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

UNITED STATES OF AMERICA,

Plaintiff,

v.

RANDY J. BALLMER and
DELCINA HOCHSTETLER,

Defendants.

REPORT AND
RECOMMENDATION

11-cr-91-bbc

REPORT

The grand jury has returned a four-count indictment charging defendants Randy J. Ballmer and Delcina Hochstetler in Count 1 with conspiring unlawfully to possess pseudoephedrine; in Count 2 with being users of unlawful drugs in possession of 11 listed firearms (and 1000+ rounds of ammunition), in Count 3 with unlawfully possessing a fully automatic (machine) gun, and in Count 4, Hochstetler alone with being a felon in possession of the previously-listed firearms and ammunition.

Ballmer has filed a motion to dismiss the firearms charges in Counts 2 and 3 on the ground that the charging statues are unconstitutional. *See* dkt. 39. Hochstetler has joined this motion. *See* dkts. 56-57. Both defendants have filed motions to suppress evidence, *see* dkts. 43 and 54, alleging that they did not voluntarily consent for sheriff's deputies to enter their house during investigation of a dog bite incident, and that there was no probable cause to support the search warrant that resulted from this entry.[1] After the evidentiary hearing on the suppression motions, both defendants filed a motion seeking leave to file a motion challenging the first search warrant affidavit pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). *See* dkt. 65.

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[1] Ballmer has filed (and Hochstetler has joined) several nondispositive motions that the court will address in a separate order.

For the reasons stated below, I am recommending that the court: deny the motions to dismiss; grant that portion of the motions to suppress based on the involuntariness of the defendants' consent to enter their home; and deny the motions to quash the first search warrant.

I. Motions To Dismiss

Defendants seek to dismiss the charges in Counts 2 and 3 on the ground that both statutes are unconstitutional. *See* dkt. 29. Count 2 charges both defendants under 18 U.S.C. § 922(g)(3) with possessing firearms while being users of unlawful controlled substances. Count 3 charges both defendants under 18 U.S.C. § 922(o) with unlawful possession of a machine gun.

In their brief, dkt. 72, defendants acknowledge that the Court of Appeals for the Seventh Circuit has held §922(o) constitutional, *see United States v. Kenney*, 91 F.3d 884 (7th Cir. 1996), but they cite other cases to the court in support of their Commerce Clause arguments. Duly noted. This court is not inclined to suggest that the Seventh Circuit is wrong on this issue. Defendants have successfully preserved this issue for appeal if necessary.

Also as a placeholder, defendants make a Second Amendment challenge against §922(g)(3), acknowledging that *United States v. Yancey*, 621 F.3d 681 (7th Cir. 2010) holds otherwise. Defendants also argue that the statute violates the Commerce Clause and that it is unconstitutionally vague, in general and as applied, because the bounds of the term "user of unlawful controlled substances" cannot be sufficiently discerned.

As the government notes in response, the Court of Appeals for the Seventh Circuit has rejected a Commerce Clause challenge to § 922(g)(1) (felon with a gun) on the ground that the statute requires proof that the defendant possessed the firearm "in or affecting commerce,"

which simply requires proof that the firearm crossed state lines before the defendant possessed it. *United States v. Williams*, 410 F.3d 397, 397 (7th Cir. 2005). This analysis applies to § 922(g)(3), which also requires possession of the firearm "in or affecting commerce," but simply identifies a different type of prohibited person.

In response to defendants' vagueness challenge, the government first notes that a vagueness challenge not raising First Amendment issues must challenge the statute as applied, with the burden of proving vagueness on the defendant. *See United States v. Stephenson*, 557 F.3d 449, 456 (7th Cir. 2009). The government then catalogues the abundant evidence seized during execution of the search warrants demonstrating that Hochstetler and Ballmer smoked marijuana and methamphetamine. *See* dkt. 79 at 4-5. The government also intends to present witnesses at trial who will testify that Ballmer and Hochstetler used controlled substances on a "frequent or ongoing basis." *Id.* at 6. Against this backdrop, neither defendant has provided any evidence–or argument–that § 922(g)(3) failed to provide a person of ordinary intelligence a reasonable opportunity to know what was prohibited, or failed to provide sufficiently explicit standards so as to prevent arbitrary and discriminatory enforcement by the government and its agents. *See United States v. Plummer*, 581 F.3d 484, 488 (7th Cir. 2009). The defendants did not file a reply brief in support of their dismissal motions.

The bottom line is that there is no basis for this court to grant any portion of the defendants' motion to dismiss Counts 2 and 3. The court should deny these motions.

II. Motions To Suppress: Defendants' Consent To Enter Their Home

Both defendants claim that the evidence against them was obtained a result of an unlawful entry into their home by deputy sheriffs on January 25, 2010 during the investigation of a dog bite incident. They have moved to suppress the evidence on the basis that they did not voluntarily consent to the entry of the deputies into their home. On March 15, 2012, this court held an evidentiary hearing on this suppression motion. Having heard and seen the witnesses, having judged their credibility and having reviewed the relevant documents, I find the following facts:

FACTS

Defendants Ralph Ballmer and Delcina Hochstetler started living together sometime in the late 1990s. When they met, Hochstetler had a young Black Lab named Ralph. Hochstetler and Ballmer were close to Ralph, taking him everywhere and letting him sleep on their bed at their rural home at N4775 County Line Road in Gleason, Wisconsin about 15 miles NE of Merrill, Wisconsin. County Line Road runs north-south, and N4775 is on the west side, with a dead-end driveway running west from the public road to the stand-alone house to the south (left) of the driveway. There is a walkway from the driveway to the door at the "back" of the house, which apparently is the natural entry point for people arriving in a motor vehicle. This door leads past a back bedroom into the kitchen, which opens onto a living/dining area.

On Monday afternoon, January 25, 2010, a motorist backing out of the defendants' driveway accidently ran over Ralph, severely injuring him. At that time, Ralph was 15 years old and weighed about 200 pounds. Hochstetler rushed to Ralph's aid; Ralph was so panicked that he bit Hochstetler's hand hard, tearing her tendons and ligaments. Hochstetler and Ballmer

managed to herd Ralph back into the residence where they tended to him for about three or four hours on the dining room floor. Hochstetler's wound was bleeding profusely and she was in quite a bit of pain, but she was more concerned about Ralph than herself. Unable to stanch Hochstetler's bleeding, Ballmer finally persuaded her to let him drive her to the hospital emergency room in Merrill, 20 miles and 30 minutes distant. They arrived near 6:00 p.m. and were ushered to a treatment room with a bed. A doctor and nurse gave Hochstetler some pain medication and started cleaning and examining her wound.

Wisconsin's rabies control statute required the hospital to report Hochstetler's dog bite to the Lincoln County Sheriff's Department, which sent over Deputy Sheriff Andrew Schmidt, a five-year veteran of the department, accompanied by a brand-new deputy-in-training, Roger Sir. Deputies Schmidt and Sir entered Hochstetler's treatment room, introduced themselves and explained why they were there.[2] Throughout this process, Hochstetler and Ballmer remained upset about Ralph's condition and Hochstetler's injuries. Hochstetler told the deputies that Ralph had died from his injuries, which was untrue. Once Hochstetler said this, Ballmer followed her lead.[3] The deputies advised that they needed Ralph's rabies vaccination documentation or his carcass for testing. Ballmer and Hochstetler had not brought Ralph's

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[2] Wisconsin law requires peace officers to investigate dog and cat bites for the purpose of rabies control. If the biting animal does not have an up-to-date rabies vaccination, then the animal must be quarantined by a veterinarian. This information is contained in a preprinted form that Deputy Schmidt would have gone over with Ballmer. *See* Exh. 5. Deputy sheriffs in Lincoln County respond to animal bite calls almost weekly.

[3] It is unclear why Hochstetler and Ballmer lied about Ralph's death. Later they explained that they thought the deputies were going to put down Ralph. Did they fear this because Ralph might not have had a current rabies vaccination? At the evidentiary hearing, Ballmer implied that Hochstetler had current records for Ralph, *see* dkt. 63 at 109, but he hedged his answer during cross examination, *Id.* at 116-18. Neither side presented conclusive evidence that Ralph was or was not properly vaccinated against rabies on January 25, 2010, *id.* at 128-29.

papers or tags with them to the hospital and stated that they were unsure where his vaccination paperwork was located. They asked if they could get the paperwork from the veterinarian the next day (Tuesday, January 26, 2010) and bring the papers to the sheriff's department then. The deputies agreed that this was acceptable. The entire conversation between the deputies, Ballmer and Hochstetler lasted about half an hour.

Because of the severity of Hochstetler's hand injury, the ER team had to telephone a surgeon to schedule an examination for the next day. The ER doctor stitched up the wound, gave Hochstetler something for her pain, then let Ballmer drive her home. They arrived home just before 8:00 p.m. and immediately began tending to Ralph, who remained immobile on a blanket in the dining room. Hochstetler took a painkiller provided by the ER.

Within five to ten minutes, there was an unexpected knock at the door. Unexpected because it was late, cold, dark, and the house was at the end of a dead-end road in the middle of nowhere. Who would come calling? Ballmer answered the knock; it was Deputies Schmidt and Sir, whom Ballmer had not been expecting at all. Ballmer stepped out of his house, closed the door behind him and met with the deputies on the walkway leading to the back door.

Why were the deputies there? After they left the hospital, their supervisor, Lieutenant Peterson, abrogated their oral agreement with Ballmer and Hochstetler and ordered them to complete this dog bite investigation that evening. Lieutenant Peterson did not know the names of the people involved in this dog-bite incident, but he was aware that they had reported that they did not have their rabies paperwork available and that the dog was dead.

Deputy Sir announced to Ballmer that the deputies needed the rabies vaccination paperwork for Ralph. Ballmer responded that he thought they had taken care of this at the

hospital and that the deputies had agreed that Hochstetler could bring the paperwork to the station the next day. Deputy Sir acknowledged that this had been their agreement, but then their supervisor had directed them to resolve the issue that night, so they had to have the paperwork now.[4] Ballmer replied that the dog had been Hochstetler's, so he would go inside to see if he could find something. Ballmer went inside, closed the door behind him and told Hochstetler what was happening. They could not find Ralph's vaccination papers.

Ballmer went back outside, explained to the deputies that he and Hochstetler could not find Ralph's vaccination papers just then, but that they would bring them to the station the next day as previously agreed. Ballmer announced that he figured they were done for the night, so he went back into the house and shut the door. (When Ballmer had first answered the door, Deputy Sir saw what appeared to be a glass meth pipe in his shirt pocket; when Ballmer returned, the pipe was gone).

From the deputies' perspective, however, they were *not* done for the night: the deputies viewed this as a simple investigation that they had to resolve before they left. Therefore, Ballmer and Hochstetler had only two options: either provide the paperwork or provide the carcass before the deputies would leave.[5]

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[4] The only firm deadline on the report form states that the biting animal had to be delivered to a veterinarian within 24 hours of receipt of the notice, which in this case would have been late afternoon the next day, Tuesday, January 26, 2010. *See* Gov. Exh. 5. The form states that failure to comply with the entire quarantine order shall result in a fine of not less than $100, not more than $1000 and/or imprisonment for up to 60 days.

[5] **Q:** Isn't it true . . . that you told them that the papers or the dog had to be produced and you weren't going to depart until you had them?

A: I wouldn't say in those words, but it was made very clear to them that that's what needed to happen.

Dkt. 63 at 53-54.

Given their agenda, the deputies knocked again. This time, Hochstetler and Ballmer both answered and stepped outside to find out why the deputies still were there and what they wanted. The deputies repeated their demand that Hochstetler provide the rabies paperwork that evening. Hochstetler, who was in tears, angrily responded "Either give me a ticket or take me to jail, but please leave! Get the hell out of here!" Dkt. 63 at 110. Deputy Schmidt was conciliatory but unyielding, telling Hochstetler, "Look, you know, we're not here to write you tickets or, you know, to do anything like that, or take you to jail. We just need to see the paperwork or have the dog." *Id.* at 30. Unmollified Hochstetler stormed back into her house. Ballmer stayed outside long enough to tell the deputies they could not have Ralph's body because Ballmer already had buried it out behind the barn. Ballmer announced to the deputies that "we're done here." He went back into the house and shut the door. This announcement of Ralph's burial puzzled Deputy Schmidt, given that the ground was frozen and it hadn't been that long since Ballmer and Hochstetler had left the hospital.

What happened next is disputed, at least in part: Ballmer testified that both deputies began wandering around the property with flashlights, shining them directly into the house through the patio doors. Ballmer claims that this intrusion caused him to go back outside to see what it would take to make the deputies go away. Both deputies deny shining flashlights into the house; Deputy Sir testified that he *did* shine his flashlight around the yard "to make sure nobody else was around and there weren't any other hazards or doors on the exterior of the house," and he recalls Deputy Schmidt doing the same, although he implies that this occurred earlier in their visit. Dkt. 63 at 77, 84-85.

Deputy Schmidt recalls returning to the squad car to decide what to do next. By this time, the deputies had spent between 20-30 minutes trying to persuade Ballmer and Hochstetler to meet their demands that evening. Deputy Schmidt called his lieutenant to report that "Hey, they're not cooperating with what we're trying to do here," so that the lieutenant would come out to the Ballmer-Hochstetler residence that night "to help solve the . . . problem." Dkt. 63 at 62.[6] In any event, the deputies did not leave the property; indeed, they intended to stay until their supervisor drove to the residence to make another attempt to obtain compliance with their demands that evening.

All witnesses agree that when Ballmer came out of his house at this time (about 30-40 minutes after the deputies had first knocked), he admitted for the first time that Ralph actually was *not* dead: he was inside the house, lying on the dining room floor, dying. Ballmer explained that he and Hochstetler had feared that the deputies would put Ralph down if they knew he was alive. In any event, continued Ballmer, because Ralph was not dead, the deputies could not have his body.

The deputies responded that they had to see the dog to verify this.[7] Ballmer relented and allowed both deputies into the house to look at the injured dog. Ballmer let them into the house because he felt that he had no choice: the deputies had made it clear that they were not going to leave until they got what they came for. Ballmer and Hochstetler were concerned about Ralph

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[6] Presumably it would have taken Lieutenant Peterson about 30 minutes to drive from the Sheriff's Department in Merrill to the residence, so that he would have arrived around or after 9:00 p.m..

[7] Deputy Schmidt does not dispute that he told Ballmer and Hochstetler that "look, we need to check on the animal and we need to see if we can still find the paperwork." Dkt. 63 at 32. He made it clear that "we need to try to take care of this tonight." *Id.* at 33. As the government put it while questioning Deputy Schmidt, it did not matter which choice Ballmer and Hochstetler made: either bring out the forms or bring out the dog. *Id.* It had to be one or the other.

and they did not want to be distracted further by the deputies, so at that point Ballmer was going to do whatever it took to get rid of them. Ballmer did not view this as a voluntary decision: he concluded that, because there was no paperwork available, he had to satisfy the deputies that there was no carcass to retrieve in order to make them go away.

Ballmer escorted both deputies into the kitchen. They saw Ralph lying on the floor between the living room and dining room. Hochstetler was with Ralph, talking to him and petting him. The deputies verified that Ralph was badly injured and that he was "very, very large," too large for the deputies to transport; plus, knowing what had happened to Hochstetler, they didn't want Ralph to bite them. While the deputies were there, either Ballmer or Hochstetler again made a cursory search for vaccination records, without success. While standing in the kitchen, Deputy Schmidt saw a gun cabinet with a firearm in it. Deputy Sir saw a .22 rifle in the cabinet and some sort of assault rifle leaning against the wall next to the cabinet. The gun cabinet was in the kitchen. Dkt. 63 at 76. No one was closer than 8 to 10 feet to the cabinet. *Id.* at 35.

Unsure what to do next, the deputies re-contacted their supervisor to report that they didn't have any good options regarding the dog. They told the supervisor that "we kind of have to leave it until they can take it to the veterinarian on their own tomorrow and then they can figure out the vaccination stuff and we can take care of it then." Dkt. 63 at 36. At that point, the deputies left the property and drove away.

That, however, was not the end of the investigation. According to Deputy Schmidt, something about Ballmer and Hochstetler "rang a bell." That same night he telephoned Sheriff's Sergeant-Investigator Chad Collinsworth at home (he was off duty) to ask "why their name was

kind of ringing a bell for me." (Dkt. 63 at 37.) Deputy Schmidt (and apparently Deputy Sir as well) reported that they had seen firearms in the Ballmer-Hochstetler residence, and that Ballmer might have had a meth pipe in his pocket. Sergeant Collinsworth seemed to recall that Hochstetler had a felony conviction, which would make *her* possession of firearms unlawful. (Ballmer was not a prohibited person). Sergeant Collinsworth directed the Sheriff's Department Dispatcher to check Ballmer and Hochstetler's criminal histories. Dispatch produced a printed report showing that Ballmer had no criminal record and that Hochstetler had a burglary conviction from 1978, plus a 1984 arrest for theft. The report contained this disclaimer:

> THE RESPONSE IS BASED ON A SEARCH USING THE FINGERPRINTS AND/OR IDENTIFICATION DATA SUPPLIED. SEARCHES BASED SOLELY ON NAME AND NON-UNIQUE IDENTIFIERS ARE NOT FULLY RELIABLE. THE CIB CANNOT GUARANTEE THAT THE INFORMATION FURNISHED PERTAINS TO THE INDIVIDUAL YOU ARE INTERESTED IN.

Gov. Exh. 1, dkt. 62-1.[8]

Sergeant Collinsworth prepared a search warrant affidavit on this basis and obtained a warrant to search the Ballmer-Hochstetler residence. This search uncovered the evidence that underlies the criminal charges in this federal prosecution (including evidence used to obtain a second, broader search warrant for controlled substances). The defendants have filed separate motions challenging the first search warrant, which I will deal with in a subsequent section.

[8] A later-obtained Judgment of Conviction from Oneida County showed that Hochstetler had pled guilty on September 27, 1978 to five counts of aiding and abetting burglary. *See* Gov. Exh. 2, dkt. 62-2 This information was not available to Sgt. Collinsworth at the time he applied for a search warrant. Hochstetler's pretrial service report (dkt. 15, under seal) indicates that in 2011 she was convicted in state court of two drug felonies arising out of this same incident in Lincoln County Case No. 10CF24. Obviously, this would not constitute prior contact with the criminal justice system for the purposes of this court's voluntariness analysis.

Ballmer would have been about 46 or 47 years old in early 2010. He has an associate's degree in marketing, plus some additional college credits. Ballmer's only other contact with law enforcement before this encounter had been traffic related. Hochstetler would have been 50 at the time of this encounter.

ANALYSIS

A. Law Enforcement Entry into Defendants' Home

> For over 200 years, our country has considered itself the world's foremost protector of liberties. The privacy and sanctity of the home have been primary tenets of our moral, philosophical, and judicial beliefs.
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> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 285-86 (1990) (Stevens, J., concurring).

The Fourth Amendment accommodates warrantless searches when police receive voluntary consent to search. The government must prove by a preponderance of the evidence that consent was freely and voluntarily given. *United States v. Hicks*, 650 F.3d 1058, 1064 (7th Cir. 2011). Whether consent is voluntary is a question of fact, dependent upon the totality of the circumstances. Relevant factors include the consentor's age, intelligence and education; whether he or she was advised of her right to refuse; whether she had been detained before giving his consent; whether consent was immediate or was prompted by repeated requests by the authorities; whether any physical coercion was used; and whether the defendant was in police custody. *See, e.g.,United States v. Swanson*, 635 F.3d 995, 1003 (7th Cir. 2011); *United States v. Pineda-Buenaventura*, 622 F.3d 761, 776 (7th Cir. 2010).

A consentor's fragile emotional state at the time he or she consented is a factor that bears on voluntariness. It is immaterial whether this state arose from official coercion. Emotional fragility is not dispositive; the question is whether emotional distress was so profound as to impair her capacity for self-determination or understanding of what the police were seeking. *United States v. Duran*, 957 F.3d 499, 503 (7th Cir. 1992). *See also Schneckloth v. Bustamonte*, 412 U.S. 218, 229 (1973)("in examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents"). The determination of voluntariness does not rest on the presence or absence of a single controlling criterion but instead requires careful scrutiny of all the surrounding circumstances." *United States v. Strache*, 202 F.3d 980, 985 (7th Cir. 2000).

Relevant to the voluntariness determination in this particular case is the court's analysis in *United States v. Jerez*, 108 F.3d 684 (7th Cir. 1997). *Jerez* is not squarely on point because the court found (with dissent) that the officers' conduct of pounding on the door of the suspects' motel room and shining flashlights in their window in order to provoke a "knock and talk" had transmogrified this encounter into an unconstitutional investigative detention. In other words, *Jerez* is a seizure case, not a search case. Even so, the court's reasoning is instructive:

> Our jurisprudence interpreting the Fourth Amendment has long recognized that police encounters at a person's dwelling in the middle of the night are especially intrusive. Indeed, the special vulnerability of the individual awakened at the privacy of his place of repose during the nighttime hours to face a nocturnal confrontation with the police was recognized in the common law that antedates our separation from England.
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> Because our law and legal traditions long have recognized the special vulnerability of those awakened in the night by a police intrusion at their dwelling place, our Fourth Amendment jurisprudence counsels that, when a knock at the door comes in the dead of night, the nature and effect of the intrusion into the privacy of the dwelling place must be examined with the greatest of caution. Therefore, in recognizing the particular intrusiveness of nocturnal encounters with the police at one's dwelling, the courts of appeals have stressed the impact of such encounters on the individual dwelling there.

Id. at 690. The court held that the deputies' persistence in the face of the defendants' refusal to admit them transformed a consensual encounter into an investigatory stop devoid of reasonable suspicion. The legal question posed in the instant case is different but the observable facts are the same:

> Simply stated, this is a case in which the law enforcement officers refused to take "no" for an answer. Their actions, when objectively assessed, conveyed a message that compliance with their requests was required.

Jerez, 108 F.3d at 692. Indeed, the totality of circumstances in *Jerez* established that a reasonable person in the position of the defendants

> would not have felt free to ignore the deputies and continue about their business. A reasonable person in their situation could conclude only that the deputies would not leave unless the door was opened.

Id. at 692-93. Also worth noting is that the court found that although an illegal seizure had occurred, defendant's subsequent consent to enter and to search was voluntary, *id.* at 694, n. 10. Finally, the court's finding was based in part on its disapproval of the deputies' intent "to cause surprise, fright and confusion."*Id.* at 695 n.12.

Let's start with this last point from *Jerez*: there is no evidence that Deputy Sir or Deputy Schmidt intended to surprise, frighten or confuse Ballmer or Hochstetler. Deputy Schmidt

obviously was uncomfortable with his predicament: at the hospital he had agreed to give Hochstetler and Ballmer a full day to provide the required paperwork, which would have comported with the explicit requirements of the governing statute; but then his supervisor directed him to close the matter that night; in response, Ballmer and Hochstetler refused and told him to go away. Something that he had expected to be quick and simple had become prolonged and messy.

What to do? Perhaps not surprisingly, the deputies followed orders and disrepected the wishes of the private citizens who were not suspected of any crime and who had asked to be left alone in the privacy of their own home after dark. Although Deputy Schmidt (and Deputy Sir) remained polite and professional throughout their interaction with Ballmer and Hochstetler, they refused to take "no" for an answer. They clearly–*explicitly*–conveyed the message that compliance with their demands was required. Ballmer and Hochstetler were not free to ignore the deputies and go about their business in the privacy of their own home. Despite Hochstetler's angry demand that the deputies to "get the hell out of here!" the deputies did not leave. They stayed on the premises, parked in the driveway. In fact, unbeknownst to Ballmer and Hochstetler, they were calling for reinforcements, which would have prolonged the confrontation well past 9:00 p.m.

The government makes much of the fact that Ballmer and Hochstetler lied to the deputies: Ralph wasn't really dead, he still was alive in the house. This is an analytical non sequitur. The rabies control statute gave Ballmer and Hochstetler 24 hours to comply with their obligations to produce one of three things: a live dog, a dead dog or proof that the dog had received his rabies vaccinations. That afternoon at the hospital, Ballmer and Hochstetler had

explicitly agreed to meet this legal obligation. Therefore, within 24 hours, they were going to have to put up or shut up; who knows, perhaps by Tuesday afternoon Ralph actually might be dead.[9] Accordingly, their lie about Ralph's death was immaterial; it certainly did not trigger some acceleration of the statute's 24-hour compliance period.

More relevant to the voluntariness analysis is that the Lincoln County Sheriff's Department had no legal right unilaterally to shorten this statutory deadline for its own administrative convenience and then essentially lay siege to Ballmer and Hochstetler in their home that night. Ballmer and Hochstetler weren't under arrest, but they had nowhere else to go to escape the unwanted and unwarranted demands being made by the sheriff's department. More blameworthy under the totality of circumstances is the sheriff department's unjustified and self-serving reneging of its agreement, its night-time visit to the residence of a couple whom its deputies knew to be suffering palpable physical and emotional distress, and its obdurate refusal to leave them be despite Hochstetler's anguished demand that the deputies "get the hell out of here!"

The government points out that Deputies Schmidt and Sir did not have any inkling that contraband was in the house, that they did not need to or ask to go into the house, and that they were acting in good faith the entire time. As noted above, the court in *Jerez* noted the officers' intentional attempts to disturb and disorient the defendants as a factor relevant to its decision to suppress; here, in contrast, there is no *scienter*. This certainly weighs in the government's favor, but it is not dispositive. A *polite* refusal to take "no" for an answer is still a refusal to take "no" for answer.

[9] The record reflects that Ralph died but it doesn't indicate how quickly.

Ballmer and Hochstetler were despairing of Ralph's grievous injuries and imminent death, Hochstetler was suffering the physical pain and emotional distress of a deep hand wound that might have ripped her tendons and ligaments, she was on pain medication, Ballmer was distressed by Hochstetler's condition, it already had been a long, awful day, but at least now they were home again with Ralph to spend a long, awful night together. Then came the deputies' knock at the door, the breach of the agreement, the repeated insistence on immediate compliance with demands that could not be met that evening, the announcement that the demands *had* to be met, the refusal to leave until propitiated with the carcass of their pet or the paperwork they did not have. Upon being advised that Ralph still lived, the deputies insisted upon seeing this for themselves, which required entry into the house. Believing that this demand would not be met, the deputies planned to bring their supervisor to the scene to increase the pressure on Ballmer and Hochstetler.

Under the totality of these circumstances, I conclude that the government has not proved by a preponderance of the evidence that the defendants voluntarily consented to the entry of law enforcement officers into their home. Indeed, on these facts, I conclude that the invitation to enter the home at night to confirm that Ralph was not dead was not a rational act of free will but rather was an involuntary acquiescence by emotionally and physically drained citizens to the persistent demands of well-intentioned but overbearing deputy sheriffs. The means by which Deputies Schmidt and Sir obtained an invitation to enter the residence violated Ballmer and Hochstetler's Fourth Amendment rights.

Whether this violation should result in the suppression of evidence is a different question.

B. Suppression as the Appropriate Remedy

"Suppression of evidence . . . has always been our lasts resort, not our first impulse."

Hudson v. Michigan, 547 U.S. 586, 591 (2006).

Although the Supreme Court has retrenched the exclusionary rule, it has not yet abrogated it, and perhaps never will. *See United States v. Simms*, 626 F.3d 966, 969 (7th Cir. 2010); *cf. United States v. Sims*, 553 F.3d 580 583- 85 (7th Cir. 2009)(predicting the forthcoming demise of the exclusionary rule in favor of civil rights lawsuits). Here is the current 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 v. United States, 555 U.S. 135, 144 (2009).

No clear picture has emerged yet from the Seventh Circuit on how it gauges the impact of *Herring* and *Hudson*. 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. *See also United States v. Burnside*, 588 F.3d 511, 517 (7th Cir. 2009) (same). In *Guzman v. City of Chicago*, 565 F.3d 393, 398 (7th Cir. 2009), a civil rights lawsuit the court found a constitutional violation based on the officers' reckless execution of a search 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." *Id.* at 398. 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 Rovner 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), 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 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 review of circuit cases does not provide much useful guidance beyond the Supreme Court's own observations and admonitions in *Herring* and *Hudson:* a court should not suppress evidence in a criminal case unless it finds a need to deter police conduct that violated a suspect's rights in a manner that exceeds mere negligence. To recapitulate, "the extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct." *Herring*, 555 U.S. at 143.

So how should this court characterize the actions of the Lincoln County Sheriff's Department toward Ballmer and Hochstetler on January 25, 2010? Perhaps relevant to this analysis is this court's observation in its report and recommendation in *United States v. Field,* 03-cr-104-jcs, that criticized the U.S. Attorney's Office in this district for pursuing federal prosecution in a series of state investigations that had demonstrated substandard police work that could only be rescued by application of the good faith doctrine. (Ballmer quotes this order in his suppression brief, dkt. 69 at 3). The U.S. Attorney took heed, and the flow of such cases abated.

Here we are, about nine years later, with a heavy-handed attempt by a sheriff's department to close out a dog bite investigation by reneging on a promise that comported with the applicable statute and sending, at night, two guileless but implacable deputies to the private home of two citizens known to be in physical pain and emotional distress from the incident. Why was this necessary? It wasn't. At best, this night-time intrusion was for the administrative convenience of the sheriff's department, although the department would have expended considerably fewer resources if it had stuck with its deal and let Ballmer and Hochstetler come in the next afternoon. Without attributing any *scienter* to the deputies–or even their supervisor–this court can find that this behavior was objectively unreasonable, systemic, capable of being repeated, and therefore capable of being deterred department-wide in the future. Therefore exclusion may be appropriate.

Weighed against this would be the cost to society of quashing this particular prosecution. The charges against Ballmer and Hochstetler are serious, including a methamphetamine-related conspiracy and possession of a fully automatic assault rifle. It would be naive of this court to

suppose that the Lincoln County Sheriff's Department didn't have some inkling of this activity before Ralph was run over. Why else would Sgt. Collinsworth be so willing so quickly to pursue a skeletal warrant application founded on flimsy facts against a woman with a 32-year old felony conviction? But the record before the court reveals no actual misuse of the firearms or any manufacture or distribution of methamphetamine by either Ballmer or Hochstetler. And while the current thinking on the exclusionary rule envisions a balancing test of sorts, it long has been the law that a suppression decision should not be result oriented. *See, e.g., Olmstead v. United States*, 277 U.S. 438, 469 (1928)[10] and *Byars v. United States* , 273 U.S. 28, 29-30 (1927).[11]

Prior to the deputies' entry into the house, this investigation was about a dog owner being bitten by her own dog. How the sheriff's department chose to pursue it was an unreasonable bureaucratic overreaction that resulted in the unwelcome and intrusive entry of law enforcement officers into a private home at night. Suppression of the evidence that resulted would appear to be an appropriate remedy to deter such bureaucratic overreaching in the future.

Admittedly, this is not a slam-dunk decision. One could choose to characterize what happened more charitably, or could determine that suppression is too extreme a sanction for

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[10] "To declare that in the administration of the criminal law the end justifies the means–to declare that the government may commit crimes in order to secure the conviction of a private criminal–would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face."

[11] "Nor is it material that the search was successful in revealing evidence of a violation of a federal statute. A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and the doctrine has never been recognized by this court, nor can it be tolerated under our constitutional system, that evidences of crime discovered by a federal officer in making a search without a lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed."

what the sheriff's department did. All that being so, I am recommending that this court grant Ballmer and Hochstetler's motions to suppress evidence derived from the deputies' initial entry into their home that night. This would deprive the government of the evidence used to support the first search warrant, which would result in the suppression of all the evidence recovered during execution of both search warrants.

III. Motion To Quash the First Search Warrant

In the event the court does not accept my recommendation to suppress evidence observed as a result the deputies' first entry, the court will have to address the defendants' challenge to the resulting search warrant.

The defendants have sought leave to file a late motion to quash Sgt. Collinsworth's first search warrant, claiming that he withheld material information from the state court in violation of *Franks v. Delaware*, 438 U.S. 154 (1978). Specifically, defendants claim that Sgt. Collinsworth should have provided to the court the disclaimer on the teletype quoted in the fact section (at p. 11). Defendants also argue that Sgt. Collinsworth did not include any evidence showing that Hochstetler actually "possessed" the firearms seen in the house. *See* Hochstetler Brief, dkt. 66 at 3-4; Ballmer Brief, dkt. 69 at 2-4.

The government objects to the *Franks* challenge as untimely and misdirected. The government also defends the first warrant as supported by probable cause. *See* Gov. Brief, dkt. 77.

The probable cause for the warrant consists of these averments by Sgt. Collinsworth:

> 4. On Monday, January 25, 2010 at approximately 8:04 PM Deputies Roger Sir and Andrew Schmidt . . . were sent to investigate an animal complaint at N4775 County Line Road. . . . Randy J. Ballmer and Delcina P. Hochstetler reside at that residence and were home during the investigation. During that investigation Deputy Sir observed two long-gun firearms in the kitchen area of the residence. One rifle was inside a gun cabinet and the other was leaning against the exterior of the cabinet. Delcina Hochstetler was present in the same room as the firearms. . . . .
>
> 5. On Monday, January 25, 2010 I had dispatch check criminal history for Delcina P. Hochstetler F/W 09/01/59. Hochstetler is listed by the state of Wisconsin as a "FELONY OFFENDER." Hochstetler has a felony conviction in the state of Wisconsin.

Gov. Exh. 3 (dkt. 62-3)

Dealing first with the *Franks* challenge, although it is untimely, there is no prejudice to the government to considering it on its merits because the defendants are incorrect: there is no *Franks* violation here. First, as the government observes, it cannot be a *Franks* violation for Sgt. Collinsworth to "omit" evidence he doesn't have, such as stronger indicia that Hochstetler actually possessed either firearm. That is a probable cause question, which I deal with below. As for Sgt. Collinsworth's failure to quote or paraphrase the disclaimer on the record, there is no evidence that Sgt. Collinsworth did so with the intent to gull the court into issuing the warrant improperly, or with reckless disregard for the truth. *See United States v. Spears*, 673 F.3d 598, 604 (7th Cir. 2012). More to the point, even if he had included the disclaimer, it would not have negated probable cause. *See id.*

A court's task when presented with a search warrant application is to make a practical, common-sense decision about whether the evidence in the record shows a fair probability that

contraband or evidence of a crime will be found in a particular place. *United States v. Miller*, 673 F.3d 688, 692 (7th Cir. 2012). Put another way, the evidence must suffice to induce a reasonably prudent person to believe that a search will uncover evidence of a crime. *United States v. Searcy*, 664 F.3d 1119, 1122 (7th Cir. 2011). A reasonably prudent person reading the entire criminal history report regarding Delcina Hochstetler, including the disclaimer, would conclude that the "Dalcina" a.k.a. Delcina P. Hochstetler identified in that report probably was the same person Sgt. Collinsworth was investigating. As a starting point, the first and last names are not so common as to raise any realistic fear that there are two Delcina Hochstetlers in the system. Second, the dates and locations of the conviction and arrests listed are consistent with the location and age of Sgt. Collinsworth's suspect. Even taking into account the qualifying language of the report, Sgt. Collinsworth was justified in concluding that the Delcina Hochstetler listed in the criminal history report was the same Delcina Hochstetler he was investigating.

The next question is whether the facts Sgt. Collinsworth presented to the court sufficed to establish probable cause that Hochstetler constructively possessed the firearms seen by the deputies upon entry into the home. The commonsensical answer would be "no." The legally accurate answer would be "yes."

Common sense suggests that there is no evidentiary connection between Hochstetler and the two long guns. Contrary to Sgt. Collinsworth's report, she wasn't even in the same room with the firearms: the guns were in the kitchen, Hochstetler was in the living/dining area, tending to Ralph. The .22 was in a gun cabinet, the assault rifle was leaning next to it. There is no evidence that Hochstetler owned, used or ever touched the guns. Further, she shared the house with Ballmer, who was not a prohibited person. How does this "prove a nexus between the

defendant and the [firearm] to separate true possessors from mere bystanders"? *United States v. Morris*, 576 F.3d 661, 666 (7th Cir. 2009). After all,

> Proximity to the item, presence on the property where the item is located, or association with a person in actual possession of the item, without more, is not enough to support a finding of constructive possession. Instead, the defendant must exercise dominion and control over the item.
>
> *Id.*

So far, so good for Hochstetler. But the court's exegesis in *Morris* of the concept of constructive possession (in both the firearm and drug contexts) shows that the legal definition encompasses what the deputies saw in her home. In the absence of exclusive control over contraband, evidence that a defendant had a substantial connection to the location where the contraband was located is sufficient to establish the nexus between that person and the contraband. *Morris*, 576 F.3d at 667. For instance, the court cites *United States v. Kitchen*, 57 F.3d 516, 520-21 (7th Cir. 1995), in which the court upheld a defendant's conviction–i.e. found proof beyond a reasonable doubt–that the defendant "possessed" two firearms found at another person's residence where the defendant "was something more than a casual visitor," keeping personal items there and giving out the telephone number as a place where he could be reached. It was not an ineluctable conclusion, but it was enough to support a conviction for constructively possessing the firearms.

Here, firearms were in Hochstetler's house. This supported, at least to the low threshold of probable cause, that she exercised dominion and control over them. Perhaps if both long guns had been in the gun cabinet, it would be a closer case: after all, Ballmer still had a constitutional right to possess firearms, and if the evidence was that all firearms in the house were in a gun

cabinet, the logical inference would be that they were there, locked up, in order to prevent Hochstetler from unlawfully exercising dominion and control over them. But in the evidentiary equivalent of a shoestring tackle, the assault rifle was outside the cabinet, leaning against it, and Sgt. Collinsworth said so in his affidavit. This was enough to provide probable cause supporting the warrant.

In short, there is no basis for the court to grant the motions to quash the search warrant.

RECOMMENDATION

Pursuant to 42 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court:

(1) Deny the defendants' motions to dismiss Counts 2 and 3;

(2) Grant the motions to suppress evidence derived from the deputies' entry into defendants' residence on January 25, 2010;

(3) Deny the motions to quash the first-issued search warrant.

Entered this 25th day of May, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

UNITED STATES DISTRICT COURT
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May 25, 2012

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Re: United States v. Ballmer and Hochstetler
Case No. 11-cr-91-bbc

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 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 June 4, 2012, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by June 4, 2012, 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 Barbara B. Crabb, District Judge

MEMORANDUM REGARDING REPORTS AND RECOMMENDATIONS

Pursuant to 28 U.S.C. § 636(b), the district judges of this court have designated the full-time magistrate judge to submit to them proposed findings of fact and recommendations for disposition by the district judges of motions seeking:

(1) injunctive relief;

(2) judgment on the pleadings;

(3) summary judgment;

(4) to dismiss or quash an indictment or information;

(5) to suppress evidence in a criminal case;

(6) to dismiss or to permit maintenance of a class action;

(7) to dismiss for failure to state a claim upon which relief can be granted;

(8) to dismiss actions involuntarily; and

(9) applications for post-trial relief made by individuals convicted of criminal offenses.

Pursuant to § 636(b)(1)(B) and (C), the magistrate judge will conduct any necessary hearings and will file and serve a report and recommendation setting forth his proposed findings of fact and recommended disposition of each motion.

Any party may object to the magistrate judge's findings of fact and recommended disposition by filing and serving written objections not later than the date specified by the court in the report and recommendation. Any written objection must identify specifically all proposed findings of fact and all proposed conclusions of law to which the party objects and must set forth

with particularity the bases for these objections. An objecting party shall serve and file a copy of the transcript of those portions of any evidentiary hearing relevant to the proposed findings or conclusions to which that party is objection. Upon a party's showing of good cause, the district judge or magistrate judge may extend the deadline for filing and serving objections.

After the time to object has passed, the clerk of court shall transmit to the district judge the magistrate judge's report and recommendation along with any objections to it.

The district judge shall review de novo those portions of the report and recommendation to which a party objects. The district judge, in his or her discretion, may review portions of the report and recommendation to which there is no objection. The district judge may accept, reject or modify, in whole or in part, the magistrate judge's proposed findings and conclusions. The district judge, in his or her discretion, may conduct a hearing, receive additional evidence, recall witnesses, recommit the matter to the magistrate judge, or make a determination based on the record developed before the magistrate judge.

NOTE WELL: A party's failure to file timely, specific objections to the magistrate's proposed findings of fact and conclusions of law constitutes waiver of that party's right to appeal to the United States Court of Appeals. ***See United States v. Hall,*** **462 F.3d 684, 688 (7th Cir. 2006).**