

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) 02 CR 20448 D/P
)
 JOHN E. MADISON and)
 WILLIEANN D. MADISON,)
)
 Defendants.)
)

REPORT AND RECOMMENDATION ON DEFENDANTS'
MOTIONS TO SUPPRESS

Presently before the court are defendants John and WillieAnn Madison's motions to suppress, filed on May 1, 2003 (docket entry 79 & 109) and on June 25, 2003 (docket entry 176). For the reasons stated below, the court recommends that defendants' motions to suppress be DENIED.

I. BACKGROUND

On November 20, 2002, defendants John and WillieAnn Madison were indicted for various tax offenses in violation of Title 26, United States Code ("U.S.C."), §§ 7201, 7206(1), and 7206(2), making false statements in violation of 18 U.S.C. § 1001, making false and fraudulent claims against the United States in violation of 18 U.S.C. § 287, embezzling funds in violation of 18 U.S.C. § 666, and money laundering in violation of 18 U.S.C. § 1957.

Prior to the return of the indictment in this case,¹ Special Agent Brian Burns with the Federal Bureau of Investigation ("FBI") served a grand jury subpoena on David Weed, a court-appointed receiver who had control of two of Mrs. Madison's businesses - Cherokee Children and Family Services ("Cherokee Children") and Cherokee Food and Nutrition ("Cherokee Nutrition") (collectively the "Cherokee Corporations"). Mr. Weed, who was acting under a Tennessee Chancery Court order that dissolved the Cherokee Corporations and appointed him as receiver, allowed Agent Burns to collect and remove seven boxes of documents from one of these business locations - an office building located at 2771 Colony Park Drive in Memphis, Tennessee ("Colony Park").

Shortly thereafter, on April 23, 2001, Mrs. Madison filed a motion to quash the grand jury subpoena, to suppress the evidence, and for return of property pursuant to Federal Rule of Criminal Procedure 41(e) ("Motion to Quash"). On June 13, 2001, District Court Judge Jon McCalla held a hearing on Mrs. Madison's motion. On June 29, 2001, Judge McCalla entered an order denying Mrs. Madison's Motion to Quash ("June 29 Order"). The court concluded that Mrs. Madison did not have a legitimate expectation of privacy in the documents, and therefore lacked standing to challenge the subpoena. Furthermore, the court held that there was no Fifth

¹Subsequently, on September 16, 2003, the grand jury returned a superseding indictment against Mr. and Mrs. Madison.

Amendment violation of Mrs. Madison's privilege against self incrimination.

The defendants were later indicted. On May 1, 2003, Mr. and Mrs. Madison filed motions to suppress the documents removed by Agent Burns from the Colony Park office. On June 25, 2003, the defendants filed a Joint Amended Motion to Suppress. On August 21, 2003, at the conclusion of the suppression hearing, the defendants filed in open court a Joint Supplemental Brief of Defendants WillieAnn Madison and John E. Madison In Support of Motion To Suppress Warrantless Search and Seizure. In their motions, the defendants argue that the government obtained the documents in violation of the Fourth and Fifth Amendments.² First, the defendants contend that they have a legitimate expectation of privacy in the documents, and thus have standing to challenge the grand jury subpoena and the alleged warrantless search. Second, the defendants attack the validity of the grand jury subpoena,

²At the suppression hearing, the defendants informed the court that their motions to suppress also included a motion for return of property pursuant to Federal Rule of Criminal procedure 41(e). Because the motion for return of property is brought post-indictment, and the basis for that motion is the alleged unlawful search and seizure by Agent Burns, the motion is treated as a motion to suppress. See Stillman v. United States, No. 96-1607, 1997 WL 464044, at *1-2 (6th Cir. July 23, 1997) (unpublished op.) The court notes that Rule 41(e) was amended in December 2002, and is now Rule 41(g). The changes, however, were intended to be stylistic only, and not substantive. See Fed. R. Crim. P. 41 (2002 Comm. Notes); see also Sanchez-Butriago v. United States, No. 00 Civ. 8820, 2003 WL 21649431, at *2 n.1 (S.D.N.Y. July 14, 2002).

claiming that the subpoena was defective because it did not describe the documents with reasonable particularity. The defendants assert that because the subpoena was defective, Agent Burns' removal of those documents amounted to an unlawful, warrantless search. Third, the defendants contend that the receiver was not authorized under the Chancery Court order to use force to take possession of the Colony Park office, and thus the receiver did not have authority to turn over the documents in response to the subpoena or give the FBI agent consent to take the documents. Fourth, the defendants object to Mr. Weed's production of the files on Fifth Amendment grounds, as a violation of their right against self incrimination.

On June 10 and July 2, 2003, the government filed its responses to the defendants' motions to suppress. The government argues that the June 29 Order denying Mrs. Madison's pre-indictment Motion to Quash bars relitigation of the same issues that are now presented in Mrs. Madison's motion to suppress. Alternatively, the government asserts that neither of the defendants has standing to challenge either the subpoena or the removal of the documents from Colony Park. The government contends that the grand jury subpoena described the documents with sufficient particularity because it referenced a photograph of the documents that was later attached to the subpoena. The government claims that Mr. Weed was authorized by the Chancery Court order to take possession of Colony Park, was

the custodian of the records, and thus, had authority to allow Agent Burns to take the documents. Furthermore, the government argues that Mr. Weed had both actual and apparent authority to consent to Agent Burns' request to take the documents. Addressing the defendants' final argument, the government insists that the receiver's production of the documents was not a violation of the defendants' Fifth Amendment rights against self-incrimination.

The district court referred the defendants' motions to suppress to the United States Magistrate Judge for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and (C). On August 21, 2003, this court held a suppression hearing on the motions. Five witnesses testified: (1) defendant WillieAnn Madison; (2) defendant John Madison; (3) attorney Allan Wade, who represented the Cherokee Corporations; (4) Agent Brian Burns; and (5) attorney David Weed, the court-appointed receiver.

Several exhibits were admitted into evidence, including: (1) the Chancery Court's April 11, 2001 Final Order (Ex. A); (2) letter dated April 12, 2001 from Mr. Wade to Mr. Weed (Ex. B); (3) letter dated April 16, 2001 from Mr. Wade to Mr. Weed (Ex. C); (4) Minutes of a Special Meeting of the Board of Directors of Cherokee Children (Ex. D); (5) two photographs of Colony Park (Ex. F & G); (6) grand jury subpoena with photograph and inventory (Ex. H); (7) Mr. Weed's billing records (Ex. I); (8) a collection of photographs taken by the FBI of documents at Colony Park on August 17, 2001 (Ex. 1); and

(9) an FBI photograph log (Ex. 2).

II. PROPOSED FINDINGS OF FACT

Cherokee Children, prior to its dissolution, was a corporation that provided a variety of child care related services in Tennessee, including serving as a "brokering agency" that screened applicants and assisted eligible applicants in locating approved child care providers. Cherokee Nutrition handled certain portions of the food program for which Cherokee Children was responsible in accordance with contracts between Cherokee Children and the Tennessee Department of Human Services. Mrs. Madison was the former Executive Director of the Cherokee Corporations. Mr. Madison, who is Mrs. Madison's husband, is a certified public accountant and a presiding Elder for his church. Mr. Madison was paid by the Cherokee Corporations to provide accounting services.³

On April 5, 1999, Mr. and Mrs. Madison jointly purchased the Colony Park office building. From April 1999 through April 1, 2001, Cherokee Children leased office space in the Colony Park building from the Madisons. Cherokee Nutrition also leased space at Colony Park, and had additional office space in a building

³The minutes of the Special Meeting of Cherokee Children's Board of Directors, held on March 30, 2001, state that "[t]he Corporation's arrangement with John Madison has been renegotiated to pay him \$60.00 per hour but no more than \$500 per month; his services will be on an as needed basis. He is presently teaching Mrs. Weathers how to do the day to day bookkeeping services and working with the auditors on the final stages of the 2000 audit." (Ex. D. at 3)

across the street from Colony Park, located at 4280 Cherry Center in Memphis ("Cherry Center").

As the Executive Director of Cherokee Children, Mrs. Madison kept an office at the Colony Park building. Mrs. Madison sometimes kept her office locked, and only she and Mr. Madison had keys to her office.⁴ Inside her office, Mrs. Madison stored a variety of documents, including records for Cherokee Children; records for several of her other businesses, including A.C. Jackson Day Care, Little People Child Development Center, and Affordable Homes; various real estate records unrelated to the Cherokee Corporations; personal banking records; and personal income tax records. The file cabinets and drawers which stored these files were not marked to identify the types of documents inside. Some, but not all, of the documents were kept in individual file folders and were labeled to identify the documents inside the individual folders. With the exception of one desk drawer, the file cabinets and drawers were not locked.

Mrs. Madison kept a similar assemblage of files in a locked closet that was inside an office across the hall. This office was occupied by Mrs. Dilworth Weathers, the Assistant Executive

⁴Although Mrs. Madison testified that she kept her office locked, Mr. Weed testified that when he and Mr. Wade walked through the Colony Park office on April 12, 2001, Mrs. Madison's office was not locked. Moreover, Mrs. Dilworth Weathers testified at the hearing on the Motion to Quash that Mrs. Madison locked her door on "some occasions."

Director and Director of Operations of Cherokee Children. Both Mrs. Weathers and Mrs. Madison had a key to that closet.⁵

Mr. Madison did not maintain an office at Colony Park. Mr. Madison sometimes kept documents at Colony Park, such as his church documents and personal tax records. However, as he testified at the suppression hearing, Mr. Madison did not know exactly where in the building his records were kept. Although he had a key to Mrs. Madison's office, he did not have a key to the locked closet inside Mrs. Weathers' office.

On March 30, 2001, the Board of Directors for Cherokee Children convened a special meeting and decided that effective April 1, 2001, Cherokee Children would no longer lease space at Colony Park. As indicated in the minutes of the special meeting, Cherokee Children was going to move its operations across the street to the Cherry Center building (Ex. D at 3). At least one employee, Mrs. Weathers, continued to work for Cherokee Children from the Colony Park location after April 1.⁶ Mrs. Madison was going to step down as Executive Director, and would take on the role of a consultant.

⁵At the suppression hearing, Mrs. Madison testified that only she had the key to the locked closet. Mrs. Weathers testified at the hearing on the Motion to Quash that she, too, had a key to the closet. In fact, on April 12, Mrs. Weathers accessed the closet to remove documents to give to Mr. Weed.

⁶The board decided that Mrs. Weathers' hours would be reduced to 20 hours per week effective April 1, and that effective April 30, 2001, all other employees would be laid off.

On April 6, 2001, Chancellor Irvin H. Kilcrease, Jr. of the Tennessee Chancery Court in Nashville, ruling from the bench, ordered the dissolution of the Cherokee Corporations and appointed a receiver.⁷ Although Mrs. Madison was not in court when the ruling was made, the Cherokee Corporations' attorney, Allan Wade, was present. On April 7, 2001, Mr. Wade called Mrs. Madison on the telephone and informed her that the Chancery Court had ordered the Cherokee Corporations dissolved and appointed a receiver.

The Chancery Court entered its written order on April 11, 2001. The order, among other things, appointed attorney David Weed as the receiver of the Cherokee Corporations. Specifically, the order authorized Mr. Weed to:

1. Take exclusive custody, control and possession of all bank accounts, goods, chattels, . . . monies, effects, books and records of account and other papers and property or interests owned or held by the [Cherokee Corporations] or placed under the control of the receiver by order, with full power to . . . receive and take possession of such receivership properties.
2. Conserve, hold and manage all receivership properties in order to prevent loss, damage and injury to investors, creditors and others who have done business with receivership entities; . . .

⁷The Attorney General of Tennessee had previously filed a lawsuit to dissolve the Cherokee Corporations. Both the Attorney General and the Cherokee Corporations filed motions for summary judgment. The court granted summary judgment for the Attorney General, finding that the Cherokee Corporations had abandoned their charitable purposes and devoted themselves to private purposes. Summers v. Cherokee Children & Family Servs., Inc. et al., No. 00-2988-I, at 1-2 (Tenn. Ch. April 11, 2001), aff'd, 112 S.W.3d 486 (Tenn. Ct. App. 2002).

5. Engage and employ managers, agents, employees, servants, attorneys, . . . and other persons to evaluate, marshal, conserve, hold, manage and protect any receivership property. . . .

Summers v. Cherokee Children & Family Servs., Inc. et al., No. 00-2988-I, at 2-3 (Tenn. Ch. April 11, 2001). The order expressly prohibited the Cherokee Corporations and their managers, directors, employees, attorneys, and agents from "[d]oing any act or thing whatsoever to interfere with the taking control, possession or management by the receiver of the receivership properties or to in any way interfere with the receiver, . . ." Id. at 3-4. The order further stated that "[i]f entry to the offices in Cherry Center cannot be had by conventional means, then the receiver is authorized to cause a locksmith to open the doors, or to use force, if necessary." Id. at 4.

On April 11, 2001, Mr. Weed traveled from Nashville to Memphis, and on April 12, he arrived at Colony Park. Mr. Weed went to Colony Park first (instead of Cherry Center) because it was Mr. Weed's belief that the Cherokee Corporations operated from that location. Mr. Weed had previously agreed with Mr. Wade's law firm that Mr. Weed would wait for a representative from the law firm before entering the Colony Park building. When Mr. Wade arrived, Mr. Weed and Mr. Wade entered Colony Park together, and Mr. Wade gave Mr. Weed a tour of the building. Mrs. Weathers was the only

Cherokee Children employee present in the building on April 12.⁸ When Mr. Weed came upon Mrs. Madison's office, he noticed that the office was not locked. Mr. Weed observed files, furniture, and office equipment throughout the building. It appeared to Mr. Weed that Cherokee Children had not removed any of its files or property from the premises, even though the lease was terminated effective April 1.⁹ As Mr. Weed walked through the building, he pointed out certain items to Mrs. Weathers and asked her who owned those items. Mrs. Weathers told Mr. Weed that everything at Colony Park belonged to Cherokee Children.

Shortly thereafter, Mr. Wade left Colony Park.¹⁰ After Mr. Wade left, Mr. Weed instructed Mrs. Weathers to leave. Mr. Weed

⁸A former receptionist of Cherokee Children was also present. Mr. Weed testified that Mrs. Madison was not present at Colony Park on April 12, 2001, which is consistent with the testimony of Mrs. Weathers at the hearing on the Motion to Quash, as well as the testimony of Mr. Wade. Mrs. Madison, however, testified that she was present when Mr. Weed arrived, and recalls being ordered removed from the premises by Mr. Weed. Mrs. Madison testified that she immediately informed Mr. Madison about Mr. Weed's presence at Colony Park.

⁹Mrs. Weathers previously testified that prior to April 12, she, Mrs. Madison, and other employees removed their personal effects out of the Colony Park offices.

¹⁰Mr. Wade testified that he believed that he and Mr. Weed agreed that Mrs. Weathers would put property belonging to Cherokee Children in the lobby for Mr. Weed to take, and that Mr. Weed would not take anything else until Mr. Weed worked out an arrangement to access the building with the Madisons' attorney, A.C. Wharton. Mr. Weed recalls Mr. Wade making that request, but testified that he never made any such agreement to restrict his receivership duties with Mr. Wade or any other representative of the Madisons.

changed the locks on the building.¹¹ He posted the Chancery Court order on the front of the building and took control of Colony Park and the items inside. Mr. Weed knew that Cherokee Children had terminated its lease, and he considered himself to be taking the place of Cherokee Children as a holdover tenant in possession of the Colony Park location. Mr. Weed testified that there were documents for companies other than Cherokee Children at Colony Park. However, many of these documents were commingled with Cherokee Children's files. Mr. Weed testified that he had been appointed as a receiver on several prior occasions, and based on his prior experience, he believed that it was important for him to review the records for entities other than the Cherokee Corporations because the records could provide leads to receivership assets, or reveal a right to file suit to recover assets. For these reasons, Mr. Weed wanted to fully review all of the files.

On April 16, Mr. Weed received a phone call from Agent Burns. Mr. Weed identified himself as the receiver for the Cherokee

¹¹Mr. Weed testified that he believed the Chancery Court order authorized him to change the locks at Colony Park, and enter locked areas of the building. Although the order expressly permitted the use of physical force at Cherry Center and was silent on using force at Colony Park, Mr. Weed did not interpret the order to mean that he was prohibited from using force at Colony Park. Mr. Weed believed that the order specifically mentioned using force at Cherry Center because it was a "sealed" facility and it was unlikely that anyone would be present to let Mr. Weed into the building, whereas Colony Park was generally occupied by employees.

Corporations, and told Agent Burns that he had taken control of Colony Park pursuant to the Chancery Court order. Mr. Weed agreed to meet with Agent Burns at the Colony Park building the next day. As agreed, on April 17, 2001, Agent Burns met Mr. Weed at Colony Park. Mr. Weed, who was very cooperative with Agent Burns, talked briefly with Agent Burns about his duties and obligations as a receiver. Mr. Weed stated that he had control of the entire facility and all the documents, equipment, and other items inside.¹² Next, Mr. Weed led Agent Burns on a tour of the building. At one point, Agent Burns noticed a locksmith cutting the lock on the closet inside Mrs. Weathers' office.¹³ Inside the closet, Agent Burns saw records for Cherokee Children, A.C. Jackson Day Care, Little People Child Development Center, Affordable Homes, grant records, and banking records. After the tour, Mr. Weed told Agent Burns that he had work to do, but invited Agent Burns to continue to look around the building at whatever he wanted. Agent Burns, this time unescorted, again walked through Colony Park and looked in all the rooms. Mr. Weed gave Agent Burns unrestricted access to the Colony Park building. Agent Burns saw Cherokee Children's

¹²Based on his investigation, Agent Burns knew that Mr. and Mrs. Madison owned the Colony Park building. He did not have any prior contact with either Mr. or Mrs. Madison, and was not aware of any alleged agreement between Mr. Weed and Mrs. Madison's attorneys regarding how Mr. Weed would take possession of the documents at Colony Park.

¹³Mr. Weed directed the locksmith to remove the lock on the closet. Agent Burns did not influence Mr. Weed's decision to change or remove any of the locks at Colony Park.

records as well as records for other business entities. Agent Burns testified that there was extensive commingling of Cherokee Children's files with a variety of other files.

Although Mr. Weed did not impose any limits on Agent Burns' examination of the files at Colony Park, Agent Burns did not conduct a detailed inspection of the files. Before proceeding further, Agent Burns wanted to meet with prosecutors in the United States Attorney's Office to discuss how to obtain the documents. On April 17, 2001, after consulting with the Assistant United States Attorneys ("AUSAs"), Agent Burns obtained a grand jury subpoena. The subpoena was directed to the "Custodian of Records or his Designee, State Receiver for the State of Tennessee, Receiver's Office, ATTN: David Weed." (Ex. H). The subpoena instructed Mr. Weed to bring "Any and all records in boxes and files as shown on the attached photograph," and that he could comply with the subpoena by turning over the documents to Agent Burns, by April 18, 2001. At that time, a photograph was not attached to the subpoena, nor was there a written description of the documents that were the subject of the subpoena. Agent Burns then telephoned Mr. Weed and told him that he would be bringing a subpoena to Mr. Weed for some records at Colony Park. Mr. Weed told Agent Burns that "would not be a problem."¹⁴ However, Mr. Weed

¹⁴At no time did Mr. Weed ask Agent Burns to get a subpoena, either to review the documents or to remove the documents from Colony Park.

asked that before the documents were removed from the premises, that Agent Burns provide him (Mr. Weed) with a list of the documents for his records.

On the evening of April 17, 2001, Agent Burns returned to Colony Park with the subpoena. Agent Burns showed Mr. Weed the subpoena, and told Mr. Weed that the subpoena was for documents relating to his investigation.¹⁵ Mr. Weed testified that, as a receiver, he "automatically" cooperates with law enforcement when they ask for documents. His decision to allow Agent Burns to remove the documents was an "easy decision." Mr. Weed told Agent Burns that he was free to look around the building and collect whatever files he needed. For documentation purposes, Agent Burns brought an assistant, Ms. Shannon E. Petty, to photograph the files in the location where they were stored in Colony Park. Upon seeing documents that Agent Burns wanted to take, he had Ms. Petty photograph the documents in their original location, and afterwards Agent Burns removed them from their location and placed them in separate boxes. The documents that Agent Burns took were from Mrs. Madison's office, the closet in Mrs. Weathers' office, and in various other locations in Colony Park. None of these areas were locked by the time that Agent Burns entered to collect the files.¹⁶

¹⁵Mr. Weed was generally aware that the Cherokee Corporations were being investigated by the federal authorities, but did not know the specifics of the investigation.

¹⁶Mr. Weed had already accessed any areas of the building that previously had been locked.

Agent Burns collected numerous files, including Cherokee Children's records, other business records, and a category of records which Agent Burns designated "personal" because they contained a mixture of income tax and checking records, commingled with other documents.¹⁷ Agent Burns testified that he found it difficult to tell what, if anything, was truly personal because the files were commingled. In total, Agent Burns collected seven boxes of documents. He gathered these boxes together in a common location, took a photograph of the boxes, and attached the photograph of the boxes to the subpoena. As requested, Agent Burns gave Mr. Weed the inventory log that generally described the files contained in the seven boxes.¹⁸ Mr. Weed saw the boxes of documents, reviewed the inventory log, and without conducting an in-depth review of the documents inside the file folders, told Agent Burns that he could take the files.

When Mrs. Madison returned to Colony Park sometime after April 17, 2001, she learned that the locks had been changed. Mr. Weed allowed her to enter the building and retrieve personal items. While inside, Mrs. Madison discovered that the lock was broken on the closet inside Mrs. Weathers' office, and that files were

¹⁷The "personal" designations appear on the inventory list created by Agent Burns and provided to Mr. Weed. The files themselves, however, were not marked as "personal."

¹⁸It is unclear whether the documents were gathered and photographed before or after Mr. Weed was served with the subpoena. This, however, does not affect the court's Proposed Conclusion of Law.

missing from that closet and from Mrs. Madison's office.

On April 23, 2001, Mrs. Madison filed her pre-indictment Motion to Quash, claiming violations of both her Fourth and Fifth Amendment rights. The district court, after conducting a hearing, denied her motion. The court concluded that Mrs. Madison did not possess a legitimate expectation of privacy in the files taken by Agent Burns because she knew that the Cherokee Corporations were being dissolved, that a receiver had been appointed as of April 6, 2001, and that she chose to allow the files to remain at the Colony Park facility from April 6 through April 11, 2001. The court's decision was also based on its finding that Mrs. Madison allowed her personal files to be commingled with Cherokee Children's files, and that the files taken by Agent Burns were not marked in any way as personal property.¹⁹ The court also rejected Mrs. Madison's Fifth Amendment argument.

III. PROPOSED CONCLUSIONS OF LAW

A. STANDING

1. Mrs. Madison

As a threshold matter, this court must first address the government's argument that the district court has already ruled that Mrs. Madison lacks standing to challenge the government's removal of documents, and thus is precluded from relitigating the same issue before this court. Under the law of the case doctrine,

¹⁹Mrs. Madison did not testify at the hearing.

courts are generally discouraged from reconsidering determinations that the court made in an earlier stage of the proceedings.²⁰ United States v. Graham, 327 F.3d 460, 464 (6th Cir. 2003) (citing United States v. Tocco, 306 F.3d 279, 288 (6th Cir. 2002)). Once a court has decided an issue, its decision should generally be given effect throughout the litigation. Graham, 327 F.3d at 464; see also United States v. Washington, 197 F.3d 1214, 1216 (8th Cir. 1999) (quoting Arizona v. California, 460 U.S. 605, 618 (1983)); United States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997); United States v. Mendez, 102 F.3d 126, 131 (5th Cir. 1996); United States v. Webb, 98 F.3d 585, 587 (10th Cir. 1996).

The doctrine is not a limitation on a tribunal's power, but rather a guide to discretion. Arizona, 460 U.S. at 618; Wilson v. Meeks, 98 F.3d 1247, 1250 (10th Cir. 1996). A court may have discretion to depart from the law of the case where the court is presented with substantially different evidence; controlling authority has since made a contrary decision of the law applicable to such issues; or the decision was clearly erroneous and would work a manifest injustice. United States v. Moored, 38 F.3d 1419, 1421 (6th Cir.1994) (citation and internal quotation marks omitted); see also Wilson, 98 F.3d at 1250; Alexander, 106 F.3d at 876; Mendez, 102 F.3d at 131; United States v. Montos, 421 F.2d 215, 220

²⁰Although the government does not specifically cite the law of the case doctrine in its brief, the government does, however, argue that the district court's June 29 Order is "res judicata" for purposes of Mrs. Madison's motion to suppress.

(5th Cir. 1970).

The court sees no reason why the law of the case doctrine should not be applied in this case. After Agent Burns removed the documents from Colony Park, Mrs. Madison filed her Motion to Quash. It is clear from the record²¹ that the relief sought by Mrs. Madison was to quash the grand jury subpoena, and to have the documents returned under Rule 41(e) based on the alleged unlawful search and seizure. Mrs. Madison further argued that "the seizure of Mrs. Madison's records in the above described manner was in violation of her Fourth Amendment rights barring unlawful searches and seizures, . . . and her Fifth Amendment right not to incriminate herself." These are the same arguments marshaled by Mrs. Madison in her motion to suppress presently before this court.

Indeed, Mrs. Madison thoroughly briefed, argued, and presented evidence on these same legal and factual issues to the district court in her Motion to Quash. On June 13, 2001, the district court conducted a day-long hearing on Mrs. Madison's motion. Mrs. Madison was present, as was her attorney, A.C. Wharton. Allan Wade, Dilworth Weathers, David Weed, and Agent Brian Burns all testified, and several exhibits were admitted into evidence. Although Mrs. Madison elected not to testify at the hearing, she

²¹On May 29, 2003, the district court, upon motion of the government, entered an order unsealing the pleadings and transcript of the hearing on the Motion to Quash. The government and the defendants have relied on the transcript in support of their positions on defendants' motions to suppress.

attached her sworn affidavit as an exhibit in support of her motion. The district court concluded that Mrs. Madison lacked standing because she did not have a legitimate expectation of privacy. That conclusion should apply with equal force to Mrs. Madison's present motion to suppress.²² See United States v. Giacalone, 541 F.2d 508, 512 (6th Cir. 1976); see also United States v. Mid-States Exchange, 620 F.Supp. 358, 359 (D.S.D. 1985) (stating that the court's pre-indictment ruling on defendant's motion for return of property under Rule 41(e) seized during grand jury investigation "would constitute the law of the case, and

²²In reaching this conclusion, the district court applied the Fourth Amendment's legitimate expectation of privacy test set forth in United States v. Phibbs, 999 F.2d 1053 (6th Cir. 1993), United States v. Salvucci, 448 U.S. 83 (1980), and Katz v. United States, 389 U.S. 347 (1967). Although the court did not expressly state that its standing analysis also applied to Mrs. Madison's motion for return of property, it is clear that the basis for her motion for return of property was (and is) the alleged illegal search. In other words, Mrs. Madison was not asking that the government return her documents by merely providing her with copies, which is one basis for a motion for return of property. Instead, she wanted the government to return the originals because Agent Burns allegedly took the documents in violation of the Fourth Amendment. See Fed. R. Crim. P. 41(g) ("A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return.") (emphasis added); In Re Warrant Dated December 14, 1990, 961 F.2d 1241, 1244-45 (6th Cir. 1992) (discussing difference between motion solely for the return of property and motion for return of property based on illegal search). Therefore, because her motion was based on the alleged illegal search, the district court's Fourth Amendment analysis - and its conclusion that she lacked standing - also applied to her motion for return of property. See Stillman v. United States, No. 96-1607, 1997 WL 464044, at *1-2 (6th Cir. July 23, 1997) (unpublished op.)

would, therefore, be binding upon the trial court in a subsequent criminal prosecution."); United States v. Phillips, 577 F.Supp. 879, 880 (N.D. Ill. 1984) (rejecting defendant's argument that subpoenaed documents violated his qualified common law privilege because "he has already presented these arguments in this District to [the chief judge] in a motion to quash the grand jury subpoena. . . . [who] denied the motion to quash; this Court will not review that order.").

Furthermore, this case does not fall within any of the recognized exceptions to the law of the case doctrine. Although Mrs. Madison presented additional evidence to this court - in the form of Mrs. Madison's testimony - that evidence is not *substantially different* from the evidence previously presented to the district court at the hearing on the Motion to Quash. At the suppression hearing, the testimony of Mr. Wade, Mr. Weed, and Agent Burns was substantially similar to their testimony at the June 13 hearing. Mrs. Weathers, who was Mrs. Madison's assistant and was knowledgeable about the storage of files at Colony Park, testified extensively at the hearing on the Motion to Quash about how files were kept, who had access to files, and whether offices and closets were kept locked and who had keys to those areas. Although this court had the added benefit of Mrs. Madison's testimony, her testimony did not alter or otherwise add to the facts that had already been presented to the district court in any substantially

different way.²³

Importantly, neither Mrs. Madison's testimony nor any other evidence presented at the suppression hearing has any bearing on the critical facts that the district relied upon in concluding that Mrs. Madison lacked standing, specifically: even though Cherokee Children's lease was terminated effective April 1, it continued to occupy the Colony Park building after April 1, and Mrs. Weathers continued to work from that location; even though Mrs. Madison owned the office building, Cherokee Children was in possession of the premises at that time; Mrs. Madison knew about the dissolution and the appointment of a receiver as of April 7, 2001, and from April 7 through April 11, she failed to remove her personal items;²⁴ her personal files were commingled with Cherokee Children's files; and files were not marked in any way as personal property. In sum, as the district court previously held, Mrs. Madison does not have standing to challenge Agent Burns' removal of the files from Colony Park.

2. Mr. Madison

²³One piece of new evidence was Mrs. Madison's testimony that she always kept her office locked. However, the court finds that was not the case, as evidenced by Mrs. Weathers' prior testimony to the contrary, as well as Mr. Weed's testimony that the office was not locked on April 12.

²⁴The district court concluded that Mrs. Madison learned this information on April 6. However, the evidence at the suppression hearing indicates that Mr. Wade notified her via telephone on April 7. This one day difference does not change the court's analysis.

Mr. Madison was not a participant in the pre-indictment motions filed by his wife, and under the circumstances, the law of the case doctrine should not apply to his motion to suppress. Nevertheless, the court also concludes that Mr. Madison lacks standing to challenge the removal of the files. This is so because he did not possess a legitimate expectation of privacy in the office space occupied by Cherokee Children or in the removed documents.²⁵ See Phibbs, 999 F.2d at 1077-78 (holding that the criminal defendant lacked standing to challenge administrative subpoenas issued to third-party business); see also United States v. Plunk, 153 F.3d 1011, 1020 (9th Cir. 1998) (citing Phibbs).

To be sure, Mr. Madison's asserted privacy interest is even more removed than the asserted privacy interest of Mrs. Madison. Unlike Mrs. Madison, Mr. Madison did not have an office at Colony Park. The files that he seeks to suppress, which consist of income tax returns and church records, were located at Colony Park solely because they were kept there by Mrs. Madison. He testified that he did not even know where the documents were stored in the building. Moreover, there was no evidence that any of the files that belonged to Mr. Madison were marked personal. Although Mr. Madison jointly owned the Colony Park building with his wife, that fact alone is insufficient to demonstrate a privacy interest. See Shamaeizadeh v. Cunigan, 338 F.3d 535, 544 (6th Cir. 2003) ("Although Shamaeizadeh

²⁵Neither Mr. Madison nor Mrs. Madison argue that the district court erred in relying on Phibbs.

owned the entire residence, ownership alone does not justify a reasonable expectation of privacy."); see also United States v. Salvucci, 448 U.S. 83, 91 ("while property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated, property rights are neither the beginning nor the end of this Court's inquiry."). On these facts, the court concludes that Mr. Madison does not have standing.

B. CONSENT SEARCH

Even assuming, *arguendo*, that the defendants each have standing to challenge the removal of the documents, the court concludes that Agent Burns lawfully removed the documents because he obtained consent from Mr. Weed. If voluntary consent is given to search by an individual who has actual or apparent authority, the Fourth Amendment's prohibition against a warrantless search does not apply. United States v. Campbell, 317 F.3d 597, 608 (6th Cir. 2003). The consent may be given by the individual whose property is searched or from a third party who possesses common authority over the premises. Illinois v. Rodriguez, 497 U.S. 177, 181 (1990). When the validity of a warrantless search is based on consent, the government must show the consent was "unequivocally, specifically, and intelligently given, uncontaminated by any duress and coercion." United States v. Tillman, 963 F.2d 137, 143 (6th Cir. 1992). In assessing whether consent is voluntary, the court

must examine several factors, including age, intelligence, and education of the individual; whether the individual understands his or her rights to refuse to consent; whether the individual understands his or her constitutional rights; the length and nature of detention; and the use of coercive conduct by the police. United States v. Riascos-Suarez, 73 F.3d 616, 625 (6th Cir. 1996).

Here, Mr. Weed had authority to give consent because he was in lawful possession of the documents stored in Colony Park. The language of the Chancery Court order clearly authorized Mr. Weed to “[t]ake exclusive custody, control and possession of all bank accounts, goods, chattels, . . . monies, effects, books and records of account and other papers and property or interests owned or held by the [Cherokee Corporations] or placed under the control of the receiver by order, with full power to . . . receive and take possession of such receivership properties.” Although there was language in the order expressly authorizing Mr. Weed to use force if he could not enter the Cherry Center building, nothing in the order prohibited Mr. Weed from employing a locksmith to change the locks at Colony Park. To the extent that Mrs. Madison, Mr. Wade, or other representatives of the defendants may have questioned Mr. Weed on April 12 about his authority to take possession of Colony Park, those same individuals were prohibited from “[d]oing any act or thing whatsoever to interfere with the taking control, possession or management by the receiver of the receivership

properties or to in any way interfere with the receiver, . . .” Thus, Mr. Weed did not need the approval of Mrs. Madison, Mr. Madison, or Mr. Wade before taking possession and control of the documents and assets in Colony Park. Since Mr. Weed was acting within his powers as receiver and was in lawful possession of the items in Colony Park, he had the authority to allow Agent Burns to examine and remove files.

The court further concludes that Mr. Weed’s consent was voluntary. As discussed in the Proposed Findings of Fact, Mr. Weed is an attorney and had considerable prior experience as a court-appointed receiver. He was cooperative with Agent Burns at all times. He initially gave Agent Burns a tour of Colony Park, and then gave him unrestricted and unescorted access to the Colony Park building, allowing him to look at whatever he wanted. When Agent Burns telephoned Mr. Weed and told him that he would be bringing a subpoena for some records at Colony Park, Mr. Weed told Agent Burns that “would not be a problem.” Mr. Weed did not ask for a subpoena; he only asked that Agent Burns provide him with an inventory of the documents taken from the premises for record-keeping purposes. Mr. Weed said that he “automatically” cooperates with law enforcement when they ask for documents, and his decision to allow Agent Burns to remove the documents was an “easy decision.” Mr. Weed told Agent Burns that he was free to look

around the building and to collect whatever files he needed.²⁶

The fact that Agent Burns served Mr. Weed with a grand jury subpoena does not vitiate Mr. Weed's otherwise voluntary consent. See United States v. Iglesias, 881 F.2d 1519, 1522 (9th Cir. 1989) (holding that consent was voluntary even though officer threatened to get a grand jury subpoena or search warrant); United States v. Allison, 619 F.2d 1254, 1262 (8th Cir. 1980) (holding that when a search is pursuant to the service of a subpoena duces tecum, whether consent to the search was voluntary or was the product of coercion is a question of fact to be determined from the totality of all the circumstances.) In Allison, an FBI agent obtained a grand jury subpoena for documents stored at a labor union's headquarters. Concerned that the union would destroy documents once it was served with the subpoena, the agent arrived at the headquarters with several other agents, evidence tape, and cardboard boxes. The agents planned to obtain consent from the union's records custodian to enter the headquarters, to assist in the collection of the records, and to remove the records from the building. Id. at 1256. The agents arrived at the headquarters shortly after 8:00 a.m., and served the records custodian with the subpoena, which directed him to appear before the grand jury at 9:30 a.m. that same morning with the documents. Instead of

²⁶The scope of Mr. Weed's consent included not only the search for documents, but also the seizure of the documents as well.

collecting the documents himself, he allowed the agents to gather the records and to remove the documents from the premises. *Id.* at 1256-57. The Eight Circuit held that even though the records custodian was not aware of his right to object to the subpoena or to the search, his consent to the search was voluntary. *Id.* at 1264-65. In the present case, the evidence clearly demonstrates that the grand jury subpoena did not in any way influence Mr. Weed's decision to allow Agent Burns to review and remove the documents.²⁷ Before Agent Burns obtained the subpoena, Mr. Weed allowed Agent Burns to look at any files he wanted to see in Colony Park. It was Agent Burns' decision to talk with the AUSAs about getting a grand jury subpoena - Mr. Weed did not ask for one. Mr. Weed was cooperative both before and after he was served with the subpoena.²⁸

²⁷The defendants state in their Joint Supplemental Brief that "The Receiver never indicated to Agent Burns that a subpoena would be needed. He testified that he needed no subpoena, court order or any type of permission to release any records to the FBI or anyone else." (Joint Supp. Br. At 8).

²⁸The defendants allege that the subpoena, by referencing a photograph, failed to describe the documents with reasonable particularity, and therefore the subpoena was invalid. Even assuming, *arguendo*, that the defendants are correct, that deficiency would not lead the court to conclude that Mr. Weed's consent was involuntary. Although "[a] search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid[,] "Bumper v. North Carolina, 391 U.S.543, 549 (1968), the court is unaware of any case law extending Bumper to apply to grand jury subpoenas that fail to satisfy the "reasonable particularity" requirement. The focus of the Supreme Court's holding in Bumper was the officers' coercion on the person giving consent. "When a law enforcement officer claims authority to search a home under a

Moreover, Mr. Weed had apparent authority to consent to the search. "When one person consents to a search of property owned by another, the consent is valid if 'the facts available to the officer at the moment . . . warrant a man of reasonable caution in the belief that the consenting party had authority over the premises.'" United States v. Jenkins, 92 F.3d 430, 436 (6th Cir. 1996) (citing Illinois v. Rodriguez, 497 U.S. 177, 188 (1990)). There is no Fourth Amendment violation if, under the totality of the circumstances, the officer performing the search has relied in good faith on a person's apparent authority. See Rodriguez, 497 U.S. at 188-89. Mr. Weed told Agent Burns that he was the court-appointed receiver of the Cherokee Corporations, and that he had control of all the property in Colony Park. When Agent Burns met Mr. Weed at Colony Park, by all appearances, Mr. Weed's claim of authority over Colony Park was accurate. Mr. Weed had removed Mrs. Weathers from the building, posted the Chancery Court order on the front door, and changed the locks.²⁹ He gave Agent Burns a personal

warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion - albeit colorably lawful coercion. Where there is coercion there cannot be consent." Id. at 550. In this case, however, the record is completely devoid of any evidence of coercion. Agent Burns did not threaten, intimidate, or coerce Mr. Weed in order to obtain his consent. Thus, even if the subpoena was somehow deficient in its description of the documents, such a deficiency would not negate the voluntariness of Mr. Weed's consent.

²⁹Agent Burns had no knowledge of any alleged agreement between Mr. Weed and Mrs. Madison's attorneys regarding the handling of the property at Colony Park.

tour of the facility, and then allowed Agent Burn to review and take any documents he wanted. Based on these facts, Agent Burns reasonably believed that he had been given consent to search Colony Park and remove documents from someone with authority. See Campbell, 317 F.3d at 609.

D. FIFTH AMENDMENT PRIVILEGE

Finally, the defendants argue that the production of the documents stored at Colony Park to the government violated their Fifth Amendment privilege against self incrimination. Their arguments fail for two reasons. First, the law of the case doctrine applies to Mrs. Madison, and her argument was considered and rejected by the district court in its June 29 Order. Second, with respect to both defendants, no compulsion was exerted upon either Mr. Madison or Mrs. Madison by the production of the documents via grand jury subpoena. See Couch v. United States, 409 U.S. 322, 336 (1973). It was Mr. Weed, not the defendants, who produced the documents in response to the grand jury subpoena. In fact, neither defendant was present at Colony Park when Mr. Weed produced the documents, and neither defendant was involved or assisted in any way with the production of the documents. See United States v. Chary, No. 97-6394, 1999 WL 236189, at *2 (6th Cir. April 14, 1999) (unpublished op.).

IV. RECOMMENDATION

For the above reasons, this court recommends that the

defendants' motions to suppress be DENIED.

Respectfully submitted this 17th day of November, 2003.

TU M. PHAM
United States Magistrate Judge

NOTICE

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN TEN (10) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE THEM WITHIN TEN (10) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND FURTHER APPEAL.

ANY PARTY OBJECTING TO THIS REPORT MUST MAKE ARRANGEMENTS FOR A TRANSCRIPT OF THE HEARING TO BE PREPARED.