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

UNITED STATES OF AMERICA,

Plaintiff

v.

DAVID A. BIENFANG,
HAL D. MULFORD, and
CHRISTOPHER SCHMELTZER,

Defendants.

REPORT AND
RECOMMENDATION

10-cr-130-wmc

REPORT

The grand jury returned a three-count indictment charging defendants David Bienfang, Hal Mulford and Christopher Schmeltzer in Counts 1 and 2 with being members of two conspiracies related to methamphetamine cooking in Lincoln County, Wisconsin. The grand jury also charged Bienfang and Mulford in Count 3 with possessing chemicals and materials to be used to cook methamphetamine. All three defendants have reached plea agreements with the government, but Bienfang has reserved his right to obtain rulings on his motion to dismiss the indictment (dkt. 49) and motion to suppress evidence (dkt. 50).[1] For the reasons stated below, I am recommending that the court deny these motions.

Dkt. 49: Motion To Dismiss the Indictment

Bienfang argues that the elements-only indictment returned against him is impermissibly vague, even under the lenient standard of F.R. Crim. Pro. 7(c)(1). In addition to citing *United*

[1] Schmeltzer joined Bienfang's motion to dismiss the indictment and filed his own brief in support, dkt. 69. It is not of record yet whether he reserved his challenge in his plea agreement; if he did, he gets the same ruling as Bienfang.

States v. Resendiz-Ponce, 549 U.S. 102, 109 (2007) and *Russell v. United States*, 369 U.S. 749 (1961), Bienfang invokes the newly-tightened pleading standard in *civil* cases announced by the Court in *Bell Atlantic Corp. V. Twombly*, 550 U.S. 554, 555 (2007) and *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937 (2009). Bienfang argues that, notwithstanding the general rule that an elements-only indictment generally suffices, *See Resendiz-Ponce*, 549 at 109, the charges leveled here must allege more facts in order to provide him with fair notice so that he can make reasoned, timely decisions about how to respond, Brief in Support, dkt. 66 at 5, and to ensure that there is in fact a legal case for him to answer. Reply Brief, dkt. 86 at 3. Schmeltzer also raises a double-jeopardy concern and argues that a vague indictment cannot be rescued by discovery or a bill of particulars. Dkt. 69 at 4-5.

In response, the government agrees that an indictment not only must state the elements of the charge but also must provide the defendants with adequate notice of the nature of the charges to allow preparation of a defense, and must allow the defendant to plead the judgment as a bar to future prosecutions for the same offense. Gov't. Response, dkt. 73, at 1-2, citing *United States v. Dooley*, 578 F.3d 582, 589 (7th Cir. 2009). The government contends that the grand jury's indictment meets these criteria. The government also notes that a defendant challenging the sufficiency of an indictment must demonstrate prejudice from its alleged deficiencies. *See United State v Dooley*, 578 F.3d at 589, *citing United States v. Castaldi*, 547 F.3d 699, 703 (7th Cir. 2008). The government is correct on both points.

Starting with the prejudice argument, as the court noted in *Dooley*,

> [Defendant] has not alleged, much less proved, that he suffered any prejudice from the alleged infirmities in the indictment. Indeed, he never asked for a bill of particulars. Nor does he deny that the Government has an "open file" policy. It is clear from the

> record that [Defendant] and his counsel understood the Government's allegations and were able to mount a vigorous, albeit unsuccessful, defense at trial.
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> *United States v. Dooley*, 578 F.3d at 590.

Here, neither Bienfang nor Schmeltzer even has attempted to prove actual prejudice from the government's terse indictment. Bienfang and Schmeltzer filed a battery of discovery motions and demands, *see* dkts. 31-48 and 52-53, but neither defendant requested a bill of particulars. When asked at the September 16, 2010 pretrial motion hearing if they had any concerns about the government's disclosures, both defendants, by counsel responded that they were satisfied. It seems that the government has made available–or will make available–a transcript of the grand jury proceedings so that the defendants can be certain as to the basis of the charges brought against them. *See* Gov't Response, dkt. 73 at 4. The defendants are reduced to hypothesizing theoretical problems with the indictment.

Perhaps more tellingly, after filing their briefs but before getting a ruling on dismissal, both defendants entered into agreements to plead guilty to at least one charge in the indictment. The court will not accept these pleas unless there is a factual basis for them and the pleas are voluntary, *see* F.R. Crim. Pro. 11(b)(2) & (3); therefore, it would seem by defendants' conduct that they understand the factual and legal basis of the charge(s) to which they are pleading guilty and are willing to enter a plea to it.

Picking up on this point, but for Bienfang's guilty plea, the court was prepared–even in the absence of a defense request–to find that Count 3 (unlawful possession of chemicals and equipment intended for meth cooking) required a bill of particulars at trial in order to cabin the government's presentation and to ensure a unanimous jury verdict. In fact, the court's October

19, 2010 draft jury instructions accounted for this. *See* dkt. 85, Exh. 3 at 10. By virtue of Bienfang's decision to plead guilty, the court infers that these concerns have resolved themselves. Further, it is this court's practice in every conspiracy prosecution to grant any defense motion to require the government to identify every alleged coconspirator known to it. As noted above, no such motions were filed here. Again, the court can only conclude that there are no genuine concerns here about the scope of the government's charges.

In previous cases this court has questioned the government's practice of returning elements-only indictments as opposed to speaking indictments, but this concern is pragmatic, not legal. The Court of Appeals for the Seventh Circuit has consistently held that an indictment charging a drug conspiracy under 21 U.S.C. § 846 is sufficient if it sets forth the existence of a drug conspiracy, the operative time of the conspiracy, and the statute violated. The indictment does not even need to allege an overt act. *United States v. Singleton*, 588 F.3d 497, 499-500 (7th Cir. 2009). *See also United States v. White*, 610 F.3d 956, 958-59 (7th Cir. 2010) (indictment that tracks the words of statute to state elements of the crime generally is acceptable as long as there are enough particulars so that defendant is aware of the specific conduct at issue).

In light of all this, defendants' invocation of *Twombly* and *Iqbal*, while creative, is non sequitur. There is no basis to dismiss the indictment.

Dkt. 50: Bienfang's Motion To Suppress Evidence

Some of the evidence against Bienfang was seized during execution of a state search warrant on January 4, 2010 at a cabin outside of Merrill owned by the Mulford family in which Bienfang was living. Much of the evidentiary support for the warrant application was obtained during and as a result of a visit by Lincoln County deputy sheriffs to the property earlier that

same day. Bienfang has moved to suppress the evidence derived from the first visit and to quash the resulting search warrant.

On September 23, 2010, this court held an evidentiary hearing on Bienfang's motion to suppress. *See* Transcript, dkt. 62. Having heard and seen the witnesses testify, having reviewed the exhibits (dkts. 59-60) and Bienfang's affidavit (dkt. 54), and having made credibility determinations, I find the following facts:

Facts

Chad Collinsworth has been a deputy sheriff in Lincoln County, Wisconsin for about three years. For the past year he has been assigned to the local narcotics unit as a sergeant investigator. Sgt. Collinsworth has received specialized training in drug case investigation, including methamphetamine laboratories and their characteristics. One of the ingredients necessary to cook methamphetamine is anhydrous ammonia, which has a powerful aroma that is more caustic and longer-lasting than regular ammonia. Sgt. Collinsworth had smelled and been exposed to anhydrous ammonia in the field, so in January 2010 he was familiar with its lingering pungency. Another common ingredient in a meth cook is liquid ether, which can be obtained by depressurizing aerosol cans of engine starting fluid, then punching holes through the bottom of the can. Sgt. Collinsworth is not aware of any reason to punch holes in the bottom of a starting fluid can other than to milk it for liquid ether.

Since at least 2009, the drug task force that covers Lincoln County has focused on the methamphetamine labs proliferating in the area, along with their supply chains. During this ongoing investigation, many witnesses had named David Bienfang as a local methamphetamine cook; Bienfang's notoriety was such that in the local argot, Sudafed tablets were called "beans"

in his honor. Bienfang was living (with permission) in the Mulford family's cabin off of rural Tug Lake Road.[2] more than one witness had told Sgt. Collinsworth that Bienfang cooked methamphetamine at the Mulford cabin on a regular basis.

On the afternoon of Monday, January 4, 2010, an anonymous tipster telephoned Sgt. Collinsworth at the Sheriff's Department to report that there probably was a meth cook going on at the Mulford cabin right now, and that David Bienfang, Casey Mulford and Matt Suhling probably were the cooks. This wasn't enough information to seek a search warrant, so Sgt. Collinsworth decided to drive out to the property for a "knock-and-talk." This was an investigative procedure by which Sgt. Collinsworth would attempt to make contact with whomever was on the property, tell them what he had heard about an active meth cook, obtain a response and see if what he could learn. Because he did not have probable cause, Sgt. Collinsworth knew that he only could seek voluntary cooperation from anyone he saw on the property. Sometimes, however, Sgt. Collinsworth did see relevant evidence in plain view during this process. If the residents declined to talk to him or if he saw nothing of investigative interest, Sgt. Collinsworth would call it a day. On the other hand, since there was the possibility of encountering a live meth cook, Sergeant Collinsworth intended to have backup at his disposal.[3]

So, Sgt. Collinsworth drove out to the Mulford cabin that same afternoon in a four vehicle convoy, with Collinsworth and his lieutenant (Mark Gartman)each driving an unmarked unit and two other deputies driving marked units. The convoy drove north out of Merrill to Tug

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[2] Perhaps"rural" goes without saying in Lincoln County, which has 99,000 acres of forest and a population density of 34 people per square mile, about one person every 19 acres.

[3] By way of example, on the knock-and-talk prior to this one, the deputies had driven into an active meth cook taking place in the suspect's yard. This required the deputies to evacuate the area and secure the scene while they applied for their search warrant.

Lake Road, then turned north onto the one-lane frontage road that led up to the clearing in which stood the Mulford cabin and some outbuildings, about ½ to ¾ mile up the road. (See the June 23, 2009 aerial photograph, Gov. Exh. 9). There was a chain gate and a barn gate on the private frontage road; both were open. "No trespassing" signs also were posted along the road, at least one of which Sgt. Collinsworth recalls seeing. It was about 5:00 p.m., very cold, and getting dark.

As the four sheriff's vehicles drove up the frontage road, about two hundred feet shy of the clearing they confronted a full-sized pickup truck with a snow plow driving down the road. The road was narrow and the snow was so deep, so everybody had to stop, headlight to headlight. They were close enough to the Mulford cabin that anyone inside would be able to see the deputies' vehicles and destroy evidence if that was their intent. Tactically the deputies also viewed themselves as sitting ducks. Sgt. Collinsworth and Lt. Gartman got out of their vehicles and walked up to the truck, pausing only a few seconds to ask the driver through his rolled-down window who he was and whether anyone was at the cabin. The driver said he was David Bienfang and there was no one at the cabin but his dog. Sgt. Collinsworth directed the two uniformed deputies to stay with Bienfang while he and Lt. Gartman hurried up to the clearing to determine if anyone actually was there. At no time did any of the deputies draw or display any firearms, nor did any of them activate the emergency lights on his vehicle.

Sgt. Collinsworth entered the clearing, which was littered with vehicles, equipment, tools, and construction debris; there was stuff all over. As Sgt. Collinsworth approached the entrance to the cabin (which faced East) and stepped onto the front deck, he smelled anhydrous ammonia. Lt. Gartman confirmed that he also smelled anhydrous ammonia. The deputies

knocked on the front door but received no response. They circled the cabin on foot but saw no signs that anyone was inside or in the scattered vehicles, although they did see Bienfang's dog. As he circled the clearing, Sgt. Collinsworth saw an open burn barrel at the edge of the clearing near the woods, about 50 feet West-northwest behind the cabin *(See* hand-drawn map, Gov. Exh. 10). Sgt. Collinsworth looked into the barrel and saw burnt aerosol cans with holes punched in their bottoms. Sgt. Collinsworth concluded that Bienfang had cooked meth at the Mulford cabin. About three to five minutes had passed since the convoy had encountered Bienfang's truck.

Sgt. Collinsworth walked back to the stalemated vehicles. Bienfang had turned off his truck, and either had stepped out or was directed out by the two uniformed deputies. The three men chatting about the quality of the deer hunting on and near the Mulford property. The deputies had not handcuffed Bienfang, nor had they displayed their weapons. Sgt. Collinsworth directed the deputies to arrest Bienfang on a methamphetamine charge. There was a 30 minute delay leaving because the deputies could not back their vehicles down the narrow frontage road and Bienfang's truck would not start without significant coaxing.[4]

Once transported to the county jail, Bienfang waived his *Miranda* rights and answered Sgt. Collinsworth's questions. He admitted to possession of a bindle of methamphetamine found during his search incident to arraign, admitted that within the past two days he had smoked

[4] Earlier that same day, at about 11:00 a.m. on January 4, 2010, Bienfang's brother-in-law, Tom Kouba, had driven a trailer full of drywall scraps from his business out to the Mulford property to dump into a pit that needed filling. Kouba met Bienfang at the Mulford cabin; they switched out vehicles, drove in Bienfang's truck to the pit at the back of the property, completed the dump, then returned to the Mulford cabin where they lit a fire to warm up. Kouba left around 1:00 or 1:30 p.m. At no time did Kouba smell ammonia at the clearing, in the cabin or on Bienfang.

meth at the Mulford cabin with David Graap, Casey Mulford and Matt Suhling, and reported that a glass meth pipe still was located on the premises.

Sgt. Collinsworth applied for and obtained from the Lincoln County Circuit Court a warrant to search the Mulford cabin and its premises, including all outbuildings and vehicles. *See* dkt. 67, Exh. 1. The warrant affidavit speaks for itself; Sgt. Collinsworth's probable cause section essentially mirrors the facts found above, with these additions: Bienfang currently was on bond for local charges of unlawfully possessing amphetamine and drug paraphernalia; within the law few months, Mulford and Suhling both had made multiple buys of "Sudafed 24," which commonly is used to cook meth; on November 11, 2009, Jake Jones had told Sgt. Collinsworth that in late summer, 2009, he had dropped Chuck Groff at the Mulford cabin to cook meth with Bienfang, and Groff had pointed out to Jones security cameras mounted in the trees.

During execution of the search warrant, deputies found and seized a tank of anhydrous ammonia stashed in one of the cars in the yard.

ANALYSIS

Bienfang seeks to quash the state search warrant by persuading this court that some of the facts offered in Sgt. Collinsworth's affidavit should be redacted as having been unlawfully discovered, and without these facts, there is no probable cause to support the warrant. In a terse post-hearing brief (dkt. 67), Bienfang makes four points: (A) He was subjected to an unlawful *Terry* stop, which should result in redaction from the affidavit in support of the search warrant the report of his post-arrest statements and the suspected methamphetamine recovered from his person. (B) Sgt. Collinsworth conducted an unlawful search of the Mulford property's curtilage.

which uncovered the aerosol cans in the burn barrel; implicitly, Bienfang wants this evidence redacted from the search warrant affidavit as well. (C) The anonymous telephone tip had no evidentiary weight that would support the search warrant request; and (D) As a result of (A) through (C), the now-bare bones affidavit cannot be rescued by the good faith doctrine of *United States v. Leon*, 468 U.S. 897 (1984). Therefore, posits Bienfang, the warrant must be quashed and the evidence seized in reliance on it must be suppressed.

In response, the government argues that Bienfang was not unlawfully detained; no evidence was gathered as a result of any alleged detention of Bienfang; and Sgt. Collinsworth's observations on the Mulford property did not violate any legitimate expectation of privacy. Therefore, no evidence should be redacted from the warrant application, which then is fully supported by probably cause. In the event there are any redactions, suppression is not justified because the deputies did not act intentionally or recklessly. *See* dkt. 75. I will address the parties' arguments in the order that events occurred on January 4, 2010:

(1) The Telephone Tip

Anonymous tips are less reliable than information from identifiable sources, but they still can form the basis for reasonable suspicion if accompanied by specific indicia of reliability. Some indicia of reliability are the amount of information provided by the tipster and the extent to which the police can corroborate the tip. *United States v. Booker*, 579 F.3d 835, 839 (7th Cir. 2009); *United States v. LePage*, 477 F.3d 485, 487-88 (7th Cir. 2007). Here, the telephonic tipster identified by name three men already implicated by other sources in the local meth cooking scene, and placed a specific time (right now) and location (the Mulford cabin) on their

alleged illegal activity. This was enough information to pique Sgt. Collinsworth's curiosity, but as he recognized, it was not enough to obtain a search warrant for the Mulford cabin. So, Sgt. Collinsworth gathered some backup and investigating further.

(2) Bienfang's Encounter with the Deputies on the Frontage Road

Bienfang implies that it was improper for the deputies to drive up the private frontage road because it had gates and no trespassing signs. However, because the gates were open, the deputies had the same legal right to enter the property as other visitors or delivery people. *United States v. LePage*, 477 F.3d at 488, citing *United States v. French*, 291 F.3d 945, 953 (7th Cir. 2002); *Bleavins v. Bartels*, 422 F.3d 445, 454 (7th Cir. 2005) (the route that any visitor to a residence would take is not private in the Fourth Amendment sense). This gave the deputies the right to enter the property, to knock on the cabin's front door, and to attempt their knock-and-talk routine. *Cf. United States v. Adeyeye*, 359 F.3d 457, 461 (7th Cir. 2004) (police may approach a person in a public place and seek permission to ask questions or to search, so long as the person is free to decline and free to end the encounter). Therefore, it would have been constitutionally reasonable for the deputies to drive up to the clearing, park in front of the Mulford cabin and knock on the front door to ask whomever was home if he/she would be willing to answer some questions or allow a search of the premises.

But as noted above, the convoy had to stop short of the clearing because it encountered Bienfang in his plow truck coming down the road. This initial encounter does not implicate the Fourth Amendment because it was a chance meeting, unplanned and unwelcome by the deputies: it stopped them 200 yards short of the clearing, within sight of the cabin, putting them

at risk and allowing anyone in the cabin to destroy evidence if that was their intent. As is clear by how the deputies eventually cleared the traffic jam, it wasn't feasible for the deputies to back four vehicles ½ to ¾ mile back down the narrow, snow-lined frontage road; the only practical solution would have been for Bienfang to back up 200 yards into the clearing, an act that the deputies had not yet prevented (*could* not prevent) and had not yet directed him not to perform. So, at least up to the point when Sgt. Collinsworth walked to Bienfang's truck to ask him who he was and whether anyone else was at the cabin, Bienfang was not seized in any sense of the word. No matter who had been driving the plow truck, the bottleneck would have had to have been resolved by a consensual encounter between the drivers to discuss and plan who was going to go where.

Things changed, however, when Sgt. Collinsworth told the uniformed deputies to "stay with" Bienfang while Collinsworth and the lieutenant hurried up to the clearing to salvage their knock-and-talk. More about that in the next section. About five minutes elapsed before they came back to the truck and arrested Bienfang. Contrary to the government's assertion, during that five minutes, Bienfang was not free to go.

Whether this matters to the suppression analysis depends on how this court resolves other aspects of Bienfang's suppression motion. The government is correct that Bienfang's pre-arrest detention is irrelevant to what Sgt. Collinsworth did in the clearing and therefore is irrelevant to the analysis whether to suppress the aroma of anhydrous ammonia or the starting fluid cans in the burn barrel. But Sgt. Collinsworth's affidavit in support of his search warrant affidavit includes Bienfang's post-arrest statements and the recovery of a bindle of meth from

Bienfang's person. If this evidence were to have been derived from an unlawful seizure, then it would have to be redacted from the search warrant affidavit.

Let's start this analysis with a pragmatic observation: even if Bienfang had been free to go at all times, he still would have been on the property or close to it (close enough to be chased down by the deputies) five minutes later when Sgt. Collinsworth had developed the probable cause to arrest him. Assuming, *arguendo*, that Bienfang had been free to go and had backed into the clearing, which would have allowed the two uniformed deputies to drive all four sheriff's department vehicles into the clearing (and out of Bienfang's only path of exit), it would have been impossible to complete all of this maneuvering before Sgt. Collinsworth had smelled the anhydrous ammonia–which would have justified at least a *Terry* stop–and virtually impossible to do all this before Sgt. Collinsworth had seen the contents of the burn barrel, thus establishing probable cause for Bienfang's arrest. In other words, even if Bienfang had never been detained, Sgt. Collinsworth would have developed probable cause and would have arrested him before Bienfang left. In light of this, it would be improper to suppress evidence derived from Bienfang's arrest because this would put the police in a worse position than the would have been in had no error or misconduct occrred. *United States v. Cazares-Olivas*, 515 F.3d 726, 728 (7th Cir. 2008), citing *Nix v. Williams*, 467 U.S. 431, 443 (1984)(articulating the inevitable discovery doctrine). This pragmatic approach obviates the need to determine whether it was improper to detain Bienfang for five minutes.

The next step normally would be to analyze this brief detention as a *Terry* stop, *see, e.g., United States v. Hampton*, 585 F.3d 1033, 1038 (7th Cir. 2009)(investigatory stop allowed if police can point to specific and articulable facts that suggest criminality rather than a hunch);

United States v. Fiasche, 520 F.3d 694, 697 (7th Cir. 2008)("'reasonable suspicion,' of course, lies in an area between probable cause and a mere hunch") or perhaps as an encounter analogous to the airport/train station scenario explained in *Tyler*, 512 F.3d 405, 410 (7th Cir. 2008). But the government has not argued for such an analysis, so the court won't pursue it. My recommendation is that the court should not redact from the warrant affidavit the evidence obtained from Bienfang following his arrest. I explore this in Section (4), below.

(3) Sgt. Collinsworth Enters the Clearing

As noted above, the deputies did not violate the Fourth Amendment by entering the clearing and approaching the front door of the Mulford cabin. It was during his walk to the front door that Sgt. Collinsworth detected the odor of anhydrous ammonia. Bienfang asserts in his affidavit –"on information and belief"–that there was no odor of anhydrous ammonia in the clearing, but he did not subject this equivocal assertion to cross-examination. His brother-in-law was on the property earlier that day and smelled nothing, but that does not impeach Sgt. Collinsworth testimony as to what he and Lt. Gartman smelled at 5:00 that afternoon. As a result, there is no basis to redact from the search warrant affidavit Sgt. Collinsworth's report that he smelled anhydrous ammonia.

Whether it was proper for Sgt. Collinsworth to look in the burn barrel at the back of the clearing is a closer question, one that requires the court to determine if the barrel was within the cabin's curtilage, and whether Bienfang's claimed expectation of privacy in the barrel is valid.

"Curtilage" is an imaginary boundary line on residential property separating the resident's protected zone of privacy from the rest of the property accessible to–and unprotected from– the

public. *United States v. Redmon*, 138 F.3d 1109, 1112 (7th Cir. 1998)(*en banc*). Curtilage is the area encompassing the intimate activity associated with the sanctity of the home and the privacies of life, where privacy expectations are most heightened. *United States v. Hedrick*, 922 F.2d 396, 398-99 (7th Cir. 1991). Sometimes the line is easy to locate, sometimes not; it is not necessarily the property line, nor can it be located merely by measuring the distance separating the home and the area searched. *United States v. French*, 291 F.3d 945, 951 (7th Cir. 2002). Factors to be considered include the proximity of the area to the home; whether the area is included within an enclosure surrounding the home; the nature of the uses to which the area is put; and the steps taken to protect the area from observation by passers-by. *Id.* at 952, citing *United States v. Dunn*, 480 U.S. 294, 300-01 (1987). Courts are to examine the totality of circumstances to determine whether the owner of the seized property has demonstrated a privacy expectation in the location where his personal property was located, and whether society is prepared to accept that expectation as objectively reasonable. *Redmon*, 138 F.3d at 1112-13. For instance, courts have concluded that society is not willing to accept as reasonable a claim of expectation of privacy in trash left for collection in an area accessible to the public. *Id.* at 1114. While a back yard customarily is viewed as within a home's curtilage, a field used to store vehicles and tools is not. *Bleavins*, 422 F.3d at 452-53. On the other hand in a rural setting, curtilage may extend hundreds of feet from the home. *See, e.g., United States v. Reilly*, 76 F.3d 1271, 1277 (2nd Cir. 1996), cited with approval in *Bleavins*, 422 F.3d at 451, n.6.

In the instant case, three of the four *Dunn* factors suggest that the entire clearing on the Mulford property can be viewed as curtilage. The clearing is at least ½ mile from the nearest public road, and the frontage road has two gates and several "no trespassing" signs. For all

practical purposes, the entire clearing is "enclosed" by dense forest that extends in all directions. The record does not reveal the exact size of the clearing, but it is big enough to hold a house, a shed and a variety of randomly strewn vehicles and machines. The owners had taken logical steps to ensure the privacy of the clearing, and society would be willing to accept these steps as reasonable, at least up to this point: notwithstanding all of the factors just listed, when the gates were open, visitors could enter the clearing and approach the front door of the Mulford cabin without implicating the Fourth Amendment. Anything in plain view of a visitor traversing a straight line across the clearing from the frontage road to the cabin could not be deemed "private" for Fourth Amendment purposes.

But the burn barrel that contained the starting fluid cans was *behind* the cabin and distant from it. Sgt. Colinsworth saw the barrel as he circled the house at dusk looking for signs of occupancy. Perhaps the government could justify Sgt. Collinsworth descrying the barrel as part of an allowable occupancy sweep, but then Sgt. Colinsworth literally went too far when he walked to the barrel and peered into it, apparently aided by a flashlight. This side trip could be viewed as an unreasonable invasion of the curtilage. This is the conclusion that I am recommending.[5] This could lead the court to redact the starting fluid bottles from the search warrant affidavit, although two other factors need to be considered:

First, the government questions whether Bienfang, as a "guest" in the Mulford cabin, can assert privacy interests in the Mulfords' burn barrel. (Bienfang has not claimed ownership of the barrel or its contents for suppression purposes). A defendant who objects to the search of a

[5] On the other hand, it would not be a stretch for the court to adopt the government's position that the burn barrel was outside the curtilage because it was too far from the house, too near the woods, and intermingled with lots of large machinery and vehicles.

particular area bears the burden of proving a legitimate expectation of privacy in the area searched. He cannot assert a privacy interest on behalf of someone else. He must show a privacy interest not only in the seized good, but also in the area where the good was found. *United States v. Mendoza*, 438 F.3d 792, 795 (7th Cir. 2006); *see also United States v. Carter*, 573 F.3d 418, 426 (7th Cir. 2009). The only direct evidence on this point is Bienfang's unimpeached, sworn assertion that he "lawfully resided at the Mulford Cabin . . . on or about January 4, 2010." Declaration of Facts, dkt. 54 , ¶1. Circumstantial evidence supports the conclusion that Bienfang wasn't just a houseguest visiting the cabin; he lived there. Therefore, Bienfang had a privacy interest in the curtilage of the Mulford cabin. That being the case, Bienfang does not have to establish a separate privacy interest in the barrel or its contents. *See United States v. Meyer*, 157 F.3d 1067, 1079-80 (7th Cir. 1998), citing *Alderman v. United States,* 394 U.S. 165, 176-77 (1969) (homeowner may object to the government's use of a third party's tangible property against him if the police obtained the property by improperly entering the home).

Second, the court has to apply the new suppression template of *Herring v. United States*, ___ U.S. ___, 129 S.Ct. 695 (2009). I address this in the next section:

(4) The Search Warrant

The three preceding sections of the analysis set the stage for analyzing the question at the heart of Bienfang's motion: should this court quash the state court search warrant and suppress evidence seized during its execution? As a starting point, Bienfang does not challenge the sufficiency of the unredacted search warrant affidavit, so if the court redacts nothing, then

the analysis is over and the court should not quash the warrant and should not suppress any evidence. Both redaction decisions–the evidence derived from Bienfang personally and the evidence found in the burn barrel–involve relatively close questions of Fourth Amendment law, and this court could determine that Bienfang was not detained prior to his arrest or that his arrest was inevitable, and it could determine that the burn barrel was outside the curtilage.

At the other extreme, the court could determine that the evidence obtained directly from Bienfang was derived from an unlawful investigative detention and that the aerosol cans of starter fluid were derived from an unlawful invasion of Bienfang's curtilage. The court then could remove this evidence from the affidavit to determine if it still provided probable cause to justify the search. *See United States v. Billian*, 600 F.3d 791, 793 (7th Cir. 2010), *citing Franks v. Delaware*, 438 U.S. 154, 171-72 (1978). Options three and four would be variations on this theme, redacting one of the two types of evidence but not the other, then analyzing for probable cause. For completeness's sake, I will perform this analysis at the end of this section.

Before getting there, however, the court needs to consider the impact of the Supreme Court's recent decisions reining in the exclusionary rule. As the Court observed in *Hudson v. Michigan,* 547 U.S. 586, 591 (2006), "suppression of evidence . . . has always been our lasts resort, not our first impulse." The exclusionary rule now is reserved for cases of deliberate, reckless or grossly negligent conduct by law enforcement officers. *Herring v. United States*, 126 S.Ct. at 702. Here's the new rule:

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the judicial system. As laid out in our cases, the exclusionary rule serves to

> deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.
>
> *Herring*, 129 S.Ct. at 702.

In this case, the underlying facts are close to equipoise on Bienfang's two significant challenges to the search warrant affidavit, so that it is not clear whether the deputies even violated the Fourth Amendment in obtaining this evidence. If this court, with the benefit of hindsight, reflection and access to the case law, sees this as a close call, then the court cannot find that Sgt. Collinsworth and his colleagues deliberately recklessly, or with gross negligence violated Bienfang's Fourth Amendment rights. It is pellucid that the deputies did not intend to subject Bienfang to an investigative detention when they almost literally ran into his truck on the narrow frontage road at the cusp of the clearing, and the delay to his departure lasted at most five minutes while Sgt. Collinsworth hurried to the clearing to deal with this unexpected exigency. Sgt. Collinsworth may or may not have been on Bienfang's curtilage when he looked into the burn barrel, so there is no evidence to support a finding that he did so with deliberate or reckless disregard for Bienfang's reasonable expectation of privacy in the area where the barrel was located. To the contrary, Sgt. Collinsworth believed (which may in fact be legally correct) that there was nothing wrong with what he did, since he forthrightly reported it to the state court in his warrant affidavit.[6] Obviously the state court had no concerns about this, since it issued the requested search warrant.

In sum, I am recommending that if this court finds that the deputies committed any violations of Bienfang's Fourth Amendment rights during their initial investigation, then the

[6] "In the yard at the cabin was a burn barrel. . . . I looked in the burn barrel and could see burnt aerosol cans . . .." Affidavit at ¶ (7)

court further should find that these violations were not deliberate, reckless or grossly negligent. If the court makes this finding, then there is no basis to redact any information from the search warrant affidavit, in which case the warrant and resulting search both are valid. *Cf. United States v. Billian*, 600 F.3d at 793 (errors in search warrant affidavit that were neither deceitful nor reckless did not justify use of the exclusionary rule).

I will conclude the *Herring* section of the analysis by repeating the case law overview presented in this court's July 12, 2010 report and recommendation in *United States v. Barttelt*, 10-cr-38-wmc dkt. 64 at 5-7, another methamphetamine case out of Lincoln County: In *United States v. Groves*, 559 F.3d 637, 642 (7th Cir. 2009), the court offered in dicta its view that even if the challenged car stop had not been supported by reasonable suspicion, suppression of the contraband was not required because there was nothing in the record to suggest that the police had recklessly disregarded constitutional requirements or had knowingly falsified an arrest record to justify the stop.

In *United States v. Crowder*, 588 F.3d 929 , 934 (7th Cir. 2009), decided on the defendant's lack of an expectation of privacy, the court observed in *dicta* that courts usually exclude evidence obtained in violation of the Fourth Amendment, then tempered this observation with a "*but see*" citation to *Herring*, 129 S.Ct. at 700. In *United States v. Burnside*, 588 F.3d 511, 517 (7th Cir. 2009), the court, by the same authoring judge (Kanne, J.), made pretty much the same observation with the same "*but see*" citation to *Herring* and *Guzman v. City of Chicago*, 565 F.3d 393, 398 (7th Cir. 2009).

Guzman was § 1983 civil rights lawsuit opinion authored by Judge Evans (who sat with Judge Kanne on *Crowder*) in which the plaintiff sued for a violation of her Fourth Amendment

rights when Chicago police officers searched her apartment in a multi-unit building based on a search warrant affidavit that had incorrectly reported the building to be a single-family dwelling. The court found a constitutional violation based on the officers' reckless execution of the warrant after learning facts that should have alerted them that their warrant was wrong. The majority then offered in dicta its view that *Guzman* "may illustrate our recent observation that in some ways it is easier to protect Fourth Amendment rights through civil actions, rather than through the suppression of evidence in criminal cases." 565 F.3d at 398, citing *United States v. Sims*, 553 F.3d 580 585 (7th Cir. 2009).[7] Citing *Herring* and *Hudson*, the court noted that suppression is a last resort, that exclusion is not a necessary consequence of a Fourth Amendment violation, and the benefits of exclusion must outweigh the costs, costs that are not a concern in civil cases. As an example, the court noted that civil rights lawsuits did not raise concerns that illegally seized evidence essential to convicting a defendants of a grave crime might have to be suppressed and the criminal let go to continue his career of criminality, even if the harm inflicted by the illegal search to the interests protected by the Fourth Amendment was slight in comparison to the harm to society of letting the defendant off scot free. *Id.* at 399. Judge Rover offered a concurrence joining the result but scolding the majority for its gratuitous musings on the continued vitality of the exclusionary rule. *Id.* (Rovner, J., concurring).

Judge Rovner was on the panel in *United States v. Elst*, 579 F.3d 740 (7th Cir. 2009) (Judge Tinder wrote the opinion), in which the court declined to suppress evidence obtained by the officers in the good faith execution of a search warrant that lacked probable cause. The court

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[7] In *Sims*, Judge Posner predicts the forthcoming demise of the exclusionary rule in favor of civil rights lawsuits. 553 .F.3d at 583-84; *see also Samuel v. Frank*, 525 F.3d 566, 570 (7th Cir. 2008), in a state habeas case, Judge Posner's opinion observes that "exclusionary rules have fallen out of favor."

cited *Herring* for the proposition that exclusion of evidence is an extreme sanction that applies only where it would result in appreciable deterrence. The court found that "it would not here." *Id.* at 747.

This same conclusion applies to Bienfang's motion to suppress: Even if the deputies' conduct in this case violated the Fourth Amendment, any violations were not deliberate, reckless or grossly negligent. Their conduct, if unconstitutional was so close to being constitutional, and the resulting intrusion on Bienfang's rights so minimal, that suppression would be too extreme a sanction under the circumstances. Therefore, I recommend that the court deny Bienfang's motion to suppress evidence.

Finally, if this court were to conclude that there are Fourth Amendment violations here that exceed negligence and require appreciable deterrence, then the court must redact the offending statements from the search warrant affidavit and then determine if the warrant still is supported by probable cause. *See United States v. Billian* 600 F.3d at 794 (if contents of defendant's trash cans were seized in violation of Fourth Amendment, then they cannot count toward probable cause to support a search warrant.)

Probable cause is a common-sense nontechnical inquiry and a search warrant affidavit will be sufficient if, based on the totality of circumstances, it sets forth sufficient evidence to induce a reasonably prudent person to believe that search will uncover evidence of a crime. *United States v. Dismuke*, 593 F.3d 582, 586 (7th Cir. 2010). Put slightly differently, the court must determine whether, given totality of circumstances, there is a fair probability that contraband or evidence of a crime will be found at a particular place. *United States v. Alexander*,

573 F.3d 465, 477 (7th cir. 2009). As the Supreme Court noted fifty years ago in *Brinegar v. United States*, 338 U.S. 160 (1949),

> In dealing with probable cause, . . . as the very name implies, we are dealing with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act.

Id. at 175.

This is a low evidentiary threshold, requiring only a probability or a substantial chance of criminal activity, not an actual showing of such activity. *United States v. Roth*, 201 F.3d 888, 893 (7th Cir. 2000), *quoting Illinois v. Gates*, 462 U.S. 213, 244 (1983).

In this case, Sgt. Collinsworth began on January 4, 2010 with a tip from an anonymous telephonic informant. Although such tips start with little value, they gain weight when, as here, the tipster provides detailed information that dovetails with information already known to the police. *See, e.g., United States v. Olson*, 408 F.3d 366, 371-72 (7th Cir. 2005)(small bits of corroboration can add up to increase the weight of an informant's tip). The tipster identified Bienfang, Mulford and Suhling by name and said they might be cooking meth right now at the Mulford cabin. Sgt. Collinsworth already had general information naming these three men as players in the local meth scene, along with some specific information that he reported in his affidavit, including that Bienfang was on bond for meth related charges at that time, and that a named information (Jake Jones) had reported dropping Chuck Groff off at the Mulford cabin in the summer of 2009 to cook meth with Bienfang.

Sgt. Collinsworth then reports in his search warrant affidavit that he visited the Mulford property, saw Bienfang there, and smelled anhydrous ammonia in the air near the cabin. Notwithstanding Bienfang's attempts to impeach this account, I have found it to be an accurate

report of what Sgt. Collinsworth smelled. Although Sgt. Collinsworth did little in his warrant affidavit to connect this smell to methamphetamine cooking, he did enough to alert the court that this smell was physical corroboration of the informant's account. This probably is enough additional information to support a probable cause determination, without regard to the other evidence that might be redacted from the warrant affidavit.

If we add back in the bindle of methamphetamine taken from Bienfang after his arrest, and add in his post-arrest statements, then there definitely is probable cause to support the search. If nothing else, a search *will* recover the glass meth pipe that Bienfang reported was still at the cabin, and probably will recover other indicia of methamphetamine use, if not unused methamphetamine or equipment and chemicals used to cook methamphetamine.

Adding back into the warrant application the burnt and hole-punched starter fluid cans provides a separate basis to find probable cause to search because the cans themselves are evidence that meth was cooked on the premises. Keep in mind that a search warrant is for a place, not a person, so that it was not necessary for Sgt. Collinsworth to connect this evidence to Bienfang or to anyone else. He simply had to convince the court that there was a probability that evidence of a crime will be found on the Mulford property.

In short, even if this court were to redact from the affidavit the information that *might* have been derived from arguable Fourth Amendment violations–a course that this court ought not take in light of *Herring*–there still is sufficient evidence in Sgt. Collinsworth's affidavit to provide probable cause for the search. No matter how this court approaches Bienfang's motion, he is not entitled to suppression of any evidence recovered during execution of the state search warrant.

RECOMMENDATION

Pursuant to 42 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny the motion to dismiss the indictment and the motion to suppress evidence.

Entered this 22nd day of October 2010.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge