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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No. 02-20423 MlV**
	)	
LESLIE DELYNN CHAMBERS,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION
ON DEFENDANT'S MOTION TO SUPPRESS

The defendant in this case, Leslie Chambers, has been indicted on four counts associated with the manufacturing of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(c), 843(a)(6), and 846, and one count of being a felon in possession of firearms in violation of 18 U.S.C. 922(g). These charges arise out of an October 9, 2002 search by law enforcement officers of Chamber's residence in Fayette County, and the subsequent seizure by officers of evidence including anhydrous ammonia, muriatic acid, a variety of household solvents, empty blister packs associated with pseudoephedrine tablets, white powder that tested positive for methamphetamine, and assorted firearms.

Chambers moved to suppress all evidence seized and all statements made on the evening of October 9, 2002, claiming that

they are the results of an unlawful entry and an unlawful search, or alternatively, obtained pursuant to a flawed search warrant, all in violation of the Fourth Amendment. His motion was referred to the United States Magistrate Judge for a report and recommendation.

Pursuant to the reference order, an evidentiary hearing was held on February 26, 2002. At the hearing, the government presented four witnesses: Deputies George Alan (Al) Freeman, Jeff Barker, and Shannon Dale (Dale) Phillips of the Fayette County, Tennessee Sheriff's Department, and Sergeant James A. (Tony) Taylor of the Memphis Police Department Narcotics Unit. The defendant called Officer Daniel William Feathers of the Somerville, Tennessee police department, and also testified on his own behalf.

Fifteen exhibits were introduced at the hearing, including photographs of items found during the search of Chambers' residence and outbuilding (Exs. 1-4, 7, 8, 11, and 12); an inventory of items seized (Ex. 14); photographs of the residence doors (Ex. 10); a search warrant issued October 9, 2002 but dated October 8, 2002 (Ex. 9); a utility bill showing that the residence utilities were in the name of the defendant's wife Terry Chambers, a/k/a Iris Chambers (Ex. 15); a clerk of court's documentation of Chambers' prior felony arrest (Ex. 13); and consent-to-search forms signed by Leslie Chambers and by Iris Chambers (Exs. 5 and 6).

After careful consideration of the statements of counsel, the

testimony of the witnesses, the exhibits, and the entire record in this cause, this court submits the following findings of fact and conclusions of law and recommends that the motion to suppress be granted.

PROPOSED FINDINGS OF FACT

The testimony of the four law enforcement officers - three proffered by the government and one by the defense - is identical in all major details. This court finds the officers credible and adopts as fact their version of the events.

In June of 2002, Deputy Al Freeman of the Fayette County Sheriff's Department began surveillance on the defendant's trailer home at 815 Linwood Drive, Fayette County, Tennessee. Freeman is a twelve-year law enforcement officer with significant experience in narcotics investigation, having participated in more than 100 narcotics-related investigations and more than fifty "crack house" investigations. His department had received a tip from a person involved in a traffic stop en route to Chambers' home that there was possible drug activity on the property.

815 Linwood Drive is located on a dead-end rural road about one and one-half miles long. It is the middle residence of only three on the road. In late June and early July of 2002, Deputy Freeman spent three nights in an adjacent open field, observing 815 Linwood with a "spotting scope" at distances of 200 to 400 yards.

He observed considerable security of the premises. He noted that the trailer home was rigged with motion detectors, floodlights, and video surveillance cameras, and that a person appeared to be operating as a lookout. On one of his observation nights, a floodlight near the house shifted to double the illumination on his observation point in the field. On the night of June 26,[1] he saw five or six vehicles coming and going from 815 Linwood, and eight to ten people moving between the trailer home and a "garage-type" outbuilding at various times between 10:30 p.m. and 12:30 a.m.[2] Each vehicle stayed only fifteen to twenty minutes, which Deputy Freeman testified was, in his experience, consistent with narcotics activity at a house. Deputy Freeman also testified that this volume of traffic was unusual in a rural area. He conducted an aerial fly-over on July 2, 2002. Despite his observations, Deputy Freeman did not believe he had enough information about the activities at 815 Linwood to apply for a search warrant at that time.

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[1] Deputy Freeman identified this date as "the Wednesday night before July 2nd."

[2] Throughout testimony, this building is interchangeably referred to as the "garage," the "barn," or a "garage-type building." For the sake of clarity, this court refers to it as "the outbuilding." There apparently is another small shed on the property, but it is not relevant to the suppression motion issues.

In the early evening of October 9, 2002, an anonymous tipster informed the Fayette County Sheriff's Department that Chambers was "cooking meth" at his residence "right now," and advised officers to "get out there." Deputy Barker took the call and alerted Deputy Freeman. Deputy Freeman instructed Deputies Barker and Phillips to meet him at the Moscow, Tennessee police department. The three then proceeded to 815 Linwood, planning to conduct a "knock and talk" and find out what was afoot. En route, Deputy Freeman called Daniel Feathers of the Somerville, Tennessee police department, to alert him that his expertise in narcotics might be needed that evening.

Three law enforcement vehicles pulled into 815 Linwood at roughly 6:15 p.m.: Deputy Freeman's unmarked police vehicle and two marked vehicles driven by Deputies Barker and Phillips. Deputy Freeman was in plainclothes, and the other two deputies were uniformed. The deputies saw two automobiles parked at the residence in addition to the vehicles regularly parked there, but no people in the yard. Deputy Freeman dispatched Deputy Barker to survey the outbuilding, while he approached the trailer home with Deputy Phillips behind him. The two passed through an open storm door, onto a covered porch, and up three steps to the trailer home's side door, which was half glass. Deputy Freeman knocked at

the door and announced, "Sheriff's Department." A white female[3] appeared at the door, looked at the deputies, and ran back into the trailer home out of sight, very excited and loudly shouting, "The police are here." Immediately the deputies, even Deputy Barker, who was nearly thirty yards away, heard footsteps loud enough to indicate that several people were running inside the trailer home. Deputy Freeman called for the other deputies and opened the unlocked door, stepping inside the residence and simultaneously drawing his firearm and holding it down at his side. Deputy Phillips followed, doing the same. Deputy Barker entered shortly thereafter.

Upon entry, Deputy Freeman saw no one. He proceeded eight or ten steps down a narrow hall and turned the corner into a living room. There, he saw one or perhaps two white males. He asked to speak to the homeowner, and a male motioned toward the back of the home without speaking. Deputy Freeman proceeded a few more steps toward the back of the home, noticing a blue metal can of toluene. Iris Chambers emerged from the back of the home and walked toward him. She appeared calm. Deputy Freeman recognized Iris Chambers as the homeowner because he had visited the property three or four years earlier on an unrelated investigation.

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[3] Defendant Chambers claims that the woman was there cleaning his house that evening.

They met in the living room, where Deputy Freeman identified himself and told Iris Chambers that he was there on a complaint of a "meth" lab. Deputy Freeman explained that he had entered the trailer home because they had knocked and the woman who answered the door had run away. He asked Iris Chambers if it was all right for them to look around. She said "okay" and indicated she had no problem with it but asked, "What did Butch [defendant Leslie Chambers] say?" She indicated, when asked, that Leslie Chambers was outside in the yard. While talking to Iris Chambers, Deputy Freeman noticed several items in the living room, including three or four burned strips of aluminum foil and a blue plastic bag with stacks of empty blister packs spilling out the top. He also noticed a pack of lithium batteries in the bedroom area behind Iris Chambers. Deputy Freeman testified that, in his experience, all these items were associated with methamphetamine manufacture or consumption. By this time, all the deputies had holstered their firearms.

Deputy Barker, on hearing that the defendant might be outside the trailer home, exited and found three or four people standing in the yard. Deputy Freeman followed, with Deputy Phillips remaining in the trailer home. Deputy Freeman located defendant Chambers among the people in the yard, introduced himself, and read defendant Chambers his *Miranda* rights. A brief conversation ensued

during which Deputy Freeman advised Chambers that incriminating items had been found in the house and Chambers advised Freeman that there was anhydrous ammonia stored on the premises:

> I was calm and to the point after what I had seen inside. In reading [defendant Chambers] his rights I told him that it wasn't looking real good, you know, we had already noticed a few things in the house, was there anything else we needed, you know, to be aware of. And he said that he had an anhydrous tank in the garage out back, which he added that he had a commercial license to have.

(Tr. at 42.) Deputy Freeman then asked Chambers for consent to search the premises. Chambers said, "Everyone has enough chemicals in their house to cook methamphetamine," and then gave consent to search the house. (Tr. at 40.) Chambers was not handcuffed or physically detained, although the parties agree that Chambers was not free to go at this time. Chambers did not appear impaired in any way, but he was agitated and insisted that he had been set up by someone who had just left.

The deputies called Officer Daniel Feathers of the Somerville, Tennessee police department and advised him to join them at 815 Linwood Drive. While waiting for Officer Feathers, the deputies on the scene conducted an initial, limited search or "walk through." At some point, defendant Chambers provided the deputies with the keys to the outbuilding, where they located a 150-pound cylinder of anhydrous ammonia.

After Officer Feathers arrived on the scene at about 7:30 p.m., he met with Iris Chambers and the defendant in the living room of their trailer home. Both agreed to give written consent to a search. Officer Feathers produced consent-to-search forms, which both defendant Chambers and Iris Chambers signed. Defendant Chambers asked Officer Feathers how to spell "prejudice," and added by his signature the note "without prejudice." Iris Chambers also added the phrase by her signature. When Officer Feathers asked what that meant, defendant Chambers responded without further explanation, according to Officer Feathers, that it was "old-time law, common law." (Tr. at 192-193.) Deputy Barker confirmed that defendant Chambers did not explain what he meant by the phrase "without prejudice."

Despite signing the consent to search form, Chambers claims that he told the officers that he "didn't agree." Defendant Chambers testified at the hearing that he believed the phrase "without prejudice" meant he didn't agree with anything and that the phrase would make the "contract" non-binding and absolve him from responsibility or liability for items found during a search. According to Chambers' testimony, his belief was erroneously based on the advice of an attorney who once advised him on a matter involving the Uniform Commercial Code (UCC). The parties agree that the UCC has no application to the present facts.

This court finds unbelievable Chambers' testimony that he told the officers he didn't agree and that he thought adding "without prejudice" meant he did not agree to the search. It was undisputed that no one threatened the Chambers into signing the consent form or ever raised their voices. Defendant Chambers is about fifty years old; he graduated from high school; and he attended one year of college at UT Martin where he majored in engineering. For the past five to six years, he has operated his own business, doing excavation work. Chambers has a criminal record which includes a felony drug conviction in 1972.

At about 8:15 p.m., several DEA agents arrived, including Sergeant James A. (Tony) Taylor of the Memphis Police Department Narcotics Unit. The deputies on the scene informed the DEA agents that they had obtained both written and verbal consent to search. The DEA agents commenced a more thorough search of the property, and at about 8:30 p.m. Officer Feathers left the scene to prepare a search warrant application. He spoke to Sergeant Taylor and to Deputy Freeman to get information for the affidavit underlying the warrant. Officer Feathers completed the warrant application, drove to the home of Judge Jon Kerry Blackwood, obtained the judge's signature, and returned to 815 Lindale Drive with the signed warrant at about 11:30 or 11:45 p.m. The application for the warrant stated that the 911 address and the utilities for the

residence were in defendant Chambers' name. At the hearing, Officer Feathers testified that he was mistaken as to the utilities, and that they were in Iris Chambers' name, not the defendant's. It was undisputed that the information for the warrant was obtained on October 9th, the warrant was signed on October 9th, and the warrant was returned a few days later.

In the meantime, the DEA agents' search had revealed numerous items in the trailer home and the outbuilding at 815 Linden Drive. In the outbuilding, agents found a workbench provisioned with rubber gloves, acetone, a hair dryer, and rubber tubing. They also found a freezer containing muriatic acid and "pill soak," additional cylinders and tanks of anhydrous ammonia, and starter fluid (a solvent) on a shelf. Inside the trailer home, the agents cataloged more solvent, the empty blister packs, and the lithium batteries that Officer Freeman had earlier observed. They found a blender and a hot plate in the master bedroom, along with a plastic container of white powder. Finally, the agents found a 12-gauge shotgun under a bed; a .45 caliber handgun under clothing in a bureau drawer; an SKS assault rifle with two magazines of .30 caliber ammunition; and a Glock semiautomatic pistol.

Throughout the search, Iris Chambers and the defendant both remained inside the trailer home on the living room couch. Defendant Chambers alternately watched television and dozed. Iris

Chambers napped and prepared and ate a salad. Neither ever objected to the agents' search, nor revoked their consents to search. During the search, defendant Chambers voluntarily revealed the locations of the three firearms. The search ended around midnight. In November of 2002, Leslie Chambers was taken into custody on four charges associated with the manufacturing of methamphetamine and one charge of being a felon in possession of firearms.

PROPOSED CONCLUSIONS OF LAW

Chambers' motion to suppress evidence seized the night of October 9, 2002 raises three issues: 1) whether the deputies' warrantless entry was lawful because of exigent circumstances; 2) whether the Chambers' consents to search were valid; and 3) whether the information set forth in the affidavit in support of the search warrant renders the warrant invalid.

The Fourth Amendment prohibits warrantless searches, unless an exception to the warrant requirement applies. U.S. CONST. amend. IV; *United States v. Roarke*, 36 F.3d 14, 17 (6th Cir. 1994)(quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). In this case, the government relies on the exigent circumstance exception and the consent exception to the warrant requirement.

A. The Officers' Warrantless Entry and the Exigent Circumstances Exception

The defendant first argues that the deputies' warrantless entry into his trailer home was unlawful. In response, the government urges that events during the "knock and talk" gave rise to probable cause which, coupled with exigent circumstances, justified warrantless entry to the trailer home.

The Supreme Court has long recognized the age-old adage that "a man's home is his castle," and specifically that the Fourth Amendment embodies a right to be secure from intrusion in that castle. *Minnesota v. Carter,* 525 U.S. 83, 94 (1998)(Scalia, J., concurring). "A police officer's warrantless entry into a home is presumptively unconstitutional under the Fourth Amendment." *Ewolski v. City of Brunswick*, 287 F.3d 492, 501 (6th Cir. 2002)(citing *O'Brien v. City of Grand Rapids*, 23 F.3d 990, 996 (6th Cir. 1992)). A defendant bears the burden of making a prima facie showing of illegal entry, after which the burden shifts to the government to prove that the entry was justified. *See United States v. Murrie*, 534 F.2d 695, 697-98 (6th Cir. 1976) (discussing burdens of proof in the context of knock-and-announce entries).

In this case, it is submitted that Chambers has met his burden. It is uncontroverted that no one let the officers into the trailer home. Indeed, the officers testified that they entered the

home precisely because the women who answered the door fled, shouting, without opening the door to them. Accordingly, the burden shifts to the government to show probable cause coupled with exigent circumstances justifying entry to Chamber's home. WAYNE R. LAFAVE, § 11.2(b) SEARCH AND SEIZURE 38 (3d ed. 1996).

The Supreme Court made clear in *Payton v. New York*, 445 U.S. 573 (1980):

> **In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed with out a warrant.**

***Id.* at 590. Thus, to justify crossing the threshold of a house where Chambers had a rightful expectation of privacy, the government must show that the police either had a warrant or probable cause and exigent circumstances.**

Probable cause exists when "facts and circumstances, within the officer's knowledge . . . are sufficient to warrant a prudent person . . . in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979). Probable cause to search exists when the facts and circumstances indicate "a fair probability that evidence of a crime will be located on the premises of the proposed search." *United States v. Bowling*, 900 F.2d 926, 930 (6th Cir. 1990)(quoting *United States v.*

Algie, 721 F.2d 1039, 1041 (6th Cir. 1983)).

In this case, the government admits it had no search warrant at the time of entry and admits that prior to the "knock and talk" the officers did not feel they had enough information to apply for a search warrant. A summer's worth of investigation had revealed only a rural home with floodlights and motion detectors that had, for at least one night of surveillance, hosted unusual foot traffic and several vehicles coming and going from the yard. On October 9, 2002, an anonymous tipster indicated Chambers was "cooking meth" at the same location. While an anonymous tip may contribute to the existence of probable cause, ***Alabama v. White***, 496 U.S. 325, 330 (1990), it does not alone create probable cause to enter or search, *see id.* at 328 (discussing the role of a tip in establishing reasonable suspicion and distinguishing reasonable suspicion from probable cause). Further, in the instant case, the government offered no testimony to underscore the validity or reliability of this particular tip. Nor did the government offer any explanation for the officer's decision to conduct a "knock and talk" instead of seeking a warrant upon receipt of the tip.

The only additional piece of information acquired by the officers before they entered the trailer home was the reaction of the woman who answered the door. When the officers announced their presence at the trailer home, the woman who answered the door fled,

shouting, "The police are here!" and the officers heard the footsteps of several people running inside the trailer home. Considering the totality of the circumstances, at this point the officers, at best, had a reasonable suspicion that methamphetamine was being manufactured inside the trailer home at 815 Linwood Drive or that the trailer home contained evidence of a crime. There was no proof of any observation of chemicals being carried in or out of the trailer home, and the officer's observations in the summer, three months before, were too remote in time to be probative. Mere speculation that a meth lab was being operated in a home is not sufficient to establish probable cause to enter the residence. *United States v. Howard*, 528 F.2d 552, 555 (9th Cir. 1987).

Even if there was probable cause, the government has failed to show that exigent circumstances justified a warrantless entry into the trailer home to seek evidence. Exigent circumstances traditionally exist in one of four situations: (1) when evidence is in immediate danger of destruction, *Schmerber v. California*, 384 U.S. 757, 770-71 (1966); (2) when the safety of law enforcement officers or the general public is immediately threatened, *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967); (3) when the police are in hot pursuit of a fleeing suspect, *United States v. Santana*, 427 U.S. 38, 42-43 (1976); or (4) when the suspect may flee before an officer can obtain a warrant, *Minnesota v. Olson*, 495 U.S. 91, 100

(1990). *See also United States v. Saari*, 272 F.3d 804, 811-12 (6th Cir. 2001) (summarizing exigent circumstances). In this case, the government relies on two exigencies: fear for officer safety and fear that evidence would be destroyed.

The officer safety exigency is without merit for the simple reason that the officers had no evidence whatsoever of an immediate threat on the premises. Officer Freeman saw no firearms during his three nights of surveillance. All inhabitants of the trailer home were out of sight behind closed doors. Nothing indicates that any deputy, nor any member of the public, was in immediate danger. Moreover, nothing stopped the officers from immediately leaving the premises and obtaining a search warrant.

Nor does the officers' alleged concern for destruction of evidence provide a sufficient exigency. As discussed above, the officers had no probable cause to believe the trailer home contained any evidence to be destroyed. Reasonable suspicion is all that the facts support, and a reasonable suspicion of evidence inside the trailer home does not justify entering that home without a warrant to preserve evidence. Accordingly, it is submitted that the government failed to meet its burden of proving that probable cause and exigent circumstances justified the warrantless entry into Chambers' home.

A. Validity of the Defendant's Consent to Search

The defendant next argues that he did not voluntarily consent to the search of his home, and further that, because of the illegal entry, any subsequent consent he gave was invalid. The government contends, in response, that Chambers gave both oral and written consent to search his trailer home, and even if the officers' entry was illegal, *United States v. Calhoun*, 49 F.3d 231 (6th Cir. 1994), compels a finding that illegal entry does not vitiate an otherwise valid consent in the Sixth Circuit.

A search conducted with the property owner's voluntary consent is an exception to the Fourth Amendment's proscription on warrantless searches. *Schneckloth v. Bustmonte*, 412 U.S. 218, 219 (1973). The voluntariness of consent is a question of fact, to be proved by the government by a preponderance of the evidence through clear and positive testimony, *id.* at 222, and determined from the totality of all the circumstances, *id.* at 227. The Sixth Circuit described the analysis for determining the validity of a consent to search in *United States v. Riascos-Suarez*, 73 F.3d 616 (6th Cir. 1996), as follows:

> **A search may be conducted without a warrant if a person with a privacy interest in the item to be searched gives free and voluntary consent. A court will determine whether consent is free and voluntary by examining the totality of the circumstances. It is the Government's burden, by a preponderance of the evidence, to show through "clear and positive" testimony that valid consent**

> was obtained. Several factors should be examined to determine whether consent is valid, including the age, intelligence, and education of the individual; whether the individual understands the right to refuse to consent; whether the individual understands his or her constitutional rights; the length and nature of detention; and the use of coercive or punishing conduct by the police.

Id. at 625 (internal citations omitted).

Chambers is a mature man, approximately fifty years old, whose education progressed through a year of college as an engineering major. For the last five to six years, he has been a private excavation contractor. Chambers's age and intelligence indicate the ability to freely consent. Chambers was not alone but standing in the yard with several other people when he gave oral consent. Chambers was in his own home and in the company of his wife when he gave written consent. Chambers's arrest for a cocaine-related felony in 1972 suggests a familiarity with his constitutional rights and with criminal procedure. There was no evidence of coercion or intimidation by law enforcement officers at any time. Chambers was read his *Miranda* rights. Chambers had opportunity to read and review the consent-to-search form; he even had opportunity to make an additional note next to his name and to question the law enforcement officer who gave him the form about spelling. The consent-to-search form advised Chambers in writing that he had the right to refuse to consent to a search. Chambers

testified that he had no trouble reading. These factors all support a finding that Chambers' consent was free and voluntary.

The pivotal issue is whether Chambers' consent was the fruit of the officers' original illegal entry or sufficiently voluntary to remove the taint of the illegal entry.

The Sixth Circuit has held in *United States v. Calhoun*, 49 F.3d 231 (6th Cir. 1994), that a defendant's voluntary consent to search removed the taint of the initial illegal sweep of her home. In *Calhoun*, police arranged for controlled delivery of a United Parcel Service package addressed to one Sean Johnson. After Calhoun opened the door, identified herself as Sean Johnson, and took delivery of the package, police arrested her. They then entered Calhoun's apartment[4] and conducted a pre-arranged protective sweep that revealed no evidence. Officers asked Calhoun to sign a consent-to-search form, which she did. The officers conducted a second search, seizing, inter alia, a firearm that Calhoun indicated they would find under the bed. At no time did officers have an arrest warrant or a search warrant. On appeal, Calhoun argued that the officers' protective sweep was illegal and that it invalidated her consent. The Sixth Circuit agreed that the

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[4] It is not exactly clear, but it appears that Calhoun asked to go back inside because her baby was inside, crying, and because she was cold outdoors, and that she voluntarily allowed the police to accompany her inside.

sweep was illegal but went on to hold that the consent was valid. A search conducted pursuant to valid consent, the court held, constituted an independent source of evidence. *Calhoun*, 49 F.3d at 234-35.

Calhoun specifically argued that the mere illegal presence of the police created a "coercive atmosphere" that rendered involuntary her consent. *Calhoun*, 49 F.3d at 235. The court disagreed, pointing out that Calhoun had received *Miranda* warnings, had signed a consent form advising her of the right to refuse a search, "was not physically or mentally abused," and was not threatened by officers in any way. *Id.* A key factor in Calhoun's consent, the court noted, was Calhoun's understanding of the form that advised her of her right to refuse the search. *See id* at n. 4. *Compare United States v. Haynes*, 301 F.3d 669, 683-84 (6th Cir. 2002) (discussing *Calhoun* and holding that when defendant had not received *Miranda* warnings, had not been advised of his right to refuse a search, and had shouted an objection to the first illegal search, the government failed to show by clear and positive testimony that consent to a second search was valid); *United States v. Jones*, 846 F.2d 358, 360-61 (6th Cir. 1988) (per curiam) (finding consent invalid when defendant had not received *Miranda* warnings, had not been advised of his right to refuse a search, had no formal education, could not read, and was unable to drive away

when three police vehicles blocked his car).

"When consent follows an illegal search, the [g]overnment must demonstrate that 'consent was *sufficiently* an act of free will to purge the primary taint of the unlawful invasion.'" *Haynes*, 301 F.3d at 682 (discussing *Calhoun* and quoting *United States v. Buchanan*, 904 F.2d 349, 355 (6th Cir. 1990) [emphasis in original]). The *Haynes* court recognized that a suspect's knowledge of a prior illegal search can give rise to a sense of futility that the victim has no choice but to comply. *Id.* at 683 (citing *United States v. Furrow*, 229 F.3d 805, 815 (9th Cir. 2000)).

Of particular significance in the present case is the conversation between Deputy Freeman and defendant Chambers in the yard. After securing Iris Chambers' oral consent to search, Deputy Freeman left the house, sought defendant Chambers in the yard, and advised Chambers that it wasn't looking good, and that officers had "noticed things" in the house. Deputy Freeman then asked Chambers for his oral consent to search. At this time he already had advised Chambers of his *Miranda* rights but not of the right to refuse a search.

Like Calhoun, defendant Leslie Chambers received *Miranda* warnings; signed a form advising him of the right to refuse; was not abused, threatened, or coerced by officers; and presented no evidence of a failure to understand his right to refuse a search.

Unlike Calhoun, however, the officers entered Chambers' trailer home with their weapons drawn, and the officers advised Chambers that they had already found incriminating evidence before they asked him for his oral consent to search. Moreover, before Chambers gave written consent to search, the officers conducted another limited search and found the anhydrous ammonia to which Chambers alerted them. It would be reasonable for Chambers to think that refusing consent would be futile gesture amounting to no more than "closing the barn door after the horse is out." *Haynes*, 310 F.3d at 683. Chambers testified, "He asked me if I had the keys to the shed [where the anhydrous was stored], and he had me under arrest, I didn't know what else to do . . . I had no choice in it." (Tr. at 217.)

The facts of the instant case are more analogous to *United States v. Howard*, 828 F.2d 552 (9th Cir. 1987) than to *Calhoun*. In *Howard*, the police, after observing the defendants purchasing chemicals that are sometimes used to manufacture methamphetamine, speculated that the defendants were operating a meth lab inside their house. The police stormed the house and entered the house with guns drawn. After gaining entry, the police read the defendant's wife her *Miranda* rights then asked for consent to search the house. She signed a consent to search form. The Ninth Circuit held that the wife's consent to search the premises after

the officer had gained illegal entry into the residence was tainted and therefore invalid. *See also United States v. Tovar-Rico*, 61 F.3d 1529 (11th Cir. 1995)(finding defendant's consent to search not voluntary when given subsequent to an illegal warrantless entry into her apartment); *United States v. Thomas*, 955 F.2d 207 (4th Cir. 1991) (holding that consent to search was not valid because it was fruit of the original illegal entry).

Considering the totality of the circumstances, the court finds that Chambers' consent was the product of the prior illegal entry into his residence. Accordingly, it is submitted that the government has not carried its burden to show by a preponderance of the evidence through clear and positive testimony that Chambers' consent was voluntary.[5]

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[5] **If the court had found Chambers' consent to be voluntary, the "without prejudice" notation on the consent-to-search forms would have changed nothing in the consent analysis. Even if Chambers subjectively believed the notation would insulate him from responsibility for anything law enforcement officers discovered during the search, he gave no indication that he objected to the search itself, nor did he attempt to revoke his consent. To the contrary, Chambers provided the deputies with the keys to the outbuilding after giving his oral consent, and he voluntarily revealed the locations of several firearms after giving his written consent. Similarly, Iris Chambers made no objections as the search progressed but instead watched TV and fixed herself a meal. The conduct of the defendant and Iris Chambers are inconsistent with persons who did not give consent to officers to search their home. *See United States v. Price*, 54 F.2d 342, 346 (7th Cir. 1995)(noting that the answer, "Sure," to the question, "Mind if we search?" was ambiguous, but finding valid consent based on "the crucial fact" of the defendant's**

C. The Validity of Iris Chambers' Consent to Search

The defendant also challenges Iris Chambers' consent to search on the grounds that Iris lacked authority to consent to search and that her consent was not voluntary. The government, while insisting that Iris had both actual and apparent authority to consent to search and that her consent was voluntary, raises another, more fundamental issue: whether the defendant has standing to raise or assert alleged violations of Iris's Fourth Amendment rights.

Essentially, the government argues that because Fourth Amendment rights cannot be asserted vicariously, the defendant cannot challenge the voluntariness of Iris's consent. The Supreme Court expressly rejected the "rubric of standing" as to violations of the Fourth Amendment over twenty years ago. *Carter*, 525 U.S. at 87 (citing *Rakas v. Illinois*, 439 U.S. 128, 143 (1978)). Instead, the proper inquiry is whether the defendant personally has an expectation of privacy in the place searched. *Id.* at 88. The government has not disputed the defendant's privacy expectations in the trailer home. Indeed, by its position that the defendant can challenge his own consent to search, the government has implicitly recognized that the defendant has a legitimate expectation of privacy in the trailer home at 815 Linwood Drive.

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failure to protest when the search commenced). The "without prejudice" notation would not have vitiated consent.

When the validity of a warrantless search is based on consent, the government has the "burden of proving that the necessary consent . . . was freely and voluntarily given." *Royer*, 460 U.S. at 497. Accordingly, a necessary element of the government's case is to show that consent, no matter from whom received, was voluntary. Therefore, it is not the defendant who raises the issue of voluntariness in the first instance, and it would be wholly inappropriate to prevent the defendant from contesting the government's assertion that the consent was voluntary. *See, e.g., United States v. Mayes*, 552 F.2d 729, 733 (6th Cir. 1977) (suppressing evidence against defendant when his girlfriend's consent to a search of their shared residence was found involuntary); *Howard*, 528 F.2d at 556 (suppressing evidence against defendant Angel when his wife's consent to a search of their shared residence was found involuntary).

***United States v. Riascos-Suarez*, 73 F.3d 616 (6th Cir. 1996), relied upon by the government, is inapposite. Riascos-Suarez did not have standing to challenge his girlfriend's consent to search her hotel room because he had checked out earlier; he no longer enjoyed a "legitimate expectation of privacy." *Id.* at 625 n. 3. By contrast, in this case it is uncontested that defendant, as a resident, had a legitimate privacy expectation in the trailer home and, therefore, has "standing" to contest the voluntariness of**

Iris's consent.

As to Iris's authority to consent to search, the proof was undisputed that Iris resided at the trailer home and that the utilities were listed in her name. Indeed, the defendant himself presented this proof. Thus, it is submitted that Iris had common authority over the premises. In addition, the officers had a reasonable belief that Iris had authority over the premises. She appeared in response to Officer Freeman's request to speak to the owner. Also, Officer Freeman knew Iris from a previous investigation of the premises prior to the time the defendant resided there. The consent of a third party whom officers reasonably believe to possess common authority of over the premises is valid. ***Illinois v. Rodriquez*****, 497 U.S. 177 (1990);** ***United States v. Campbell*****, 317 F.3d 597, 608 (6th Cir. 2003).**

With respect to the voluntariness of Iris's consent, there was very little testimony about her background or education. There was some testimony about her familiarity with police procedures to the extent that officers had been in her trailer home before in connection with gun charges involving a prior husband. The testimony was undisputed that there were no threats or coercion, and that she was in the presence of her husband when she signed the consent to search. There is no reason to believe she was mentally impaired in any way. Her oral consent, however, was equivocal to

the extent she deferred to her husband, the defendant.

Regardless, for the reasons set forth in the analysis of the defendant's consent, the court finds that Iris's consent was not voluntary but was the result of the prior illegal entry by the officers into her home and their subsequent observation and discovery of incriminating evidence. Accordingly, it is submitted that the government has not carried its burden of showing by clear and positive testimony that Iris's consent was freely and voluntarily given.

D. <u>Validity of Search Warrant</u>

Finally, the defendant argues that false statements alleged in the search warrant affidavit render the search warrant invalid. He contends that the affidavit in support of the search warrant issued October 9, 2002, erroneously stated that the 815 Lindale Drive utilities were in Chambers' name; that it was dated the day after the warrant was issued; and that it identifies the tipster with information so vague and ambiguous that it cannot be reliable. Chambers insists that law enforcement officers intentionally and recklessly falsified the affidavit on which the search warrant was based, and argues that, without the erroneous information, there was no probable cause to issue the warrant. The defendant requested a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154, 171 (1978).

Mere "[a]llegations of negligence or innocent mistake" by an affiant are not enough to undermine a warrant's validity. *Franks*, 438 U.S. at 171. To be entitled to a *Franks* hearing, the defendant must make a substantial preliminary showing that the underlying affidavit contained something more than "careless errors." *United States v. Charles*, 138 F.3d 257, 263-64 (6th Cir. 1998); *United States v. Zimmer*, 14 F.3d 286, 288 (6th Cir. 1994) (citing *Franks*, 438 U.S. at 156). Chambers, however, pleaded no facts other than the errors themselves and a conclusory allegation of their deliberate or reckless falsehood; nor did he show deliberate or reckless behavior on the part of law enforcement officers. *See Charles*, 138 F.3d at 263-64 (finding a warrant valid for lack of evidence that affidavit containing incorrect telephone number, incorrect physical description, and an incorrect implication regarding the number of informants represented anything other than "unintentional error[s]"); *United States v. Mitchell*, 457 F.2d 513, 515 (6th Cir. 1972) (affidavit's incorrect license plate number does not invalidate search warrant). The testimony was undisputed that the warrant was applied for and issued the same day, even though the search warrant was dated before the tip was received and the affidavit prepared.

Because Chambers failed to show that the officer's errors were deliberate or reckless and failed to show that the errors were so

material that a factual mistake should invalidate the warrant and for the reasons stated at the hearing, the inquiry ends and the court need not ask whether the affidavit's non-erroneous information alone establishes probable cause. *Charles*, 138 F.3d at 264; *Zimmer*, 14 F.3d at 288. It is submitted that the defendant is not entitled to a *Franks* hearing.

The defendant also argues that because the issuance of the search warrant was based on information the officers obtained after illegally entering and searching the Chambers' residence, it is fruit of a poisonous tree and should be excluded. *See Wong-Sun v. United States*, 371 U.S. 471, 485-86 (1963)(holding that both verbal and physical evidence derived from "the exploitation of illegality" is inadmissible). The affidavit in support of the search warrant clearly is based on items observed and found in the Chambers' house following the illegal entry and search, for example, foil strips, anhydrous ammonia, and other items used in the manufacture of methamphetamine. Without this information, there would not be sufficient probable cause to issue a search warrant. Therefore, because the search warrant was based on evidence discovered as a result of the illegal entry into the Chambers' residence, the search warrant is invalid as fruit of the poisonous tree.

RECOMMENDATION

It is submitted that the officers' initial entry to the

trailer home was illegal; that the Chambers' consents were the products of the illegal entry; and that the information supplied in support of issuance of the search warrant was fruit of the poisonous tree. It is therefore recommended that the defendant's motion to suppress should be granted.

Respectfully submitted this 24th day of March, 2003.

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DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE