IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

LAZZERICK M. ALEXANDER,

Defendant.

REPORT AND RECOMMENDATION

07-CR-071-S

REPORT

Before the court in this gun possession case is defendant Lazzerick Alexander's motion to suppress the two firearms charged against him. Alexander contends that the police had not obtained valid consent to perform either the car search or the apartment search that led to discovery of the two handguns. *See* Dkt. 11. The government responds that both searches were based on voluntary consent provided by persons with actual authority to provide that consent. The government is correct, although I'm not convinced that consent is material to either search. In any event, this court should deny all phases of Alexander's motion.

On August 7, 2007, this court held an evidentiary hearing. Having heard and seen the witnesses testify, having made credibility determinations, and having considered all of the parties' exhibits, documents and affidavits, I find the following facts:

FACTS

In April 2007, Vaniece Harris rented Apt. 1 at the Country Meadows apartment complex at 6804 Schroeder Road on Madison's far west side. Early that month the complex's manager, Kathy Bastien, received an extraordinarily detailed anonymous telephonic tip regarding an

alleged drug dealer staying with Harris. The informant told Bastien that a man named Lazzerick Alexander, date of birth 10/24/80, was living with Vaniece at 6804 Schroeder Road, Apt. 1. The informant described Alexander as an African American man of smaller build, approximately 5 foot 8 inches, 165 pounds, who drove a white Buick Riviera with "nice wheels" and Wisconsin license plate 909-LRS. The informant told Bastien that Alexander was selling crack cocaine out of Apt. 1, charging $100 for eight balls, $350 for half ounces, and $700 per ounce. The informant told Bastien that Alexander used his microwave and stove top to cook the crack, stirring with a wire hanger. The informant reported hearing that Alexander kept a gun hidden under the hood of his car. The informant also reported that Alexander had been involved in a stabbing in Madison and currently was on probation or parole.

Bastien promptly conveyed all of this information to the Madison Police Department (MPD), which advised its West Community Policing Team (WCPT), a street-level drug interdiction unit on the far west side. WCPT Officer Daniel Nale confirmed Alexander's vital statistics and learned that Alexander's probation officer had issued a warrant for his arrest. Based on this, Officer Nale began preparing to locate and arrest Alexander.

By serendipity, on April 16, 2007 Officer Nale overheard a police radio broadcast assigning two officers to accompany an automobile repossession company employee (a "repo man") to 6804 Schroeder Road as security during repossession of a white Buick Riviera. The repossession company (Ultimate Repossessors, Inc., or URI) had requested assistance because the woman to whom the Riviera was titled (Jennifer Fjelstad) had warned that the man who

actually drove this car might react violently to a repossession attempt.[1] Officer Nale contacted the repo man, Bryan Bowman, to advise that the WCPT expected to arrest the driver of the Riviera that evening, after which Bowman could repossess Fjelstad's car. Bowman agreed.

At about 8:15 p.m. on April 16, 2007, WCPT officers waited for Alexander in the Country Meadows parking lot. The Riviera pulled in with a different man (Antwan Richmond) driving and Alexander in the front passenger seat. Officers stopped the car and arrested Alexander on the warrant. Alexander denied that the Riviera was his car, asserting that it belonged to Antwan or Antwan's girlfriend. He made no claim that any item contained in the car belong to him. Antwan claimed that the Riviera was Alexander's.

Officer Nale telephoned Bowman, who was waiting at a nearby gas station. Bowman arrived, checked the Riviera's VIN against his paperwork and confirmed that this was the vehicle he was assigned to repossess. Among other things, Bowman had a document titled "Order To Repossess," listing "Credit Acceptance" of Michigan as URI's client.[2] As a result of and in reliance on this representation, Officer Nale explicitly turned possession of the vehicle over to Bowman; Bowman accepted and took custody. It was Ultimate Repossessors' policy and procedure upon repossessing a vehicle to inventory and seize all property contained within it. The company would hold such property until the lender sent word to auction the vehicle.

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[1] URI had been hired by Fjelstad's lender to repossess her car. Fjelstad's contract allowed the lender to repossess her vehicle to the extent allowed by the law, and allowed the lender and its agents to remove and hold "any personal property contained within the vehicle." *See* attachment to Gov't Brief, dkt. 35. Wis. Stat. Sec. 409.609 allows a secured party to repossess property after default without judicial process if it proceeds without breach of the peace.

[2] This was a business order from Fjelstad's lender, not a court order.

If URI was able locate the owners of personal property seized from a vehicle then it would offer back the property; if the owners did not take it, then the company could auction or destroy it.

After Bowman took possession of the Riviera, Officer Nale asked Bowman to consent to its search. Bowman agreed. Although Bowman would not have checked under the hood, he had authority to do so and gave explicit permission for the police to search there. There they found a handbag containing a handgun, just as the informant had predicted.[3]

Alexander, who was in custody in a squad car based on the probation warrant, asked the officers to contact Harris in Apt. 1 to report his arrest. Apt. 1 was on the ground floor, one of four apartments flanking a short hallway, two to a side. Several officers entered the common hallway, including Officer Jeff Felt and his K-9 partner, Gilden, a trained drug-sniffing dog.[4] Gilden did not alert to the doorway of Apt. 1 when Officer Felt led him down the hallway. Gilden and Officer Felt apparently went back outside.

WCPT Officer Matt Schroedl and another officer knocked on the door to Apt. 1. Harris answered and allowed the officers to enter. The officers reported Alexander's arrest. Then they explained that they had received a tip that Alexander was cooking and selling crack from the

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[3] In support of his motion to suppress, Alexander submitted an affidavit claiming that although the Buick was titled to his "ex-girlfriend," he owned it because he made the down payment and monthly payments. *See* dkt. 13. Alexander later submitted a supplemental affidavit claiming ownership of the *bag* found in the engine compartment; he does not mention the gun found inside it. *See* dkt. 36.

[4] Officer Felt recovered controlled substances about 93% of the time that Gilden alerted. The misses might be attributable to the lingering odor of controlled substances once present but since removed.

apartment and that he possessed a firearm. They asked permission to search the apartment. Harris refused, telling the officers to get a warrant. The officers accepted this answer and left.

Simultaneously, Officer Felt and Gilden had re-entered the communal hallway and conducted a counterclockwise sweep. *This* time, Gilden alerted strongly to the doorway of Apt. 1. This was not the first occasion on which Gilden had failed to alert to an area on the first go-round and then alerted on the second; in previous instances of no alert/alert conduct by Gilden, Officer Felt had found controlled substances. In Officer's Felt's opinion, Gilden's alert signaled that there probably were drugs in Apt. 1. The officers returned to the parking lot to consult with their supervisor, Sergeant Linda Kosovak. Sergeant Kosovak decided to secure Apt. 1 in order to preserve the status quo pending a search. Sergeant Kosovak, Officer Schroedl and Officer Bernards went back into the building, knocked on the door of Apt. 1, and when Harris answered they entered without seeking her permission.

The officers advised Harris that based on the K-9 alert, along with the informant's detailed information (corroborated by recovery of the firearm from the Riviera), they believed that they had probable cause to search. Therefore, they would apply for a search warrant if necessary, and they expected to get it. In light of this, Sergeant Kosovak asked Harris if she would consent to a police search. Sergeant Kosovak explained that in the absence of consent, she would send an officer to draft a warrant application. This would take about two hours; the officer then would present it to the judge; if the judge granted it, then the officer would return with the warrant and the search would begin at that time. On the other hand, if Harris consented to the search, then the police could begin immediately and finish that much sooner.

Harris vacillated. She had work the next day and didn't want the officers there all night, but she still would not agree to a warrantless search. Hoping to prompt a decision one way or the other, Sergeant Kosovak went back to her squad car to retrieve a written consent form to review with Harris to see if this would assuage her concerns. It appeared to do so: Harris verbally consented to the search. Officer Schroedl joined Harris at the dining table to fill in the blanks on the consent form. But Harris added a qualifier: the officers could search, but Harris would not sign their consent form. Sergeant Kosovak declined to search on those terms. She explained that department protocol required a signed consent form, particularly when the consentor was palpably ambivalent. Harris did not agree to sign the form.

Sergeant Kosovak accepted this answer and moved to Plan B: she directed Officer Schroedl to return to the West Side police station (just a few blocks away) to draft a search warrant application. Sergeant Kosovak believed that her team had probable cause to search based on the informant's richly detailed tip corroborated by recovery of the firearm in the Riviera's engine compartment and Gilden's alert on Apt. 1. Officer Schroedl left for the station, genuinely intending to draft the application and obtain the warrant. The other officers remained in Apt. 1 to prevent the destruction of evidence.

After Officer Schroedl left, Harris telephoned Alexander's mother to discuss what was happening. While talking to Alexander's mother, Harris decided to consent to the search without requiring the officers to obtain a search warrant. Harris so advised Sergeant Kosovak; Sergeant Kosovak pulled back out the written consent form and went through it with Harris. At 9:25 p.m. Harris signed the form with Kosovak as a witness. *See* Gov. Exh. 3. Police searched the apartment and discovered a second handgun.

ANALYSIS

I. The Car Search

Alexander challenges the search of the Riviera in which he was a passenger, claiming that no one with actual or apparent authority had consented to the search. This is an understandable but mildly ironic position for Alexander to take, considering that at the time of the search, he unequivocally denied any authority to object to it.

A. Alexander's Expectation of Privacy in the Riviera

Alexander's road to suppression begins with him establishing that he had a reasonable expectation of privacy in the Riviera. *See United States v. Brack*, 188 F.3d 748, 754-55 (7th Cir. 1999), *quoting Minnesota v. Carter*, 525 U.S. 83, 88 (1998); *see also United States v. Torres*, 32 F.3d 225, 229-30 (7th Cir. 1994). Although a passenger in a car *can* have a legitimate expectation of privacy in the car's contents, *see United States v. Nitch*, 477 F.3d 933, 938 (7th Cir. 2007), where the passenger has not asserted a property or a possessory interest in the automobile, and has not asserted an interest in the property seized, then he has no expectation of privacy in areas of the car that normally are not accessible to the passenger, such as the trunk, glove box, or in this case, the engine bay. *See Rakas v. Illinois*, 438 U.S. 128, 148-49 (1978). Honing in more tightly, where, as here, the passenger tells the police that it's not his car, thereby disclaiming any possessory interest in the vehicle, he has abandoned any expectation of privacy that would allow him later to challenge the search. *See United States v. Washburn*, 383 F.3d 638, 643 (7th Cir. 2004).

Although Alexander has accompanied his motion to suppress with a claim to own the bag found in the Riviera's engine bay (but apparently denying ownership of the gun in it), when deciding whether a defendant abandoned luggage, the flow of information stops the moment the officer opens the bag. *Id.*, quoting *United States v. Rem*, 984 F.2d 806, 811 (7th Cir. 1993). No person can have a reasonable expectation of privacy in an item that he has abandoned; it is the government's burden to prove by a preponderance of the evidence that the defendant's voluntary words or actions would lead a reasonable person in the searching officers' position to believe that the defendant relinquished his property interests in the item to be searched. *United States v. Pitts*, 322 F.3d 449, 456 (7th Cir. 2003). This is an objective test, and the defendant's subjective desire later to reclaim the item is irrelevant. Courts are to look solely to the external manifestations of the defendant's intent as judged by a reasonable person possessing the same knowledge available to the officers involved in the search. *Id.*

Here, there is no doubt that the police *subjectively* suspected that the Riviera was Alexander's, or at least that he had been using it as his own. *Objectively*, however, they knew that the car was titled to someone named Jennifer Fjelstad and that Alexander now was proclaiming that the car belonged either to his companion (Antwan) or to Antwan's girlfriend (who may well have been Fjelstad). Even if the police did not believe Alexander's self-serving disclaimers, how could they have asked him for consent to search the Riviera when he was insisting that it was not his? True, the police chose a different route, using the repo man as their intermediary, but the question remains: why should Alexander be allowed to sandbag the police by proclaiming no interest in the car at the time of the search, only to reverse course post-indictment and claim that it really was his car that the police searched that night?

Pursuant to *Washburn* and *Rem*, Alexander is stuck with his declarations to police on the scene: it was not his car. Therefore, he cannot now claim a reasonable expectation of privacy in it sufficient to challenge its search. This is an independent and adequate basis to deny Alexander's motion to suppress evidence seized from the Riviera.

For completeness's sake, I consider the issue of the repo man's consent:

B. The Repo Man's Consent To Search

The Fourth Amendment's probable cause and warrant requirements do not apply where an authorized party voluntarily consents to a search. *United States v. Parker*, 469 F.3d 1074, 1077 (7th Cir. 2006). It is the government's burden to demonstrate that the consenting party possessed common authority over or other sufficient relationship to the effects to be inspected. *United States v. Groves*, 470 F.3d 311, 318-19 (7th Cir. 2006). Actual authority can be established by a property interest in the item but is not limited to this narrow inquiry; the question is whether the consentor actually had access to or control over the property to be searched, or reasonably appeared to have such access and control. *Id*. at 319. Either actual or apparent authority will do. *United States v. Rosario*, 733 F.2d 733, 737 (7th Cir. 1992).

Law enforcement agents are entitled to conduct a search without further inquiry if the facts available to them at the moment would warrant a person of reasonable caution in the belief that the consenting party had authority over the premises. *United States v. Goins*, 437 F.3d 644, 649 (7th Cir. 2006), quoting *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990). *See also Georgia v. Randolph*, 126 S.Ct. 1515 (2006). The focus is on what is reasonably apparent to an officer who

has made reasonable inquiry. Such a focus emphasizes the deterrent rationale underlying the exclusionary rule: obviously, reasonable police officers cannot be deterred by circumstances that are unknown or not reasonably apparent to them. Thus, the exclusionary rule should not be applied when it will not result in appreciable deterrence. *United States v. Grap*, 403 F.3d 439, 444-45 (7th Cir. 2006.

In *United States v. Rodriguez*, 88 F.3d 519 (7th Cir. 1989), the Seventh Circuit held that "just as police may have probable cause to act even though their source was lying, so they may act when the person giving consent has apparent authority." *Id*. at 523. Further,

> It is reasonable to act on the basis of apparently valid consent.
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> Suppressing evidence because of what the police did not know at the time, even though their acts were justified on the basis of what they did know, would inject a random element into Fourth Amendment jurisprudence without serving any of the functions of the exclusionary rule. Denying police the ability to act on the basis of apparent authority would not deter improper conduct; it would instead deter acting on the basis of consents.

Rodriguez, 888 F.2d at 523.

The government has met its burden of persuasion in the instant case by establishing that Bowman had the apparent authority to consent to this search. Wisconsin law authorizes self-help for repossession of personal property so long as there is no breach of the peace. Although the government observes that state law is irrelevant to determining the reasonableness of a search, in this case, state law on property repossession is relevant to determining whether it was reasonable for the police to believe Bowman had authority to consent to the search. Along these

lines, Alexander argues that the government has not established that Fjelstad actually had defaulted on her car loan, thus giving Bowman actual authority to repossess her car. *See* Reply, dkt. 37, at 1-2. This reliance on an upstream fact might seem fastidious, but it's a valid point: the record does not reflect that Officer Nale personally verified the accuracy of Bowman's representations. Even so, the police reports, exhibits and hearing testimony sufficiently establish that it was reasonable for Officer Nale and his colleagues to rely on Bowman's apparent authority to repossess the Buick and then to consent to a police search.[5] Bowman had sought out police assistance and he shared his paperwork with them showing the repossession order that had been placed for the car. Obviously the MPD has received similar requests in the past, since it had assigned its officers to assist Bowman. Therefore, it was reasonable for WCPT officers to conclude that Bowman was authorized to repossess the Riviera.

Alexander latches onto Bowman's request for police assistance as evidence to the contrary: the police could not have believed Bowman had authority to repossess the Riviera because he was expecting a breach of the peace, which would violate state law on repossession. But this argument puts the cart before the horse: if Bowman could avoid a breach of the peace by having police officers present during his repossession attempt, then he would have complied with the statute and the repossession would conform with state law. Bowman got luckier still: not only did the police agree to stand by, Officer Nale offered to arrest the predicted trouble-maker prior to Bowman arriving on the scene. Events unfolded as planned, and Bowman

[5] In hindsight, it appears that Bowman had authority to repossess Fjelstad's car, but as with Alexander's expectation of privacy in the Buick, the facts are limited to what the police knew at the time of their search.

repossessed Fjeldstad's car for her creditor. It is of no moment that the police assisted Bowman or that they benefitted from their assistance: the repossession was by-the-book and Bowman had apparent authority over the Riviera. Further, pursuant to Fjeldstad's installment contract, Bowman now had authority to take remove and hold any personal property found in the vehicle. This contract provision certainly was sufficient to allow Bowman to open any closed packages found in the Riviera, and common sense indorses this view. To forestall claims of pilfered cash and missing designer eyeglasses, prudence would require a repossession company immediately to inventory the contents of every unsealed container discovered in a repossessed car.

In any event, as the government points out, once the police popped the hood and found the bag, they had sufficient corroboration of the informant's information to provide probable cause to believe that the bag held a gun, which would be contraband *viz a viz* Alexander. At that point, pursuant to the automobile exception to the warrant requirement, the police were authorized to open the bag and seize the handgun. *United States v. Hines*, 449 F.3d 808, 814 (7th Cir. 2006). (More on the probable cause determination in the next section).

Therefore, the police did not violate Alexander's Fourth Amendment rights by searching the bag in the engine bay of the Buick. This court should not suppress any evidence derived from this search.

II. The Apartment Search

Alexander claims that the search of Apt. 1 was invalid because the police coerced Harris into consenting to the search by heavy-handed tactics coupled with a false claim that they would obtain a search warrant. Alexander starts by challenging the police re-entry into Apt. 1 without seeking or obtaining permission from Harris. Alexander argues that there were no exigent circumstances that would have justified such re-entry; therefore, it was illegal and it tainted Harris's eventual consent. Next, he argues that the threat to obtain a search warrant was empty because the police did not have probable cause to obtain a warrant and they knew it. As an interwoven corollary, Alexander argues that the totality of circumstances establish that Harris's consent was not voluntary.

The unconsented re-entry was legal. "Securing a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents." *Segura v. United States*, 468 U.S. 796, 810 (1984). The police learned nothing from re-entry that would have enhanced their warrant application, and they moved with dispatch, undoubtedly hoping to end their occupation of Apt. 1 as quickly as possible. None of this implicated Alexander's Fourth Amendment rights. *Id.* at 812-14. Defendants and their associates are not entitled to destroy evidence while police wait for a search warrant. *Segura*, 468 U.S. at 816; *see United States v. Blackwell*, 416 F.3d 631, 633 (7th Cir. 2005). Because Harris was aware that Alexander had been arrested and that the police had reason to believe he kept crack and firearms in Apt. 1, it was reasonable and prudent for the police to re-enter her apartment, with or without her permission and to remain there

until they obtained their warrant, even if it took all night. *See, e.g.., Segura*, 468 U.S. at 812-13 (reasonable to occupy defendant's apartment for 19 hours while waiting for warrant); *Minnesota v. Olson*, 495 U.S. 91, 100-01 (1990) (warrantless intrusion may be justified by imminent destruction of evidence).

A lynchpin of *Segura* is that the police actually have probable cause to support the search for which they are seeking a warrant. Here, Alexander contends that they did not. Alexander is incorrect.

Although an untested anonymous informant initially must be deemed of unknown reliability, once police corroborate material facts not readily knowable to the general public, the informant's tip assumes a high degree of reliability. *United States v. Brown*, 366 F.3d 456, 460 (7th Cir. 2004). The facts in *Illinois v. Gates*, 462 U.S. 213 (1983) are similar to those presented here: police received an anonymous letter identifying the suspects by name and address, and providing richly interwoven details regarding their alleged drug trafficking activities including dates and dollar amounts. Even so, this letter, standing alone did not establish probable cause because nothing in the letter allowed a determination of the writer's honesty or reliability. *Id.* at 225, 227. But the Court held that once police verify important facts in an informant's narrative, then they have established probable cause because an informant who is right about some things probably is right about others. Police corroboration sufficiently reduces the chance that the informant is telling a reckless or prevaricating tale. *Id.* at 244. This is particularly true when the informant is proved accurate about information he must have learned from the suspect himself. *Id.* at 243-44; *see also Brack*, 188 F.3d at, 756 (unknown informant's tip provided

probable cause because it provided rich detail and accurately predicted the suspect's future behavior, demonstrating inside information).

In this case, the informant's tip was a 20-megapixel snapshot from a day in the life of Lazzerick Alexander, purported crack-dealer & gunslinger. Some people know less about their spouses than the tipster reported about Alexander. Even so, absent independent corroboration, this richly detailed portrait could have been merely the vivid tale of a creative liar. But upon the discovery and seizure of the handgun from the Riviera's engine bay, the informant instantly morphed from "of unknown reliability" to "proven reliable as to reports of criminal conduct." The informant's narrative about Alexander, as corroborated by the recovered handgun, established probable cause for the police to believe that they would find evidence of crack manufacture and sale in Apt. 1. Had the police applied for a search warrant at that juncture, they would have received it.

But there's more: Gilden, the drug-sniffing dog, eventually alerted to the doorway of Apt. 1. A positive alert by a trained drug dog provides probable cause for a search. *United States v. Washburn*, 383 F.3d 638, 643 (7th Cir. 2004); *United States v. Ganser*, 315 F.3d 839, 844 (7th Cir. 2003). True, Gilden did not help his cause by initially failing to alert to the doorway, but Officer Felt explained at the evidentiary hearing that this sequence had occurred before and that police had recovered contraband on those other occasions. Even if we were to reduce the likelihood of the presence of narcotics to 46.5% based on Gilden's alert after a non-alert (*i.e.,*

93% of 50%), that's not nothing, and in any event, probable cause lies somewhere before the 50% threshold.[6]

So, it was reasonable for the police to push their way back into Apt. 1 without permission and to camp there until they got a warrant. Since they would have gotten their warrant if they had applied for it, either in state court or this court, we could short circuit the analysis by proceeding directly to the inevitable discovery doctrine: the exclusionary rule does not apply to evidence that is sure to be located through lawful procedures because exclusion would be a windfall for the accused. *United States v. Blackwell*, 416 F.3d 631, 633 (7th Cir. 2005). Although this court cannot use the inevitable discovery doctrine as an excuse to forgive a warrantless search, *see United States v. Elder*, 466 F.3d 1090, 1091 (7th Cir. 2006), here the police actually had initiated the launch sequence for obtaining a warrant in response to Harris's dithering: Sergeant Kosovak had ordered Officer Schroedl to return to the West Side police station to draft a search warrant application and Officer Schroedl had departed to do so. As noted above, there is no doubt that the police would have obtained a warrant.

Therefore, Harris's consent actually is irrelevant to the analysis. On these facts, this is the most equitable result: having failed to persuade Harris to sign their consent form (an MPD procedural requirement intended to forestall exactly the sort of challenge that now has been raised), the police were willing to undertake the time-consuming and inconvenient process of obtaining a search warrant. Harris dissuaded them from doing so by announcing that she had

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[6] *Edmond v. Goldsmith*, 183 F.3d 659, 669 (7th Cir. 1999)(Easterbrook, J., dissenting); *see also United States v. Funches*, 327 F.3d 582, 586 (7th Cir. 2003) (probable cause determination does not require resolution of conflicting evidence as would be required by preponderance of evidence standard).

changed her mind, which she commemorated by signing the consent form. Had the police known then that Harris was reserving the right, upon further reflection and after consultation with Alexander, to disavow the voluntariness of her consent, then undoubtedly they would have gone forward with their warrant request. As time-consuming and inconvenient as this might have been at the time, it still would have been a bargain compared to the burden of bringing half the WCPT to federal court to testify at a suppression hearing.[7]

But even if the validity of Harris's consent were to matter, the result would not change: Harris's consent was voluntary. The test is whether, given all the circumstances, the government has established that Harris's consent was the product of her free will and not the product of duress or coercion. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973); *see also Groves*,470 F.3d at 321-22. Factors to consider are include the consentor's age, education, intelligence, lack of advice regarding constitutional rights, detention, repeated or prolonged nature of any question, any physical punishment or deprivation, and whether she was in custody. *Id*. No one factor is dispositive; a court must analyze all the circumstances of the situation actually presented; only through a careful sifting of the unique facts and circumstances may a court determine the question of voluntariness. *Id.* at 322.

Here, sorting the factors into two columns might suggest that this is a close call but it isn't. Coercive police activity is a necessary predicate to a finding of involuntariness. *United*

[7] In fairness to defense counsel, I note that Attorney Jones moved to suppress following an ex parte hearing at which this court denied Jones's motion to withdraw and provided input on how to preserve the fragile attorney-client relationship. *See* July 25, 2007 order, dkt. 10. Notwithstanding Alexander's continued apprehension, *see* August 13, 2007 order, dkt. 32, Jones has gone above and beyond the call in this case.

States v. Gillaum, 372 F.3d 848, 856-57 (7th Cir. 2004), *citing Colorado v. Connelly*, 479 U.S. 157, 167 (1986). There was no coercive police activity here. As noted above, the police had probable cause to believe there was contraband in Apt. 1. Therefore, they had the legal right to re-enter the apartment and secure it until they obtained a search warrant. It also was accurate and allowable for the police to advise Harris that if she did not consent to the search, they would, in fact, obtain this warrant, and the entire process would take longer. *See United States v. Miller*, 450 F.3d 270, 272-73 (7th Cir. 2006)(a factually accurate statement about what the police will do in the absence of cooperation is not coercive). "An offer that makes the recipient better off cannot be condemned as coercive." *Id.*

Additionally, the officers' attempts to persuade Harris to consent cannot be found coercive because she rebuffed them. It was only after the police initiated the warrant application process that Harris, in consultation with Alexander's mother, chose to consent. And it *was* a choice: Harris exercised her free will throughout her interaction with the police and made a rational decision to consent to the search. I saw and heard Harris testify at the suppression hearing. She is intelligent, articulate and strong-willed. She refused to consent until she decided, on her own, that it was in her best interest. Even then, she negotiated for better terms: she would consent orally but would not to sign the form. I surmise that Harris was angling for plausible deniability if Alexander later challenged her decision. The police rejected her counter-offer.

Harris stuck to her position for a bit, but upon further reflection, decided she wanted it all to be over. It already was close to 9:00 p.m. and it would take the police about two hours

to obtain the warrant, so the search wouldn't start until around 11:00. Harris had to work the next day, so this whole situation was turning into a major inconvenience. (I have not credited Harris's claim that the police warned her they would tear her place apart if they had to get a warrant, but I it would not surprise me if this was her subjective, self-generated, unspoken belief at the time). Harris faced the predicament of having to choose between two unpalatable options, but this does not render her decision involuntary. The question is whether the police engaged in any coercive conduct that prevented Harris from using her free will to make a rational choice. The answer is "No."

In sum, there is no basis to suppress the evidence recovered from Apt. 1.

RECOMMENDATION

Pursuant to 28 U.S.C. §636(b)(1)(B) and for the reasons stated above, I recommend that this court deny in all respects defendant Lazzerick Alexander's motion to suppress evidence.

Entered this 24th day of August, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

UNITED STATES DISTRICT COURT
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Re: United States v. Lazzerick M. Alexander
Case No. 07-CR-071-S

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the newly-updated memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before September 4, 2007, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by September 4, 2007, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable John C. Shabaz, District Judge