inward, watching"—is "equally concerning," and respondents' claim that this was justified by safety concerns over Lombardo's possible presence in the home "defies reason," since the officers chose to face inward and watch Keating disrobe, rather than "face[] outwards, watching for Lombardo's return or the emergence of another threat." Pet. App. 21a–22a. Third, "[i]f Keating's account is credited, the search had virtually no justification at all." Pet. App. 22a. Fourth, the location of the search cut against reasonableness since it was outside of a prison lockup. *Id.* For these reasons, a jury could find that the strip search was "an abuse, designed to humiliate Keating." *Id.*

On April 22, 2016, the court of appeals denied Keating's petition for rehearing and rehearing en banc. Pet. App. 75a–76a.

REASONS FOR GRANTING THE PETITION

The 2–1 decision below warrants review because the majority improperly resolved disputed issues of fact in a way that contributed to an incorrect conclusion on exceedingly important legal questions involving the privacy rights of parolees. Indeed, the Third Circuit's departure from well-settled summary-judgment principles was so egregious that summary reversal is appropriate here.

I. SUMMARY REVERSAL IS WARRANTED BECAUSE THE COURT BELOW IMPROPERLY RESOLVED GENUINE DISPUTES OF MATERIAL FACT ON SUMMARY JUDGMENT

The court below acted contrary to well-settled precedent when it resolved several genuinely disputed issues of material fact, disregarding Keating's sworn testimony and making unfavorable credibility determinations in the process. These disputed factual issues were critical to the court's resolution of Keating's legal claims, including his claim that the strip search and body-cavity inspection were constitutionally unreasonable. Because the decision below is such an egregious departure from the summary-judgment standards set by this Court's precedents, and reflects the troubling tendency of some lower courts to overly credit officers' disputed accounts in civil-rights matters, summary reversal is warranted.

1. "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Accordingly, "courts"—including appellate courts—"may not resolve genuine disputes of fact in favor of the party seeking summary judgment." *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (per curiam). Rather, "[s]ummary judgment is appropriate only if 'the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id.* (quoting Fed. R. Civ. P. 56(a)). In making this determination, the court must view the evidence in the light most

favorable to the non-moving party, *id.*, and "reasonable inferences should be drawn in favor of the nonmoving party," *id.* at 1868; *accord Anderson*, 477 U.S. at 255 ("all justifiable inferences are to be drawn in [the non-movant's] favor").

2. The court below departed from the appropriate standards for summary judgment in three critical respects. And its improper resolution of disputed facts was central to its determination of the legal issues.

a. The court of appeals strayed farthest from proper application of summary-judgment standards when it found—for the first time on appeal—that Keating's urine had tested positive for morphine in violation of his parole conditions. Pet. App. 4a & n.3, 14a n.7. Coslett testified at his deposition that, after he had administered a urinalysis, Keating's urine was positive for morphine, Coslett and Keating "had a conversation about that," and Keating admitted "tak[ing] his mother's prescription." Pet. App. 145a. The District Court rightly ignored this testimony in its legal analysis. *See* Pet. App. 40a, 45a–47a.

The Third Circuit, however, credited Coslett's account, "find[ing] no basis for disputing that Keating's field urine test was positive for morphine." Pet. App. 4a n.3. But in fact there was ample basis for disputing Coslett's testimony. Most significantly, Keating's own deposition testimony flatly contradicted it:

Q. Did you take a urinalysis test?

A. Yes.

Q. What was the result of that test?

A. Nothing.

Q. Did you eventually find out the result of that test?

A. No.

Q. Would it surprise you to learn that you were found positive for—

A. He said [at his deposition] for morphine and that I was getting it off my mother. That's—

Q. Did you ever—go ahead.

A. No, that's just crazy. My mother has never gotten morphine in her life.

* * *

Q. Were you taking any other medications [than a non-narcotic for a nerve issue] as of October of 2009?

A. No.

Q. And you said you were not taking morphine?

A. No.

Q. You are unaware of the urinalysis test results for October 14 of 2009?

A. Yeah.

Pet. App. 105a, 107a.

As this testimony makes clear, Keating directly and unequivocally: denied taking morphine; denied being confronted by Coslett with a positive test result; and denied—as "just crazy"—Coslett's deposition testimony that Keating had tested positive for morphine and had admitted taking his mother's

prescription. Furthermore, the record contains no documentation of any test results and, even though the drug test supplied the claimed basis for the search, Coslett did not discuss it with the local officers. *See* Pet. App. 160a (Tokar Dep.) ("Q. Did he say anything about a urine sample? A. Not that I recall.") Keating's testimony—especially coupled with the absence of any documentation or other corroboration of the supposed test result—thus supports the reasonable inference that the test was negative and that Coslett at his deposition misrepresented or misremembered the result.[1]

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[1] The assertion by the court below that "Keating's own testimony confirms that … Coslett told him that the results were positive for morphine," Pet. App. 4a n.3, is doubly flawed. First, it mischaracterizes Keating's testimony: When Keating testified that "[Coslett] said for morphine and that I was getting it off my mother," Keating—consistent with his testimony that Coslett had not confronted Keating with a positive result ("Q. Did you eventually find out the result of that test? A. No.")—was plainly referring to what Coslett had previously said *in his own deposition*, not to anything Coslett told Keating *at the time of the test*. *Compare* Pet. App. 105a (Keating Dep.), *with* Pet. App. 145a (Coslett Dep.) (discussing test and Keating's mother). Second, even if somehow read incorrectly as an admission that Coslett told Keating that the test was positive, there is no basis for the panel's conclusion, in the face of Keating's denial of morphine use, that the test actually *was* positive. In moving seamlessly from (a) "Agent Coslett *told* [Keating] that the results were positive for morphine," Pet. App. 4a n.3, to (c) "[t]herefore, we find no basis for disputing that Keating's field urine test was positive for morphine," *id.*, the panel majority omitted a step in its syllogism: its improper conclusion, in the face of Keating's contrary testimony, that (b) Coslett was telling the truth.

Whether the morphine test was positive thus presents a classic "he said / he said" question for a jury, which can assess Keating's and Coslett's credibility and decide which of their conflicting accounts to believe. The court below usurped this role, improperly rubber-stamping Coslett's version of the story as true and rejecting Keating's version as a lie.

b. As Judge Roth explained in her dissent, the panel majority made a similar error when it found that "Keating had been instructed to remain downstairs" and had disobeyed that order, Pet. App. 6a, despite "the considerable dispute as to whether this instruction was given," Pet. App. 21a. Judge Roth correctly attributed the majority's version of events to Coslett, and pointed out that Keating's version is considerably different:

> Keating contends that he was ordered upstairs and strip searched almost immediately after he and Coslett entered the Market Street house for the second time. Coslett contends that the search occurred later, after he had ordered Keating to stay downstairs while he and another officer searched the second floor of the house.

Pet. App. 20a; *see also supra* p. 6. Keating's testimony supports that no order was given, let alone disobeyed, prior to the strip search:

> A. When they came through the breezeway … I was standing in the kitchen.
>
> Q. What did they say to you?
>
> A. Nothing. They just they descended the steps into the basement.

* * *

Q. They went down in the basement. How long were they down in the basement for?

A. Maybe less than a minute.

Q. And they came back up?

A. Yeah.

Q. What did they do after that?

A. They approached me. That's when they ordered me into the bathroom. They stripped me naked, made me bend over.

Pet. App. 89a–90a. And the accounts of Coslett's co-defendants further support Keating's version of the events. Pet. App. 166a (Houssein Dep.) ("Q: Did [Coslett] order Mr. Keating to stay downstairs? A: No."); Pet. App. 161a (Tokar Dep.) ("Q: Was Mr. Keating, if you recollect, under any orders to stay downstairs? A: Not that I recall, no."); Pet. App. 20a (Roth, J., dissenting) ("Neither Tokar nor Houssein nor Keating recall Coslett's instruction."); *see also* Pet. App. 31a (Dist. Ct. op.) ("Keating's whereabouts during the search of the residence by the officers and Agent Coslett are also in dispute.").

Here too, the court below improperly chose sides in the parties' dispute over what occurred.

c. The court below also resolved in favor of Coslett a third disputed factual issue: whether, prior to Coslett's initial entry into the 90 Market Street residence, Coslett knew that Keating was occasionally staying there overnight (in alleged violation of the conditions of Keating's parole). According to Coslett's deposition testimony, Coslett asked Keating whether Keating was living at 3

James Street or 90 Market Street; Keating replied that he was living at 90 Market Street; and Keating's answer prompted Coslett to ask Keating to sign a new home provider agreement letter. *See* Pet. App. 144a; 130a–132a (Home Provider Agreement Letter); 11a (3d Cir. op.); *supra* p. 4. Keating, however, testified to the contrary that Coslett had not "ask[ed] … whether [Keating] w[as] staying" at 90 Market Street, Pet. App. 127a, and that, before signing the home provider agreement, Keating had not told Coslett that he had been staying there overnight, *see id.* ("Q. Prior to signing the [home provider agreement], did you tell Agent Coslett that you had been staying overnight there at the 90 Street address on occasion? A. No. I don't recall that I ever told him that."); *id.* ("Q. And at that point after he suggested [signing the home provider agreement], did you tell him that you had been staying overnight there on occasion? A. I don't believe so, no."); *supra* p. 4.

The court below brushed aside this disputed factual issue by noting that lack of memory is insufficient to create a genuine dispute in the face of affirmative testimony, and positing that Keating's answers were too "qualified with equivocations" to create a disputed issue for trial. Pet. App. 13a. But Keating's testimony—consisting of statements like "no, I don't recall that" and "I don't believe so, no"—hardly reflects a lack of recall; the testimony, rather, quite directly conveys that, as far as Keating could recall, the disputed event did not occur. *See* Pet. App. 127a. Keating's slight hesitation might give *a jury* reason to believe Coslett's version over Keating's, but it does not license *a court on summary judgment* to do the same. *See* 3 Wigmore, *Evidence* §§ 726–28

(James H. Chadbourn ed., 1970) (distinguishing "merely an inferior quality … in the observation or … in the recollection of the witness" from "a total lack of original observation, a mere conjecture" (emphases omitted)); *id.* § 726 ("It is a commonplace of judicial experience that testimony most glibly delivered and most positively affirmed is not always the most trustworthy. The honest witness who will not exaggerate the strength of his recollection is well worth listening to because of this very caution."). This sort of weighing of testimony is quintessentially a jury function, usurped here by the court below.

d. These disputed facts are highly material, as they influenced the court's resolution of several disputed legal issues. Specifically, because the court held that Keating's status as a parolee allowed for warrantless searches of his person and property on reasonable suspicion of contraband or evidence of parole violations, *see* Pet. App. 10a, 16a, the key question for the court was whether the officers had such reasonable suspicion. And in concluding that they did, the court relied primarily on its resolution of these three disputed factual issues.

Most significantly, the court held the strip search and body-cavity inspection justified because "Keating had already tested positive for a prescription drug," "Keating had disobeyed an instruction to remain downstairs," and "Keating had revealed an unauthorized change of address." Pet. App. 16a; *see also* Pet. App. 17a–18a ("even accepting that there is a dispute" about the instruction to remain downstairs, "the circumstances demonstrate that Keating could not be trusted and had broken the rules several times"). Indeed, as Judge Roth noted in

dissent, "[i]f Keating's account [had been properly] credited, the [strip] search had virtually no justification at all." Pet. App. 22a.

The court's holdings concerning the constitutional reasonableness of the searches of 90 Market Street and the handcuffing of Keating likewise turned on the court's resolution of these disputed facts. *See* Pet. App. 13a–14a n.7, 15a & n.8 (property searches justified by urine test results and residence change); Pet. App. 19a (handcuffing justified by defiance of order to stay downstairs and evidence of "several parole violations"). But for the Third Circuit's improper fact finding, this case may very well have been decided differently.

3. Keating recognizes that this Court is not equipped to engage in routine error correction, but respectfully submits that summary reversal is warranted here. This Court has not hesitated to exercise its summary-reversal authority to correct serious and obvious errors, especially those that misapply the rules of procedure to short-circuit adjudication of constitutional-tort and other civil-rights actions. *See, e.g.*, *Tolan*, 134 S. Ct. at 1868 (summarily reversing in Fourth Amendment case to correct "clear misapprehension of summary judgment standards"); *Johnson v. City of Shelby*, 135 S. Ct. 346 (2014) (per curiam) (summarily reversing dismissal of complaint for due-process violations based on plaintiff's failure to expressly invoke § 1983); *Wilkins v. Gaddy*, 130 S. Ct. 1175 (2010) (per curiam) (summarily reversing in Eighth Amendment case dismissal of complaint for failure to plead more than de minimis injury); *Erickson v. Pardus*, 127 S. Ct. 2197, 2198 (2007) (summarily reversing in Eighth

Amendment case because "[t]he holding departs in so stark a manner from the pleading standard mandated by the Federal Rules of Civil Procedure"); *Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006) (summarily reversing in employment-discrimination case for misapplication of Rule 50(b)).

Indeed, this case is remarkably similar to *Tolan*, where, just three Terms ago, this Court summarily reversed the Fifth Circuit's misapplication of the summary-judgment standards in a § 1983 action alleging Fourth Amendment violations. In *Tolan*, the Fifth Circuit upheld a grant of summary judgment to an officer who had shot the plaintiff based mainly on the officer's testimony that the site of the shooting had been dimly lit, the suspect's mother had refused an order to remain quiet and calm, the suspect had made a verbal threat, and the suspect was moving to intervene in the officer's handling of the mother. 134 S. Ct. at 1865. This Court summarily reversed because the officer's testimony was contradicted by testimony of other witnesses that the site of the shooting was not in darkness, that the suspect's mother was neither aggravated nor agitated, and that the suspect was not behaving in a threatening manner nor moving to intervene. *Id.* at 1866–67. "The witnesses on both sides come to th[e] case with their own perceptions, recollections, and even potential biases," this Court emphasized, and "[i]t is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system." *Id.* at 1868.

Here, too, Coslett's testimony concerning Keating's morphine test, alleged disregard of officer instructions, and supposed statements to the officer

about his residence—all credited by the Third Circuit—was significantly contradicted by the testimony of Keating and other witnesses. As in *Tolan*, the record here "lead[s] to the inescapable conclusion that the court below credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion." *Id.* at 1867–68. And, as in *Tolan*, intervention is appropriate "because the opinion below reflects a clear misapprehension of summary judgment standards in light of [this Court's] precedents." *Id.* at 1868.[2]

Moreover, like *Tolan*, this case involves the troubling tendency of some lower courts to overly credit officer testimony in criminal and civil-rights matters. *See* Carol A. Chase, *Rampart: A Crying Need To Restore Police Accountability*, 34 Loy. L.A. L. Rev. 767, 769–73 (2001) ("[T]he courts too often accept as true the exaggerated or perjured testimony of police officers testifying at suppression hearings."); Morgan Cloud, Essay, *The Dirty Little Secret*, 43 Emory L.J. 1311, 1321–24 (1994) (discussing reasons why, in search and seizure cases, "[w]hen judges must decide whom to believe, … they usually opt to

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[2] *Tolan* involved a decision on qualified immunity, but the rule that the Fifth Circuit misapplied was "not … specific to qualified immunity." *Id.* at 1866. Nor did it matter that "other facts might contribute to the reasonableness of the officer's actions as a matter of law." *Id.* at 1868. Vacatur and remand were appropriate so that the Fifth Circuit could make that determination in the first instance "when [the plaintiff's] evidence is properly credited and factual inferences are reasonably drawn in his favor." *Id.* That same result is required here.

believe law enforcers rather than lawbreakers"). This tendency may be one reason why summary judgment is granted disproportionately to dismiss civil-rights cases. *See* Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. Pa. L. Rev. 517, 548–49 (2010) (discussing Federal Judicial Center studies). But when courts place a thumb on the government's side of the scale in cases involving confrontations between officers and members of the public, they undermine confidence in the legal system and respect for the rule of law.

For these reasons, it is particularly appropriate for the Court to exercise its supervisory authority over the circuit courts in cases like this one. Accordingly, the Court should summarily reverse (or vacate) the decision below and remand for further proceedings consistent with application of the appropriate summary-judgment standards.

II. THE COURT SHOULD REVIEW THE CONSTITUTIONALITY OF THE WARRANTLESS STRIP SEARCH AND BODY-CAVITY INSPECTION

Apart from the Third Circuit's misapplication of the summary-judgment standards, this case warrants review because of the gravity of the privacy interests at stake as a result of the court's legal rulings. The decision below rubber-stamped a warrantless, non-custodial strip search and body-cavity inspection conducted with disputed justification, under the gaze of two observers, and in absence of the safety concerns of the prison setting. This authorization of such a gross invasion of

privacy, potentially affecting millions of parolees and probationers, merits the attention of the Court.

Moreover, in holding the warrantless strip search and body-cavity inspection constitutionally reasonable, the Third Circuit made two separate legal errors. First, it concluded that a warrant was not required because Keating's parole conditions provided for warrantless "personal search[es]." But in doing so the court neglected to consider whether—and thus failed to realize that—(i) this parole condition lacks the clarity necessary to validly diminish a parolee's reasonable expectations of privacy vis-à-vis strip searches and, regardless, (ii) the government's interest in supervising parolees fails to outweigh the severity of this particular intrusion. And, second, it improperly took from the jury the power to decide whether the strip search was conducted in an unconstitutionally abusive manner.[3]

A. Warrantless Strip Searches Raise Questions of Exceptional Importance

Strip searches, especially those coupled with body-cavity inspections, are "uniquely" serious intrusions upon personal privacy rights. *Hartline v. Gallo*, 546 F.3d 95, 102 (2d Cir. 2008). That is because such searches force an individual to expose intimate parts

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[3] These issues are worthy of the Court's plenary review. However, if the Court chooses to summarily return the case to the Third Circuit for further proceedings consistent with the appropriate summary-judgment standards, *see supra* Part I, then Keating respectfully requests that it also reject the Third Circuit's perfunctory analysis of these issues and instruct that court to address in the first instance the considerations discussed herein.

of his or her body that our society recognizes will often be withheld from all but medical professionals and one's most intimate acquaintances. A "strip search, regardless how professionally and courteously conducted, is [therefore] an embarrassing and humiliating experience." *Boren v. Deland*, 958 F.2d 987, 988 n.1 (10th Cir. 1992). Indeed, "one of the clearest forms of degradation in Western Society is to strip a person of his clothes." *Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994) (quoting 3 *Privacy Law and Practice* 25.02[1] (George B. Trubow ed., 1991)).

As then-Judge Breyer has noted, "all courts that have considered the issue [have recognized] the severe if not gross interference with a person's privacy that occurs when [officers] conduct a visual inspection of body cavities." *Arruda v. Fair*, 710 F.2d 886, 887 (1st Cir. 1983); *see also Thompson v. City of Los Angeles*, 885 F.2d 1439, 1446 (9th Cir. 1989) ("The feelings of humiliation and degradation associated with forcibly exposing one's nude body to strangers for visual inspection is beyond dispute."); *Jones v. Edwards*, 770 F.2d 739, 742 (8th Cir. 1985) ("intrusive, depersonalizing, and distasteful"); *Chapman v. Nichols*, 989 F.2d 393, 396 (10th Cir. 1993) ("thoroughly degrading and frightening"); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983) ("demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission"). For these reasons, this Court has recognized that "[t]he meaning of [a strip search], and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own."

Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364, 377 (2009).

The decision below authorizes *warrantless* strip searches of parolees (and probationers). The court's reasoning, if followed nationally, would potentially subject millions of individuals to these uniquely intrusive searches without the protection against arbitrary action that the warrant requirement affords. By 2015, there were more than 4.7 million adult parolees and probationers living in the United States. Danielle Kaeble et al., Bureau of Justice Statistics, U.S. Dep't of Justice, *Probation and Parole in the United States*, *2014* at 2 tbl. 1 (2015). The overwhelming majority, nearly 4.6 million, were state parolees and probationers. *See id.* at 17 app. tbl. 4, 18 app. tbl. 5. And more than 3.6 million of these parolees and probationers live in the thirty-three states, including Pennsylvania, that have parole and probation statutes, regulations, policies, and/or standard conditions containing language similar to the "personal search" provision before the Third Circuit here.[4] Should other courts follow its lead in

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[4] *See* Ark. Code Ann. § 16-93-106(a)(1) ("warrantless search[es] of [parolee's or probationer's] person"); Colo. Rev. Stat. § 17-2-201(5)(f)(I)(D) ("searches of [parolee's] person"); Del. Code Ann. tit. 11, § 4321(d) ("searches of individuals"); 730 Ill. Comp. Stat. 5/3-3-7(a)(10) ("search of [parolee's] person"); Kan. Stat. Ann. § 22-3717(k)(2), (k)(3) (amended May 17, 2016) ("searches of [parolee's] person"); La. Code Crim. Proc. Ann. art. 895(A)(13)(a) ("searches of [probationer's] person"); Mich. Comp. Laws § 791.236(19) ("search of [parolee's] person"); Nev. Rev. Stat. § 176A.410(1)(a) ("search … of [probationer's] person"); N.C. Gen. Stat. § 15A-1374(b)(11) ("warrantless searches … of the parolee's person"); N.D. Cent. Code § 12.1-32-07(4)(n) (probationer must "[s]ubmit [his] person … to search"); Ohio

Rev. Code Ann. § 2967.131(C) (searches of "the person" of the supervisee); Or. Rev. Stat. § 137.540(1)(j) (probation conditioned on "[c]onsent to the search of person"), § 144.270(4)(b)(I) ("consent to a search of the person"); 61 Pa. Cons. Stat. § 6153(d)(1) ("personal search[es]" of parolees); S.C. Code Ann. § 24-21-645(B) ("search … of the parolee's person"); Utah Code Ann. § 77-23-301(1) ("search … of [parolee's] person"); Wis. Stat. § 304.06(1r) ("person released … may be searched"); *In re Disqualification of Tina Holtman*, OAH No. 12-1800-15518-2, 2003 WL 23318768, at *2 (Minn. Off. Admin. Hr'gs Oct. 22, 2003) ("random searches of [probationer's] person"); *Himmage v. State*, 496 P.2d 763, 764–65 (Nev. 1972) (searches of parolee's "person"); *State v. Baca*, 90 P.3d 509, 513 (N.M. Ct. App. 2004) ("warrantless search[es] … of [probationer's] person"); *State v. Turner*, 297 S.W.3d 155, 166, 173 n.2 (Tenn. 2009) ("search, without a warrant, of [parolee's] person"); *Tamez v. State*, 534 S.W.2d 686, 690 (Tex. Crim. App. 1976) (probationer must "[s]ubmit his person … to search"); Fla. Admin. Code Ann. r. 23-21.0165(1)(h)(1) ("search … of [parolee's] person"); Idaho Admin. Code r. 50.01.01.250.03(h) ("search of [parolee's] person"); 220 Ind. Admin. Code 1.1-3-9(b) (parolee's "person … subject to reasonable search"); Mont. Admin. R. 20.7.1101(7) ("probation and parole officer may search [offender's] person"); 270 Neb. Admin. Code § 8-002.02G (2016) ("routine searches of [parolee's] person"); N.H. Code Admin. R. Ann. Par 401.02(b)(9) ("searches of [parolee's] person"); N.J. Admin. Code § 10A:71-6.4(a)(18) ("search … without a warrant of [parolee's] person"); N.Y. Comp. Codes R. & Regs. tit. 9, § 8003.2(d) ("search and inspection of [parolee's] person"); Wash. Admin. Code § 381-40-110(1)(e) ("search of [parolee's] person"); Ariz. Dep't of Corr., *Conditions of Supervision and Release* ¶ 9, https://goo.gl/FVAkPK ("search of my person … at any time, with or without a warrant."); Conn. Bd. of Pardons and Paroles, *Parole Conditions* ¶ 13, http://goo.gl/E6b1AF ("search of your person"); Ga. Bd. of Pardons and Paroles, *General Conditions for Parolees* ¶ 1, http://goo.gl/oU6ip6 ("warrantless search of my person"); Okla. Pardon and Parole Bd., *Policy and Procedures Manual: Executive Parole Revocation Hearings and Waivers* 24, https://goo.gl/DlioTb ("[s]earches ... of the parolee's person").

holding this language sufficient to diminish a parolee's (or probationer's) reasonable expectation of privacy vis-à-vis strip searches, the Fourth Amendment rights of millions beyond the Circuit's borders could be severely compromised.

In sum, given the gravity of the privacy interests at stake and the potentially far-reaching impact of the decision below, review is warranted here.

B. The Court Below Misapplied *Samson v. California*

To protect individuals from arbitrary state action, this Court's cases establish that a search for evidence of wrongdoing is unreasonable absent either a valid search warrant backed by probable cause and issued by a neutral and detached magistrate or the existence of an exception to the warrant requirement. *See, e.g.*, *Riley v. California*, 134 S. Ct. 2473, 2482 (2014). Moreover, in determining whether to exempt a given type of search from the warrant requirement, this Court's cases require a balancing of, on the one hand, the degree to which the search intrudes upon the individual's expectations of privacy and, on the other, the degree to which the exception is needed for promotion of legitimate government interests. *Id.* at 2484; *see also Samson*, 547 U.S. at 853.

In the context of parolees and probationers, this Court has recognized that individuals have diminished expectations of privacy owing to their status. *Samson*, 547 U.S. at 850; *United States v. Knights*, 534 U.S. 112, 121–22 (2001). In *Samson*, the Court upheld a warrantless (and suspicionless) search of a parolee conducted pursuant to a California statute expressly authorizing such

searches as a condition of parole. In doing so, the Court emphasized that it was "salient" that the parole search condition was "clearly expressed" so that the parolee was "unambiguously aware of it." *Id.* at 852; *see also Knights*, 534 U.S. at 119–20 (probation order significantly diminished probationer's expectation of privacy where it "clearly expressed the search condition and [the probationer] was unambiguously informed of it"). Based on the totality of circumstances—"including the plain terms of the parole search condition"—the Court concluded that the parolee did not have a legitimate expectation of privacy vis-à-vis the search at issue. *Samson*, 547 U.S. at 852.

The Court in *Samson* next analyzed the State's "substantial" interest in supervising parolees in order to reduce recidivism and promote their reintegration into society. *Id.* at 853–55. Reasoning that "the Fourth Amendment does not render the States powerless to address these concerns effectively," *id.* at 854 (emphasis omitted), the Court weighed those interests against the invasion of the parolee's privacy and concluded that California's approach was "drawn to meet its needs and [was] reasonable, taking into account a parolee's substantially diminished expectation of privacy," *id.* at 855.

The decision below pays lip service to *Samson*, but does not include any of the analysis that *Samson* requires. The court began by observing that, under *Samson*, parolees may constitutionally be subjected to warrantless searches to the extent such invasions of privacy are imposed as parole conditions under state law. Pet. App. 9a, 14a n.7, 16a (citing *Samson*). And it cited a state statute that it read as authorizing

parole officers to conduct warrantless strip searches of a parolee if they have reasonable suspicion of contraband or evidence of a parole violation. Pet. App. 16a (citing 42 Pa. Cons. Stat. § 9912(d)(1) (authorizing warrantless "personal search" of county parolees)); *see also* 61 Pa. Cons. Stat. § 6153(d)(1) (same for state parolees like Keating).[5] But the court failed to consider whether that purported authorization is "clearly expressed," so that parolees like Keating are "unambiguously aware of it." *Samson*, 547 U.S. at 852. And it neglected, on the other side of the balance, to consider the substantiality of the State's interests. Under the proper inquiry, the warrantless strip search was unconstitutional.

1. The Pennsylvania statute authorizing warrantless searches of parolees upon reasonable suspicion does not mention strip searches, let alone visual body-cavity inspections. Rather, it provides in general terms only that a parole agent may conduct a "personal search of an offender" under specified conditions. 61 Pa. Cons. Stat. § 6153(d)(1); *see also id.* § 6153(b)(1) ("Agents may search the person and property of offenders in accordance with the provisions of this section."). Similarly, the parole agreement executed by Keating refers only to "the search of [his] person, property and residence, without a warrant." Pet. App. 136a.

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[5] The court below mistakenly cited the Pennsylvania statute governing county parolees, 42 Pa. Cons. Stat. § 9912(d)(1), but Keating was a state parolee governed by a different provision of state law, 61 Pa. Cons. Stat. § 6153(d)(1). This error was immaterial because the relevant language—"personal search"—is the same in both statutes.

Such generic language fails to provide parolees with the "clear[]" and "unambiguous[]" notice needed under *Samson* to validly diminish their expectations of privacy concerning strip searches. A reasonable parolee would quite naturally understand these authorizations for a warrantless "personal search" and search of his or her "person" to extend to frisks, pat downs, searches of the garments and pockets, and the like. But in light of the qualitatively greater privacy intrusion occasioned by a strip search, *see supra* pp. 23–25, the "plain terms" of the statute in no way "unambiguously" or "clearly" put parolees on notice that they are also subject to these demeaning and humiliating searches other than in the usual manner: pursuant to either a warrant backed by probable cause or a well-settled exception to the warrant requirement. *See, e.g.*, *Moss v. Commonwealth*, 516 S.E.2d 246, 249 (Va. Ct. App. 1999) (non-parolee's "consent to a search of his person" did "not, without more, justify a strip search or a body cavity search").[6]

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[6] Though the court below purported to apply *Samson*, it also couched its ruling in terms of Keating's "consent." Pet. App. 16a. But *Samson* was not a consent case, *see* 547 U.S. at 852 n.3, and consent in this context is "a 'manifest fiction,'" since "the [parolee] who purportedly waives his rights by accepting such a condition has little genuine option to refuse." *Samson*, 547 U.S. at 863 n.4 (Stevens, J., dissenting) (alteration in original) (quoting 5 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 10.10(b) (4th ed. 2004)). Regardless, Keating's purported "consent" was insufficient for the same reasons the parole search term was insufficient: "[w]aivers of constitutional rights … must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences," *Brady v. United States*,

2. On the other side of the balance, ignored by the court below, the unique intrusiveness of strip searches greatly outweighs whatever additional, marginal value those searches add to the government's interest in supervising parolees to reduce recidivism.

Parole officers have ample tools to further the state's interest in combating the heightened risk of recidivism by parolees, including various warrantless search authorities permitting unannounced drug testing and surprise visits to and searches of a parolee's residence. In the unusual circumstance where those tools prove insufficient—where an officer cannot obtain evidence of suspected parole violations through a search of the parolee's property or a non-strip search (*e.g.*, a pat-down) of a parolee's person, but nevertheless has a reasonable belief that a parolee is hiding contraband in his or her body cavities—the parole officer can secure the evidence by less intrusive means, such as by restraining the parolee and obtaining a warrant. *See, e.g.*, *Missouri v. McNeely*, 133 S. Ct. 1552, 1562–63 (2013) (requiring warrant to take blood from a DUI arrestee and noting that technology allows for expeditious processing of warrants); *Illinois v. McArthur*, 531 U.S. 326, 331–32 (2001) (in upholding warrantless seizure of trailer home, finding it relevant that the police "imposed a significantly less restrictive restraint" to a full-blown search "until a neutral

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397 U.S. 742, 748 (1970), and no reasonable parolee would understand a provision permitting a "personal search" as consent to the invasive, humiliating strip search and body-cavity inspection that occurred here. *See, e.g.*, *Moss*, 516 S.E.2d at 249.

Magistrate, finding probable cause, issued a warrant"); *Toles v. Friedman*, No. 99-4031, 2000 WL 1871683, at *4 (6th Cir. Dec. 11, 2000) (unpublished) (no basis to fear destruction of evidence, warranting a strip search, where "plaintiffs had already been detained at the time of the search and nothing prevented the … detention from extending until a judicial warrant could be obtained").

Nothing in this Court's precedents permitting strip searches of detainees, inmates, and others in the general prison population lends support to the lawfulness of the strip search here, outside of the jail-security context. *See, e.g.*, *Evans v. Stephens*, 407 F.3d 1272, 1279 (11th Cir. 2005) (en banc) (distinguishing investigative strip searches from strip searches related to jail administration). It should go without saying that detention facilities have uniquely compelling safety and security needs justifying extraordinary intrusions upon prisoner privacy. *See Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1515 (2012) ("[t]he difficulties of operating a detention center must not be underestimated"); *id.* at 1520 ("There is a substantial interest in preventing any new inmate … from putting all who live or work at these institutions at even greater risk when he is admitted to the general population."); *Bell*, 441 U.S. at 559 ("A detention facility is a unique place fraught with serious security dangers."). These safety interests are both substantially more compelling and of an entirely different nature than the government's interest in investigating potential parole violations, and simply cannot serve as justifications for warrantless parolee strip searches.

C. The Strip Search Was Unjustified and Conducted in a Constitutionally Unreasonable Manner

The court below erred, moreover, even if warrantless strip searches of parolees are generally reasonable. A jury that accepts Keating's version of the evidence could reasonably find that the specific strip search at issue here was neither justified nor conducted in a reasonable manner, thus rendering it constitutionally unreasonable.

1. Any warrantless searches pursuant to the parole condition imposed on Keating must have been based on reasonable suspicion. 61 Pa. Cons. Stat. § 6153(d). Here, the evidence viewed most favorably to Keating is sufficient to permit a jury to conclude that the officers lacked justification to initiate the strip search because they lacked reasonable suspicion to believe that Keating was carrying or concealing contraband beneath his clothing, between his buttocks, or in his anal cavity. As discussed, the court below found such reasonable suspicion only by crediting Defendants' versions of disputed facts and ignoring Keating's. *See supra* Part I. But, as Judge Roth noted, "[i]f Keating's account [had been properly] credited, the search had virtually no justification at all." Pet. App. 22a.

2. Questions of fact also exist for the jury concerning whether the manner in which the search was conducted was reasonable. It is well-settled that strip searches "must be conducted in a reasonable manner." *Bell*, 441 U.S. at 560; *see also Evans*, 407 F.3d at 1280–81 (considering reasonableness of manner in which a strip search was conducted

separately from reasonableness of initiation of strip search). What is reasonable depends on the facts and circumstances of each search, but the touchstone is that a strip search may not be conducted "in an abusive fashion," *Bell*, 441 U.S. at 560, or "in a harassing manner intended to humiliate and cause psychological pain," *Mays v. Springborn*, 575 F.3d 643, 649 (7th Cir. 2009) (per curiam). Whether a strip search was abusive will depend on various highly fact- and credibility-dependent circumstances surrounding the search, such as an officer's demeaning comments, *id.* at 649, or whether the search was unnecessarily conducted "in full view of … others," *Farmer v. Perrill*, 288 F.3d 1254, 1260 (10th Cir. 2002); *accord Stoudemire v. Mich. Dep't of Corr.*, 705 F.3d 560, 573 (6th Cir. 2013) ("strip search is more invasive when it is performed where other people can see the person being stripped"); *Campbell v. Miller*, 499 F.3d 711, 719 (7th Cir. 2007) ("Courts across the country are uniform in their condemnation of intrusive searches performed in public.").

Applying these standards to the disputed facts at issue here, a jury could find the strip search of Keating unnecessarily abusive. There was little need for an immediate, warrantless strip search, either as part of the parole system generally, *see supra* pp. 32–33, or in relation to the particular facts of this case. On the other side of the equation, the degree of intrusiveness was quite high. Of particular relevance is the fact that the officers refused Keating's request to have the strip search conducted and viewed by his parole officer alone, and instead insisted that Officers Tokar and Houssein crowd into the small bathroom to watch as Keating was forced to undress, bend over,

spread his buttocks, and display and lift his genitals. Pet. App. 90a–92a, 123a. A reasonable jury could agree with Judge Roth that respondents' purported safety concerns were pretextual and unreasonable, given that the officers faced inward, watching Keating strip, rather than outward, watching for a returning Lombardo or other threat. And given that nobody thought Keating was armed or dangerous and Tokar and Houssein were not needed to (and did not) assist with the search, a jury could readily infer that there was no legitimate reason—other than gratuitous humiliation and intimidation—for the officers to insist on Tokar and Houssein's presence. A jury could also find that the search was unnecessarily and unreasonably prolonged. *See* Pet. App. 92a (search took up to ten minutes).

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment below summarily reversed. Alternatively, the petition should be granted and the case set for briefing and argument.

Respectfully submitted,

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July 21, 2016

APPENDIX

APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

No. 14-1840

MARC KEATING,
Appellant

v.

PITTSTON CITY; OFFICER TOKAR; OFFICER
HOUSSEIN; PENNSYLVANIA STATE POLICE;
AGENT COSLETT

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA
(D.C. Action No. 3-11-cv-00411)
District Judge: Honorable Joel H. Slomsky

Argued: October 28, 2015

Before: GREENAWAY, JR., SCIRICA, and ROTH,
Circuit Judges.

(Opinion Filed: March 10, 2016)

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OPINION*

GREENAWAY, JR., *Circuit Judge*.

Plaintiff/Appellant Marc Keating appeals the District Court's entry of summary judgment in favor of Defendants/Appellees on his claims, brought pursuant to 42 U.S.C. § 1983, for unlawful searches and seizure in violation of his Fourth Amendment rights. Appellees are Pennsylvania State Parole Agent Frank Coslett and Pittston City Police Officers Justin Tokar and Maivaun Houssein. For the following reasons, we will affirm.

I. BACKGROUND

A. Factual Background

In 2009, Keating was on parole after his release from state prison and under the supervision of Agent Coslett. The terms of Keating's parole required him to maintain a residence as approved in a home provider agreement. If Keating were to have an unauthorized change of residence, that would be a parole violation. *See* 37 Pa. Code § 63.4(2) (Pennsylvania Parole Code requiring that a parolee "[l]ive at the residence approved by the Board at release and not change residence without the written permission of the parole supervision staff").

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

On the morning of October 14, 2009, Agent Coslett and Keating met at 3 James Street in Pittston for a urine test. 3 James Street, the residence of Keating's parents, was Keating's approved residence for purposes of his home provider agreement. The status of another family-owned property, 90 Market Street, arose during their meeting. Keating had been renovating 90 Market Street and occasionally stayed there overnight. This fact piqued Agent Coslett's interest. Both he and Keating proceeded to 90 Market Street. Agent Coslett intended to search the residence to determine whether Keating was living there without authorization.[1] Once inside 90 Market Street, Agent Coslett observed Francis Lombardo, Keating's cousin, asleep on a couch in the living room, which caused some consternation.[2] In the kitchen, Keating submitted to a field urine test, which tested positive for morphine — a violation of his parole conditions.[3] Keating showed Agent Coslett what he

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[1] At some point — the parties dispute whether it was before or after Agent Coslett entered and searched 90 Market Street — Keating signed a new home provider agreement, seeking to change his approved residence to 90 Market Street.

[2] Agent Coslett testified that, as of October 2009, he knew Lombardo because Lombardo had been suspected of harboring Keating in 2005 when Keating had previously absconded supervision and because Keating had previously told Agent Coslett that he had used drugs with Lombardo.

[3] At oral argument, Keating contended that the positive drug result was in dispute because no documentation of the results had been produced during discovery. However, Keating's own testimony confirms that he submitted to a field urine test and that Agent Coslett told him that the results were positive for morphine. App. 216. Therefore, we find no basis for disputing that Keating's field urine test was positive for morphine.

identified as his bedroom and a second bedroom. A brief search of Keating's bedroom revealed, on a dresser, several personal checks not in Keating's name. Keating claimed that he had found the checks on the side of the road and had intended to give them to his lawyer, but had misplaced them. Agent Coslett also found, while in the kitchen, what he believed to be rum in the fridge — another violation of Keating's parole conditions.

Based on the identified parole violations, Agent Coslett decided to engage in a more complete search of 90 Market Street. Concerned for his safety given that he was outnumbered by Keating and Lombardo, Agent Coslett went outside and called his supervisor for backup. Agent Coslett was directed to request backup from the Pittston Police Department, which in turn dispatched Officers Tokar and Houssein (collectively, "the officers"). The Police Department also advised Agent Coslett that there were no reports of any misplaced or stolen checks.

When Officers Tokar and Houssein arrived at 90 Market Street, Agent Coslett advised them that he was going to search the residence and that Lombardo was inside. The record is unclear on what happened next. According to Agent Coslett, he reentered 90 Market Street with the officers and Keating trailing behind. Agent Coslett realized that Lombardo was gone from the living room, drew his weapon, and went upstairs with one of the officers to look for Lombardo. According to Keating, Officers Tokar and Houssein entered the house shouting for Lombardo, realized Lombardo was gone, drew their weapons, and then all four men went upstairs. According to the officers, when they entered 90 Market Street,

Lombardo was still asleep in the living room and after a brief visit upstairs, they discovered that he had departed and then all four individuals again proceeded upstairs to search for him.

Notwithstanding these varying accounts about the reentry into 90 Market Street, Agent Coslett testified that, after he and the officers realized that Lombardo was gone, he went upstairs believing that Keating had been instructed to remain downstairs with one of the officers. While surveying the upstairs bedrooms for Lombardo, Agent Coslett heard a toilet flush and found Keating in the upstairs bathroom. Suspecting that Keating was attempting to destroy or hide drugs, Agent Coslett ordered him to strip naked. At Agent Coslett's request, Keating bent over, spread his buttocks, and lifted his genitals. Officers Tokar and Houssein stood in the threshold of the bathroom during the search. No one touched Keating. No contraband was found during the strip search.

Agent Coslett handcuffed Keating and sat him in a chair downstairs under the supervision of Officer Houssein. Agent Coslett and Officer Tokar then conducted a more thorough search of the upstairs bedrooms. They found a further violation of Keating's parole conditions: a pellet gun in the second bedroom. After completing the search of the upstairs bedrooms, which took thirty minutes, Agent Coslett removed Keating's handcuffs. Agent Coslett and the officers ultimately departed without taking Keating into custody.

B. Procedural Background

In an Amended Complaint filed in 2011, Keating brought suit pursuant to 42 U.S.C. § 1983 against the

City of Pittston, the Pennsylvania State Police, Agent Coslett, and Officers Tokar and Houssein, alleging illegal searches and seizure in violation of his Fourth Amendment rights. The District Court dismissed the City of Pittston and the Pennsylvania State Police from the case.

Following discovery, both Agent Coslett and the officers filed motions for summary judgment, which Keating opposed. The District Court adopted the Magistrate Judge's Report and Recommendation over Keating's objections, concluded that the record established no Fourth Amendment violations, and granted summary judgment for Agent Coslett and Officers Tokar and Houssein. Keating timely appealed.

II. JURISDICTION AND STANDARD OF REVIEW

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331. We have jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1291.

We exercise plenary review over a district court's grant of summary judgment, applying the same standard as the district court. *NAACP v. N. Hudson Reg'l Fire & Rescue*, 665 F.3d 464, 475 (3d Cir. 2011). Summary judgment may be granted if the moving party demonstrates that there is no "genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). A fact is material if it has "the potential to alter the outcome of the case." *N. Hudson*, 665 F.3d at 475. In determining whether a dispute of fact is genuine, the court must assess whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Belmont v. MB Inv. Partners, Inc.*,

708 F.3d 470, 483 n.17 (3d Cir. 2013) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986)).

When considering whether summary judgment is appropriate, "we view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 265 (3d Cir. 2014) (quoting *Penn. Coal Ass'n v. Babbitt*, 63 F.3d 231, 236 (3d Cir. 1995)). "An inference based upon a speculation or conjecture does not create a material factual dispute sufficient to defeat summary judgment." *Halsey v. Pfeiffer*, 750 F.3d 273, 287 (3d Cir. 2014) (quoting *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 382 n.12 (3d Cir. 1990)). At the summary judgment stage, a court must be mindful to not "weigh the evidence or make credibility determinations." *Id.* (quoting *Petruzzi's IGA Supermarkets v. Darling-Del. Co.*, 998 F.2d 1224, 1230 (3d Cir. 1993)).

III. ANALYSIS

Keating argues that he is entitled to a trial on whether the following were unreasonable warrantless intrusions in violation of the Fourth Amendment: (1) Agent Coslett's entry into 90 Market Street and the initial search of the residence; (2) the reentry and search by Agent Coslett along with Officers Tokar and Houssein; (3) the strip search of Keating; and (4) the handcuffing of Keating. We conclude that Keating has failed to establish genuine disputes of material facts sufficient to defeat summary judgment, and that the District Court properly found that Agent Coslett and Officers Tokar and Houssein are entitled to summary judgment as a matter of law.

A. Keating Has Not Established a Genuine Dispute of Material Fact Regarding the Reasonableness of Agent Coslett's Entry into 90 Market Street and the Initial Search of Those Premises.

Keating claims that Agent Coslett's entry into and initial search of 90 Market Street were unreasonable because Agent Coslett lacked sufficient justification to search the house to confirm whether Keating was residing there in violation of his parole conditions. We disagree.

"The fundamental task of any Fourth Amendment analysis is assessing the reasonableness of the government search." *United States v. Sczubelek*, 402 F.3d 175, 182 (3d Cir. 2005). Whether a search is reasonable under the general Fourth Amendment totality of the circumstances approach "is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Samson v. California*, 547 U.S. 843, 848 (2006); *see United States v. Williams*, 417 F.3d 373, 378 (3d Cir. 2005). Parolees have "severely diminished expectations of privacy by virtue of their status alone" because they consent to restrictive parole conditions such as reporting requirements, travel limitations, and drug testing in exchange for early release from prison. *Samson*, 547 U.S. at 852. By contrast, a state's "overwhelming interest" in supervising parolees to reduce recidivism "warrant[s] private intrusions that would otherwise not be tolerated under the Fourth Amendment." *Id.* at 853.

Therefore, a search of a parolee's residence may be reasonable even if conducted without a warrant and without probable cause. *See United States v. Knights*, 534 U.S. 112, 121 (2001); *Griffin v. Wisconsin*, 483 U.S. 868, 873–74 (1987); *United States v. Hill*, 967 F.2d 902, 909 (3d Cir. 1992).[4] Reasonable suspicion suffices to justify a parole agent's warrantless search of premises that parolees are on or have control of, including a parolee's residence, when an agent reasonably believes that the premises contain evidence of a parole violation. *See United States v. Baker*, 221 F.3d 438, 443–44 (3d Cir. 2000); *Hill*, 967 F.2d at 908–09; 42 Pa. C.S.A. § 9912(d)(2) (authorizing parole agents to conduct "property searches . . . if there is reasonable suspicion to believe that the real or other property in the possession of or under the control of the offender contains contraband or other evidence of violations of the conditions of supervision").[5] An analysis of reasonable suspicion considers, under the totality of the circumstances, whether an official "has a particularized and objective basis for suspecting legal wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 273 (2002).

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[4] Both *Knights* and *Griffin* involved searches of probationers rather than parolees. We treat both situations identically because "there is no constitutional difference between probation and parole for purposes of the [F]ourth [A]amendment [sic]." *Williams*, 417 F.3d at 376 n.1 (quoting *Hill*, 967 F.2d at 909).

[5] A "property search" is defined as a "warrantless search of real property, vehicle or personal property which is in the possession or under the control of the offender." 61 Pa. C.S.A. § 6151. "Real property" is defined as "[a]ny residence or business property of an offender, including all portions of the property to which the offender has access." *Id.*

We conclude that the record is such that a reasonable jury could not return a verdict for Keating, and that Agent Coslett is entitled to judgment as a matter of law, on Keating's challenge to Agent Coslett's initial search of 90 Market Street. It is undisputed that, prior to his search of 90 Market Street, Agent Coslett knew that Keating had been repairing the residence for several months and thus that Keating had access to and control over the family property. In addition, Agent Coslett testified that when he arrived at 3 James Street and asked about the status of 90 Market Street, Keating volunteered that he was living there and had moved over all of his belongings. According to Agent Coslett, when he warned Keating that this change of residence was a parole violation, Keating chose to change his approved address to 90 Market Street and was willing to sign a new home provider agreement. Agent Coslett also stated that he went to 90 Market Street at Keating's request. These facts establish that Agent Coslett reasonably believed that Keating was living at 90 Market Street in violation of his parole conditions and, thus, had reasonable suspicion to believe that 90 Market Street would contain evidence of Keating's unauthorized change of residence. *See Shea v. Smith*, 966 F.2d 127, 131 (3d Cir. 1992) (a probation officer may enter third party home to confirm whether probationer has violated a condition of probation where the officer "reasonably believes" that the probationer resides there). Therefore, we find no violation of the Fourth Amendment based on Keating's decision to search 90 Market Street.

At oral argument, Keating identified certain areas in his deposition testimony as establishing a genuine dispute of material fact regarding whether Agent Coslett had sufficient information on the morning of October 14, 2009 to suspect that Keating had violated his parole conditions by changing his residence without authorization.[6] Although Keating agreed that Agent Coslett inquired about the status of 90 Market Street, in response to whether Keating told Agent Coslett that he was occasionally staying at 90 Market Street Keating testified: "No. I don't recall that I ever told him that"; "I don't believe so, no"; and "I don't recall." App. 225–26. Keating also stated that Agent Coslett never asked whether Keating was staying at 90 Market Street. App. 225.

While mindful that we must not make credibility determinations or weigh the evidence at the summary judgment stage, we find Keating's testimony insufficient to create a genuine dispute of material fact. A lack of memory does not create a genuine dispute because an answer such as "I don't recall" is insufficient evidence to rebut affirmative testimony or at least create "fair doubt." *Cf. Lexington Ins. Co. v. W. Pa. Hosp.*, 423 F.3d 318, 333 (3d Cir. 2005) (citing favorably *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 674 (10th Cir. 1998) (finding no genuine issue of material fact as to whether employer had knowledge of a sexual harassment incident where plaintiff could not

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[6] One citation offered by Keating does not relate to the facts *available to Agent Coslett* on the morning of October 14, 2009. *See* App. 217 (testimony from Keating without reference to whether he told the information to Agent Coslett).

"remember when or exactly what was said" in her discussion with her supervisor)); *Jersey Cent. Power & Light Co. v. Lacey Tp.*, 772 F.2d 1103, 1109 (3d Cir. 1985) (a finding of a genuine dispute means the evidence creates "a fair doubt").

Here, Keating's responses to whether he told Agent Coslett that he was occasionally staying at 90 Market Street are qualified with equivocations such as "I don't recall" or "I don't believe so." Rather than disputing Agent Coslett's detailed account of their discussion, Keating's answers invite speculation as how [sic] Agent Coslett may have learned that Keating was staying at 90 Market Street if Agent Coslett's testimony that Keating told him so is false. Such speculation is insufficient to defeat summary judgment. *Cf. Jackson v. Danberg*, 594 F.3d 210, 228 (3d Cir. 2010) ("Speculation does not create a *genuine* issue of fact; instead, it creates a false issue, the demolition of which is a primary goal of summary judgment.") (quoting *Lexington Ins. Co.*, 423 F.3d at 333). Accordingly, we find no genuine dispute of material fact remains regarding the constitutionality of Agent Coslett's initial search of 90 Market Street.[7]

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[7] Keating also contends that Agent Coslett's search exceeded the scope of its justification and was therefore unreasonable. We again conclude otherwise. Agent Coslett's preliminary search of 90 Market Street was limited to the living room, kitchen, and upstairs bedrooms. Thus, his search was limited to areas over which Keating had access and control and which might contain evidence of whether Keating was in fact residing at 90 Market Street — the suspected parole violation that justified Agent Coslett's search in the first instance. *Cf. Florida v. Royer*, 460 U.S. 491, 500 (1983) (a warrantless search "must be limited in scope to that which is justified by the particular purposes served by the [warrant] exception."). Moreover, before Agent Coslett's

B. The Continued Search of 90 Market Street by Agent Coslett and Officers Tokar and Houssein Was Reasonable.

Keating next challenges as unreasonable the reentry into and further search of 90 Market Street by Agent Coslett and Officers Tokar and Houssein. However, as Keating concedes, his claim fails if we conclude — as we do here — that the search by Agent Coslett and the officers was a reasonable continuation of Agent Coslett's initial search or based on independent, specific facts supporting reasonable suspicion. *See* Appellant's Br. at 27 ("Defendants thus cannot prevail here unless their warrantless re-entry into the home was either a reasonable continuation of the initial search or independently justified by an exception to the warrant requirement."); *Hill*, 967 F.2d at 910 ("[I]t is reasonable to allow a parole officer to search whenever he reasonably believes it is necessary to

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search of the upstairs, Keating's urine tested positive for morphine. A positive drug test by itself has been held to provide reasonable suspicion necessary to support a search of a probationer's residence. *See United States v. Hubbard*, 269 F. Supp. 2d 474, 480 (D. Del. 2003). In support of his impermissible scope argument, Keating points to his testimony that Agent Coslett "tore the place apart" during his initial search. *See* App. 205. However, such "conclusory allegations" are insufficient to oppose summary judgment. *See D.E. v. Cent. Dauphin Sch. Dist.*, 765 F.3d 260, 268–69 (3d Cir. 2014). Keating also cites his testimony that the personal checks were under a textbook rather than in plain view. *See* App. 205. Even if this is true, given the "severely diminished expectations of privacy" of Keating as a parolee, *Samson*, 547 U.S. at 852, we find this testimony insufficient to render the scope of Agent Coslett's search unreasonable.

perform his duties. The decision to search must be based on specific facts.") (internal quotation omitted).

Here, we find Agent Coslett's decision to complete his search of 90 Market Street only when he had sufficient backup to secure his safety to be reasonable. Agent Coslett had reasonable suspicion that he might find evidence of Keating's prescription drug use based on his knowledge of Keating's past prescription drug use and Keating's positive urine test that day. Moreover, once inside 90 Market Street, Lombardo's flight and Keating's presence in the upstairs bathroom provided additional justification for the search of the residence. We find the search reasonable.[8]

C. The Strip Search of Keating Was Reasonable.

We also agree with the District Court that the strip search of Keating was reasonable under the circumstances. The reasonableness of a strip search or visual cavity search is assessed by considering the totality of the circumstances, including "the scope of

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[8] Keating also argues that Officers Tokar and Houssein entered 90 Market Street with an impermissible purpose of pursuing Lombardo. As we have explained, "inquiries into the purpose underlying a [parole] search are themselves impermissible." *Williams*, 417 F.3d at 378 (citing *Knights*, 534 U.S. at 122). Rather, a search of a parolee's property is subject to "ordinary Fourth Amendment analysis" of the totality of the circumstances. *Id.* If Agent Coslett, the parole agent, had reasonable suspicion that evidence of parole violations existed within 90 Market Street, then entry by Agent Coslett and the officers was reasonable. Moreover, even if we considered Keating's assertion, we find it to be an unreasonable inference based on the totality of the circumstances.

the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *See Bell v. Wolfish*, 441 U.S. 520, 559 (1979) (holding that prison officials may conduct visual body cavity searches in a reasonable manner).

We reiterate that Keating, as a parolee, had diminished privacy rights by virtue of his prior consent to warrantless personal searches by parole agents based on reasonable suspicion. *See Samson*, 547 U.S. at 852; 42 Pa. C.S.A. § 9912(d)(1) (authorizing a parole agent to conduct a personal search of a parolee "if there is a reasonable suspicion to believe that the [parolee] possesses contraband or other evidence of violations of the conditions of supervision"). As to the justification for initiating the strip search, Agent Coslett reasonably believed that Keating was attempting to destroy or hide contraband or drugs to prevent discovery during the ongoing search because: Agent Coslett had an underlying heightened level of suspicion because Keating had revealed an unauthorized change of address; Agent Coslett believed that Keating had disobeyed an instruction to remain downstairs; Keating had already tested positive for a prescription drug; Lombardo, whom Agent Coslett knew to have a history of drug use with Keating, had left the house during Agent Coslett's initial search; and Agent Coslett and the officers had begun to more thoroughly search the bedrooms. *See Richmond v. City of Brooklyn Ctr.*, 490 F.3d 1002, 1009 (8th Cir. 2007) (where police had reasonable suspicion that individual was concealing evidence on his person, exigent circumstances justified a "private, hygienic

and non-abusive strip search on the spot, rather than risk [the individual] disposing of the evidence during the course of his transportation to the police station"); *Burns v. Loranger*, 907 F.2d 233, 237–38 (1st Cir. 1990) (finding exigent circumstances justifying a strip search where individual had no opportunity to dispose of any drugs concealed on her person after the police arrived, "which surely would augment the legitimate concerns of an experienced officer that [the individual's] requests to use the bathroom were not prompted by the call of nature, but the desire to be alone").

As to the manner in which the strip search was conducted, neither Agent Coslett nor the two male officers touched Keating during the strip search, which took place in the privacy of Keating's home. *See Richmond*, 490 F.3d at 1008 (law requires that officers of the same sex conduct strip search "in an area as removed from public view as possible without compromising legitimate security concerns"); *Polk v. Montgomery Co., Md.*, 782 F.2d 1196, 1201–02 (4th Cir. 1986) ("Whether the strip search was conducted in private is especially relevant in determining whether a strip search is reasonable under the circumstances.").

The Dissent first contends that summary judgment is barred by a dispute about whether Agent Coslett ordered Keating to remain downstairs. We disagree with the Dissent as to Keating's testimony on the issue but, even accepting that there is a dispute, we view the strip search in the totality of the circumstances. Here, the circumstances demonstrate that Keating could not be trusted and had broken the rules several times, leading a reasonable person to

believe that Keating was hiding something on his person when Agent Coslett found him.

The Dissent also argues that Keating's constitutional rights were impinged when Agent Coslett conducted the strip search in the presence of the two police officers. However, we find that Agent Coslett conducted the search in sufficient privacy, given that it was conducted only in the presence of male police officers who were there for Agent Coslett's safety. *Cf. Amaechi v. West*, 237 F.3d 356, 361–62 (4th Cir. 2001) (finding strip search of arrestee unreasonable where it was conducted in front of arrestee's home, subject to viewing by the public). Despite the protestations of my colleague in dissent, we find that the conditions of Keating's strip search were not abusive or humiliating.

Under the totality of the circumstances, our view remains that there was no constitutional violation.

D. The Seizure of Keating Was Reasonable.

Finally, we conclude that the brief seizure of Keating through handcuffing was reasonable under the circumstances. Reasonableness of a seizure is "determined by balancing 'the need of law enforcement officials against the burden on the affected citizens and considering the relation of the [officer's] actions to his reason for [seizing] the [individual].'" *Vargas v. City of Phila.*, 783 F.3d 962, 970 (3d Cir. 2015) (quoting *Baker v. Monroe Twp.*, 50 F.3d 1186, 1192 (3d Cir. 1995)). Here, the handcuffing of Keating for thirty minutes was a limited burden. *See Muehler v. Mena*, 544 U.S. 93, 99 (2005) (concluding that officers' handcuffing of occupant for two to three hours was a "marginal

intrusion"). On the other hand, there was a clear need for the restraint given that: Lombardo had previously left the house; Agent Coslett had found evidence of several parole violations and a potential crime; and Agent Coslett believed that Keating had previously disregarded an instruction to remain downstairs while he searched upstairs.

Balancing these considerations, we conclude that the brief seizure of Keating was reasonable. *See id.* (concluding that handcuffing of occupant for two to three hours was reasonable during a search of individual's house for weapons); *Torres v. United States*, 200 F.3d 179, 186 (3d Cir. 1999) (handcuffing of a suspect was reasonable where officers feared destruction or concealment of evidence).

IV. CONCLUSION

For the foregoing reasons, we will affirm the judgment of the District Court.

ROTH, *Circuit Judge*, dissenting.

The privacy interests protected by the Fourth Amendment exist on a spectrum. At one end are the petty intrusions we all must endure by virtue of modern life, such as emptying one's pockets at the airport. At the other are those intrusions that can leave the subject feeling violated. Strip searches, the Supreme Court has held, are among the most intrusive searches the government can undertake.[1]

My colleagues believe that forcing Keating to disrobe and expose his most intimate areas to his parole officer and two police officers was "reasonable under the circumstances." Were this case before us after a jury trial, where facts had been found and the credibility of witnesses weighed, I might agree. Yet, this matter is before us on summary judgment and the circumstances under which this search occurred are in considerable dispute. As such, I must respectfully dissent in part.[2]

Keating contends that he was ordered upstairs and strip searched almost immediately after he and Coslett entered the Market Street house for the second time. Coslett contends that the search occurred later, after he had ordered Keating to stay downstairs while he and another officer searched the second floor of the house. According to Coslett, it was only after Keating "disobeyed" this instruction that Coslett ordered the strip search. Neither Tokar nor Houssein nor Keating recall Coslett's instruction.

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[1] *Bell v. Wolfish*, 441 U.S. 520, 558–59 (1979).

[2] While I dissent as to the reasonableness of the strip search, I join my colleagues' well-reasoned opinion in all other respects.

Given the considerable dispute as to whether this instruction was given and the way Coslett relies on Keating's alleged disobedience to justify his search, I find the record too murky to warrant summary judgment.

Even more troubling, I find all four of the factors the Supreme Court identified in *Bell* to be used in evaluating the reasonableness of strip searches to militate against a finding of reasonableness here. Notably, the search subjects in *Bell* were prisoners in state custody, whose privacy expectations were considerably lower than Keating's.[3] Yet, even for prisoners, the Supreme Court held that strip searches with a visual body cavity inspection, the same search to which Keating was subjected, were not presumptively reasonable and courts must be careful "not to underestimate the degree to which these searches may invade the personal privacy" of those being searched.[4] Thus, taking the facts in the light most favorable to Keating, the first factor, the scope of the particular intrusion, does not favor a finding of reasonableness.

The second element, the manner in which the search was conducted, is equally concerning. Keating contends that he asked Coslett to perform the search in private, with only Keating and Coslett present. Coslett denied the request and, instead, performed the search with the bathroom door open and Houssein and Tokar facing inward, watching. Although Coslett cited safety concerns as justifying

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[3] *See Bell*, 441 U.S. at 559.

[4] *Bell*, 441 U.S. at 560.

this manner of search, noting the sudden disappearance of Lombardo, Coslett did not have similar safety concerns when he brought Keating to the Market Street residence, searched it, and conducted a urinalysis test, all without backup and with Lombardo in the house. Moreover, if officer safety were truly at issue, it defies reason to believe that the three officers were safer watching Keating disrobe and lift his genitals than allowing Coslett to search Keating in private while the other two officers faced outwards, watching for Lombardo's return or the emergence of another threat.

The third element, the justification for the search, is the subject of considerable dispute, as noted above. If Keating's account is credited, the search had virtually no justification at all. As for the fourth element, the place in which the search was conducted, a private home with three law enforcement officers present, is a far cry from the prison lockup in *Bell*, where the location of the strip search favored a reasonableness finding.

In *Bell*, the Supreme Court noted that, even in prisons, strip searches can be conducted in "an abusive fashion" and that such "abuse cannot be condoned." [5] Viewing the totality of the circumstances in the light most favorable to Keating, Coslett's strip search of Keating could be interpreted as just such an abuse, designed to humiliate Keating. Consequently, I would hold that there are sufficient disputes of material factual issues to send Keating's Fourth Amendment claim regarding his strip search

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[5] *Id.*

to a jury. Therefore, as to this claim, I must respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MARC KEATING, Plaintiff, v. FRANK COSLETT, et al., Defendants.	CIVIL ACTION NO. 11-0411

OPINION

Slomsky, J. **March 19, 2014**

I. INTRODUCTION

This case arises out of an October 2009 incident in which a Pennsylvania state parole agent and two police officers allegedly entered the home of the father of Marc Keating ("Plaintiff" or "Keating"), searched the home, and then handcuffed and strip searched Keating, who was present in the house. As a result of these events, on October 14, 2011, Keating filed a pro se Amended Complaint against the City of Pittston, Pennsylvania State Parole Agent Frank Coslett ("Agent Coslett"), Pittston City Police Officer Justin Tokar ("Officer Tokar") and Pittston City Police Officer Maivaun Houssein ("Officer Houssein") (collectively referred to as "Defendants").

In the Amended Complaint, Plaintiff alleges that his Fourth Amendment rights were violated by Defendants' entry of the home and the ensuing search and seizure of Plaintiff, all pursuant to 42 U.S.C. § 1983.[1] (Doc. No. 18.) On April 30, 2013, Officer Tokar and Officer Houssein filed a Joint

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[1] On March 3, 2011, Plaintiff filed his original pro se Complaint. (Doc. No. 1.) In that Complaint, Plaintiff alleged that: 1) Officers Tokar and Houssein violated his Fourth Amendment rights by entering his father's house at 90 Market Street; 2) Officers Tokar and Houssein violated his Fourth Amendment rights by searching and seizing him; and 3) The City of Pittston failed to train its officers and was therefore liable for their misconduct under *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978). (*Id.*) Plaintiff did not raise any claims against Agent Coslett at this time. On March 21, 2011, United States Magistrate Judge Thomas M. Blewitt issued a Report, recommending that all of Plaintiff's claims be dismissed. (Doc. No. 10.) On April 18, 2011, after considering Plaintiff's objections, this Court adopted and approved the Magistrate Judge's Report and Recommendation, dismissing the Complaint. (Doc. No. 14.) Plaintiff was not given leave to amend the Complaint, and he appealed to the Third Circuit.

On October 5, 2011, the Third Circuit affirmed in part and vacated in part the Court's judgment, remanding the case for further consideration. (Doc. No. 17.) Specifically, the Court of Appeals found that Plaintiff should have been permitted to amend his claim that Officers Tokar and Houssein violated his Fourth Amendment rights when they entered his father's house. (Doc. No. 19-1 at 4.) The Third Circuit also noted that Plaintiff should have been given leave to amend his illegal search and seizure claim to include one against Agent Coslett and to add several allegations about Officer Tokar's involvement in the alleged search and seizure. (*Id.* at 4-5.) The Third Circuit affirmed the District Court's judgment with respect to Plaintiff's other claims, including all claims against the City of Pittston. Thereafter, Plaintiff retained private counsel to represent him in this case.

Motion for Summary Judgment, seeking dismissal of the remaining claims against them. (Doc. No. 45.) The same day, Agent Coslett also filed a Motion for Summary Judgment, seeking dismissal of the claims against him. (Doc. No. 49.) Plaintiff opposed the Motions. (Doc. Nos. 56-57.) On January 27, 2014, the Magistrate Judge assigned to the case issued a Report, recommending that Defendants' Motions for Summary Judgment be granted. (Doc. No. 61.) Plaintiff filed timely objections to the Magistrate Judge's Report and Recommendation, and those objections are now before the Court for consideration.[2] (Doc. No. 68.)

II. FACTUAL BACKGROUND

The following factual account is taken from the Magistrate Judge's Report and Recommendation:

> Defendant Frank Coslett is a Pennsylvania State Parole agent based out of the Scranton district office. (Doc. 58-2, p. 3). Defendant Justin Tokar, at all relevant times, was a police officer with the Pittston Police Department. Defendant Maivaun Houssein, at all relevant times, was a police officer for the Pittston Police

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[2] For purposes of this Opinion, the Court has considered the Amended Complaint (Doc. No. 18), Defendants Tokar and Houssein's Joint Motion for Summary Judgment with related filings (Doc. Nos. 45-47, 60), Defendant Coslett's Motion for Summary Judgment with related filings (Doc. Nos. 49-51), Plaintiff's Responses in Opposition to the Motions (Doc. Nos. 56-59), Defendants Tokar and Houssein's Joint Reply in Further Support of the Motion (Doc. No. 60), the Report and Recommendation of United States Magistrate Judge Karoline Mehalchick (Doc. No. 61), and Plaintiff's objections to the Report and Recommendation (Doc. No. 68).

Department. Plaintiff, Marc Keating, is an individual who, at all relevant times, was subject to parole supervision as a result of a criminal conviction and had an approved residence listed with the Pennsylvania Board of Probation and Parole as 3 James Street, Pittston, Pennsylvania. (Doc. 50-2, p. 38).

The conditions of Keating's parole included that his approved residence may not be changed without the written permission of the parole supervision staff. (Doc. 50-2, pp. 37, 52; Doc. 48-2, p. 3). Additionally, the conditions of Keating's parole include an express consent by Keating "to the search of [his] person, property and residence, without a warrant by agents of the Pennsylvania Board of Probation and Parole." (Doc. 50-2, p. 52). Special conditions were also attached to Keating's parole, including that he "shall submit to urinalysis testing" and "achieve negative results in screening tests ... for the presence of controlled substances or designer drugs..." and that he "shall not consume or possess alcohol under any condition for any reason." (Doc. 50-2, p. 53).

The Home Provider Agreement gives the parole supervision staff the right to search the residence at any time when reasonable suspicion exists that conditions of supervision have been violated. (Doc. 50-2, p. 51). Additionally, the Home Provider Agreement signed for the 90 Market Street residence [3]

[3] The 90 Market Street residence is Keating's father's residence where Keating alleges the civil rights violations occurred.

prohibits Keating from living in a residence with firearms, including look-alike firearms such as air rifles, starter pistols or toy guns. (Doc. 50-2, p. 51). When he signed the Home Provider Agreement on October 14, 2009, Keating agreed to these conditions.

Pennsylvania State Parole Agents have to approve the home plan. Parolee must have an approvable site to go to. (Doc. 58-2, p. 6). Agent Coslett believes that, as an agent, he has the power to take custody of a person and incarcerate them, and further that ... he has the right to enter a parolee's residence if he has reasonable suspicion to believe that conditions of parole have been violated. (Doc. 58-2, pp. 6-8). If a parolee wishes to change anything on his home plan, including his approved residence, he needs to make a request of his agent, who would then conduct an investigation to approve the change. (Doc. 58-2, p. 7).

The undisputed facts in the record are as follows: On [the] morning of October 14, 2009, Agent Coslett telephoned Keating to tell him he needed to collect a urine sample from him, and then proceeded to Keating's approved residence at 3 James Street. (Doc. 58-2, p. 10; Doc. 50-2, p. 39). Agent Coslett asked Keating where he was living, and Keating told him that he was living at 90 Market Street, and that all his belongings were there and that he was fixing it up. (Doc. 58-2, p. 10). The utilities were in Keating's name at the 90 Market Street residence, and he received mail there for the utilities. (Doc. 50-2, p. 40). Keating testified at his deposition that

the residence at 3 James Street was his primary residence, but that he also resided at 90 Market Street from 2007 until April 2012. (Doc. 50-2, p. 24). Keating testified that he was staying at 90 Market Street, on average once or twice a week. (Doc. 50-2, p. 48). Keating further testified in the same deposition that he had been primarily sleeping at the 3 James Street residence, but that he signed the new home agreement letter because Agent Coslett told him he would get "jammed up" if he did not sign it. (Doc. 50-2, p. 40). Agent Coslett informed Keating that staying at 90 Market Street was a violation of his parole because it was not his approved residence, and asked him if he wanted to stay at the Market Street address, and if that is where Keating wished to have his approved residence. (Doc. 58-2, p. 10).

Following the meeting at 3 James Street, Agent Coslett drove to the Market Street residence and met Keating, who had walked to the location. It is unclear from the record as to when Agent Coslett had Keating sign a new Home Provider Agreement for the 90 Market Street residence. Agent Coslett testified that he retrieved a home provider agreement letter and Keating signed the same prior to asking Keating to show him around the Market Street residence, which Keating agreed to do. (Doc. 58-2, p. 10). Keating testified that Agent Coslett presented him with the home agreement letter *after* Agent Coslett had searched the house for the first time, but before Tokar and Houssein got there. (Doc. 50-2, 35). Regardless, the home provider

agreement letter doesn't address the violation of changing residence without permission; rather, it addresses to Keating what the rules of the residence will be if he was going to live at the residence. The agreement was signed at 9:13 a.m. (Doc. 58-2, p. 12).

Agent Coslett testified that he had reasonable suspicion to search the residence at 90 Market Street because of the change in residence without permission, which was a violation of Keating's conditions of parole. At the time Agent Coslett called the Pittston Police Department, he intended to conduct a parole search of the Market Street residence. A parole search is a warrantless search that can be conducted by an agent whenever there exists reasonable suspicion that conditions of parole have been violated. (Doc. 58-2, p. 15).

At some point Agent Coslett secured a urine sample from Keating, which tested positive for morphine. (Doc. 58-2, p. 11). Keating told Agent Coslett he had used his mother's prescription without her permission, which was a violation of his parole. (Doc. 58-2, p. 11). Agent Coslett began his first search of the Market Street residence, with Keating showing him through the house. Francis Lombardo[4] was sleeping on the living room couch. (Doc. 58-2, p. 11).

Agent Coslett testified that he called his supervisor to advise him of the situation and to

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[4] Francis Lombardo is Plaintiff's cousin.

ask if there were any other agents in the area to assist him in searching the residence. His supervisor advised him that there were none in the area but to call the police for officer presence. (Doc. 58-2, p. 12). Agent Coslett also called the Pittston Police Department to request that an officer be dispatched to the Market Street residence as an officer safety precaution. (Doc. 58-2, pp. 11-13).

When Officers Tokar and Houssein arrived, Agent Coslett advised them that he was going to conduct a search and that Francis Lombardo was sleeping on the couch. At this point, the record is unclear as to what happened next. Agent Coslett testified that when he and the officers walked into the living room, Agent Coslett noticed that Lombardo had left. (Doc. 58-2, p. 16). Officers Tokar and Houssein testified that Lombardo was asleep on the couch when they entered the room, but that he was gone when they came back downstairs. (Doc. 58-2, pp. 24, 27, 33). Keating testified that Officers Tokar and Houssein went in the house first and started shouting "Gupper's gone" which prompted he and Agent Coslett to reenter the house, at which point Officers Tokar and Houssein both had their guns drawn. (Doc. 50-2, p. 28). Officer Houssein and Officer Tokar testified that they never drew their guns during the entire incident. (Doc. 58-2, pp. 24, 37).

Keating's whereabouts during the search of the residence by the officers and Agent Coslett are also in dispute. Keating testified that Agent Coslett instructed him to sit on the chair while

one of the officers watched him while Agent Coslett and the other officer went to the second floor to make sure that Lombardo did not go up there. Officer Houssein testified that Keating came upstairs with him during the search. (Doc. 58-2, p. 35). Agent Coslett testified that he drew his gun at this point. (Doc. 58-2, p. 16).

Once Agent Coslett cleared the bathroom and the bedroom where Keating stayed, he heard a toilet flush. Officer Houssein testified that he was downstairs with Agent Coslett and Officer Tokar when they heard the toilet flush and that they went upstairs to see what was going on. (Doc. 58-2, p. 36). Agent Coslett went back to the bathroom and noticed Keating standing at the bathroom despite having been advised that he was to stay downstairs. Agent Coslett asked him what he was doing and told him he failed to follow the instruction to stay downstairs. He then proceeded to handcuff Keating. Agent Coslett asked Keating if he had any drugs on him. Keating said no, but Agent Coslett proceeded to search him for "obvious concerns." (Doc. 58-2, p. 16). Agent Coslett removed Keating's clothing, searched him, placed all his clothing back on him, re-handcuffed him and he was taken back downstairs for observation by Officer Houssein. During the search of Keating's person by Agent Coslett, Officers Houssein and Tokar stood in the doorway or immediately outside the bathroom. (Doc. 58-2, pp. 17, 26; Doc. 50-2, p. 29). Neither Officer Tokar, Officer Houssein nor Agent Coslett touched Keating during the search, which lasted

between five and ten minutes. (Doc. 50-2, p. 29). Officer Houssein took Keating downstairs and he stayed with Keating while Agent Coslett finished his search. (Doc. 58-2, p. 37).

At some point during one of the searches, Agent Coslett found a number of checks in Keating's bedroom made out to a Nicholas D'Amico. The name on the checks was not Keating. (Doc. 58-2, p. 11). Officers Houssein and Tokar both testified that Agent Coslett found the checks while they were present, but Agent Coslett recalled finding the checks during his initial search. (Doc. 58-2, pp. 26, 38). Agent Coslett questioned Keating about the checks and Keating told them he found them on the road but had forgotten to give them to his lawyer. (Doc. 58-2, p. 11). Agent Coslett also opened the refrigerator and saw what he believed to be alcohol, a parole violation. Keating asserts that what Coslett found was just mojito mix, and not alcohol. (Doc. 58-2, p. 11; Doc. 50-2, pp. 39-40).

In his second search, accompanied by the officers, Agent Coslett looked under the mattress and went through the dresser. He did not find anything of significant parole noteworthiness. (Doc. 58-2, p. 18). Officer Tokar described the search as "very controlled." (Doc. 58-2, p. 27). In the second bedroom, that which was used by Lombardo, Agent Coslett found prescription pills and a pellet gun, another violation of Keating's parole conditions. (Doc. 58-2, pp. 18-19; Doc. 50-2, p. 30).

> After the search was completed, the handcuffs that had been placed on Keating were removed. Based on money and work Keating had put towards a degree at Penn State, Agent Coslett and his supervisor made the decision to sanction Keating for his parole violations and order him to the office for a supervisory conference the following week. Additionally, Keating was placed on a 6 p.m. curfew, but he was allowed to reside at the Market Street residence. (Doc. 58-2, p. 19).
>
> Officers Tokar and Houssein never took Keating to the police station, and never put him in a police vehicle. (Doc. 50-2, p. 25). They did file charges against him by criminal complaint, for five counts of receiving stolen property. (Doc. 50-2, p. 26). Keating eventually plead [sic] guilty to these charges on December 9, 2009. (Doc. 50-2, pp. 27, 50).

(Doc. No. 61 at 2-8 (emphasis in original).)

III. STANDARD OF REVIEW

Pursuant to 28 U.S.C. § 636(b)(l)(B) and the local rules of this Court, a district judge may designate a magistrate judge to file proposed findings and recommendations. Any party may file written objections in response to those findings. *Id*. § 636(b)(1)(C). In the Middle District of Pennsylvania, Local Rule 72.3 governs Plaintiff's objections to the Magistrate Judge's Report and Recommendation. Under this Rule, Plaintiff "shall specifically identify the portions of the proposed findings, recommendations or report to which objection is

made and the basis for such objections." Local R. Civ. P. 72.3.

Once objections are filed, the 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. [The judge] may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). The Third Circuit has "assumed that the normal practice of the district judge is to give some reasoned consideration to the magistrate [judge's] report before adopting it as the decision of the court." *Henderson v. Carlson*, 812 F.2d 874, 878 (3d Cir. 1987); *see also Bolt v. Strada*, No. 12-1599, 2013 WL 4500466, at *1 (M.D. Pa. Aug. 21, 2013).

IV. ANALYSIS

Plaintiff filed objections to the Magistrate Judge's Report and Recommendation, arguing that the Magistrate Judge did not apply the correct summary judgment standard. Specifically, Plaintiff contends that in recommending that Defendants' Motions for summary judgment be granted, the Magistrate Judge resolved factual disputes in favor of the moving parties, rather than Plaintiff. (Doc. No. 68 at 3.) In her Report, the Magistrate Judge correctly noted the relevant summary judgment standards. (Doc. No. 61 at 8-9.) Importantly, in deciding a motion for summary judgment, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts arejury functions, not those of a judge.... The evidence of the non-movant is to be believed, and all justifiable inferences

are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The question here is whether the Report and Recommendation properly construes the facts in a light most favorable to Plaintiff. The Court concludes that all three Defendants are entitled to summary judgment.

1. Plaintiff's Illegal Entry Claim

In Count I of his Complaint, Plaintiff alleges that on October 14, 2009, Defendants Agent Coslett, Officer Tokar and Officer Houssein illegally entered his home without a warrant, in violation of the Fourth Amendment. (Doc. No. 18 at 7-8.) The Magistrate Judge correctly noted that under the Fourth Amendment, warrantless searches are presumed unreasonable unless an exception to the warrant requirement applies. (Doc. No. 61 at 9 (citing *United States v. Crutchfield*, 444 Fed. App'x 526, 528 (3d Cir. 2011).) The parole system is one of the exceptions to the warrant requirement. For example, parole agents may conduct warrantless searches of parolees and their residences when reasonable suspicion of a parole violation exists. *United States v. Davilla*, 69 F. App'x 537, 539 (3d Cir. 2003); *United States v. Hill*, 967 F.2d 902, 910 (3d Cir. 1992). In determining whether Defendants violated the Fourth Amendment by entering the residence at 90 Market Street without a warrant, the Magistrate Judge correctly explained that "an officer must have probable cause to believe that a parolee is a resident of the house to be searched, but only needs reasonable suspicion to search a property to determine if a probationer violated the terms and conditions of his probation by failing to obtain approval before changing his residence." (Doc. No. 61

at 13) (citing *United States v. Manuel*, 342 F. App'x 844, 848 (3d Cir. 2009)).[5]

As of October 14, 2009, the day of the alleged violations, Keating's approved residence was 3 James Street, Pittston, Pennsylvania. (Doc. No. 50 at ¶ 8; Doc. No. 58 at ¶ 8.) The parties do not dispute that as condition of his parole, Keating could not change his approved residence without permission of the parole supervision staff. (Doc. No. 58-2, Ex. B at 14:20-25; Doc. No. 50-2, Ex. B at 60:22-61:3.) Therefore, if Keating were residing at an unapproved residence, that would have been a violation of the conditions of his parole. Keating admits that he occasionally slept at the non-approved residence at 90 Market Street, while he was renovating it. (Doc. No. 58 at ¶¶ 10, 16.) He also admits that Agent Coslett was aware of this arrangement because Keating advised him about it. (*Id.*; Doc. No. 50-2, Ex. B at 106:13-25.) In fact, on the day of the incident, Agent Coslett met Keating at his approved residence on James Street to conduct a urine analysis, but they eventually went to the Market Street residence instead. Furthermore, Keating signed a new Home Provider Agreement for the Market Street residence that morning. The facts surrounding the signing of this agreement are in dispute, but the Court agrees with the Magistrate Judge that it is immaterial whether Keating signed the new Home Provider Agreement before or after Agent Coslett searched the Market Street residence. In any event, Agent Coslett did not need to rely on the new Home Provider

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[5] The same standard applies to probationers and parolees. *Davilla*, 69 F. App'x at 539.

Agreement in order to enter the Market Street residence. Instead, "[m]aterial to the question of whether summary judgment should be granted in Agent Coslett's favor on Keating's illegal entry claim is whether Agent Coslett had probable cause to believe Keating was residing at his non-approved residence." (Doc. No. 61 at 13.) *See also Manuel*, 342 F. App'x at 848 (explaining that probable cause is required to believe that a probationer resides at a particular location).

When determining whether probable cause exists, the Court must first "identify all of the relevant historical facts known to the officer at the time of the stop or search[.]" *Ornelas v. United States*, 517 U.S. 690, 701 (1996) (Scalia, J., dissenting). In her probable cause analysis, however, the Magistrate Judge considered some facts which Agent Coslett may not have known when he entered the Market Street residence. For instance, the Magistrate Judge considered the fact that Keating had utility bills in his name for the Market Street residence. (Doc. No. 61 at 14.) While the parties do not dispute this particular fact, the record does not demonstrate that Agent Coslett was aware of it at the time he entered the Market Street residence. (Doc. No. 50 at ¶ 11; Doc. No. 58 at ¶ 11.) Instead, this was a fact that came out during discovery, well after the incident in question.

It is not disputed, however, that Keating advised Agent Coslett that he occasionally slept at the non-approved Market Street residence while he was renovating it. (Doc. No. 50 at ¶ 14; Doc. No. 50-2, Ex. B at 106:13-25; Doc. No. 58 at ¶¶ 10, 16.) Agent Coslett knew this fact on October 14, 2009 when he

entered the Market Street residence without a warrant. The question then becomes whether this information gave Agent Coslett the necessary probable cause to believe that Keating was residing there. *Ornelas*, 517 U.S. at 696. For probable cause to exist, the available evidence must have provided Agent Coslett with reasonable grounds to believe that Keating was residing at the Market Street residence. *See Schneyder v. Smith*, 653 F.3d 313, 323 (3d Cir. 2011) (explaining "probable cause" requirement). Because it is undisputed that Keating himself informed Agent Coslett that he occasionally stayed at the Market Street residence, the Court agrees with the Magistrate Judge that Agent Coslett had probable cause to believe that Keating was residing there. Therefore, Agent Coslett did not need a warrant to enter the house on Market Street, and the Magistrate Judge correctly recommended summary judgment on this claim in favor of the three Defendants.

2. Plaintiff's Illegal Search Claim

In Count II of his Complaint, Plaintiff alleges that on October 14, 2009, Defendants Agent Coslett, Officer Tokar and Officer Houssein illegally searched him and his property, in violation of the Fourth Amendment. (Doc. No. 18 at 8-9.) As an initial matter, Keating expressly consented to the search of his person, property and residence by parole agents without a warrant, as a condition of his parole. (Doc. No. 50-2, Keating Dep. Ex. 3.) Therefore, Agent Coslett did not need a warrant to search Keating's person or property. Furthermore, "[p]arole officers with reasonable suspicion may perform warrantless searches for the purpose of determining whether

conditions of parole have been violated." *United States v. Marcano*, 508 F. App'x 119, 121 (3d Cir. 2013) (citing *United States v. Williams*, 417 F.3d 373, 376 (3d Cir. 2005) ("'[N]o more than reasonable suspicion' is required to justify a search in these circumstances.") (quotation omitted)).

As noted above, the Magistrate Judge correctly explained that "[m]aterial to the question of whether summary judgment should be entered in Agent Coslett's favor on Keating's illegal search and seizure claim is whether Agent Coslett had reasonable suspicion to believe that Keating had violated the conditions of his parole by residing in a non-approved residence (i.e. 90 Market Street)." (Doc. No. 61 at 13-14.) *See also Manuel*, 342 F. App'x at 848 (explaining that only reasonable suspicion is needed to investigate a possible probation violation). In determining whether Agent Coslett violated Keating's Fourth Amendment right by searching the Market Street residence without a warrant, the Magistrate Judge relied on two facts: 1) the fact that Keating expressly consented to the warrantless searches as a condition of his parole; and 2) the fact that Keating informed Agent Coslett that he occasionally stayed at the Market Street residence. (Doc. No. 61 at 15.) Neither fact is disputed. Based on these undisputed facts, the Court agrees that Agent Coslett had a reasonable suspicion that Keating violated the terms of his parole by living at 90 Market Street. Therefore, Agent Coslett's warrantless search of the home did not violate the Fourth Amendment.

In addition to searching the Market Street residence, Agent Coslett also searched Keating's

person. Again, as a condition of his parole, Keating expressly consented to the search of his person by parole agents without a warrant. (Doc. No. 50-2, Keating Dep. Ex. 3.) In this case, it is undisputed that Agent Coslett performed a strip search of Keating in the upstairs bathroom while Officers Tokar and Houssein stood at the threshold of the bathroom. (Doc. No. 46 at ¶ 29; Doc. No. 59 at ¶ 29.) Agent Coslett also conducted a visual cavity search of Keating at this time. (Doc. No. 58-2, Ex. B at 59:19-62:14; Doc. No. 50-2, Ex. B at 26:7-29:1.) It is also undisputed that neither Officer Tokar nor Officer Houssein took an active part in the search of Keating's person. Instead, these two Defendants stood at the threshold of the bathroom while Agent Coslett conducted the search. Officers Tokar and Houssein did not speak to Keating during the search, and neither officer put their hands on him. (Doc. No. 50-2, Ex. B at 28:15-23.) While both Officers testified that they did not observe anyone examining Keating's genital area, this seeming conflict between their testimony and that of Agent Coslett is not enough to create a genuine issue of material fact. (Doc. No. 58-2, Ex. C at 15:2-4; Doc. No. 58-2, Ex. D at 28:18- 29:7.) Keating alleged that Agent Coslett was the one who searched him, and Agent Coslett's deposition testimony corroborates this allegation. Importantly, there is no dispute between Keating and Agent Coslett that a visual cavity search took place. Keating alleges that the strip search violated his Fourth Amendment rights.

In reviewing the Report and Recommendation, the Magistrate Judge did not fully discuss the allegations surrounding the search of Keating's person. Given

the intrusive nature of this type of search, Keating's allegations about it "instinctively gives us the most pause." *Bell v. Wolfish*, 441 U.S. 520, 558 (1979). While the Court ultimately agrees with the Magistrate Judge's findings, the Court will consider the evidence surrounding this allegation and whether Keating's Fourth Amendment rights were violated.

During his deposition, Agent Coslett testified about the strip search of Keating in the upstairs bathroom. The relevant testimony is as follows:[6]

> A: I drew my gun and proceeded up the steps —
>
> Q: Mm hm.
>
> A: For obvious safety and security issues. Cleared the bathroom, went back to the room where [Keating] was staying, then I believe I went to the next room, we were clearing that room, and that's when I heard a toilet flush, and the bathroom that I had already gone — that I had already passed and looked in it and saw that there was nobody standing, I was alarmed, I ran back to the — I didn't run back, I walked back to the bathroom and noticed Marc Keating standing at the bathroom when he was advised to stay downstairs with the officer. I asked Marc what you're doing here, he — I don't know what his — what exactly he stated. And I said to him you were instructed to stay downstairs, you did not follow the instruction, I then proceeded to

[6] In this transcript, the questions are being asked by Plaintiff's counsel.

handcuff him, I asked him if he had any drugs on him, he stated no, he then — I then proceeded to search him. I asked for one officer to remain with me while I searched him for obvious concerns. Mr. Keating was searched —

Q: Was he strip-searched?

A: He was yea — I removed all the articles of clothing from him, that is correct. That was — his articles of clothing were removed, after I searched him all of his articles of clothing were placed back on by him, he was re-handcuffed and taken back downstairs and placed in a chair to be observed by the police officer.

Q: Who participated in the strip-search?

A: I don't know which officer did, one of the two, I'm not — I can't recall which one was there, if both of them were there or I know that at least one was there for my safety.

Q: Did you lift his testicles?

A: Did I?

Q: Yep.

A: No, I didn't touch his testicles.

Q: Did someone touch his testicles?

A: Nobody touched his testicles. If he did — well if we would search him, we would ask him, he would — we would ask him and he would do it.

Q: Okay, did you?

> A: I may have, I don't recall, but it's part of our procedure that —
>
> Q: Did he bend over and spread his cheeks -could you view his anal cavity?
>
> A: I — he — he would spread his cheeks normally yes, to make sure there was nothing in the — in the portion of his —
>
> Q: Anal area?
>
> A: Correct.

(Doc. No. 58-2, Ex. B at 59:19-62:14.) Despite having been told to wait downstairs, Keating came up to the second floor bathroom. According to Keating, "he attempted to retrieve his cell phone, looking for it in the bathroom where [he] had just showered and thought it would be located." (Doc. No. 18 at ¶ 31.) When Agent Coslett found Keating in the bathroom after telling him to remain downstairs, he believed that Keating might have been in possession of contraband or trying to hide contraband. (Doc. No. 51 at 11.) The question is whether Agent Coslett had reasonable suspicion to search Keating's person. The Court concludes that he did.

As previously mentioned, Keating expressly consented to warrantless searches of his person by parole agents as a condition of his parole. (Doc. No. 50-2, Keating Dep. Ex. 3.) Furthermore, the Third Circuit "has decided that a parolee's expectation of privacy is less than an average citizen's." *United States v. Wingfield*, 206 F. App'x 208, 210 (3d Cir. 2006) (citing *Hill*, 967 F.2d at 910). Moreover, in *Newkirk v. Sheers*, the Court explained:

> [I]n order to strip search [nonviolent or misdemeanor offenders], the arresting officers must have reasonable individualized suspicion that a detainee is carrying or concealing contraband. Individualized suspicion sufficient to warrant a strip search of such detainees may be based on such factors as the nature of the offense, the arrestee's appearance and conduct, and any prior arrest record.

834 F. Supp. 772, 788 (E.D. Pa. 1993) (internal citations omitted).

In this case, Agent Coslett had a reasonable individualized suspicion that Keating was carrying contraband or trying to hide it. Keating had a prior arrest record and was on parole at the time of the strip search. Agent Coslett had already suspected that Keating had violated the conditions of his parole by staying at an unapproved residence. In addition, Agent Coslett had found potential evidence of a new crime when he found checks in Keating's bedroom that were made out to someone else. Finally, despite Agent Coslett's instructions to remain downstairs, Agent Coslett found Keating in the second floor bathroom after hearing the toilet flush. Given these facts, Agent Coslett had reasonable suspicion to believe that Keating may be carrying contraband or trying to hide it. Therefore, the strip search and visual cavity search of Keating did not violate the Fourth Amendment.

3. Plaintiff's Illegal Seizure Claim

In Count II of his Complaint, Plaintiff alleges that on October 14, 2009, Defendants Agent Coslett, Officer Tokar and Officer Houssein illegally seized

him, in violation of the Fourth Amendment. (Doc. No. 18 at 8-9.) Although Keating was not arrested on October 14, 2009, Agent Coslett placed Keating in handcuffs and had him sit on a chair downstairs while Agent Coslett searched the home for potential parole violations. (Doc. No. 18 at ¶ 37.) A Fourth Amendment "seizure occurs '[w]henever an officer restrains the freedom of a person to walk away.'" *Curley v. Klem*, 298 F.3d 271, 279 (3d Cir. 2002) (quoting *Tennessee v. Garner*, 471 U.S. 1, 7 (1985)). A seizure is reasonable when, based on the totality of the circumstances, the officer's "'actions [were] 'objectively reasonable' in light of the facts and circumstances' confronting him, regardless of his underlying intent or motivation." *Id.* (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)).

In her Report and Recommendation, the Magistrate Judge found that "once inside [the Market Street residence], the record reflects that Agent Coslett uncovered more potential parole violations which gave him reasonable suspicion to ... seize Keating's person ..."[7] (Doc. No. 61 at 16.) Namely, it is undisputed that once Agent Coslett and Keating were inside the Market Street residence, Agent Coslett found a number of checks in Keating's bedroom that were made out to a man named

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[7] In addition to finding checks made out to someone other than Keating in Keating's bedroom, Agent Coslett also opened the refrigerator and saw what he believed to be alcohol, a parole violation. (Doc. No. 58-2, Ex. B at 39:9-17; Doc. No. 50-2, Ex. B at 69:23-70: 10.) Agent Coslett also found prescription pills and a pellet gun in the second bedroom of the home, both of which were violations of Keating's parole as well. (Doc. No. 58-2, Ex. B at 68:16-69:14; Doc. No. 50-2, Ex. B at 70:18-25.)

Nicholas D'Amico. (Doc. No. 18 at ¶ 17; Doc. No. 50 at ¶ 30; Doc. No. 50-2, Ex. B at 23:6-19, 40:9-15.) The checks were not made out to Keating, and Agent Coslett believed that they could be contraband or evidence of another crime. (Doc. No. 18 at ¶ 17.) Because Agent Coslett reasonably believed that Keating had violated the conditions of his parole by living at a non-approved residence and had also found evidence of a potential crime, the Court agrees that it was reasonable for Agent Coslett to handcuff Keating and have him sit on a chair downstairs while Agent Coslett finished searching the house.[8] The temporary restraint of Keating was also reasonable considering that Keating had previously ignored Agent Coslett's instructions to remain downstairs. Once the search was over, Agent Coslett removed the handcuffs. (Doc. No. 18 at ¶ 37.) This seizure was reasonable under the totality of the circumstances and therefore did not violate the Fourth Amendment. Defendants are entitled to summary judgment on this claim as well. Because the Court has determined that Defendants did not violate Keating's Fourth Amendment rights, the Court need not consider Defendants' arguments that they are entitled to qualified immunity.[9]

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[8] Agent Coslett handcuffed Keating and placed him in the chair after he searched Keating's person in the upstairs bathroom.

[9] In resolving claims of qualified immunity, a court should consider: 1) whether the facts alleged or shown by plaintiff make out a violation of a constitutional right, and 2) whether that right was clearly established at the time of defendants' misconduct. *Pearson v. Callahan*, 555 U.S. 223 (2009). As noted, since the facts do not establish a violation of a

V. CONCLUSION

The Magistrate Judge applied the correct summary judgment standards in her Report and Recommendation. For the reasons discussed above, the Court approves and adopts the Magistrate Judge's Report and Recommendation, granting all three Defendants' Motions for Summary Judgment.

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constitutional right, the qualified immunity claim need not be considered further.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MARC KEATING, Plaintiff, v. FRANK COSLETT, et al., Defendants.	CIVIL ACTION NO. 11-0411

ORDER

AND NOW, this 19th day of March 2014, upon consideration of the Amended Complaint (Doc. No. 18), Defendants Tokar and Houssein's Joint Motion for Summary Judgment with related filings (Doc. Nos. 45-47, 60), Defendant Coslett's Motion for Summary Judgment with related filings (Doc. Nos. 49-51), Plaintiff's Responses in Opposition to the Motions (Doc. Nos. 56-59), Defendants Tokar and Houssein's Joint Reply in Further Support of the Motion (Doc. No. 60), the Report and Recommendation of United States Magistrate Judge Karoline Mehalchick (Doc. No. 61), Plaintiff's objections to the Report and Recommendation (Doc. No. 68), and in accordance with the Opinion of the Court issued this day, it is **ORDERED** as follows:

1. The Report and Recommendation of Magistrate Judge Mehalchick (Doc. No. 61) is **APPROVED** and **ADOPTED** as modified.
2. The Joint Motion for Summary Judgment of Officers Tokar and Houssein (Doc. No. 45) is GRANTED.

3. The Motion for Summary Judgment of Agent Frank Coslett (Doc. No. 49) is **GRANTED**.

4. The Clerk of Court shall close this case for statistical purposes.

BY THE COURT:
/s/ Joel H. Slomsky
JOEL H. SLOMSKY, J.

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

MARC KEATING,	
Plaintiff	CIVIL ACTION NO. 3:11-CV-0411
v.	(SLOMSKY, J.)[1] (MEHALCHICK, M.J.)
FRANK COSLETT, et al.,	
Defendants	

REPORT AND RECOMMENDATION

This case arises out of an incident in which two police officers and a parole agent entered the home of the father of Plaintiff, Marc Keating, searched the home, and handcuffed and strip-searched Keating (who was present at the house at the time). Keating initiated this action with the filing of a Complaint on March 22, 2011. (Doc. 1). Keating filed an Amended Complaint on October 14, 2011, naming as Defendants the City of Pittston, Pennsylvania State Parole, Pittston City Police Officers Justin Tokar and

[1] District Court Judge Joel H. Slomsky of the Eastern District of Pennsylvania has been assigned this case pursuant to a designation by the Honorable Theodore A. McKee, Chief Judge for the Third Circuit Court of Appeals.

Maivaun Houssein, and Pennsylvania Probation and Parole Agent Frank Agent Coslett, and alleging that his Fourth Amendment rights were violated by Defendants' illegal entry, search, seizure and arrest pursuant to 42 U.S.C. § 1983. (Doc. 18).

Following this Court's dismissal of Defendants City of Pittston and the Pennsylvania State Parole, Plaintiff was permitted to proceed against Defendants Officers Tokar and Houssein and Agent Coslett with respect to his illegal entry claim in Count I of his Amended Complaint, and the illegal search and seizure claims set forth in Count II of the Amended Complaint. (Doc. 27 and Doc. 30). Pending before this Court are the motions for summary judgment of Defendants Officers Tokar and Houssein (Doc. 45) and Defendant Agent Coslett (Doc. 49). These motions have been fully briefed and are ripe for disposition.

I. FACTUAL BACKGROUND

Defendant Frank Coslett is a Pennsylvania State Parole agent based out of the Scranton district office. (Doc. 58-2, p. 3). Defendant Justin Tokar, at all relevant times, was a police officer with the Pittston Police Department. Defendant Maivaun Houssein, at all relevant times, was a police officer for the Pittston Police Department. Plaintiff, Marc Keating, is an individual who, at all relevant times, was subject to parole supervision as a result of a criminal conviction and had an approved residence listed with the Pennsylvania Board of Probation and Parole as 3 James Street, Pittston, Pennsylvania. (Doc. 50-2, p. 38).

The conditions of Keating's parole included that his approved residence may not be changed without the written permission of the parole supervision staff. (Doc. 50-2, pp. 37, 52;[2] Doc. 48-2, p. 3). Additionally, the conditions of Keating's parole include an express consent by Keating "to the search of [his] person, property and residence, without a warrant by agents of the Pennsylvania Board of Probation and Parole." (Doc. 50-2, p. 52). Special conditions were also attached to Keating's parole, including that he "shall submit to urinalysis testing" and "achieve negative results in screening tests… for the presence of controlled substances or designer drugs…" and that he "shall not consume or possess alcohol under any condition for any reason." (Doc. 50-2, p. 53).

The Home Provider Agreement gives the parole supervision staff the right to search the residence at any time when reasonable suspicion exists that conditions of supervision have been violated. (Doc. 50-2, p. 51). Additionally, the Home Provider Agreement signed for the 90 Market Street residence prohibits Keating from living in a residence with firearms, including look-alike firearms such as air rifles, starter pistols or toy guns. (Doc. 50-2, p. 51). When he signed the Home Provider Agreement on October 14, 2009, Keating agreed to these conditions.

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[2] The conditions of parole attached to Keating's deposition and incorporated into the record list his approved address as Minsec. This is the halfway house to which Keating was released when he started parole. (Doc. 50-2, p. 38). It is undisputed by the parties that at the time of the incident in question, the approved address for Keating on file with the Parole Board was 3 James Street, but that these conditions were still in place for Keating's parole, Parole No. 601AC. (Doc. 50-2, pp. 52-53).

Pennsylvania State Parole Agents have to approve the home plan. Parolee must have an approvable site to go to. (Doc. 58-2, p. 6). Agent Coslett believes that, as an agent, he has the power to take custody of a person and incarcerate them, and further that if a that he has the right to enter a parolee's residence if he has reasonable suspicion to believe that conditions of parole have been violated. (Doc. 58-2, pp. 6-8). If a parolee wishes to change anything on his home plan, including his approved residence, he needs to make a request of his agent, who would then conduct an investigation to approve the change. (Doc. 58-2, p. 7).

The undisputed facts in the record are as follows: On morning of October 14, 2009, Agent Coslett telephoned Keating to tell him he needed to collect a urine sample from him, and then proceeded to Keating's approved residence at 3 James Street. (Doc. 58-2, p. 10; Doc. 50-2, p. 39). Agent Coslett asked Keating where he was living, and Keating told him that he was living at 90 Market Street, and that all his belongings were there and that he was fixing it up. (Doc. 58-2, p. 10). The utilities were in Keating's name at the 90 Market Street residence, and he received mail there for the utilities. (Doc. 50-2, p. 40). Keating testified at his deposition that the residence at 3 James Street was his primary residence, but that he also resided at 90 Market Street from 2007 until April 2012. (Doc. 50-2, p. 24). Keating testified that he was staying at 90 Market Street, on average once or twice a week. (Doc. 50-2, p. 48). Keating further testified in the same deposition that he had been primarily sleeping at the 3 James Street residence, but that he signed the new home agreement letter because Agent Coslett told him he would get "jammed

up" if he did not sign it. (Doc. 50-2, p. 40). Agent Coslett informed Keating that staying at 90 Market Street was a violation of his parole because it was not his approved residence, and asked him if he wanted to stay at the Market Street address, and if that is where Keating wished to have his approved residence. (Doc. 58-2, p. 10).

Following the meeting at 3 James Street, Agent Coslett drove to the Market Street residence and met Keating, who had walked to the location. It is unclear from the record as to when Agent Coslett had Keating sign a new Home Provider Agreement for the 90 Market Street residence. Agent Coslett testified that he retrieved a home provider agreement letter and Keating signed the same prior to asking Keating to show him around the Market Street residence, which Keating agreed to do. (Doc. 58-2, p. 10). Keating testified that Agent Coslett presented him with the home agreement letter *after* Agent Coslett had searched the house for the first time, but before Tokar and Houssein got there. (Doc. 50-2, 35). Regardless, the home provider agreement letter doesn't address the violation of changing residence without permission; rather, it addresses to Keating what the rules of the residence will be if he was going to live at the residence. The agreement was signed at 9:13 a.m. (Doc. 58-2, p. 12).

Agent Coslett testified that he had reasonable suspicion to search the residence at 90 Market Street because of the change in residence without permission, which was a violation of Keating's conditions of parole. At the time Agent Coslett called the Pittston Police Department, he intended to conduct a parole search of the Market Street

residence. A parole search is a warrantless search that can be conducted by an agent whenever there exists reasonable suspicion that conditions of parole have been violated. (Doc. 58-2, p. 15).

At some point Agent Coslett secured a urine sample from Keating, which tested positive for morphine. (Doc. 58-2, p. 11). Keating told Agent Coslett he had used his mother's prescription without her permission, which was a violation of his parole. (Doc. 58-2, p. 11). Agent Coslett began his first search of the Market Street residence, with Keating showing him through the house. Francis Lombardo[3] was sleeping on the living room couch. (Doc. 58-2, p. 11).

Agent Coslett testified that he called his supervisor to advise him of the situation and to ask if there were any other agents in the area to assist him in searching the residence. His supervisor advised him that there were none in the area but to call the police for officer presence. (Doc. 58-2, p. 12). Agent Coslett also called the Pittston Police Department to request that an officer be dispatched to the Market Street residence as an officer safety precaution. (Doc. 58-2, pp. 11-13).

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[3] Francis Lombardo, Keating's cousin (Doc. 50-2, p. 40), had previously been convicted of several charges in the Court of Common Pleas of Luzerne County, Dkt. No. CP-40-CR-0002441-2008 (Doc. 50-3, p. 2). The arresting officer in his case was Officer Tokar. Agent Coslett was familiar with Lombardo's criminal history. (Doc. 50-2, p. 10). Officer Houssein was familiar with Lombardo's history, particularly with regard to his previous fights with the police, and had concerns over safety due to his presence at the residence. (Doc. 50-4, p. 22).

When Officers Tokar and Houssein arrived, Agent Coslett advised them that he was going to conduct a search and that Francis Lombardo was sleeping on the couch. At this point, the record is unclear as to what happened next. Agent Coslett testified that when he and the officers walked into the living room, Agent Coslett noticed that Lombardo had left. (Doc. 58-2, p. 16). Officers Tokar and Houssein testified that Lombardo was asleep on the couch when they entered the room, but that he was gone when they came back downstairs. (Doc. 58-2, pp. 24, 27, 33). Keating testified that Officers Tokar and Houssein went in the house first and started shouting "Gupper's gone" which prompted he and Agent Coslett to reenter the house, at which point Officers Tokar and Houssein both had their guns drawn. (Doc. 50-2, p. 28). Officer Houssein and Officer Tokar testified that they never drew their guns during the entire incident. (Doc. 58-2, pp. 24, 37).

Keating's whereabouts during the search of the residence by the officers and Agent Coslett are also in dispute. Keating testified that Agent Coslett instructed him to sit on the chair while one of the officers watched him while Agent Coslett and the other officer went to the second floor to make sure that Lombardo did not go up there. Officer Houssein testified that Keating came upstairs with him during the search. (Doc. 58-2, p. 35). Agent Coslett testified that he drew his gun at this point. (Doc. 58-2, p. 16).

Once Agent Coslett cleared the bathroom and the bedroom where Keating stayed, he heard a toilet flush. Officer Houssein testified that he was downstairs with Agent Coslett and Officer Tokar when they heard the toilet flush and that they went

upstairs to see what was going on. (Doc. 58-2, p. 36). Agent Coslett went back to the bathroom and noticed Keating standing at the bathroom despite having been advised that he was to stay downstairs. Agent Coslett asked him what he was doing and told him he failed to follow the instruction to stay downstairs. He then proceeded to handcuff Keating. Agent Coslett asked Keating if he had any drugs on him. Keating said no, but Agent Coslett proceeded to search him for "obvious concerns." (Doc. 58-2, p. 16). Agent Coslett removed Keating's clothing, searched him, placed all his clothing back on him, re-handcuffed him and he was taken back downstairs for observation by Officer Houssein. During the search of Keating's person by Agent Coslett, Officers Houssein and Tokar stood in the doorway or immediately outside the bathroom. (Doc. 58-2, pp. 17, 26; Doc. 50-2, p. 29). Neither Officer Tokar, Officer Houssein nor Agent Coslett touched Keating during the search, which lasted between five and ten minutes. (Doc. 50-2, p. 29). Officer Houssein took Keating downstairs and he stayed with Keating while Agent Coslett finished his search. (Doc. 58-2, p. 37).

At some point during one of the searches, Agent Coslett found a number of checks in Keating's bedroom made out to a Nicholas D'Amico. The name on the checks was not Keating. (Doc. 58-2, p. 11). Officers Houssein and Tokar both testified that Agent Coslett found the checks while they were present, but Agent Coslett recalled finding the checks during his initial search. (Doc. 58-2, pp. 26, 38). Agent Coslett questioned Keating about the checks and Keating told them he found them on the road but had forgotten to give them to his lawyer. (Doc. 58-2, p. 11).

Agent Coslett also opened the refrigerator and saw what he believed to be alcohol, a parole violation. Keating asserts that what Coslett found was just mojito mix, and not alcohol. (Doc. 58-2, p. 11; Doc. 50-2, pp. 39-40).

In his second search, accompanied by the officers, Agent Coslett looked under the mattress and went through the dresser. He did not find anything of significant parole noteworthiness. (Doc. 58-2, p. 18). Officer Tokar described the search as "very controlled." (Doc. 58-2, p. 27). In the second bedroom, that which was used by Lombardo, Agent Coslett found prescription pills and a pellet gun, another violation of Keating's parole conditions. (Doc. 58-2, pp. 18-19; Doc. 50-2, p. 30).

After the search was completed, the handcuffs that had been placed on Keating were removed. Based on money and work Keating had put towards a degree at Penn State, Agent Coslett and his supervisor made the decision to sanction Keating for his parole violations and order him to the office for a supervisory conference the following week. Additionally, Keating was placed on a 6 p.m. curfew, but he was allowed to reside at the Market Street residence. (Doc. 58-2, p. 19).

Officers Tokar and Houssein never took Keating to the police station, and never put him in a police vehicle. (Doc. 50-2, p. 25). They did file charges against him by criminal complaint, for five counts of receiving stolen property. (Doc. 50-2, p. 26). Keating eventually plead guilty to these charges on December 9, 2009. (Doc. 50-2, pp. 27, 50).

II. MOTION FOR SUMMARY JUDGMENT STANDARD

To prevail on a motion for summary judgment, the moving party must show that "there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material if proof of its existence or nonexistence might affect the outcome of the suit under the applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Where there is no material fact in dispute, the moving party need only establish that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Where, however, there is a disputed issue of material fact, summary judgment is appropriate only if the factual dispute is not a genuine one. *Anderson*, 477 U.S. at 248. An issue of material fact is genuine if "a reasonable jury ... could find for the nonmoving party." *Childers v. Joseph*, 842 F.2d 689, 693-94 (3d Cir. 1988).

A federal court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 278 (3d Cir. 2000). In making this determination, "a court must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor." *Armbruster v. Unisys Corp.*, 32 F.3d 768, 777 (3d Cir. 1994). The Court need not accept mere conclusory allegations, whether they are made in the complaint or a sworn statement. *Lujan v. National Wildlife*

Federation, 497 U.S. 871, 888 (1990). In deciding a motion for summary judgment, the court's function is not to make credibility determinations, weigh evidence, or draw inferences from the facts. *Anderson*, 477 U.S. at 249. Rather, the court must simply "determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

III. DISCUSSION

A. *PLAINTIFF'S FOURTH AMENDMENT ILLEGAL ENTRY AND SEARCH AND SEIZURE CLAIM AGAINST AGENT COSLETT*

Keating contends that Agent Coslett's warrantless entry, and the search and seizure that followed by Agent Coslett and Officers Tokar and Houssein, violated his Fourth Amendment rights. The Fourth Amendment to the United States Constitution guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV.

Warrantless searches are presumed unreasonable, unless an exception applies. *United States v. Crutchfield*, 444 Fed. Appx. 526, 528 (3d Cir. 2011); *citing Payton v. New York*, 445 U.S. 573, 585–86, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). The parole system is one such exception. *See Griffin v. Wisconsin*, 483 U.S. 868, 873-74, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987); *United States v. Hill*, 967 F.2d 902, 909–10 (3d Cir. 1992). A parolee's privacy rights are not equal to those held by the general public. *Samson v. California*, 547 U.S. 843, 857 (2006)(holding parolee's reasonable expectation of privacy severely diminished). The Third Circuit Court of Appeals has

held that a parole agent does not need to show probable cause to obtain a warrant to search a parolee's home. *Hill*, 967 F.2d at 910. Rather, parole agents may conduct warrantless searches of parolees and their approved residences when reasonable suspicion of a violation exists. *Id*. When determining whether reasonable suspicion exists, the Court will consider the "totality of the circumstances" to determine whether the "officer has a particularized and objective basis for suspecting legal wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 273 (2002); reasonable suspicion is a "particularized and objective basis, supported by specific and articulable facts, for suspecting a person of criminal activity." Black's Law Dictionary (9th ed. 2009).

Pennsylvania courts have long concluded that a search warrant was not required when a parole officer searches a parolee's home. *Jarvis El v. Pandolfo*, 701 F. Supp. 98, 101-02 (E.D. Pa. 1988); citing *Commonwealth v. Brown*, 240 Pa.Super. 190, 361 A.2d 846 (1976). "One who has been placed on probation in being sentenced after conviction of a crime is as much under the supervision of the state as one who is sentenced to incarceration. A probation officer is entitled to search the belongings of such an individual to ensure that they do not reveal a violation of the terms of probation." *Commonwealth v. Devlin*, 294 Pa. Super. 470, 478, 440 A.2d 562, 566 (1982); see also *Commonwealth v. Brown*, 361 A.2d at 850 (when performing his normal duties, a parole officer is not required to obtain a search warrant); see also *Griffin v. Wisconsin*, 483 U.S. 868, 107 S.Ct. 3164, 3168 (1987) (probation is simply one point on a continuum of possible punishments). The Fourth

Amendment rights of persons on probation or parole must give way to the necessity for ensuring that incarceration for some period is not necessary for the protection of society. Pennsylvania has thus adopted the basic test that for a search to be reasonable, it must be based upon the probation or parole officer's reasonable belief that the search is necessary to the performance of his duties. 701 F. Supp. 98; cf. *United States v. Duff*, 831 F.2d 176, 179 (9th Cir. 1987); *Latta v. Fitzharris*, 521 F.2d 246, 250 — 52 (9th Cir.1975) (en banc).

In *Shea v. Smith*, the Third Circuit addressed the issue of whether a probation officer can enter a third person's home if the probationer did not reside there. In doing so, the Third Circuit looked to a decision from the Ninth Circuit Court of Appeals:

> The court said, "If the police lack probable cause to believe the suspect is an actual resident, but have probable cause to believe he's present, they must get a search warrant." *United States v. Harper,* 928 F.2d 894, 896 (9th Cir.1991). This follows because the Supreme Court has held that an arrest warrant does not carry with it the authority to enter the home of a third person to seize a suspect and that to enter such a home police need to get a search warrant. *Steagald v. United States,* 451 U.S. 204, 222, 101 S.Ct. 1642, 1653, 68 L.Ed.2d 38 (1981). If police armed with probable cause cannot enter the home of a third party to seize a criminal suspect without a search warrant, then a probation officer cannot enter [a third party's] home to see if [the probationer] has violated a condition of

> probation, unless the officer reasonably believes that [the probationer] resides there.
>
> *Shea v. Smith*, 966 F.2d 127, 131 (3d Cir. 1992).

Ultimately, in *Shea*, the Court determined that the probationer did reside in the home that was searched, as the homeowner admitted that the probationer resided in her home "approximately one-half of the time" and conceded that he spent three or four days per week in her house. Additionally, the probationer had listed the homeowner's address as his with the Probation Office. The Third Circuit concluded that there was no question that a reasonable police officer could have believed that the homeowner's residence that was searched was the probationer's residence. *Shea v. Smith*, 966 F.2d at 131; relying on *United States v. Harper*, 928 F.2d 894, 896-897 (9th Cir. 1991) (concluding that because the defendant entered the third party's home with his own key once or twice during a three day period police had "probable cause to believe that David resided there — but just barely.")

The Third Circuit has also concluded that officers may have "reasonable suspicion" to search a property to determine if a probationer violated the terms and conditions of his probation by failing to obtain approval before changing his residence. *United States v. Manuel*, 342 Fed. Appx. 844, 847-48 (3d Cir. 2009); relying on *Griffin v. Wisconsin,* 483 U.S. 868, 875 — 76 (1987); *see also* 61 Pa. Stat. § 331.27b(d)(2) ("A property search may be conducted by any officer if there is reasonable suspicion to believe that the real or other property in the possession of or under the control of the offender contains contraband or *other*

evidence of violations of the conditions of supervision.") (emphasis added). In *Manuel*, the conditions of Manuel's release expressly provided that he could not change his residence without the permission of his probation/parole officer. The Third Circuit affirmed a finding by the District Court that the totality of the circumstances — including the two telephone calls from an anonymous informant reporting that Manuel was living at the Washington Street Address, and the fact that Officer Dowling corroborated this information by observing the name "T. Manuel" written on the mailbox outside of the residence, together with Manuel's having the keys in his possession — gave the officers probable cause to believe that Manuel resided at the Washington Street address. *See Motley v. Parks,* 432 F.3d 1072, 1080 (9th Cir. 2005) (en banc) ("before conducting a warrantless search pursuant to a parolee's parole condition, law enforcement officers must have probable cause to believe that the parolee is a resident of the house to be searched"). *United States v. Manuel*, 342 Fed. Appx. at 847.[4] As such, it appears that an officer must have probable cause to believe that a parolee is a resident of the house to be

[4] In Manuel, the Third Circuit distinguished the facts of that case from those in the Pennsylvania Superior Court's decision in *Commonwealth v. Edwards*, 874 A.2d 1192 (Pa. Super. 2005), in which that court determined that the officers did not have probable cause to enter and search an unapproved residence where there was evidence presented to the officers prior to the search indicating that the parolee had a "vouched for explanation" for his presence at the location, and that the officer's sole basis for his suspicion was a tip from an informant who had proved to be unreliable in the past.

searched, but only needs reasonable suspicion to search a property to determine if a probationer violated the terms and conditions of his probation by failing to obtain approval before changing his residence. *Id*.

In this case, it is undisputed that Keating could not change his residence without the written permission of the parole supervision staff, and that Keating understood that to be a condition of his parole. (Doc. 58-2, p. 5, Doc. 50-2, p. 37). It is immaterial whether Keating signed the new home provider agreement before or after Agent Coslett's initial search of the property, as the agreement doesn't address the violation of changing residence without permission, it addresses to Keating what the rules of the residence will be if he's going to live at the residence. (Doc. 58-2, p. 12). It is also immaterial as to whether or not Keating was concerned about being "jammed up" or under any sort of duress when he signed the new home provider agreement. Material to the question of whether summary judgment should be granted in Agent Coslett's favor on Keating's illegal entry claim is whether Agent Coslett had probable cause to believe Keating was residing at his non-approved residence. Material to the question of whether summary judgment should be entered in Agent Coslett's favor on Keating's illegal search and seizure claim is whether Agent Coslett had reasonable suspicion to believe that Keating had violated the conditions of his parole by residing in a non-approved residence (i.e. 90 Market Street). *See United States v. Manuel*, 342 Fed. Appx. at 847.

In this case, the Court finds that Agent Coslett did have probable cause to believe that Keating was

residing at the residence at 90 Market Street, and not at his approved residence at 3 James Street. Under the Fourth Amendment, probable cause amounts to more than a bare suspicion but less than evidence that would justify a conviction. Black's Law Dictionary (9th ed. 2009). The record reflects the following undisputed facts on this issue: Agent Coslett asked Keating where he was living, and Keating told him that he was living at 90 Market Street, and that all his belongings were there and that he was fixing it up. (Doc. 58-2, p. 10). The utilities were in Keating's name at the 90 Market Street residence, and he received mail there for the utilities. (Doc. 50-2, p. 40). Keating testified at his deposition that the residence at 3 James Street was his primary residence, but that he also resided at 90 Market Street from 2007 until April 2012. (Doc. 50-2, p. 24). Keating further testified that he was staying at 90 Market Street, on average once or twice a week. (Doc. 50-2, p. 48). Additionally, Keating's own amended complaint avers that he "had permission from his parents to reside at the Market [S]treet residence, all utilities were paid by [Plaintiff] and in his name, [Plaintiff] slept and showered at the Market [S]treet residence, he even had appliances delivered to the residence." (Doc. 18, p. 1). The totality of these undisputed facts, including testimony from Keating himself, is enough for this Court to find Agent Coslett had probable cause to believe that Keating was residing, at least some of the time, at the 90 Market Street residence, in violation of the conditions of his parole. *Cf. United States v. Manuel,* 342 Fed. Appx. at 847 (two telephone calls from an anonymous informant

reporting that parolee was living at the residence, and the fact that the officer observed the parolee's name written on the mailbox outside of the residence, together with the parolee having the keys in his possession gave the officers probable cause to believe that parolee was using the property as his residence); *United States v. Harper*, 928 F.2d 894, 896–897 (9th Cir. 1991) (concluding that because the defendant entered the third party's home with his own key once or twice during a three day period police had "probable cause to believe that [he] resided there — but just barely.")

For these reasons, the Court finds that the undisputed facts in the record establish that Agent Coslett had probable cause to believe that Keating was residing at 90 Market Street. The Court turns next to the question of whether the undisputed facts in the record establish that Agent Coslett had reasonable suspicion of parole violations to conduct a search and seizure of the 90 Market Street residence, and of Keating's property and person.

The undisputed facts in the record material to the question of whether Agent Coslett had reasonable suspicion that Keating had violated the terms of his parole include the following: First, as a condition of his parole, Keating consented to the search of his person, property, and residence by parole agents without the need of a warrant as a condition of his parole. (Doc. 50-2, p. 52). Second, Keating was residing at an unapproved residence. This violation alone supports the existence of reasonable suspicion. *See United States v. Marcano*, 508 Fed. Appx. 119, 122 (3d Cir. 2013); *United States v. Manuel*, 342 Fed. Appx. 844, 847-48 (3d Cir. 2009) (officers had

"reasonable suspicion" to search the Washington Street Address to determine whether Manuel had violated the terms and conditions of his probation by failing to obtain approval before changing his residence); *Griffin v. Wisconsin,* 483 U.S. 868, 875–76, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987); *see also United States v. Crutchfield*, 444 Fed. Appx. 526, 528 (3d Cir. 2011)(defendant conceded that agents had reasonable suspicion to believe that he had violated the conditions of his parole by living at an unapproved residence).

The undisputed facts in the record establish that Agent Coslett had reasonable suspicion to search the 90 Market Street residence. Moreover, once inside, the record reflects that Agent Coslett uncovered more potential parole violations which gave him reasonable suspicion to search and seize Keating's person and property. First, at some point during one of the searches, Agent Coslett found a number of checks in Keating's bedroom made out to a Nicholas D'Amico, which were not Keating's checks. (Doc. 58-2, p. 11). Agent Coslett also opened the refrigerator and saw what he believed to be alcohol, a parole violation. (Doc. 58-2, p. 11. In the second bedroom of the residence, Agent Coslett found prescription pills and a pellet gun, another violation of his parole conditions. (Doc. 58-2, pp. 18-19; Doc. 50-2, p. 30). As stated previously, as a condition of his parole, Keating consented to the search of his person and property without the need of a warrant. (Doc. 50-2, p. 52). After careful consideration, the Court finds that the undisputed record establishes that the search of Keating's person and property was based on reasonable suspicion by Agent Coslett and therefore

did not violate Keating's Fourth Amendment rights. As such, and after construing all facts in a light most favorable to the Plaintiff, the Court recommends that Defendant Agent Coslett's motion for summary judgment be granted on Keating's Fourth Amendment illegal entry and illegal search and seizure claims.

B. *PLAINTIFF'S FOURTH AMENDMENT ILLEGAL ENTRY AND SEARCH AND SEIZURE CLAIM AGAINST OFFICERS TOKAR AND HOUSSEIN*

Having determined that the undisputed facts in the record establish that the entry into the 90 Market Street residence, and subsequent search and seizure of Keating's person and property, were lawful and not in violation of any of Keating's Fourth Amendment rights, it is recommended that the motion for summary judgment of Defendants Officers Tokar and Houssein also be granted. Moreover, in the case of Officers Tokar and Houssein, the record is devoid of the requisite personal involvement necessary to establish liability of a defendant in a civil rights case. A defendant in a civil rights action must have personal involvement in the alleged wrongs. *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988). Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence. Allegations of participation or actual knowledge and acquiescence, however, must be made with appropriate particularity. *Rode*, 845 F.2d at 1207.

In this case, the record establishes that at the time of the search, Officers Tokar and Houssein were dispatched to the 90 Market Street residence at the

request of Agent Coslett, for purposes of assisting him with a search of a residence for possible parole violations. (Doc. 58-2, pp. 11-13). Nothing in the record suggests that either officer might have been aware that the residence at 90 Market Street may not have been Keating's residence, or that Officers Tokar and Houssein did anything other than assist Agent Coslett at the residence by sweeping the residence for Lombardo and monitor Keating for a short period of time after he was handcuffed by Agent Coslett. (Doc. 58-2, pp. 16, 37). Agent Coslett was the individual who conducted the search of Keating's person and of the residence. (Doc. 58-2, pp. 17, 26; Doc. 50-2, p. 29).

For the forgoing reasons, it is recommended that this Court grant the summary judgment [sic] of Defendants Officers Tokar and Houssein.[5]

IV. RECOMMENDATION

Based on the foregoing, it is recommended that the Court grant the Motions for Summary Judgment of Defendant Agent Coslett (Doc. 49) and Defendants Officers Tokar and Houssein (Doc. 45), in their entirety.

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[5] All three Defendants have also moved for summary judgment on the grounds that they are entitled to qualified immunity. Having found that there was no constitutional violation committed by any of the Defendants, the Court will not address the question of qualified immunity.

BY THE COURT:

Dated: January 27, 2014

s/ Karoline Mehalchick
KAROLINE MEHALCHICK
United States Magistrate Judge

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MARC KEATING,	
Plaintiff	CIVIL ACTION NO. 3:11-CV-0411
v.	(SLOMSKY, J.) (MEHALCHICK, M.J.)
FRANK COSLETT, et al.,	
Defendants	

NOTICE

NOTICE IS HEREBY GIVEN that the undersigned has entered the foregoing **Report and Recommendation** dated **January 27, 2014**.

Any party may obtain a review of the Report and Recommendation pursuant to Rule 72.3, which provides:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636(b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is

made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Dated: January 27, 2014

s/ Karoline Mehalchick
KAROLINE MEHALCHICK
United States Magistrate Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 14-1840

MARC KEATING,
Appellant

v.

PITTSTON CITY; OFFICER TOKAR; OFFICER HOUSSEIN; PENNSYLVANIA STATE POLICE; AGENT COSLETT

(Civ. Action No. 3-11-cv-00411)

SUR PETITION FOR REHEARING

Present: McKEE, *Chief Judge*, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR.,

VANASKIE, SHWARTZ, KRAUSE, RESTREPO, SCIRICA, and ROTH,[1] *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied. Judge Roth voted for panel rehearing.

BY THE COURT,

s/ Joseph A. Greenaway, Jr.
Circuit Judge

Dated: April 22, 2016

PDB/SLC/cc: All Counsel of Record

[1] Judge Scirica's and Judge Roth's votes are limited to panel rehearing only.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

No. 14-1840

MARC KEATING,

Appellant

v.

PITTSTON CITY; OFFICER TOKAR; OFFICER
HOUSSEIN; PENNSYLVANIA STATE POLICE;
AGENT COSLETT

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA
(D.C. Action No. 3-11-cv-00411)
District Judge: Honorable Joel H. Slomsky

Argued: October 28, 2015

Before: GREENAWAY, JR., SCIRICA, and ROTH,
Circuit Judges.

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Middle District of Pennsylvania and was argued on October 28, 2015. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment entered by the District Court on March 19, 2014 is hereby AFFIRMED. All of the above in accordance with the Opinion of this Court.

ATTEST:

s/ Marcia M. Waldron
Clerk

Date: March 10, 2016

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA

MARC KEATING, Plaintiff, vs. PITTSTON CITY, et al., Defendant.	No. 3:11-CV-00411 (Judge Slomsky) JURY TRIAL DEMANDED

Deposition of	:	MARC KEATING
Taken by	:	Defendants
Date	:	February 19, 2013, 10:13 a.m.
Place	:	4311 North 6th Street Harrisburg, Pennsylvania
Before	:	Ann M. Wetmore Reporter - Notary Public

APPEARANCES:

DON BAILEY LAW
By: DON BAILEY, ESQ.
Appearing on behalf of the Plaintiff

LAVERY FAHERTY PATTERSON
By: GARY H. DADAMO, ESQ.
Appearing on behalf of the Defendants
Tokar and Hussein only

OFFICE OF ATTORNEY GENERAL
By: M. ABBEGAEL GIUNTA, ESQ.
Appearing on behalf of the Defendant Frank Coslett

* * *

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* * *

BY MR. DADAMO:

Q. So, you currently live at 3 James Street?

A. Yeah.

Q. Who do you live there with?

A. My parents.

Q. And what are their names?

A. Joseph and Diane Keating.

Q. How long have you lived at 3 James Street?

A. My entire life. But I recently moved back in. For about two years I've been living with them.

Q. Do your parents own that house?

A. Yes.

Q. You have been living there the past two years. Where did you live prior to that?

A. At 90 Market Street.

Q. When did you stop living at 90 Market Street, if you can recall specifically?

A. I think it was last April the house was sold.

Q. So, April 2012 you were still living there?

A. I believe so.

Q. So, when you said that you lived at the 3 James Street for the last two years, was that your primary residence?

A. Yeah.

Q. When you were living at 90 Market Street, that was not your primary residence?

A. Well, the house was with the realtor. So, basically I was just back and forth, but 3 James Street would have been my primary residence.

Q. Where did you sleep at night?

A. At my parents.

Q. At the 3 James Street?

A. Yeah.

Q. Okay. How long did you live in any capacity at the 90 Market Street address?

A. Probably for a full two years. I moved in there about 2007.

Q. Who owns that residence?

A. My father.

Q. When you moved in there in 2007 and when you left in 2012, did anybody else live there with you?

A. No.

Q. Did anybody else at any point during that time temporarily reside with you?

A. Just my girlfriend.

Q. What's her name?

A. Anna Wardak.

Q. Can you spell that?

A. A-n-n-a, W-a-r-d-a-k.

Q. When did she live there with you?

A. 2007, 2008.

Q. What about a Francis Lombardo, do you know a Francis Lombardo?

A. Yes.

Q. Did he ever reside for any amount of time at 90 Market Street?

A. Just for a day or two overnight.

Q. And what would be the reasons he would be staying overnight there?

A. We were doing work on the property and he was helping me lay tile and do different things.

Q. When did he first start helping you with work at that address?

A. 2008.

Q. How many times a week would he help you or a month or was there any regular schedule?

A. No regular schedule, but I would say it would be about three times a week.

Q. Did your parents buy that as an investment property?

A. No, it was my grandmother's.

Q. Okay. When is the last time Mr. Lombardo has helped you fix up the house?

A. 2009.

Q. Were you finished — strike that

Why did he stop helping you in 2009?

A. We were confronted by Pittston City Police and Agent Coslett. And basically Fran didn't want any

part of it. He just wanted to be left alone. So, he didn't want to come back and help me after that incident.

Q. How was he — the incident meaning the incident in your lawsuit?

A. Yes.

MR. BAILEY: Let Gary finish. Just a little wee bit of time.

A. All right.

MR. BAILEY: Because the young lady has to and you know, we need to get a good recording. So just a fraction of a second before you — you were pretty quick on the uptake, so.

A. All right.

MR. BAILEY: Okay, Marc. Thank you.

BY MR. DADAMO

Q. What kind of work were you doing on the home, and by that house I mean the 90 Market Street?

A. General remodeling, roof, windows, tile flooring.

Q. Were your parents paying you to do that?

A. No, not really.

Q. Did you have — were you employed during that time?

A. Yes.

Q. In 2008, 2009?

A. Yes.

Q. What was your employment?

A. I worked at Domonic's of New York. It was a cheesesteak stand.

Q. Where was the —

A. In front of Lowe's.

MR. BAILEY: Do you favor an increase in the minimum wage as our great president does?

A. Yes.

MR. BAILEY: Good. You're acceptable to me as a client, that's fine.

BY MR. DADAMO:

Q. From when to when did you work at Domonic's?

A. From I would say late 2007 to 2009.

Q. Between 2007 and 2009, did you have any other employment other than Domonic's?

A. No.

* * *

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* * *

BY MR. DADAMO:

Q. Mr. Keating, we're going to mark this as Pittston Defendant's 1, the document that your attorney just red portions of into the record.

It is labeled Guilty Plea Colloquy and I had asked you a question as far as what had been sent to you by the City of Pittston with respect to the 2009 incident and you said that that's what was sent to you. Correct?

A. Yeah, attached with an affidavit of probable cause.

Q. Okay.

MR. BAILEY: Could I ask if we, if it's just mark it Keating 1, because I'm not that smart to keep up with you guys?

MR. DADAMO: That's fine. That's fine.

MR. BAILEY: Thank you.

(Keating Deposition Exhibit No. 1 marked for identification.)

BY MR. DADAMO:

Q. Now, when that part of it was sent to you, was it blank, meaning the bottom there — strike that.

The bottom of the page, is that your signature?

A. Yeah.

Q. Okay. Did you plead guilty to the charges?

A. Yeah.

Q. Okay. When it was sent to you, the guilty plea colloquy?

A. Yeah, maybe this isn't what was actually sent to me. It looks similar to what was actually mailed to me.

There was a paper with the headline Fred Pierantoni, Commonwealth versus Marc Keating 90 Market Street, with the docket number. And it listed the five counts of receiving stolen property similar to the way it's listed here. And then there was a page attached with the affidavit of probable cause.

Q. And what makes you think that that was sent to you by the Pittston City?

A. I remember it.

Q. Did you ever come in contact with any officers from Plains Township?

A. No.

Q. The checks that were stolen, where were they stolen from, do you know?

A. No, I don't.

MR. BAILEY: Objection to the form of the question. You may respond.

BY MR. DADAMO:

Q. Why did you plead guilty?

A. Because they offered it to be disposed of at the magistrate.

Q. Who's they?

A. Officer Tokar.

Q. Okay. Go ahead, I'm sorry.

A. And I didn't have any objections to that. I didn't want to risk going to trial on it. I believe that they were shady to begin with, so.

Q. So, why did you plead guilty?

A. Because it was disposed of at the magistrate as time served. Like basically there was no punishment. I mean if I risked going to trial, they could have lied, they could have done, you know, a lot of things to convince a jury otherwise.

Q. Did they lie before that?

A. Yes.

Q. How did they lie?

A. When they — no, I can't say they lied before that, I really don't know. But I read their transcripts

from the last deposition and they — we're dealing with bad cops here.

Q. Why are they bad cops?

A. Because they're lying.

Q. What are they lying about?

A. The entire incident, Tokar and Hussein especially.

Q. What specifically?

A. The way they entered the house, the reason they pulled their guns and what they did afterwards.

Q. Why don't you tell me what you remember about the incident then?

A. After Agent Coslett had found the —

First of all, Agent Coslett entered 90 Market Street to do a home plan approval and this wasn't home plan approval. When he entered the house this was a search. He tore the place apart specifically looking for something. You know, whether his intentions were to jam me up with two weeks left of probation, I don't know.

But during that process he found these checks and they were under a physics book. I remember him finding them. And after discovering them, we went downstairs and exited the house.

He called I believe it was Pittston City while we were on the back deck and asked them about the checks, if there was any report of the burglary and any type of receiving stolen property. And it came back there was no burglary under the name on the checks.

A couple minutes later, that's when Tokar and Hussein came up in the Pittston City vehicle. They approached, just came around the backup onto the back deck, were having a conversation. I surrendered the checks to Tokar.

And after I surrendered the checks, Coslett had mentioned to him that Fran Lombardo was inside sleeping on the couch. And Tokar he walked tight by me, he said, Oh, Gupper is in there? He walked right by me, opened the door up and walked in the house. Hussein followed him.

Me and Coslett were still standing on the deck and all's we heard was Tokar yelling, Gupper's gone, Gupper's gone. I look at Coslett, Coslett looks at me, with both of us with a surprise on our face.

So, Coslett enters the house. I followed him. And there's Tokar coming through the breezeway, both of them with their guns drawn looking for — sweeping the house looking for Gupper.

They trampled — the night before we laid, me and Fran laid tile in the kitchen. They trampled all over the tile. I had to rip those up. I have, you know, pictures of that. I have the tiles that they trampled all over.

They went nuts.

Q. And what happened after they were looking for Lombardo?

A. Nothing. Oh, they didn't locate Fran. Fran had left.

Q. Did they know that?

A. Well, yeah. They went in the house, he wasn't on the couch anymore.

Q. Did they know — did they say anything to you that indicated why they had their guns drawn?

A. No.

Q. Did anyone see Lombardo leave the house —

A. No.

Q. — that you know of?

A. No, not that I know of.

MR. BAILEY: Give him time to ask his question.

A. Okay, I'm sorry.

MR. BAILEY: That's okay.

BY MR. DADAMO:

Q. Since they did — since no one saw Lombardo leave the house, is it possible that he was somewhere else in the house where he couldn't be seen?

A. It's possible. But what if he was up in the — what if he was going to the bathroom, does that still justify them pulling guns looking for him?

Q. Did they point the guns at you at any time?

A. Yes.

Q. When?

A. When they came through the breezeway and I was standing in the kitchen.

Q. What did they say to you?

A. Nothing. They just they descended the steps into the basement.

Q. How long were their guns pointed at you?

A. Briefly.

Q. Like a few seconds?

A. Yeah.

Q. They went down in the basement. How long were they down in the basement for?

A. Maybe less than a minute.

Q. And they came back up?

A. Yeah.

Q. What did they do after that?

A. They approached me. That's when they ordered me into the bathroom. They stripped me naked, made me bend over.

Q. Who made you do that?

A. All three of them.

I asked Agent Coslett, you know, if he was going to conduct a strip search I asked him to conduct it alone. And he denied that request, Tokar denied the request and Hussein denied that request. They all wanted to stand there and see me naked.

Q. What makes you say that?

A. Because they denied my request to have Coslett conduct it alone.

Q. Other than deny your request, what gives you the impression that they wanted to see you naked?

A. They chose to stand there and watch me undress.

Q. Is that part of their job possibly?

A. No, I don't think so.

Q. How do you know that?

A. I've never heard of that happening before.

Q. How many times have you been stripped searched?

A. None. Never.

Q. What bathroom did that occur in?

A. Upstairs.

Q. How many bathrooms are upstairs?

A. One.

Q. Can you be more specific as far as — so, you walk into the bathroom. Correct?

A. (Witness nodded affirmatively.)

Q. Yes?

A. Yes.

Q. Who else walks in the bathroom with you?

A. Coslett and — Coslett was basically inside the bathroom with me. It's a small bathroom.

Q. Okay.

A. Tokar and Hussein were standing at the threshold of the bathroom.

Q. Were they in the bathroom, out of the bathroom, or one foot in, one foot out?

A. Basically in — Tokar was ahead of Hussein.

I would say he was past the threshold in the bathroom and Hussein was basically at the threshold.

Q. Coslett was in the bathroom with you?

A. Yes.

Q. What was he doing? Can you describe his activity during the search what he did?

A. He ordered me to undress. He ordered me to bend over, spread my buttocks with my genitals, basic, you know, a strip search.

And then after that they let me get dressed and they began — that's they all came in the bathroom then and they searched the entire bathroom with me still in the bathroom.

Q. After you got dressed?

A. Dressed, yes.

Q. When you were naked, what were Tokar and Hussein doing, if anything?

A. Just standing there observing.

Q. Did they touch you?

A. No.

Q. Did they say anything to you?

A. No.

Q. Did they look at you?

A. Yeah.

Q. During the strip search, did Coslett touch you?

A. No.

Q. Did he say anything to you?

A. No.

Q. Did they find anything as a result of the search?

A. No.

Q. How long did the search take, do you remember?

A. I don't know, maybe five minutes, ten minutes maybe.

Q. And what happened after that?

A. They began a search of the bathroom. Oh, they allowed me to get dressed and then they began to search the bathroom. They didn't discover anything so that's when Coslett gave Hussein the order to hand — or Coslett handcuffed me and he gave Hussein the order to bring me downstairs and seat me in a chair.

Q. So Coslett handcuffed you?

A. Yeah.

Q. Did Hussein follow Coslett's order and take you downstairs?

A. Yes.

Q. What happened downstairs?

A. He just he ordered me in a chair and he just stood there.

Q. Hussein?

A. Yeah.

Q. Did you two have any discussions while you were sitting there?

A. No.

Q. What was going on while you were sitting there in the rest of the house?

A. They were upstairs ransacking the place, Coslett and Tokar.

Q. How do you know that?

A. I heard them.

Q. What did you hear?

A. Just dumping boxes out, just opening things up.

Q. Did you actually see either one of them do anything upstairs?

A. No.

Q. How long were you on the chair, sitting on the chair handcuffed for?

A. Probably about a half hour.

Q. What happened after that?

A. They called me upstairs, Coslett and Tokar called me upstairs. And they were in the back bedroom at this time where my cousin, Fran, had some stuff. And they searched through his stuff and they, you know, they basically exposed it to me what it was.

He had a diary there and Tokar was thumbing through that looking at it, you know, commenting, you know, basically, you know, I don't want to use the — busting him about it, you know, what was in there.

Q. What was in there?

A. Just his personal notes and he — and then he found, Tokar found like a Hustler magazine and he began thumbing through that.

Q. What else did they find?

A. They found medication and they found an air gun.

Q. What kind of medication was found?

A. I don't — I'm not sure.

Q. It wasn't your medication. Correct?

A. No, it was Fran's.

Q. Okay. Do you know what they did with the medication?

A. They gave it back to me, the medication, and after they left they gave me the medication and the gun.

Q. Were you aware that there was a gun back there?

A. No.

Q. Were you aware that he was on medication?

A. I'm aware that he's on medication, yeah. But I can't say I was aware that he had medication.

Q. So, when Officers Tokar and Hussein arrived at your house you were outside the house?

A. Yes.

Q. What did they say when they showed up? Did they say anything to you?

A. No.

Q. Did they say anything to Coslett?

A. They were having a discussion. I can't, you know, I can't remember word-for-word what-it was about. Basically it was concerning the checks.

Q So, you overheard them talking?

A. Yeah, I was standing right there.

Q. Okay. And when they were finished talking, what happened next?

A. Coslett told them that Fran Lombardo was inside sleeping on the couch.

Q. Okay. And then everything we just talked about transpired once they walked in the house?

A. Yeah.

Q. You said that they pointed guns at you?

A. Yeah.

Q. Where were your — where were you standing?

A. I was in my kitchen —

MR. BAILEY: Objection, asked and answered.

You may continue to respond.

A. I was standing in my kitchen. In front of me was the island, the kitchen island, and they came through the breezeway like this (indicating) and basically all three of them were like this (indicating).

BY MR. DADAMO:

Q. Who went in the house first?

A. Tokar.

Q. Who went in second?

A. Hussein.

Q. Who went in third?

A. Coslett. Coslett only went in because he heard them yelling, Gupper is gone, Gupper is gone. I mean Tokar basically sucked him right into this. I don't know what his excitement was about

Q. When Tokar entered the house first, was his weapon drawn?

A. No.

Q. What about Hussein?

A. No.

Q. How long after they went in did you go in the house?

A. 20 seconds.

Q. How long after you went in the house did they draw their weapons?

A. Five seconds, ten seconds maybe.

Q. And then they went down in the basement and everything else you talked about earlier. Correct?

A. Yes.

Q. Now, when you were handcuffed downstairs, you claim that Tokar and Coslett were searching the upstairs. Correct?

A. Yes.

Q. They came back downstairs and what happened at that point?

A. They began searching the downstairs.

Q. And were you still handcuffed during that time?

A. Yes.

Q. Okay. How long did they search the downstairs for?

A. Probably another 15 minutes.

Q. Did you actually see them searching?

A. Yes, yes.

Q. Can you describe specifically how Defendant Coslett was searching the downstairs?

A. Coslett was going through the kitchen cabinets. He's tall so he was able to, you know, look on top of the kitchen cabinets. Tokar was combing through the garbage. And Hussein was in the bathroom, there's a bathroom attached to the kitchen, and I saw Hussein with my phone in his hand going through my phone.

Q. How long did the search of the downstairs last?

A. About 15 minutes.

Q. And what happened after that?

A. They left. Tokar and Hussein left.

Q. When they left, were you still handcuffed?

A. No, he had taken me out of the handcuffs by now.

Q. Who took you out, Coslett?

A. Coslett.

Q. Did Tokar or Hussein say anything to you before they left?

A. No, I can't recall anything right now.

Q. There were checks found, correct, you said earlier?

A. Yes.

Q. How did those checks come to be in that house?

A. I found them.

Q. Where did you find them?

A. Up the street on the side of the road.

Q. What street did you find them on?

A. Market Street, yeah.

Q. How many checks did you find?

A. I believe there was about five or six maybe. There were social security cards, there were credit cards, identification.

Q. Anything else?

A. That's it.

Q. When did you find all of those documents on the street?

A. Maybe a week prior to this incident.

Q. How did you come to discover them, were you just walking and saw them?

A. Yeah. I was walking my dog.

Q. They were personal checks. Correct?

A. I believe so, yeah.

Q. The social security cards and other documentation, what did you do with that?

A. I handed them over to my attorney.

Q. Who was your attorney?

A. Joe Castellino.

Q. Is his practice in the Pittston area?

A. Yes.

Q. Is he a criminal defense attorney?

A. Criminal and civil.

Q. Why did you turn that over to him?

A. He was representing me on a case at the time Pittston City had filed against me, which I later got thrown out.

These people basically retaliated against me. After my father lost re-election for mayor, I mean they all in this same period, all in the same time period they just ended up filing charges, charges at me, and they all ended up getting dismissed.

The dog they said I stole, they filed that against me, that got dismissed. Then they filed a set of charges against me for criminal solicitation to commit a catastrophe. That got dismissed.

Q. Getting back to the documentation that you found, how is that going to be helpful to your attorney in a case that City of Pittston had?

MR. BAILEY: Objection to the form of the question, but I'm going to let you respond. You may respond.

A. I was surrendering, I was surrendering the documents to him.

BY MR. DADAMO:

Q. Were you charged by the City of Pittston for stealing those documents?

A. Just the checks I was charged with.

Q. Okay. I'm just trying to — you said you found besides the checks information that had social security numbers on it. Correct?

A. Yes.

Q. And what else?

A. Credit cards.

Q. And you turned those over to your attorney. Correct?

A. Yes.

Q. Because those were going to assist you in a case that the Pittston had against you. Correct?

A. No, no, I —

Q. That's not correct. Okay, I think that's what you said, but go ahead explain it.

MR. BAILEY: Objection, I don't think — you go ahead and —

MR. DADAMO: Well, I can clear it up.

MR. BAILEY: No, let him — you have a question on the table and he's ready to answer it, answer it.

A. I turned them over to my attorney because I didn't want to go in City Hall and deal with Pittston City Police. Like I said, my father lost the election and these people were gung-ho for me. When my father became mayor, he switched the entire police department around. These people were, you know, sitting at the desk collecting overtime and not doing anything. And basically my father cut all that out, the overtime and the do nothing attitude.

So, I certainly wasn't going to walk in City Hall and ask for their help.

BY MR. DADAMO:

Q. Well, what was your intent on turning over the credit cards and the social security cards, what did you want to see happen?

A. I'm sure he would have surrendered them.

Q. Why didn't you give him the checks?

A. I misplaced them. And when Coslett had searched through the house, I finally saw where I had misplaced them.

Q. And you misplaced them underneath a physics book?

A. Yes.

Q. Did you tell your attorney that you had misplaced the checks?

A. Yes.

Q. Do you know whether he took any efforts to contact any authority about what you had found?

A. No, I don't.

Q. Did you have any discussion with him since you turned over that material to him —

A. No.

Q. — about what he did with it?

A. No.

Q. The checks that you had, were they personal checks?

A I believe so.

* * *

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* * *

Q. Okay. Now, when you were living at the 3 James Street at around the time of the incident complained of, which is in October of 2009, you said you were almost at the end of a five-year parole term. Is that correct?

A. Yes.

Q. When did you receive that parole sentence?

A. 1998.

Q. What was the sentence you received at that time?

A. Five to ten years.

Q. What were the charges, criminal charges?

A. Yes, conspiracy to distribute.

Q. Anything else with that?

A. There was also a delivery.

* * *

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Q. Have you ever filed a complaint with the police department about that specific day and their behavior?

A. I spoke to some people about it. I don't believe that — I don't believe there's like an actual complaint process with the city.

Q. Who did you speak with?

A. Councilman Joe McLean.

Q. When did you speak with him about it?

A. Shortly right after the incident occurred in October.

Q. What did you tell him?

A. I told him the entire incident, you know, how they drew their guns and basically I was going to sue them.

And what was strange, after I told him the next Monday I was called up to the Scranton office, the parole office by Agent Coslett, and he had found out that I, you know, was making comments that I was going to sue them.

Even stranger, after they conducted the search, they did what they did and they finally left, I was on my way to work at Domonics and Agent Coslett called me on my cell phone and asked me if I was all right, you know, kind of like he knew what happened there was, you know, wrong.

Q. The councilman that you spoke to, what did he say in response to what you told him?

A. He seemed like I was overwhelming him.

Q. What gave you that impression?

A. He really didn't comment and basically his response was like, you know, I don't know, Marc, you know.

Q. Did he say he was going to do anything?

A. I don't know. I can't recall. I don't think so.

* * *

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* * *

BY MS. GIUNTA:

Q. And I think you said earlier you had an approved plan for is it James Street?

A. Yes.

Q. Okay. The special terms in front of you, does that include some that you've mentioned already, that no alcohol use?

A. Yes.

Q. When Mr. Coslett called — or let me start —

On October 14, 2009, how did you come in contact with Mr. Coslett?

A. He called me. I was waiting to go to work, waiting to leave for work. I was dressed. And he called me on my cell phone and he said he wanted to conduct a random urinalysis.

Q. What time was that?

A. In the morning, 9:00, 9:30 in the morning. He asked me where I was. I told him that I was at my parents'.

Q. Did he then come to your parents' house?

A. Yes.

Q. Did you take a urinalysis test?

A. Yes.

Q. What was the result of that test?

A. Nothing.

Q. Did you eventually find out the result of that test?

A. No.

Q. Would it surprise you to learn that you were found positive for —

A. He said for morphine and that I was getting it off my mother. That's —

Q. Did you ever — go ahead.

A. No, that's just crazy. My mother has never gotten morphine in her life.

Q. Did you ever take Ultram?

A. Yes.

Q. Did you have a prescription for Ultram?

A. Yes.

Q. From a medical physician?

A. Yes.

MR. BAILEY: From a non-medical physician.

A. Huh?

MR. BAILEY: Never mind.

BY MS. GIUNTA:

Q. Were you taking Ultram on the day in question, October 14th, 2009?

A. I don't — I can't recall. Ultram is a non-narcotic.

Q. Who prescribed the Ultram?

A. I would say the doctors at Geisinger.

Or I also had a primary care physician in Wyoming. I'm trying to think of his name. Dr. Montgomery. I think it's the Care — not the Care and Concern Clinic. It's inside of the old First Valley Hospital. There's like a clinic there.

Q. Dr. Montgomery is inside that hospital?

A. Yeah.

Q. In the clinic?

A. Yeah.

Q. And was it Dr. Montgomery who prescribed Ultram?

A. Yes.

Q. What was the Ultram for treatment of?

A. Pain.

I have, I have nerve impingement in my leg. I have decreased use of my leg, decreased dorsiflexion. I went for surgery when I was with Agent Coslett at Hershey Medical Center to try and decompress the nerve and it really didn't improve it. So, they prescribed the Ultram.

Q. When was that surgery?

A. 2008. 2007, 2008.

Q. And you said you went with Agent Coslett?

A. No, he was — I was still being supervised by him at the time.

MR. BAILEY: Let me place an objection.

I don't mean to be — are we going to be bringing new charges? Are we — what's this?

I object to the relevancy of all of this. Let me just do it that way now.

MS. GIUNTA: You can —

MR. BAILEY: Go ahead.

MS. GIUNTA: You can object.

MR. BAILEY: I object. I object very strongly, but go ahead.

BY MS. GIUNTA:

Q. Were you taking any other medications as of October of 2009?

A. No.

Q. And you said you were not taking morphine?

A. No.

Q. You are unaware of the urinalysis test results for October 14 of 2009?

A. Yeah.

Q. Also on October 14, 2009, you discussed earlier with Mr. Dadamo that a search was conducted of your home?

A. Yes.

Q. During that search, what types of items did Agent Coslett uncover?

A. Just the checks.

Q. Was there any alcohol found in your refrigerator?

A. There was a bottle of — it was non-alcoholic, a bottle of like a mixer.

Q. Would that have been a mixer for Mojitos?

A. Yes.

Q. Okay. Was there also a bottle of rum in the refrigerator?

A. No. No.

Q. What did Agent Coslett do with the Mojito mix?

A. He gave it back to me. I still have it at my house.

MR. BAILEY: You should have brought it with you.

A. I —

MR. BAILEY: I'd have gotten the rum for it so that everybody could be happy while asking these questions.

BY MS. GIUNTA:

Q. And you said, I think you testified already that they eventually then found an air gun and some medications as well?

A. Yes.

Q. As part of the conditions of your parole, are you permitted to have any type of weapon in the home with you?

A. No.

MR. BAILEY: Objection. You may continue to respond.

MS. GIUNTA: What's your objection, Don?

MR. BAILEY: Are you familiar with Pennsylvania gun laws?

MS. GIUNTA: Yeah.

MR. BAILEY: Okay. Are you suggesting that — I understand the —

MS. GIUNTA: I thought we agreed to objections as to form?

MR. BAILEY: Oh, you asked me. I'm very happy to keep my mouth shut. Keeping on going. It's okay with me.

MS. GIUNTA: I just want to correct the form if there's a problem.

MR. BAILEY: Well, I was responding to your request. But you just told me I'm confined and I'm going to do exactly what you said and shut up and we can keep on going.

MS. GIUNTA: You — I'll wait.

MR. BAILEY: Yes, please. Thank you very much, Abby.

MS. GIUNTA: Sure.

BY MS. GIUNTA:

Q. I wanted to talk about Fran Lombardo.

A. Yes.

Q. You referred to him as your cousin. Correct?

A. Yes.

Q. And you said that he was staying with you at the 90 Market Street residence three or so times a week. Correct?

A. No, he was helping me work on the house about three, four times a week. He only stayed there like certain nights when we worked late into the evening.

Q. Are you aware of any criminal history for Mr. Lombardo?

A. He had some run-ins with the law. I'm not really aware of his entire criminal history.

Q. Are you aware of any limitation on who you may or may not have contact with while you're on parole in reference to people with any type of criminal convictions?

A. No, I'm not.

Q. Now, you said you signed a new Home Provider Agreement with Mr. Coslett on October 14th. Is that correct?

A. Yes.

Q. As of that day, where had you been primarily sleeping?

A. At my parents' house, 3 James Street.

Q. Then why did you sign a new Home Provider Agreement on October 14th?

A. I don't — you know, like he kind of persuaded me into signing it. You know, telling me that I would get jammed up, you know, you should just look out for yourself and sign it so you don't get jammed up and so I signed it.

Q. Were you sleeping at the time at the Market Street residence at all?

A. I would, I would stay there once in a while. I would crash there.

Q. Were you having any mail delivered there?

A. Probably for the utilities.

Q. Were those in your name?

A. Yes.

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BY MS. GIUNTA:

Q. I'm sorry, you said that Mr. Lumbardo [sic] may have had some run-ins with the law. Do you know if any of them included matters concerning drugs?

A. No, I don't think he's ever been arrested for drugs.

Q. Can you tell me — I think it would Paragraph 5 here.

A. Yes.

Q. Did you have a chance to look at that on Exhibit 2?

A. Yes, I signed this.

Q. And do you understand that the Home Provider Agreement gives your parole agent the right to search your residence?

A. Yes.

Q. As long as we have it out, below that, I think that would make that Number 7, is there a paragraph concerning firearms in the home?

A. Yes.

Q. And that they are restricted. Is that correct?

A. Yes, I understand like firearms as —

MR. BAILEY: Give me that exhibit there.

Did you have 105 in there, a 155, 8-inch, I mean a howitzer?

MS. GIUNTA: Don, actually I think if you read the exhibit it says firearms and look-alike firearms.

MR. BAILEY: Oh, my goodness, I'm going to need to go down to the five-and-ten and get me a —

MS. GIUNTA: Do you have an objection?

MR. BAILEY: — M16.

Yeah. I object to this document. I think it's — first of all, I don't think it's complete. It's obviously been copied, but it's something, there should be an original somewhere so I'm going to ask you to verify that.

MS. GIUNTA: Don, I think your client has verified that he signed it,

MR. BAILEY: He said that was his signature down there that he signed it.

BY MS. GIUNTA:

Q. Did someone else sign your signature to that document, sir?

MR. BAILEY: Abby, that's not the issue. It's not an original document and it's been copied.

MS. GIUNTA: Then make your objection and let it stand.

MR. BAILEY: Okay. Well, then stop raising questions about it and I'll explain it and then I'll do some things when I question him. I just want it to be clear that I object to it, okay?

MS. GIUNTA: Oh, it's clear.

MR. BAILEY: Are you sure? Did I make myself — okay.

BY MS. GIUNTA:

Q. As a result of the incident on October 14th with Mr. Coslett, I think you mentioned earlier that they were gung-ho out to get you?

A. Yeah.

Q. You feel that way?

A. Yeah.

Q. Did Coslett violate your parole after that date?

MR. BAILEY: Objection. You may respond.

A. No. No, he didn't,

But after that date I ran into — I was visiting a friend of mine, Nicole Mecadon. And while I was visiting her, her sister stopped over at the house, Lisa Mecadon. She was also being supervised by Agent Coslett.

And as soon as she walked in and saw me, she said, Marc, what did you do to Frank? He's — he's got it out for you. And it was kind of surprising that she said that right after this incident occurred.

BY MS. GIUNTA:

Q. Did Frank Coslett ever say anything to you that he was out to get you?

A. No.

Q. Did — never mind. That's all I have.

EXAMINATION

BY MR. BAILEY:

Q. Hey, Marc, how ya doing?

A. I'm all right.

Q. Good. I have a couple little questions for you, okay, just little things. All right?

You know that — I don't know what Abby called it, but she referred to it as — I refer to it as Page 1 and 2 of one your exhibits there. I think it's 3. She might have marked them 3 and 4.

Will you take them there?

A. Yeah.

Q. Okay. Now, when she was questioning you, I didn't really get when you signed that on the day in question.

A. It's signed August 9th, 2007.

Q. Well, does it have like a time stamp on it or anything?

Did he mark the time on it?

A. No, I don't see any time on it.

Q. Well, if I remember —

MR. DADAMO: Don —

MR. BAILEY: I'm sorry?

MR. DADAMO: I just want to object —

MR. BAILEY: Sure.

MR. DADAMO: — to the form. The day in question, I don't know what the day in question means. He referred to something in 2007, so.

MR. BAILEY: Well, you called it the incident and because I like you so much I never raised an objection.

MR. DADAMO: No, my understanding the day in question is in 2009, but he answered

something about 2007. So, that's why I'm objecting to the form because I don't understand.

MR. BAILEY: Okay. I'm just asking him if he marked the time when that was signed.

A. I don't, no, I don't see a time marked.

BY MR. BAILEY:

Q. So the record is clear, is that the home plan or whatever they call it that was signed the day that Mr. Hussein and — Mr. Hussein and — I hope I'm saying that right by the way, sorry.

MR. DADAMO: He's not here, it's okay.

MR. BAILEY: Well, I thought he might be offended if he had. Mr. Tokar, whatever, am I saying that right?

A. Yeah

BY MR. BAILEY:

Q. Okay. Well, the day that Franny was sleeping on the couch and he took a powder when they came into the residence there, now that address right there, that was your grandmother's old place?

A. Yes.

MR. DADAMO: Object to form.

BY MR. BAILEY:

Q. Sorry. What was the, what was the address of that place?

A. 90 Market Street, Pittston.

Q. And your plan before that had had a different address on it, didn't it?

A. Yes.

Q. And what was that address?

A. 3 James Street, Pittston.

Q. And that's where mom and dad lived. Am I right?

A. Yes.

Q. Had your grandmom passed away or —

A. Yes.

Q. She has, sorry.

Now, when the two police officers represented by Mr. Dadamo went into the house, were you under a home plan at that time?

A. I was under the 3 James Street home plan, but Agent Coslett —

Q You've answered the question, okay, but you can go ahead and finish now, okay. So, you were under the — at 3 James Street.

Now, what were you going to say when I interrupted you?

A. Agent Coslett suggested that I submit 90 Market as my home plan so I don't get jammed up.

Q. Did you — oh, he was trying to help you from getting jammed up?

A. Yes.

Q. Okay. Well, did you have any — do you know whether the terms and conditions that this fine young assistant attorney general just referred to a minute ago, whether they changed from the one that was at the other address, if you know?

A. Not that I'm aware of, no.

Q. Well, before you signed that, I understand you signed it based upon — I don't — persuasive is the

wrong word, but your words were I think that Mr. Coslett wanted you to sign it, sort of wanted you to sign it. Is that what you said?

A. Yes.

Q. Did you ask to sign that?

A. No.

Q. Did you have any opportunity to, silly as it may sound, to talk or review that with an attorney?

A. No.

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BY MR. BAILEY:

Q. All right. Now, you testified that you signed that while you were outside of your grandmother's, your deceased grandmother's residence. Is that correct? Or was it an estate or something or you owned it or who owned it?

A. My father owned it.

Q. Your father, okay.

And that's, I'm going to call that the incident if nobody objects to it. Okay?

At the incident, you signed that the day of the incident. Is that correct?

A. Yes.

Q. Okay. Now, you testified earlier in response to Mr. Dadamo as to when, in rather precise terms, when you signed that in terms of the, you know, the sequence of events. I want you to share that with us very concisely again, please.

A. He entered the house and he began, he looked around and he went upstairs, And after — before the Pittston City Police got there, we signed this.

Q. Where were you?

A. We were downstairs in the kitchen.

Q. Okay.

A. I signed it on the island, on the kitchen island.

Q. Okay. And that was before Mr. Hussein and Mr. — let me see, let's see, if we got the — Tokar, T-o-k-a-r, it was before — Hussein, I'm sorry, H-u-s-s-e-i-n, it's before those two gentlemen got there. Am I correct?

A. Yes, sir.

Q. Now, did Mr. Coslett ask them to go into the house and conduct a search?

A. No.

Q. My recollection is that, correct me if I'm wrong, that Mr. Coslett made a comment to the two Pittston police officers, who are defendants in this action, that Yuppie — is it Guppie?

A. Gupper.

Q. Gupper, the Gupper. Probably a real good friend of the Gipper, which is how they would at Notre Dame football games. But the Gupper was in the house and he ran away. Is that right?

A. Yes.

Q. At least it turned out he ran away?

A. Yeah, he left.

Q. All right. When Mr. — you said Mr. Tokar went in reaction to that, went into the house and went around the front?

A. No, he entered the back door.

Q. Oh, through the kitchen?

A. Yes.

Q. Okay. And Mr. Hussein went with him?

A. Yes.

Q. And Mr. Coslett didn't ask them to search anything?

A No.

Q. Did Mr. Coslett indicate to you why he was asking the two police officers to come up to begin with?

A. No, he didn't.

Q. And he didn't say to them anything that indicated Francey had a warrant out for him or that he was brandishing weapons or planning a big bank heist or anything in there?

MR. DADAMO: Object to form.

A. No.

BY MR. BAILEY:

Q. I'll withdraw that. A visitation to the bank to borrow money so that he could contribute to the police benevolent ball.

But the point is, though, was there any reason given at all for why these two police officers would go into the house presumably to find Mr. Francis?

A. No.

Q. All right. Now this is very important. I want you to think back. At the time do you know whether Francis was up on charges somewhere?

A. No.

Q. At the time do you know whether there were any bench warrants or any warrants out for him if you know, for any reason, contempt, anything?

A. No.

MR. DADAMO: No, there weren't or, no, he doesn't know to the last two questions?

MR. BAILEY: I'm asking him if he knows. If he said, no, he doesn't know.

MR. DADAMO: Okay.

BY MR. BAILEY:

Q. Now, now don't over answer. When — at any later time did you find out that Francis was, indeed, up on charges or was running away from something?

A. He wasn't. We were working out in the open. So, I — I would say he wasn't — there weren't warrants out for his arrest or anything along those lines. We were working out in the open.

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Q. Now I want to ask you very briefly about the prowling incident. I think you said the prowling incident occurred at the park. Your bike apparently runs hot and you were wanting it to cool off. Is that right?

A. Yes.

Q. And you were made to push the bike home upon a police order?

A. Yes.

Q. Do you know who that officer was?

A. I could — I don't know their names, but I'm familiar with their faces,

Q. I want you to find out for me because I want to make sure that my colleagues know everything. So, I want to know who that officer was, okay?

A. I would like to find out too and include them in a complaint.

Q. That never occurred to me.

But I want you to find out who it was and I want you to tell me. Okay?

A. All right.

Q. How far did you have to push that bike?

A. Uphill about 1,000 yards, 800 yards.

Q. What is the — what's the cc on that, what's it —

A. 200.

Q. Okay, so it's a small bike?

A. It's a scooter.

Q. It's a dirt bike, okay, okay.

Did you get the bike home?

A. Yes.

Q. And you never received any charges for prowling?

A. No.

Q. If I recollect your testimony on direct, you expressly objected to the two police officers being present while you were strip-searched.

Am I correct or am I wrong in that?

A. They were present.

Q. Did you — did you tell Coslett or did you tell any of them that you objected to that?

A. Yes.

Q. And do you have a recollection of any response by any one of the three?

A. They denied the request. Tokar said, No, we're going to stay here.

Q. When they do a strip search, do you have to bend over?

A. Yes.

Q. You have to spread your buttocks and reveal your anus. Is that correct?

A. Yes.

MR. DADAMO: Objection, asked and answered.

MR. BAILEY: No, no, the anus didn't come up.

MR. DADAMO: Oh, it didn't?

MR. BAILEY: No.

I've been attacked by a former colleague of yours for calling him an anal sphincter, that's why I know, which Judge Kane saw fit to investigate until it sort of didn't pan out.

BY MR. BAILEY:

Q. But in any event, you had mentioned your genitals showing. Is that correct?

A. Yes.

Q. Were the officers bending over or looking at your genitals, could you tell, do you know?

A. No, they were all just standing there. Coslett, you have to lift your genitals so they can, you know —

Q. Look under your testicles?

A. Yeah.

Q. Make sure you don't have something hidden there. Right?

A. Yeah.

Q. That sort of thing?

A. Yeah.

Q. Okay. Did you do that?

A. Yes.

Q. Did you do that on order or did —

A. On order.

Q. On order. Who gave that order?

A. Coslett.

Q. Coslett.

You were questioned by Mr. Dadamo and you said — and he specifically asked you if you saw them, and you specifically responded I believe you didn't see them but you could hear them upstairs and you had — that had been preceded by a comment of yours that they ransacked the place. Am I correct?

A. Yes.

Q. How do you know they ransacked the place? I mean you didn't see it. How do you know they did?

A. After they left, I went through the house and everything was out of order.

Q. Okay. Did you go upstairs?

A. Yes.

Q. Describe the condition of the room.

A. The dressers were pulled out like completely out of the dresser and put on the floor. Boxes were tipped over. I mean they just had no regard for anything that was in there. Coslett, he just when he first came in the house he — when he located that back bedroom, he just went nuts in there like — and he was saying this was a home plan. He — I've never seen anything like it. I've never seen anything like it.

Q. But I mean Abby did point out to you if I'm not mistaken, I mean a parole officer has a right to conduct a warrantless plan — I mean a warrantless search. Am I right?

A. Yes.

Q. I want you to listen to me real close, listen. Did Mr. Coslett search the back room before he had you sign the new plan?

A. Yes.

Q. Okay. Have you ever signed home plans that you can recollect out in the field at somebody's house or at some place?

A. No.

Q. Has it always been done in at the office?

A. Probably, yeah, usually at the office or at the home.

Q. Well, if you're not sure, say you're not sure. If you don't know, say you don't know.

A. I'm not sure.

Q. Okay. All right.

Are you given a copy of it?

A. I can't recall.

Q. Could I see Exhibits 3 and 4 real quick?

A. (Handing)

Q. What is a parole number?

A. That's your basically like a file number. 601AC I believe is mine. And then you have another number, EL8933, that's your Department of Corrections number.

Q. What is a PBPP, whatever that's called, what is that?

A. That's I believe the Pennsylvania Board of Probation and Parole.

Q. Oh, yeah. Yeah, it is.

Do you know when they revised the Exhibit Number 4, do you know whether it was March of '88?

A. I don't know.

Q. Do you know whether they revised Exhibit Number 3 on July of '91?

A. I don't know.

Q. Why don't you know?

A. I don't believe that — I don't think we're sent copies when it's revised. Or I don't know, I just don't recall ever being informed of a revision.

Q. Okay. Have you ever — last question — have you ever at any time ever had a hearing before a judge on special conditions of parole?

A. No.

MR. BAILEY: Okay. Now before you guys — because I'm sure you have additional questions or something. If you don't, fine. But if you do, can we break for just one minute?

MR. DADAMO: Yeah, I do have a few more questions.

MR. BAILEY: Okay.

(Recess taken)

EXAMINATION

BY MR. DADAMO:

Q. Back on the record.

Mr. Keating, I just have a few follow-up questions for you to clarify some previous testimony.

October 2009 before the incident, you said that you occasionally had been sleeping at the 90 Market Street?

A. Yes.

Q. How many times a week were you —

MR. BAILEY: Let him finish his question.

A. Oh, okay.

BY MR. DADAMO:

Q. How many times a week were you staying overnight there on average?

A. I don't know, once, maybe twice at the most.

Q. Prior to signing the Exhibit 2, did you tell Agent Coslett that you had been staying overnight there at the 90 Street address on occasion?

A. No. I don't recall that I ever told him that.

Q. Did he ask you whether you were staying there?

A. No.

Q. How did it come to be that a Home Provider Agreement was entered into?

MR. BAILEY: Objection. You may respond.

BY MR. DADAMO:

Q. It was his idea that you sign the Home Provider Agreement?

A. Yes.

Q. And at that point after he suggested that, did you tell him that you had been staying overnight there on occasion?

A. I don't believe so, no.

Q. Why did you enter into a Home Provider Agreement at a place that you never told the parole agent that you were staying at?

MR. BAILEY: Objection.

BY MR. DADAMO:

Q. Why was it necessary to enter into a Home Provider Agreement.

MR. BAILEY: Objection to the form of the question. He's told you it wasn't his idea.

BY MR. DADAMO:

Q. Why was it — you can answer the question why was it necessary to enter into the Home Provider Agreement?

A. So I didn't get jammed up.

Q. What does — to you what does that mean?

A. Him parole, remanding me or — I just wanted to ride the last two weeks out. I was in school and I just didn't want any more problems.

Q. Are there any other places — strike that.

When he suggested that you enter into the Home Provider Agreement, what was your thought on that? Did you think it was a good idea, a bad idea?

A. I just didn't think it was a big deal.

Q. What?

A. That entering into a home plan approval there. I —

Q. Why wasn't it a big deal to you?

A. Because I was spending a lot of time over there, but l wasn't living there. I was still living at my parents, but I was spending a lot of time over there.

I mean I was doing work over there until 3, 4:00 in the morning. And, you know, if he ever came around and looking for me at night and I was over there and not at my parents', I could have problems.

Q. So you thought it was a good idea then to enter into the Home Provider Agreement. Correct?

A. I didn't think that it was a bad idea, no.

Q. Because you were also worried about possibly getting jammed up if you were there late at night. Correct?

A. Yeah, like I said, I didn't want any problems.

Q. At any point in time did you tell Agent Coslett that you had been occasionally staying overnight at 90 Market Street address?

A. I don't recall.

Q. That's all I have. Thank you.

EXAMINATION

BY MS. GIUNTA:

Q. I just want to make clear, the morning of October 14th when Agent Coslett called you on the phone, where were you?

A. At my parents.

Q. And where did Agent Coslett meet with you?

A. At my parents.

Q. Was there talk of the Market Street residence while you were at your parents?

A. Yes.

Q. How did it come up?

A. He asked me — when I came outside to meet him, I was waiting for him to show up. I came outside to meet him, and as soon as I approached him, he asked me what the status was with Market Street. And I told him again, you know, I'm remodeling it.

I've been telling him this like — I've been telling him this all summer, I'm fixing this house up, I'm fixing this house up. And I mean this time he just took an interest in it.

Q. Nothing else.

* * *

pennsylvania
BOARD OF PROBATION AND PAROLE

HOME PROVIDER AGREEMENT LETTER

NAME: /s/Mark Keating Parole Number: 601 AC

I have been advised of the conditions of supervision of the Pennsylvania Board of Probation and Parole.

I understand this offender will be required to live at this residence, if approved, for a minimum period of six months unless written permission is given by the parole supervision staff.

I understand that the offender must have access to the residence at all times and must be provided with a key.

I understand that parole supervision staff conduct scheduled and unannounced home visits at anytime.

I understand the parole supervision staff has a right to search the residence at any time when reasonable suspicion exists that conditions of supervision have been violated. I will not deny them access to this residence. I understand that if I deny access to parole supervision staff, the laws of Pennsylvania give parole supervision staff the authority and responsibility to force entry to my residence to search for the offender or contraband without the need of a warrant.

I understand the offender may be subjected to a mandatory curfew. If so, compliance with this curfew may be verified by electronic monitoring and/or personal visits by parole supervision staff. I understand that this may require the receipt of

random telephone calls. If electronic monitoring equipment is attached to my telephone, I understand that special telephone services such as CALLER ID, CALL WAITING and THREE WAY CALLING will have to be removed. I will grant access to parole supervision staff to retrieve installed equipment.

I understand the offender is not permitted to live in a residence where firearms or other weapons are kept including look-alike firearms such as air rifles, starter pistols and toy guns. I hereby certify that no firearms, look-alike firearms or other weapons are in the residence nor will any be brought into this residence as long as the offender is residing there.

I understand the offender will not be permitted to associate with anyone using or selling drugs and I certify that no one who resides in this residence either uses or sells illegal drugs.

I understand that if the offender stops reporting there will be a search of the residence. Parole supervision staff may return to re-search until the offender is located.

I understand that anyone interfering in the lawful arrest of an offender is subject to arrest and prosecution for Obstructing Administration of Law Section 5101 PA Crimes Code and if convicted can be sentenced to one to two years imprisonment.

I may be subpoenaed to appear at hearings to give testimony regarding any violations of supervision.

I certify that I am the principal owner or lessee of this property and that in granting the offender permission to reside here, *I agree to all of the above conditions*. If this is a rental property, I also

understand that the landlord must agree to allow the offender to reside at the proposed residence.

NAME OF HOME PROVIDER:	Marc Keating
HOME PROVIDER'S ADDRESS:	90 Market Street Pittston, PA 18640
SIGNATURE AND DATE:	/s/ Marc Keating 10/14/09 9:13 AM *I have read and understand all articles of this agreement.*
PAROLE AGENT SIGNATURE:	/s/

PBPP 30H
(Rev. 10-2008)

Pennsylvania Board of Probation and Parole
PBPP-11 (Rev. 7/91)

CONDITIONS GOVERNING PAROLE/REPAROLE

To: KEATING, MARC BL-8933 Parole No. 601-AC

1. Report in person or in writing within 48 hours to the district office or sub-office listed below, and do not leave that district without prior written permission of the parole supervision staff.

Scranton District Office
430 Penn Avenue
Scranton, PA 18503
570-963-4326

2. Your approved residence is listed below and may not be changed without the written permission of the parole supervision staff.

Minsec of Scranton (228)
537-39 Linden St.
Scranton, Pa 18503
570-341-8115

3. Maintain regular contact with the parole supervision staff by:
   a. reporting regularly as instructed and following any written instructions of the Board or the parole supervision staff.
   b. notifying the parole supervision staff within 72 hours of: (1) your arrest; or (2) your receipt of a summons or citation for an offense punishable by imprisonment upon conviction; and
   c. notify the parole supervision staff within 72 hours of any change in status, including, but

not limited to, employment, on-the-job training, and education.

4. Comply with all municipal, county, state and Federal criminal laws, as well as the provisions of the Vehicle Code (75 Pa. C.S. § 101 et seq.), and the Liquor Code (47 P.S. § 1-101 et seq.)
5. You shall:
   a. abstain from the unlawful possession or sale of narcotics and dangerous drugs and abstain from the use of controlled substances within the meaning of the Controlled Substance, Drug, Device, and Cosmetic Act (35 P.S. § 780-101 et seq.) without a valid prescription;
   b. refrain from owning or possessing any firearms or other weapons; and
   c. refrain from any assaultive behavior.
6. You shall pay fines, costs, and restitution imposed on you by the sentencing court. You shall establish with appropriate county authorities within thirty (30) days of your release from prison a payment schedule for the fines, costs and restitution owed for those cases for which you are now on state parole. Thereafter, you shall:
   a. pay these obligations according to the established payment schedule or as ordered by the court;
   b. provide proof of such payment to parole supervision staff; and
   c. keep the parole supervision staff and the court informed of any changes in your financial ability to pay fines, costs and restitution.

7. You shall comply with the special conditions listed on page 2 imposed by the Board and with special conditions imposed by the parole supervision staff.

Additionally, should problems arise, or questions occur concerning the conditions of your parole/reparole, consult with the parole supervision staff, and they will help you in the interpretation of the Conditions of Parole/Reparole.

If you are arrested on new criminal charges, the Board has the authority to lodge a detainer against you which will prevent your release from custody, pending disposition of those charges, even though you may have posted bail or been released on your own recognizance from those charges.

If you violate a condition of your parole/reparole and, after the appropriate hearing(s), the Board decides that you are in violation of a condition of your parole/reparole you may be recommitted to prison for such time as may be specified by the Board.

If you are convicted of a crime committed while on parole/reparole, the Board has the authority, after an appropriate hearing, to recommit you to serve the balance of the sentence or sentences which you were serving when paroled/reparoled, with no credit for time at liberty on parole.

If you think that any of your rights have been violated as a result of your parole supervision, you may submit a timely complaint in writing, first to the district director of the district office through which you are being supervised. If your complaint is not resolved to your satisfaction, you may then submit your complaint in writing to the Pennsylvania Board of Probation and Parole, Director of Supervision, P.O.

Box 1561, Harrisburg, Pennsylvania 17105-1661. In consideration of being granted the privilege of parole/reparole by the Pennsylvania Board of Probation and Parole, I hereby agree that:

If I am ever charged with a parole violation arising out of my conduct while in a jurisdiction other than the Commonwealth of Pennsylvania, the revocation of my parole for that violation may be based solely on documentary evidence and I hereby waive any right to confront or cross-examine any person who prepared any such documentary evidence or who supplied information used in its preparation;

I expressly waive extradition to the Commonwealth of Pennsylvania from any jurisdiction in or outside of the United States, where I may be found, and I shall not contest any effort by any jurisdiction to return me to the United States or to the Commonwealth of Pennsylvania; and

I expressly consent to the search of my person, property and residence, without a warrant by agents of the Pennsylvania Board of Probation and Parole. Any items, in the possession of which constitutes a violation of parole/reparole shall be subject to seizure, and may be used as evidence in the parole revocation process.

PBPP-11 (rev 03/88)

To: MARC KEATING	Parole No. 601AC	InstNo. EL8933

SPECIAL CONDITIONS:

OUT-PATIENT DRUG/ALCOHOL TREATMENT IS A SPECIAL CONDITION OF YOUR PAROLE SUPERVISION UNTIL THE TREATMENT SOURCE AND/OR PAROLE SUPERVISION STAFF DETERMINE IT IS NO LONGER NECESSARY. YOU SHALL SIGN THE APPROPRIATE RELEASE FORM FOR CONFIDENTIAL INFORMATION.

YOU SHALL SUBMIT TO URINALYSIS TESTING.

YOU SHALL ACHIEVE NEGATIVE RESULTS IN SCREENING TESTS RANDOMLY APPLIED FOR DETECTION OF THE PRESENCE OF CONTROLLED SUBSTANCES OR DESIGNER DRUGS AND YOU MUST PAY COSTS OF THE TESTS (ACT 97-2)

YOU SHALL NOT CONSUME OR POSSESS ALCOHOL UNDER ANY CONDITION OR FOR ANY REASON.

YOU SHALL MAINTAIN EMPLOYMENT/ SCHOOLING AS APPROVED BY PAROLE SUPERVISION STAFF.

YOU SHALL OBEY CURFEW RESTRICTIONS FOR 30 DAYS AND DURING PERIODS OF UNEMPLOYMENT.

REMOVAL OR TERMINATION FROM THE RESIDENTIAL PROGRAM FOR ANY REASON OTHER THAN SUCCESSFUL COMPLETION MAY RESULT IN SANCTIONS OR A VIOLATION OF YOUR PAROLE.

YOU SHALL NOT OPERATE A MOTOR VEHICLE WITHOUT A VALID PENNSYLVANIA DRIVER'S LICENSE, PROOF OF INSURANCE, VEHICLE REGISTRATION AND SUPERVISING AGENT'S PRIOR WRITTEN PERMISSION.

YOU SHALL NOT POSSESS DRUG PARAPHERNALIA.

YOU SHALL NOT DIRECTLY OR INDIRECTLY HAVE CONTACT OR ASSOCIATE WITH PERSONS WHO SELL OR USE DRUGS, OUTSIDE A TREATMENT SETTING.

YOU SHALL ATTEND A COMMUNITY SUPPORT GROUP (E.G. TWELVE STEPS, ALCOHOLICS ANONYMOUS).

YOU SHALL PAY A MONTHLY SUPERVISION FEE AS DETERMINED BY PAROLE SUPERVISION STAFF TO THE PAROLE BOARD WHILE UNDER SUPERVISION WITHIN THE COMMONWEALTH OF PENNSYLVANIA (ACT 35 OF 1991).

WHEN RELEASED TO THE COMMUNITY YOU MUST REPORT IN PERSON TO THE DISTRICT OFFICE OR SUB OFFICE WITHIN 24 HOURS (MONDAY THROUGH FRIDAY) BETWEEN THE HOURS OF 8:30 A.M. - 5:00 P.M. THE DECISION ANNOUNCED BY THIS BOARD ACTION (PBPP-15) WILL NOT TAKE EFFECT UNTIL YOU HAVE SIGNED THE CONDITIONS (PBPP-11), AND THE RELEASE ORDERS (PBPP-10) HAVE BEEN ISSUED. YOU REMAIN UNDER THE JURISDICTION AND CONTROL OF THE DEPARTMENT OF CORRECTIONS UNTIL YOU HAVE SIGNED THE PBPP-11, AND THE PBPP-10 HAS BEEN ISSUED. THIS PBPP-15 DOES NOT

AUTHORIZE YOU TO CHANGE YOUR RESIDENCE FROM ANY COMMUNITY CORRECTIONS CENTER OR GROUP HOME IN WHICH YOU MAY BE RESIDING WHEN YOU RECEIVE IT.

/s/ Marc Keating	/s/
Signature of Parolee	Witness
8/9/07	
Date	Witness

Note: If signed by mark, there might be two witnesses to execution of the instrument.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA
* * * * * * * *

MARC KEATING,	*	Case No.
Plaintiff	*	3:11-CV-411
vs.	*	
PITTSTON CITY, PENNSYLVANIA STATE PAROLE, OFFICER TOKAR, OFFICER HOUSSEIN, and AGENT COSLETT,	*	
Defendants	*	
	*	

* * * * * * * *

VIDEOTAPED DEPOSITION
OF
AGENT FRANK COSLETT
SEPTEMBER 18, 2012

VIDEO DEPOSITION

OF

AGENT FRANK COSLETT, taken on behalf of the Plaintiff herein, pursuant to the Rules of Civil Procedure, taken before me, the undersigned, Jolynn C. Prunoske, a Court Reporter and Notary Public in and for the Commonwealth of Pennsylvania, at the law offices of Bailey & Ostrowski, 4311 North Sixth Street, Harrisburg, Pennsylvania, on Tuesday, September 18, 2012, beginning at 9:22 a.m.

A P P E A R A N C E S

DONALD A. BAILEY, ESQUIRE

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Harrisburg, PA 17110

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Office of Attorney General

15th Floor, Strawberry Square

Harrisburg, PA 17120

COUNSEL FOR DEFENDANT, AGENT COSLETT

* * *

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* * *

Q. Reparoled? Okay. Now at some point, did Marc tell you that he was fixing some house up that was owned by his parents?

A. He — as far as the 90 Market Street house?

Q. I believe so. I think that's the right address.

A. He advised me — I believe it was his grandfather or his grandmother passed away and that he was going to be fixing it up and then selling it, and then he was possibly going to get the proceeds from the sale or something to that effect.

Q. On the night in question in October 2009, why did you go to his — to this Market Street, rather — why'd you go there?

A It was the morning.

Q. Oh, it was in the morning?

A. I wasn't there in the evening, no.

Q. Sorry about that. Why did you go there, sir?

A. At the request of Marc Keating. I actually didn't meet him there; I met him at the 3 James Street, which was his approved — excuse me — his approved residence.

Q. Why don't you tell us what happened, how you came to be at Market Street if you did.

A. If I did go to Market Street?

Q. Wherever you went, how did you come to meet on that occasion? Want me to get the exact date for you?

A. No, if that's the date you're talking about with the —.

Q. That's the date of the incident that he's suing over.

A. Yes. That's — he — I telephoned him, stated to him that I needed to secure urine off of him and — I don't know what the whole conversation was. And I proceeded to his house at 3 — to his approved residence of 3 James Street in Pittston.

Q. Was this a scheduled urine stop or was it just something you have the right to do ad hoc, that you can do whenever you want to?

A. Yeah, we rarely have scheduled ones that are — yep, they're unannounced and just —.

Q. And you're a good friend of Mr. Tokar and Houssein, and they just rode along with you or what?

ATTORNEY GIUNTA:

Objection on the form. You can answer.

A. I'm not good friends with them. I don't know them very well.

BY ATTORNEY BAILEY:

Q. Why'd they go with you?

A. They didn't go with me.

Q. Okay. Well, when you went there, what happened?

A. To the 3 James Street?

Q. Yeah.

A. I came in contact with Marc Keating, and we began having a conversation.

Q. Okay. Well, tell us about that conversation.

A. I stated to him — I don't know the exact conversation, but it came up — I asked him where he was residing. He said that — I said either you're living at 3 James Street or living at 90 Market Street. He said that he's living at 90 Market Street. I said, well you got a problem. How long have you been living there? I don't know what the whole circumstance was, but he said all of his belongings were at 90 Market Street, he's living there, he's fixing it up. He's no longer living at the 3 James Street address.

Q. And what happens next?

A. I told him that, well, then you got to change your approved residence to 90 Market Street because you're jamming yourself up. Your approved residence is here and you're not staying here every night. That's a violation of your parole. I had asked him, do you wish to stay at 90 Market Street or do you wish to stay at 3 James Street? He indicated to me that he would rather go to the Market Street address, that's where he's living, that's where he's staying, and that's where he wishes to have his approved residence.

Q. So what happened next?

A. I drove my car to the residence. He walked over to the residence. I met him at the back of my vehicle. I retrieved a home provider agreement letter. It was completed. He signed it, dated it and timed it. And then I asked him to show me around his residence, the new residence.

Q. And what did he do?

A. He proceeded to show me around the new residence.

Q. Tell us about you saw.

A. Well, when I walked in the front door, there was a kitchen. At that point, I believe I got a urine off of him. I'm not quite sure when the urine was, but I believe it was in the beginning. I secured the urine from him. It was positive for morphine. We had a conversation about that. He stated that he had taken his mother's prescription without her permission, which is another violation of his parole. I then proceeded to — he then further took me to show me the rest of the residence. He was actually refurbishing the kitchen, if I remember, and there was like tiles off and new appliances and a dishwasher that was just delivered and other things.

Q. Keep going.

A. We proceeded into the, I would say, living room area. Francis Lombardo was sleeping on the couch. I asked Marc Keating who that — I said who's that and he said, I think he said Francis, I don't think he said Gupper, but I'm not sure. He indicated to me that it was Francis Lombardo. I said to him, what's he doing here? And he said that he just stayed the night.

I said — I then asked Marc — I said to Marc, show me where you sleep, show me where your bedrooms are. We proceeded up to the second floor, came up the steps, went to the bedroom in the back left where he indicated that he was sleeping. And I saw his bed, a dresser, various other items in his bedroom.

Of particular concern in the bedroom, in plain view on top of the dresser was a number of checks that were made out to, I believe it was a D'Amico, a Nicholas D'Amico and some other person. What became alarming to me was that it wasn't his name and it was a number of checks in the range of like $50, $75, $100. I'm not sure of the total amounts. I had questioned him on the checks. You know, obviously these aren't your checks, what are they doing here? He indicated to me that he had found them on the road and that he had tried to give them to his lawyer, but somehow forgot them. Something to that effect.

I then — we then searched — we then went to the bed — the adjoining bedroom, I took a look in there and then we proceeded back down, believe, to the downstairs again. Came back down the steps, I came across Mr. Lombardo still sleeping on the couch. I then proceeded to the kitchen. I opened the kitchen refrigerator, there was a bottle of rum. I believe it was like some type of mojito mix or something, which is another violation: He's not to possess alcohol. I then proceeded to my car to retrieve, I believe, it was my phone. I didn't have my state cell phone.

* * *

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* * *

Q. Okay. That's okay. Go ahead.

A. And then we proceeded to the back porch where I had called my supervisor, advised him of the situation. And I additionally called the Pittston Police Department.

Q. Keep going.

A. I had asked the Pittston Police if they had any reports of any checks that were misplaced or reported stolen or reported missing or lost, at which time they advised me that they did not. I had asked them — well, when I was on the phone with my — back up one step. When I was on the phone with my supervisor, I had asked him if there were any other agents available in the area to assist me in searching Mr. Keating's residence. He advised me that no, there was none on in the area. He advised me that — just get the police office presence. Then when I was on the phone with the Pittston Police, I asked them if they could dispatch me an officer just for officer presence at the residence that we're — that 90 Market Street residence.

* * *

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Q. A/K/A the Gupper, as opposed to the Gipper. That's Ronald Reagan. Now, did the officers come then to where you were?

A. Yes.

Q. Did you tell — I assume you told Mr. Keating, the police officers were coming?

A. I'm sure he was aware.

Q. I'm not implying you had any need to, I'm just —.

A. I'm sure he was because I wasn't hiding anything, he was right — he was standing right next me.

Q. Right. Right. Okay. Now, is this when Mr. Tokar and Mr. Houssein arrived? I mean, those were the two that came?

A. I believe they were, yeah. I —.

Q. I'm sorry.

A. I know Mr. — I've been in the company of Mr. Tokar. Mr. Houssein, I think, I bumped into a few times and I wasn't real familiar with him.

Q. Okay. Anyway, they came to the scene; right? What happens next?

A. I advised them that I was going to conduct a search and that Francis Lombardo was sleeping on the couch inside the residence, so —.

Q. And that's when you first heard the name Gupper; is that right?

A. No, I've heard Gupper before.

Q. Oh, you have? Okay. Okay.

A. I've heard it just in passing that that was Francis Lombardo.

Q. Oh, okay. I didn't know that. All right. So they said the Gupper is here, or something like that?

A. I don't recall that.

Q. You don't remember that?

A. Them saying the Gupper is here?

Q. Yeah.

A. No, because I advised them that Francis Lombardo was there. They wouldn't say the Gupper is here to me. I'm confused on that one.

Q. Okay. Did they draw their firearms?

A. When?

Q. Then.

A. No. Nobody drew their firearms then.

Q. Okay. What happened next?

A. We entered the residence — I entered the residence, they followed me.

Q. Again the address was?

A. 90 Market Street.

Q. Okay.

A. I entered the back, walked into the room where Francis Lombardo —.

Q. Keep your voice up.

A. Walked into the room where Francis Lombardo was sleeping on the couch and noticed that he had left.

Q. Okay.

A. And keep going as far as the whole search?

Q. Absolutely, every single thing that you remember.

A. All right.

Q. From every church mouse you saw, to every sequence of events.

A. All right. To the best of my recollection, I went in there. Like I said, the two officers were behind me. He was gone. At that point, I believe Marc Keating was behind me. Marc Keating came in, I don't know what the rest of the conversation was there. Marc Keating was instructed to sit on the chair and one officer was watching Mr. Keating while we went and cleared the second floor to make sure that Francis Lombardo did not go up to the second floor.

Q. Were guns drawn at that point?

A. At that point they — that point I drew my gun. I don't know if the officers drew their gun or not.

Q. Okay.

A. I drew my gun and proceeded up the steps, for obvious safety and security issues. I cleared the bathroom, went back to the room where Marc was staying, then I believe I went to the next room. We were clearing that room and that's when I heard a toilet flush. And the bathroom that I had already passed and looked in and saw that there was nobody standing in, I was alarmed.

I ran back to the — I didn't run back, I walked back to the bathroom and noticed Marc Keating standing at the bathroom when he was advised to stay downstairs with the officer. I asked Marc what you're doing here. He — I don't know exactly what he stated. And I stated to him, you were instructed to stay downstairs, you did not follow the instruction. I then proceeded to handcuff him. I asked him if he had any drugs on him. He stated no. He then — I then proceeded to search him. I asked for one officer to remain with me while I searched him for obvious concerns. Mr. Keating was searched.

Q. Was he strip searched?

A. He was — yeah, I removed all the articles of clothing from — that is correct. That was — his articles of clothing were removed. After I searched him, his articles of clothing were placed back on by him. He was rehandcuffed and taken back downstairs and placed in the chair to be observed by the police officer.

Q. Who participated in the strip search?

A. I don't know which officer did. One of the two, I can't recall which one was there, if both of them were there or — I know that at least one was there for my safety.

Q. Did you lift his testicles?

A. Did I?

Q. Yep.

A. No, I didn't touch his testicles.

Q. Did someone touch his testicles?

A. Nobody touched his testicles. If he did — if we would search him, we would ask him and he would — we would ask him and he would do it.

Q. Okay. Did you?

A. I may have, I don't recall, but it's part of our procedure.

Q. Did he bend over and spread his cheeks?

A. No, I —.

Q. Did you view his anal cavity?

A. I — he would spread his cheeks normally, yes, to make sure that there was nothing in the portion of his —.

Q. Anal area.

A. Correct.

Q. Did he appear to have any kind of contraband or anything when you did the strip search? Did he appear to have anything on him or — ?

A. What — when I initially confronted him? Or when after I did the search, did I notice anything —.

Q. Yeah, I mean after — after you did the search. Was it — is it your view that it was a thorough strip search or a proper procedural strip search —.

A. Yes, it was.

Q. — that you have, I assume, been trained to do.

A. Correct.

Q. Okay. And he didn't appear to have any violations at that point?

A. No, he didn't have any drugs on him that I'm aware of.

Q. Okay. Okay. Okay. He put his clothes — you permit him to put his clothes back on?

A. Correct.

Q. Do you remember what officer was with you at that time?

A. I don't.

Q. What happened next, sir?

A. Mr. Keating was walked downstairs and placed back in the chair.

Q. Was he handcuffed to the chair?

A. Not through the chair, no. He was just handcuffed behind the back.

Q. Okay. And you put the handcuffs on him?

A. That's correct.

Q. Now, Frank, when you did the search upstairs, if that was the second search that you did, was it a more thorough search?

A. Yes.

Q. Did you flip the mattress?

A. I'm not aware of it, but I could have. It's common practice to check the mattress, check the sheets.

Q. Did you — was there a dresser in there?

A. Yes.

Q. Did you open the drawers of the dresser and did you dump them out on the floor?

A. I don't believe I dumped them — I tend not to dump them on the floor, not that it's relevant, I tend to dump them on the bed.

Q. Okay.

A. But I'm sure I went through it very thoroughly. I don't recall where I dumped it or if I dumped it. I may have just gone through it, I'm not even sure.

Q. What did you find?

A. I didn't find anything of significant parole violation concerns.

Q. Well, well, all right. Did you find some evidence or indication of a crime?

A. Nothing — I didn't find anything of significance parole noteworthiness in the room, outside of the checks that were discovered that Mr. Keating advised that the Pittston Police could take. He was discussing the matter with the Pittston Police. I don't know.

Q. Discussing the matter — ?

A. He was discussing the matter with the Pittston Police officers. I don't know what the context of that conversation was.

Q. I see. All right. So we were at a point where Mr. Keating had gone downstairs and was

handcuffed, hands behind his back, but sitting in a chair; —

A. Correct.

Q. — is that correct?

A. That's correct. I believe, if I'm not mistaken, before we took him down, we checked the perimeter of the area that he was alone at. We searched like the perimeter, the bathroom. I searched the perimeter of like the toilet and all those other areas, just to make sure he didn't discard anything, but nothing was found.

Q. Why had the guns been drawn to begin with?

A. For safety, for obvious — there was a guy sitting in the — on the bed there and my safety was of concern, so I automatically draw my weapon. If he had gone up there to access something that could potentially harm me.

Q. Sitting on the bed?

A. I mean, not the bed, the couch. I'm sorry. Mr. Lomardo was —.

Q. The couch.

A. He was laying on the couch earlier. He had been gone.

Q. He was asleep on the couch initially.

A. Correct.

Q. And when you came back in, he was gone.

A. Uh-huh (yes). And I did not know where he was, so automatically I draw my weapon.

Q. From what you describe, you didn't have much fear of Marc. I mean, he sort of followed you around and went up —.

A. Oh, no, I always had — he was compliant, that's the only reason why he wasn't handcuffed. In the beginning he was compliant with me.

Q. Had he ever threatened you?

A. I can't recall. I don't know.

Q. If he threatened you, you wouldn't charge him, is that what you're telling us?

A. He never came up to me directly and threatened me. I don't know if he's ever threatened me in the presence of others or other things. I mean, he doesn't — I don't think he particularly think — he thinks very fondly of me. So I'm sure that in his passing, he has made his comments to people. I don't know. I couldn't say for sure.

Q. All right. Now, he's downstairs, he's sitting in a chair, he's handcuffed behind his back. What happens next, Frank?

A. I go back up and resume my search of the upstairs. I clear the bedroom that Marc has said that he was sleeping in. I proceeded to the next bedroom. If I recall correctly, we find a bunch of pills, prescription pills, and a pellet gun, a pellet handgun, in the articles in that room, in the second bedroom. But I believe they were in — in some of the paperwork contained in the area where the pills and the handgun were — the pellet gun were discovered was Francis Lombardo's paperwork. That was additionally discovered up there. But the pellet gun,

in and of itself, is another violation being at his approved residence.

Q. So that's not allowed to be anywhere in the approved residence?

A. Correct.

Q. No firearm or pellet gun?

A. Toy guns, pellet guns, air rifles, air pistols, it's all outlined.

Q. Okay. Was he violated for that or charged with that later on?

A. With one — with one — are we jumping all the way to the end of this again or — ?

Q. All right. Well, just tell us what happens next —.

A. Well, I didn't want —.

Q. — you find this pellet —.

A. Right. I just didn't want to be fragmented here because it was a collective decision at the end with all the violations.

Q. Okay.

A. So that was discovered. I went back downstairs, searched the area downstairs, no significant parole violations were discovered. I can't recall much more of that. It was very uneventful after that.

Q. Well, did you take the handcuffs off him or did you take him to jail?

A. Well, after we were done —.

Q. After you're done searching.

A. — searching, the handcuffs were removed from Marc.

Q. Okay.

* * *

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA
* * * * * * * *

MARC KEATING,	*	Case No.
Plaintiff	*	3:11-CV-411
vs.	*	
PITTSTON CITY, PENNSYLVANIA STATE PAROLE, OFFICER TOKAR, OFFICER HOUSSEIN, and AGENT COSLETT,	*	
Defendants	*	
	*	

* * * * * * * *

VIDEO DEPOSITION
OF
OFFICER JUSTIN TOKAR
SEPTEMBER 18, 2012

VIDEO DEPOSITION

OF

OFFICER JUSTIN TOKAR, taken on behalf of the Plaintiff herein, pursuant to the Rules of Civil Procedure, taken before me, the undersigned, Jolynn C. Prunoske, a Court Reporter and Notary Public in and for the Commonwealth of Pennsylvania, at the law offices of Bailey & Ostrowski, 4311 North Sixth Street, Harrisburg, Pennsylvania, on Tuesday, September 18, 2012, beginning at 11:24 a.m.

A P P E A R A N C E S

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Office of Attorney General

15th Floor, Strawberry Square

Harrisburg, PA 17120

COUNSEL FOR DEFENDANT, AGENT FRANK COSLETT

* * *

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* * *

BY ATTORNEY BAILEY:

Q. Mr. Tokar — am I saying that correct?

A. Yes.

Q. Mr. Tokar, at the time of the incident that we're talking about here, I think it was October 2009, maybe the 13th, I'm not sure of the exact date, how many years of service did you have behind you?

A. A little over three years.

Q. Under the protocols at your police department, okay, I would assume would be similar at all police departments, you were the senior officer, so technically speaking you would have been in charge?

A. Yes.

Q. Okay. Do you have a recollection of — and you have had the opportunity to hear Mr. Houssein, his testimony and there's no reason why you shouldn't draw on that if it refreshes your recollection. Do you recollect what happened or what may have been said when you first arrived at Market Street? Let me do it this way, it's easier if I do it this way. When you arrived at Market Street, do you remember seeing Mr. Coslett there?

A. Yes.

Q. Do you remember — do you have any recollection of having known Mr. Coslett from before?

A. I have met him on a few prior incidents.

Q. Do you remember what he said on that day?

A. I don't recall exactly what he said. He was there to do a check on Marc Keating, that was about it.

Q. Did he say anything about a urine sample?

A. Not that I recall.

Q. Did he say anything about knocking on the door and not getting a response?

A. I believe he had knocked on the front door, prior to our arrival, and didn't get a response.

Q. Okay. Do you have a recollection of going around the back of the house and finding Mr. Marc Keating there?

A. Yes. He was on the deck.

Q. Okay. And do you have a recollection of entering the house by the back door?

A. Yes, into the kitchen.

Q. Let's dispense with one issue at the outset here. Were guns ever drawn during this incident?

A. No, not during this incident at all.

Q. Okay. Do you have a recollection of going into the living room at one point after you first entered the house and observing Mr. Lombardo asleep on the couch?

A. Yes, we entered through the kitchen, walked through the kitchen to the living area. I identified

Francis Lombardo as Gupper, that's his nickname that everyone knows him by. I identified him as Gupper on the couch, and that was pretty much our contact with him.

Q. Do you recollect if when you — all right. Did you and Mr. Coslett and Mr. Houssein and Mr. Keating go upstairs?

A. Yes. The four of us went upstairs.

Q. Was Mr. Keating, if you recollect, under any orders to stay downstairs?

A. Not that I recall, no.

Q. Do you remember who went up the stairs first?

A. I don't recall who — what the order was.

Q. Okay. When you got upstairs, do you recollect what happened?

A. I went to the — I believe Mr. Keating's bedroom. Then Mr. Coslett had shown us checks that he had found with — they weren't issued to or from Mr. Keating and he began questioning Mr. Keating about where he obtained the checks, what he was doing with them. And subsequently, they were turned over to myself.

Q. Mr. Tokar, are you certain that Mr. Coslett asked Mr. Keating questions about the checks in your presence?

A. Yes.

Q. Do you know where Mr. Coslett found the checks?

A. I can't — I believe it was next to the bed somewhere. I'm not a hundred percent sure of the exact location.

* * *

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA

* * * * * * * *

MARC KEATING,	*	Case No.
Plaintiff	*	3:11-CV-411
vs.	*	
PITTSTON CITY, PENNSYLVANIA STATE PAROLE, OFFICER TOKAR, OFFICER HOUSSEIN, and AGENT COSLETT,	*	
Defendants	*	
	*	

* * * * * * * *

VIDEO DEPOSITION
OF
OFFICER MAIVAUN HOUSSEIN

September 18, 2012

VIDEO DEPOSITION OF

OFFICER MAIVAUN HOUSSEIN, taken on behalf of the Plaintiff herein, pursuant to the Rules of Civil Procedure, taken before me, the undersigned, Jolynn C. Prunoske, a Court Reporter and Notary Public in and for the Commonwealth of Pennsylvania, at the law offices of Bailey & Ostrowski, 4311 North Sixth Street, Harrisburg, Pennsylvania, on Tuesday, September 18, 2012, beginning at 10:43 a.m.

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ALSO PRESENT: OFFICER JUSTIN TOKAR

* * *

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* * *

Q. Okay. Can you tell us, based upon your recollection, Mr. Houssein, what happened next?

A. I believe at that point Frank Coslett, he, you know, wanted to conduct just — you know, look around the house to see if anybody else was in the house, anything like that. We all went upstairs, Officer Tokar, myself and Keating and Coslett. We all went upstairs. And again, Frank was looking around, conducting his business with him and talking and just, you know, was looking around the house to see if there's anything, you know, illegal or anything going on in there. And we — like I said, we went upstairs and we went into a bedroom, I believe.

Q. That would have been Mr. Keating's bedroom?

A. Yes, I believe so.

Q. Why didn't you order Mr. Keating to stay downstairs?

A. Again, you know, our primary —.

Q. And by the way, sir, I'm not implying that you should have.

A. No, I understand.

Q. It's just a question I'm asking because of prior testimony I heard.

A. Okay. I understand. Like I said, us being there assisting State Parole, we — you know, primarily when, you know, we go to assist another agency, we're not really taking the lead of any type in this case. So we would kind of just, you know, stay back. We're there for, you know, pretty much witness anything happens and, — you know I what mean. Plus, it's in our town, so if something does happen, you know, we need to represent Pittston City in this case.

So, but Frank being there, you know, he was conducting, you know, his business with Keating, so we, you know, pretty much just waited and let him take the lead and do what he had to do. Like I said, we sit back and we assist if needed.

Q. Given an awareness or concern, however subtle of Mr. Lombardo, was there any reason why all three of you, being Mr. Tokar, yourself, Mr. Houssein and Mr. Coslett went upstairs and left him sleeping downstairs on the couch?

A. To be honest, being that, again, there to assist and everything and me being relatively new too, I was kind of just, you know, following everyone else's lead at that point. If, you know, had Officer Tokar or

Frank, you know, advised me, you need to stay down here with him at that point, you know, we would have done so. So even though like I said before, you know, there, you know, may have been, you know, a fear in the back of my mind, if you will, that, you know, he is a problem and something could happen with him, maybe at that point in time it wasn't — it didn't raise to that level where, you know, I felt we should have all stayed there and watched him. Then again, he — you know, he wasn't doing anything illegal, we weren't having, you know, — it wasn't in a certain incident like that for us —

Q. I understand.

A. — to be standing around him.

Q. I do understand. Had you or Mr. Tokar or Mr. Coslett drawn your firearms at that point?

A. Absolutely not, no.

Q. Mr. Houssein, did you ever draw firearm?

A. Yes.

Q. Okay. All right. Well, let me get to that. Okay? Do you know why Mr. Coslett asked you and Mr. Tokar to accompany him upstairs while he presumably was going to do the search?

A. I honestly don't recall him necessarily asking us to go with him but I believe we were just following with him.

Q. Did he order Mr. Keating to stay downstairs?

A. No.

* * *