Christopher J. Schatz, OSB No. 915097
Assistant Federal Public Defender
101 SW Main Street, Suite 1700
Portland, OR 97204
Tel: (503) 326-2123
Fax: (503) 326-5524
Email: chris_schatz@fd.org

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **vs.** **TRACY DEMARCUS FUENTES,** **Defendant.**	**CR 09-414-RE** **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE AND STATEMENTS.**

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES. ii

STATEMENT OF THE CASE. 1

STATEMENT OF FACT. 2

ARGUMENT. 5

THE WARMS SPRINGS DETECTIVES VIOLATED MR. FUENTES' CIVIL (FOURTH AMENDMENT) RIGHT NOT TO BE SUBJECTED TO UNREASONABLE SEARCHES OF HIS RESIDENCE WITHOUT A WARRANT. 5

A. The Warm Springs Detectives Violated Mr. Fuentes' Civil Rights By Entering the Curtilage of His Residence and Looking Through the Living Room Window From An Unlawful Vantage Point. 5

1. The Vantage Point from Where Detectives Webb and Lockey Looked Through the Living Room Window Was Within the Curtilage of the Tommie Street Residence. 8

B. The Warm Springs Detectives Violated Mr. Fuentes' Civil Rights By Conducting a Sweep of His Residence.. 12

C. Mr. Fuentes Did Not Consent To The Search of the Tommie Street Residence. 14

D. Evidence Seized as a Direct Result of the Unlawful Searches of Mr. Fuentes' Residence Should be Suppressed. 16

CONCLUSION. 17

TABLE OF AUTHORITIES

FEDERAL CASES

California v. Ciraolo,
476 U.S. 207 (1986). 5, 10

Chimel v. California,
395 U.S. 752 (1969). 6

Coolidge v. New Hampshire,
403 U.S. 443 (1971). 5

Davis v. United States,
327 F.2d 301 (9th Cir. 1964). 11

Divello v. State of Indiana,
782 N.E.2d 433 (Ind. App. 2003). 7

Florida v. Jimeno,
500 U.S. 248 (1991). 15

Florida v. Royer,
460 U.S. 491 (1983). 15

Georgia v. Randolph,
547 U.S. 103 (2006). 6

Johnson v. United States,
333 U.S. 10 (1948). 16

Katz v. United States,
389 U.S. 347 (1967). 5

Ker v. California,
374 U.S. 23 (1963). 6

Lopez-Rodriguez v. Mukasey,
536 F.3d 1012 (9th Cir. 2008). 6

Maryland v. Buie,
494 U.S. 325 (1990). 12, 13

Oliver v. United States,
466 U.S. 170 (1984). 7

Payton v. New York,
445 U.S. 573 (1980).. 12

Smith v. Maryland,
442 U.S. 735 (1979).. 5

United States v. Alvarez,
810 F.2d 879 (9th Cir. 1987)... 13

United States v. Barajas-Avalos,
377 F.3d 1040 (9th Cir. 2004).. 7

United States v. Becerra-Garcia,
397 F.3d 1167 (9th Cir. 2005).. 1, 16

United States v. Breza,
308 F.3d 430 (4th Cir. 2002.)... 7

United States v. Burns,
298 F.3d 523 (6th Cir.2002).. 15

United States v. Butler,
966 F.2d 559 (10th Cir. 1992)... 15

United States v. Carter,
360 F.3d 1235 (10th Cir. 2004)... 13

United States v. Delgadillo-Velasquez,
856 F.2d 1292 (9th Cir. 1988).. 12, 13, 14

United States v. Dunn,
480 U.S. 294 (1987).. 5, 7, 8, 9

United States v. Gwinn,
219 F.3d 326 (4th Cir. 2000)... 7

United States v. Hatfield,
333 F.3d 1189 (10th Cir. 2003)... 6

United States v. Hersh,
464 F.2d 228 (9th Cir. 1972).. 10, 11

United States v. Impink,
728 F.2d 1228 (9th Cir. 1984)... 15

United States v. Ivy,
165 F.3d 397 (6th Cir.1998).. 15

United States v. Jansen,
470 F.3d 762 (8th Cir. 2006).. 13

United States v. Leon,
468 U.S. 897 (1984).. 16

United States v. Lester,
647 F.2d 869 (8th Cir. 1981).. 1, 3

United States v. Martinez-Fuerte,
428 U.S. 543 (1976).. 12

United States v. Murphy,
516 F.3d 1117 (9th Cir. 2008).. 12

United States v. Pineda-Moreno,
591 F.3d 1212 (9th Cir. 2010).. 11

United States v. Robertson,
606 F.2d 853 (9th Cir. 1979).. 13

United States v. Shaibu,
920 F.2d 1423 (9th Cir. 1990).. 15

United States v. United States District Court,
407 U.S. 297 (1972).. 12

United States v. Van Dyke,
643 F.2d 992 (4th Cir. 1981).. 7

United States v. Waupekenay,
973 F.2d 1533 (10th Cir. 1992).. 6

United States v. Whitten,
706 F.2d 1000 (9th Cir. 1983).. 15

Wong Sun v. United States,
371 U.S. 471 (1963).. 16

STATE CASES

Lorenzana v. Superior Court,
511 P.2d 33 (Cal. 1973). 9

FEDERAL STATUTES

18 U.S.C. §922(g)(1). 1

STATE STATUTES

Or. Rev. Stat. §475.864(3) (2009). 3

Or. Rev. Stat. §161.239 (2009). 3

OTHER

Warm Springs Tribal Code §§305.510, 305.525, 305.715. .... 3, 4

Defendant Tracy Demarcus Fuentes, through his attorney of record, Assistant Federal Public Defender Christopher J. Schatz, presents the points and authorities hereinafter set forth in support of the Motion To Suppress filed concurrently herewith.

STATEMENT OF THE CASE

Mr. Fuentes is charged with being a felon in possession of a firearm, in violation of 18 U.S.C. §922(g)(1). Mr. Fuentes was arraigned on the indictment in this case on September 2, 2010. Trial is currently scheduled to take place on January 11, 2011.[1]

The charge pending against Mr. Fuentes is based on his purported possession of firearms that were found and seized by law enforcement authorities in the course of several warrantless searches of his residence.[2] Mr. Fuentes contends that each of these warrantless searches occurred in violation of Indian Civil Rights Act (ICRA) and that the evidentiary fruits of these searches, including the aforereferenced firearms, must be suppressed.[3]

---

[1]A motion to reset the trial date has been filed concurrently with the motion to suppress in order to allow sufficient time for an evidentiary hearing to be held with respect to the factual issues raised by Mr. Fuentes' pleadings. It is anticipated that resolution of the issues presented by the Motion to Suppress will be dispositive with respect to the outcome of the instant case.

[2]As described in the indictment, the firearms in question are a Harrington & Richardson (1871) 20 gauge shotgun, a .22 caliber Savage Stevens rifle (model 84), and a .32 caliber Bryco Arms pistol.

[3]Technically, the Fourth Amendment does not apply to tribal police officers who stop and arrest individuals and search for evidence within Indian country. *United States v. Becerra-Garcia*, 397 F.3d 1167, 1171 (9th Cir. 2005). However, the Indian Civil Rights Act ("ICRA") provides that "No Indian tribe in exercising powers of self-government shall . . . violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures." Insofar as ICRA imposes limitations on the activities of tribal government personnel that are "identical" to those imposed by the Fourth Amendment on federal and state law enforcement officers, the federal courts employ Fourth Amendment precedent and standards in analyzing the reasonableness of tribal police activities. *Id.*; *see also United States v. Lester*, 647 F.2d 869, 872 (8th Cir. 1981) ("In light of the legislative history of the Indian Civil Rights Act and its striking similarity

STATEMENT OF FACT

On April 21, 2008 at approximately 1:25 p.m., Warm Springs Police Department Detectives Sam Williams, Casey Lockey, and John Webb arrived at Mr. Fuentes' residence, located at 4334 Tommie Street, on the Warm Springs Indian Reservation.[4] The purpose of this visit was purportedly to enable the law enforcement officers to interview Mr. Fuentes regarding a stolen rifle that had been found on the premises of his residence on March 8, 2008.[5]

After the officers exited their vehicle, Detective Williams walked onto the front door porch to the residence and knocked on the door.[6] Initially, there was no response. Hearing what he claimed to be movement from inside the residence, Detective Webb walked away from the front door porch to the area of a window located to the east of the porch. Looking through the window, into the living room area of the residence, Detective Webb saw what he believed was a marijuana pipe on top of a table. Detective Webb called Detective Lockey over to the window where Detective Lockey made the following observation:

---

to the language of the Constitution . . . we consider the problem before us under fourth amendment standards."). For purposes of analysis in the instant case, the bases for Mr. Fuentes' claim that he is the victim of unlawful search activity will be stated in the language of Fourth Amendment jurisprudence.

[4]The statement of facts set forth herein is drawn from the law enforcement and police reports released to Mr. Fuentes as discovery in this case. Except where his position is specifically noted, Mr. Fuentes neither confirms nor denies the accuracy of the facts related.

[5]Warm Springs Police Officers entered Mr. Fuentes' residence on March 8, 2008, in response to a domestic disturbance call. While on the premises, Officer Travis Patterson discovered and seized a Russian-made Mosin Nagant 7.62 caliber bolt action rifle (serial no. J8605) lying next to a bed in the back bedroom of the residence. Mr. Fuentes denied ownership of this weapon

[6]A photograph of the front door porch area of the Tommie Street residence is attached hereto as Exhibit A.

> Detective Webb pointed out to me a multi colored glass pipe with green leafy substance in the bowl. I observed this pipe was sitting on a coffee table next to the couch. The pipe was about two feet in front of me in plain view.

Lockey, Warm Springs Police Dept. Detectives Report Investigations Division, dated April 24, 2008, at p. 16 [TDF 00025].

Detective Webb directed Detective Lockey to keep an eye on the pipe while he returned to their vehicle in order to call the tribal prosecutor's office to obtain a search warrant. Detective Williams also returned to the vehicle to get a camera so that he could take a picture of the pipe.

While Detectives Webb and Williams were at their vehicle, Detective Lockey saw Mr. Fuentes appear in the window. Detective Lockey drew his firearm, pointed the firearm at Mr. Fuentes, and ordered Mr. Fuentes to put his hands in the air, move to the front door, and "come out and talk to us." *Id*. According to Detective Lockey, Mr. Fuentes responded by grabbing the pipe and disappearing from sight.[7]

The Warm Springs officers surrounded the residence. When Mr. Fuentes exited the residence from the rear entrance, Detective Lockey ordered Mr. Fuentes to the ground. Mr. Fuentes complied and he was taken "into custody." Initially, Mr. Fuentes was unresponsive when detectives asked if anyone else was inside the home. But when Detective Webb approached the rear entrance door and

---

[7]Under OR. REV. STAT. §161.239 (2009) a police officer may only use deadly physical force if he reasonably believes it is necessary and the crime committed is one of several specified and particularly violent or dangerous felonies, there is an imminent threat of physical force against the person of the officer or another, and/or use of deadly force is necessary for self-defense. Detective Lockey drew his weapon in response to what he perceived to be Mr. Fuentes' possession of a small quantity of marijuana that would have been treated as a mere violation under OR. REV. STAT. §475.864(3) (2009). Possession of marijuana and/or drug paraphernalia is a misdemeanor under Warm Springs Tribal Code §§305.510, 305.525, and 305.715. Nevertheless, Detective Lockey's display of a firearm in an attempt to detain Mr. Fuentes should be viewed as improper given that the only observed offense conduct was Mr. Fuentes' possession of what appeared to be a pipe bowl quantity of marijuana.

threatened to kick it in, Mr. Fuentes yelled to a person in the residence to open the door. An individual by the name of Milton Sahme Jr. opened the door. Mr. Sahme was then removed from the residence detained by Detective Webb.[8]

Mr. Fuentes and Mr. Sahme were detained outside of the residence. A search of Mr. Fuentes did not reveal the pipe. Detective Williams and Detective Webb then entered the residence purportedly to search for other persons.[9] According to Detective Webb this action was necessary because he was afraid of the "potential of having the evidence destroyed."[10] During the course of this search, a .22 caliber rifle was seen in "the master bedroom, located on the west end of the single wide trailer."[11] No other persons were found in the home.

After the residence sweep search, the detectives went outside and asked Mr. Fuentes for consent to conduct a further search of his residence.[12] Mr. Fuentes refused to sign a consent form; but in response to repeated requests for permission to search, he purportedly said "Let's just do this."

---

[8]Both Mr. Fuentes and Mr. Sahme Jr. were handcuffed.

[9]Whether both detectives entered the home is not clear. Detective Williams' report states that only Detective Webb conducted the sweep. *See* Williams, Warm Springs Police Dept. Investigation Division Detectives Report, dated April 24, 2008, at p. 8 [TDF00014]. However, Detective Webb states in his report that both he and Detective Williams entered the home. *See* Webb, Warm Springs Police Dept. Investigation Division Detectives Supplemental Report, dated April 23, 2008, at p. 12 [TDF00019].

[10]*Id.*

[11]*Id.*

[12]In the course of discussing the consent issue with the detectives, Mr. Fuentes told them that he had been living at the residence for a period of six months, and that the power bill was in his name. *See* Webb, Warm Springs Police Dept. Investigation Division Detectives Supplemental Report, dated April 23, 2008, at p. 13 [TDF00020].

The Warm Springs detectives proceeded to search the residence. In the course of this search activity, the detectives discovered and seized a number of firearms and drug paraphernalia.

ARGUMENT

I.

THE WARMS SPRINGS DETECTIVES VIOLATED MR. FUENTES' CIVIL (FOURTH AMENDMENT) RIGHT NOT TO BE SUBJECTED TO UNREASONABLE SEARCHES OF HIS RESIDENCE WITHOUT A WARRANT.

A. The Warm Springs Detectives Violated Mr. Fuentes' Civil Rights By Entering the Curtilage of His Residence and Looking Through the Living Room Window From An Unlawful Vantage Point.

The Fourth Amendment's protections extend to those areas in which a person has a "reasonable" expectation of privacy. *Smith v. Maryland*, 442 U.S. 735, 740 (1979).[13] The protection afforded by the Fourth Amendment to privacy and against unreasonable governmental search activity extends to unreasonable searches of the curtilage of a home. *United States v. Dunn*, 480 U.S. 294, 300 (1987).

A warrantless search of a suspect's home is *per se* unreasonable under the Fourth Amendment unless the government can show that it falls within "one of a carefully defined set of exceptions." *Coolidge v. New Hampshire*, 403 U.S. 443, 474 (1971). This general principle reflects

---

[13]In *California v. Ciraolo*, 476 U.S. 207, 211 (1986), the Supreme Court described the test for determining whether a "constitutionally protected reasonable expectation of privacy" will be recognized with respect to a particular location or activity as follows:

> The touchstone of Fourth Amendment analysis is whether a person has a "constitutionally protected reasonable expectation of privacy." *Katz v. United States*, 389 U.S. 347, 360, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring). *Katz* posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?

a central value of the Fourth Amendment: "a man's home is his castle [to the point that t]he poorest man may in his cottage bid defiance to all the forces of the Crown." *Georgia v. Randolph*, 547 U.S. 103, 115 (2006) (alternations in original) (internal quotation marks omitted). Protection of the privacy of the home has been a goal of Fourth Amendment jurisprudence for many years. *See, e.g., Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1016 (9th Cir. 2008) ("'It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.'") (quoting *Payton v. New York*, 445 U.S. 573, 586 (1980)); *United States v. Hatfield*, 333 F.3d 1189, 1196 (10th Cir. 2003) ("privacy in the interior of a home and its curtilage are at the core of what the Fourth Amendment protects"); *United States v. Waupekenay*, 973 F.2d 1533, 1536 (10th Cir. 1992) (observing that the defendant had "a heightened expectation of privacy when he was within his trailer" because "[a]t the very core of the Fourth Amendment stands the right of a man to retreat into his own home") (alternations and internal quotation marks omitted).

In determining whether a search or seizure is unreasonable, we begin with history. Thus, in order to "determine the norms that the Fourth Amendment was intended to preserve, "[w]e look to the statutes and common law of the founding era . . .." *Virginia v. Moore*, 553 U.S. 164, 168 (2008) The home always has received special protection in Fourth Amendment analysis. *See Silverman v. United States*, 365 U.S. 505, 511 (1961) ("At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion"). The Fourth Amendment, in fact, was a direct response to the colonists' objection to searches of homes under general warrants or without warrants. *See Chimel v. California*, 395 U.S. 752, 761 (1969). In today's society, the protection of the Fourth Amendment extends to equivalents of the traditional single-family house, such as an apartment (*see, e.g., Ker v. California*, 374 U.S.

23, 42 (1963)), or a single-wide trailer being used as a home (*see, e.g., United States v. Gwinn*, 219 F.3d 326 (4th Cir. 2000) ("[W]e must determine whether Trooper Thomas' reentry into Gwinn's trailer to retrieve shoes and a shirt for Gwinn falls within an exception to the Fourth Amendment's warrant requirement.").

It is now "clearly established that the curtilage surrounding a person's dwelling house is protected from an unwarranted entry." *United States v. Barajas-Avalos*, 377 F.3d 1040 , 1055 (9th Cir. 2004). In *United States v. Van Dyke*, 643 F.2d 992, 993 (4th Cir. 1981), the Fourth Circuit noted that "expectations of privacy are inherent in the common law concept of 'curtilage.'" According to the Supreme Court, because an individual ordinarily possesses the highest expectation of privacy within the curtilage of his home, that area typically is afforded the most stringent Fourth Amendment protection. *Oliver v. United States*, 466 U.S. 170, 180 (1984) ("the curtilage . . . warrants the Fourth Amendment protections that attach to the home."); *see also United States v. Breza,* 308 F.3d 430, 433 (4th Cir. 2002.).[14]

In *Dunn*, 480 U.S. at 301, the Supreme Court articulated an analytic scheme for use in resolving questions concerning the presence and extent of a curtilage area:

> Drawing upon the Court's own cases and the cumulative experience of the lower courts that have grappled with the task of defining the extent of a home's curtilage, we believe that curtilage questions should be resolved with particular reference to

---

[14]The term 'curtilage' is derived from a Medieval Latin word meaning "court or yard." *Divello v. State of Indiana*, 782 N.E. 2d 433, 437 (Ind. App., 2003). The curtilage concept "originated at common law to extend to the area immediately surrounding a dwelling house the same protection under the law of burglary as was afforded the house itself." *United States v. Dunn*, 480 U.S. 294, 300 (1987). In *Oliver*, 466 U.S. at 180, the Court emphasized the intimate relationship between the curtilage and the activities of a residence's occupants: "At common law, the curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'

> four factors: the proximity of the area claimed to be curtilage 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 by the resident to protect the area from observation by people passing by.

The Court made it clear that this four-factor test was not to be mechanically applied:

> We do not suggest that combining these factors produces a finely tuned formula that, when mechanically applied, yields a "correct" answer to all extent-of-curtilage questions. Rather, these factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration – whether the area in question is so intimately tied to the home itself that it should be placed under the home's "umbrella" of Fourth Amendment protection.

Id.

When the Warm Springs detectives arrived at Mr. Fuentes residence on April 21, 2008, they did not have a warrant. All of their subsequent activities appear to have been based on, and to be causally linked to, observation of a pipe containing marijuana on a table in the living room of the residence. This observation was made by Detectives Webb and Lockey by looking through a window located to the east of the front door porch area of the residence. The vantage point from which these observations were made was not a place where Detectives Webb or Lockey were entitled to be because it lay within the curtilage of Mr. Fuentes' home.

1. The Vantage Point from Where Detectives Webb and Lockey Looked Through the Living Room Window Was Within the Curtilage of the Tommie Street Residence.

Consideration of the four factors identified in *Dunn* establishes that the yard area located outside the living room window just to the east of the Tommie Street residence's front porch door lies within the curtilage of that residence. First, the yard area in front of the living room window is in very close proximity to the home.

Second, the yard area immediately outside of the window's location is set off from the gravel driveway area. A distinct non-gravel area surrounds the perimeter of the home that is composed of dirt and grass. This dirt and grass area extends approximately ten feet out from the home, which is the length of the front door porch from the front door to the driveway.[15] This dirt and grass area serves a function similar to a fence enclosure in that it differentiates the gravel driveway, which visitors to the residence may traverse, from the dirt and grass area close to the home from which visitors are excluded by common convention.[16] The Warm Springs detectives breached the boundary between the gravel and the dirt and grass area in order to conduct a search – *i.e.* look through the living room window – from an area from which members of the public and law enforcement were not invited.[17]

Third, the nature of the use accorded the area in question demonstrates that the detectives acted unreasonably. The area directly outside of the living room window is intimately tied to the Tommie Street residence. The window is an extension of the living room, a room in the interior of

---

[15]Photographs of the dirt and grass area and the front porch are attached hereto as Exhibit B.

[16]Although the existence and extent of a residence's curtilage is often demarcated by fencing, the presence of an enclosing fence is not a condition precedent to recognition of a curtilage in the area immediately surrounding a residence. *Dunn*, 480 U.S. at 301 n.4

[17]Addressing a curtilage question in *Lorenzana v. Superior Court*, 511 P.2d 33, 40-41 (Cal. 1973), the California Supreme Court observed:

> The record reveals no substantial evidence supporting a conclusion that a normal access route to either the Lorenzana home or the house behind it on the same lot would lead to a point within a scant six inches from the window through which the officers made their observations; thus, those observations were made from a position where the officers had no right to be. Since neither a warrant nor one of the established exceptions to the warrant requirement sanctioned this intrusion, it was unlawful.

the residence where Mr. Fuentes and other residents conducted their private affairs.[18] The window served to provide light to the livingroom; however, it was not intended for use by the public or law enforcement officers as a means to peer into the residence.

Fourth, Mr. Fuentes took steps to protect the area inside the home from outside observation via the living room window. The curtains on the window were drawn at the time the Warm Springs detectives conducted search activity by peering into and through the living room window from outside the home. A photograph of the interior of the living room area depicting the living room window, taken at the time of the search activity, shows that the curtains on the window were drawn when the events in question in this case took place.[19] Given that the curtains were drawn, any observations made looking through the window by Detectives Webb and Lockey of articles in the living room could only have been made from the curtilage area of the residence.

In *United States v. Hersh*, 464 F.2d 228, 229-30 (9th Cir. 1972), the Ninth Circuit found that police officers could walk to the front door of a house and, while on the porch, look through a partially draped open window without being subject to Fourth Amendment restraints. From this vantage point, where the officers in *Hersh* had a right to be, indicia of a narcotics lab seen through the window was held to be in plain view. *Id*.

Porch areas, walkways leading from a public street to the front door of a house, and driveways have been recognized as avenues of ingress and egress to and from a residence that may

---

[18]As the Supreme Court observed in *Ciraolo*, 476 U.S. at 212-13: "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened."

[19]A copy of this photograph [TDF00069] is attached hereto as Exhibit C.

be used by both the general public and law enforcement officers when contact with a residence's occupants is sought:

> Absent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's 'castle' with the honest intent of asking questions of the occupant thereof-whether the questioner be a pollster, a salesman, or an officer of the law.

Davis v. United States, 327 F.2d 301, 303 (9th Cir. 1964).[20]

The circumstances associated with the search activity in the case at hand are very different from those in *Hersh*. First, the Tommie Street residence living room window is not located next to the front door of the home. Detectives Webb and Lockey had to walk into the curtilage of the residence in order to reach an area adjacent to the living room window through which the observations of the pipe purportedly containing marijuana were made. Furthermore, unlike the window in *Hersh*, here the curtains were drawn. Thus, the interior of the living room was not visible to members of the public standing in the driveway area, nor was it possible for Detectives Webb and/or Lockey to see into the residence without breaching the curtilage zone of protection.

The Warm Springs detectives conducted an unlawful search within the meaning of the Fourth Amendment (and ICRA) by entering the curtilage of Mr. Fuentes' home and looking through the living room window.[21] Mr. Fuentes had a reasonable expectation of privacy in the area immediately

---

[20]Driveways that are open to public access have been held not to confer any Fourth Amendment protection even if they traverse area within the curtilage of a residence. *See United States v. Pineda-Moreno*, 591 F.3d 1212, 1215 (9th Cir. 2010) ("Thus, because Pineda-Moreno did not take steps to exclude passersby from his driveway, he cannot claim a reasonable expectation of privacy in it, regardless of whether a portion of it was located within the curtilage of his home.").

[21]Given the topography and physical lay-out of the Tommie Street residence, it is Mr. Fuentes' contention that the curtilage area of this residence extends out 10 feet from the exterior

outside of the window. This was not an area to which invitational access for the public had, in any way, been extended. Therefore, the observations made by Detectives Webb and Lockey of the purported marijuana pipe must be suppressed. All items, statements and observations subsequently seized by exploitation of those tainted observations must also be excluded from evidence.

B. The Warm Springs Detectives Violated Mr. Fuentes' Civil Rights By Conducting a Sweep of His Residence.

Physical entry of the home "is the chief evil against which the wording of the Fourth Amendment is directed." *Payton v. New York*, 445 U.S. 573, 585 (1980) (quoting *United States v. United States District Court*, 407 U.S. 297, 313 (1972)). Traditionally, the courts have "afforded the most stringent Fourth Amendment protection" to "the sanctity of private dwellings." *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976).

Warrantless searches violate a defendant's Fourth Amendment rights unless the government can demonstrate that an established, well-defined exception applies. *United States v. Murphy*, 516 F.3d 1117, 1120 (9th Cir. 2008) (quoting *United States v. Delgadillo-Velasquez*, 856 F.2d 1292, 1298 (9th Cir. 1988)). One recognized exception is the "protective sweep," a quick and limited search of the interior of a residence or building that is undertaken for the purpose of protecting officers and others, and/or preventing the destruction of evidence. *Id.*; *see also Maryland v. Buie*, 494 U.S. 325,

---

side-walls of the residence. This 10 foot band around the residence is demarcated by the grass/dirt area and the wooden porch which extends out 10 feet from the residence and acts as the primary public ingress and egress passage to and from the residence. Photographs of the porch area and its relationship to the driveway of the Tommie Street residence are attached hereto as Exhibit D. *See also* Declaration of Martin Caballero in Support of Motion for Discovery Pursuant to Rule 16(a)(1)(E)(i) or Issuance of Third-Party Subpoenas *Duces Tecum*, at pages 2-3.

327 (1990).[22] However, in the instance of any departure from the warrant requirement, the government bears "a heavy burden" of demonstrating that exceptional circumstances justify the departure. *Delgadillo-Velasquez*, 856 F.2d at 1298; *see also United States v. Alvarez*, 810 F.2d 879, 881 (9th Cir. 1987). Officers may justify a warrantless search by demonstrating that they had a reasonable suspicion of danger in advance of the entry. *Buie*, 494 U.S. at 335-36.[23] A valid protective sweep also requires specific and articulable facts that support a belief that other persons may be on the premises. *Id*. at 334. Officers must possess more than a subjective belief that danger exists in order to conduct a warrantless entry of a home. *Delgadillo-Velasquez*, 856 F.2d at 1298.

In *Delgadillo-Velasquez*, police officers received a tip as to where a known fugitive wanted for drug smuggling was residing. *Id*. at 1294. Officers began surveying the suspected residence and eventually stopped the defendant out on the street, believing they were intercepting a drug sale in

---

[22] In *United States v. Carter,* 360 F.3d 1235, 1242 (10th Cir. 2004), the Court of Appeals noted as follows with respect to the requirements for conducting a protective sweep search:

> "A 'protective sweep' is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." *Maryland v. Buie*, 494 U.S. 325, 327, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990). Such a sweep is permissible "if the searching officer possesse[d] a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant[ed] the officer in believing that the area swept harbored an individual posing a danger to the officer or others." *Id*.

See also United States v. Jansen, 470 F.3d 762, 765 (8th Cir. 2006) ("Police officers are able to conduct a protective sweep search pending an application for a search warrant when there is a risk that evidence will be destroyed.").

[23] Exigent circumstances justifying a protective sweep "are those in which a substantial risk of harm to the persons involved or to the law enforcement process would arise if the police were to delay a search until a warrant could be obtained." *United States v. Robertson*, 606 F.2d 853, 859 (9th Cir. 1979).

progress. *Id*. Despite arresting the defendant outside, the police officers went into the residence in order to conduct a protective sweep, which resulted in the discovery of marijuana. *Id*. at 1294-95. The Ninth Circuit found that the officers conducted an improper sweep because "[t]here was . . . no particularized evidence supporting the officer's belief that other persons (who might possibly pose a threat to the officers or who might destroy evidence) were inside the apartment or were able to observe the arrest." *Id*. at 1299.

The circumstances present in the case at hand are in one crucial respect analogous to those in *Delgadillo-Velasquez*. At the time the Warm Springs detectives conducted their protective sweep of the Tommie Street residence, there were no facts known to the detectives to support a belief that any other individual was present on the premises. The only person, other than Mr. Fuentes, located in the residence, Mr. Sahme Jr., was removed from the residence and taken into custody prior to the protective sweep. With both occupants outside of the home, the detectives had no grounds for entering the residence and conducting a protective sweep. Consequently, as in *Delgadillo-Velasquez*, the evidence seized as a result of the sweep must be suppressed.

C. Mr. Fuentes Did Not Consent To The Search of the Tommie Street Residence.

After being confronted at gunpoint by Detective Lockey, and taken into custody and handcuffed, Mr. Fuentes was asked to consent to a search of the Tommie Street residence. Although he refused to sign a consent to search form, thereby signaling his disinclination to accede to the detectives persistent importuning that he consent to such a search, Mr. Fuentes ultimately purportedly responded, "Lets just do it."

In *Florida v. Royer*, 460 U.S. 491, 497 (1983), the Supreme Court declared that "where the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority."[24] To be effective, a verbal consent to search must also be "unequivocal and specific." *United States v. Butler*, 966 F.2d 559, 562 (10th Cir. 1992). The standard for measuring "the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness – what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 251 (1991).

The government bears the burden of proving the existence of an effective consent to search. *United States v. Whitten*, 706 F.2d 1000, 1016 (9th Cir. 1983). This burden "is heavier where consent is not explicit, 'since consent is not lightly to be inferred.'" *United States v. Impink*, 728 F.2d 1228, 1232 (9th Cir. 1984). The government's burden is heaviest when "consent would be inferred to enter and search a home, for protection of the privacy of the home." *United States v. Shaibu*, 920 F.2d 1423, 1426 (9th Cir. 1990).

In the instant case, given the events preceding the statement attributed to Mr. Fuentes, "Let's just do it," the government cannot prove that the words used actually conferred permission on the Warm Springs detectives to enter the Tommie Street residence, let alone that any such purported conferral of authority was voluntary on Mr. Fuentes' part. The warrantless search of the Tommie

---

[24]The government must prove "through clear and positive testimony that the consent to search was given voluntarily. Consent is voluntary when it is unequivocal, specific and intelligently given, uncontaminated by any duress or coercion." *United States v. Ivy*, 165 F.3d 397, 402 (6th Cir. 1998) (internal quotation marks and citations omitted). The government must meet this burden by a "preponderance of the evidence." *United States v. Burns*, 298 F.3d 523, 541 (6th Cir.2002).

Street residence must therefore be found deficient according to both ICRA and governing Fourth Amendment standards.

D. Evidence Seized as a Direct Result of the Unlawful Searches of Mr. Fuentes' Residence Should be Suppressed.

The exclusionary rule is a constitutionally-based remedy that prohibits the government from introducing evidence of guilt obtained through violations of the Fourth Amendment. *United States v. Leon*, 468 U.S. 897, 906 (1984). The general rule is that the products of an unreasonable search must be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 484 (1963). Suppression of evidence has also been held to be appropriate where tribal law enforcement officers violate ICRA/ Fourth Amendment standards governing lawful search and seizure activity. *Becerra-Garcia*, 397 F.3d at 1171.

Under the circumstances of this case, application of the exclusionary rule is appropriate. The Warm Springs detectives arrested Mr. Fuentes after trespassing onto the curtilage of the Tommie Street residence where Mr. Fuentes was living, and after conducting a protective sweep of the residence notwithstanding the lack of any reason to suspect that others were present on the premises. The detectives had the time and an opportunity to get a search warrant, but chose not to do so. The detectives failed to obtain a clear, concise, and specific statement of consent to search from Mr. Fuentes. In taking upon themselves the authority to determine if a basis to search the Tommie Street residence existed, the Warm Springs detectives ran afoul of the warrant requirement. As Justice Jackson remarked in *Johnson v. United States*, 333 U.S. 10, 13-14 (1948):

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.... The

> right of officers to thrust themselves into a home is ... a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.

CONCLUSION

In light of the above, Mr. Fuentes moves the Court to enter an order excluding from admission into evidence in this matter all items seized during the course of the search activity that took place at the Tommie Street residence on April 21, 2008, and all statements made by Mr. Fuentes subsequent to his arrest on that date.

Respectfully submitted this December 8, 2010.

<u>/s/ Christopher J. Schatz</u>
Christopher J. Schatz
Attorney for Defendant