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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF OREGON**

**PORTLAND DIVISION**

**UNITED STATES OF AMERICA**

**No. CR 09-414-RE**

**v.**

**GOVERNMENT'S RESPONSE  
TO DEFENDANT'S MOTION  
TO SUPPRESS (CR 21)**

**TRACY DEMARCUS FUENTES,**

**Defendant.**

The United States, by and through Dwight C. Holton, United States Attorney for the District of Oregon, and Craig J. Gabriel, Assistant United States Attorney, hereby responds to Defendant's Motion to Suppress Evidence and Statements.

Defendant's motion is without merit and should be denied. The police officers' conduct in this case was lawful, and defendant's constitutional rights were not violated in any way. Specifically, (1) while trying to make contact with defendant, police officers lawfully saw a glass pipe full of marijuana in plain view through the window of defendant's residence; (2) for officer safety reasons and to ensure that evidence was not destroyed, police officers lawfully conducted a limited protective sweep of defendant's residence; and (3) defendant voluntarily consented to a search of his residence that revealed drugs, drug dealing paraphernalia, guns, and ammunition.

For the reasons set forth below, defendant's motion to suppress should be denied.

**I. FACTUAL BACKGROUND**

**A. March 8, 2008 Arrest of Defendant**

On March 8, 2008, Warm Springs police officers were dispatched to defendant's residence at 4334 Tommie Street on the Warm Springs Indian Reservation for a report of a possible domestic disturbance. When the officers arrived, defendant was holding his infant daughter, and he appeared to be high on methamphetamine. Also at the residence were two other adults, who had been drinking. Officers located a Nagant bolt-action rifle in the residence, along with live shotgun shells, methamphetamine, a glass smoking device with methamphetamine residue and a metal smoking device with marijuana residue. The Warm Springs police department had previously received information that a rifle similar to the one seized from defendant had been stolen from a third party in Warm Springs. Defendant had prior felony convictions for (1) Assault in the Third Degree (with a firearm), (2) Unlawful Use of a Weapon (with a firearm), and (3) Fleeing or Attempting to Elude a Police Officer.<sup>1</sup> Defendant was therefore prohibited from possessing a firearm.

Defendant was arrested on multiple charges and held for a tribal court appearance. Defendant was eventually released from tribal custody, and he returned to his residence on Tommie Street.

**B. April 21, 2008 Arrest of Defendant and Search of His Residence**

In the morning of April 21, 2008, police officers interviewed J.M., the purported owner of

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<sup>1</sup> Defendant also has a long history of arrests by the tribal police.

the Nagant rifle that had been seized from defendant's residence on March 8, 2008. J.M. confirmed that the Nagant rifle had been stolen from his residence on February 28, 2008, which was only a week before it was seized from defendant's residence.

That same afternoon – on April 21, 2008 – Warm Springs detectives Webb, Lockey, and Williams drove to defendant's residence on Tommie Street to interview defendant about the stolen Nagant rifle previously seized from his residence. Detective Williams knocked on the front door of defendant's residence, with no response. Detective Lockey was standing to the right of the front door. Detective Webb was standing to the left of the front porch and heard movement inside. In an attempt to locate defendant, and (based on defendant's history) for officer safety reasons, Detective Webb looked in a window in the front of defendant's residence. The curtains to the window were open at the time (contrary to the defense's claims); additionally, the grassy area in front of the window was immediately next to the gravel driveway and was not within any enclosure surrounding the home.<sup>2</sup> Detective Webb saw a multi-colored marijuana pipe, apparently with a full bowl of marijuana, on top of an end table directly in front of the window.<sup>3</sup>

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<sup>2</sup> Exhibits to defendant's motion generally contain fair and accurate photos of the front of defendant's single-wide trailer. The government will offer similar photos as exhibits at the evidentiary hearing.

<sup>3</sup> Possession of marijuana and possession of drug paraphernalia are both crimes under the Warm Springs Tribal Code. *See* WSTC §§ 305.466, 305.467 (2008). Under the Indian Civil Rights Act, all tribal criminal offenses at the time were misdemeanors. *See* 25 U.S.C. § 1302 (2008).

Detective Lockey then watched the pipe as Detectives Webb and Williams called the tribal prosecutor to discuss obtaining a search warrant. As Detective Lockey was watching the pipe, he saw the defendant come into view of the window and grab the marijuana pipe off the table. For his safety, Detective Lockey unholstered his duty weapon and pointed it at defendant. Detective Lockey yelled and commanded the defendant to stop and show both of his hands, come to the front door, and come out and talk to the police. Instead, defendant refused to comply and ran out of sight from the living room with the marijuana pipe.

The detectives surrounded the house, and the defendant exited his residence through a rear door. After the detectives ordered defendant to the ground three times, defendant finally complied. The detectives took defendant into custody. The marijuana pipe was not located on defendant's person. The detectives asked defendant several times if there was anyone else inside the residence, but defendant would not answer them. Fearing the potential of having the evidence destroyed, the detectives knocked on the back door to the residence and yelled, "Police." The detectives heard a muffled male voice inside saying that it wasn't his house. The detectives told the male to open the door, or they would kick it in. Defendant then yelled at the male inside the house and told him to open the door, which the male did. That other male was also detained.

For officer safety reasons and to prevent potential evidence destruction, detectives conducted a protective sweep of the residence to ensure that no one else was inside. While clearing the residence, the detectives noticed a .22 rifle in plain view on a bed (which they did

not seize at the time), but no one else was located inside. The detectives then immediately exited the residence.

The detectives subsequently read defendant his Warm Springs Confederated Tribes Advice of Rights, as well as *Miranda* warnings, from prepared forms. Defendant said he understood his rights. The detectives told the defendant that they had come to defendant's residence to discuss the Nagant rifle that had been taken from his residence the previous month, on March 8, 2008. The detectives also asked defendant what he had done with the marijuana pipe that was plainly visible from the front window. The defendant said he had handed it to the other male in the house. (The detectives could not locate the pipe in the subsequent consent search of defendant's residence.)

The detectives asked defendant for permission to search his residence. Defendant said the residence belonged to his girlfriend, who was in jail. Detectives asked defendant how long he had been living there, and defendant replied that he had lived at the residence for six months. The detectives asked if defendant helped out with any of the bills; defendant said that the power bill is in his name. The detectives again asked defendant for permission to search his residence. The detectives explained to defendant that it is completely voluntary on his part and that he could stop the search at any time. Defendant asked if he would be allowed to be present, and the detectives told him that he would absolutely be allowed to be present. The defendant then said, "Let's do it." The detectives told the defendant that they had a Consent To Search form they wanted to read him. The defendant said that he wouldn't sign any form, and said, "Let's just do this."

The detectives then entered the residence with the defendant. The detectives brought a chair from the dining room to the living room for the defendant to sit on. The defendant then immediately said that there was a pipe under the couch, and he indicated to the left side of the couch and said there was a gun located there. The detectives reminded defendant that his consent to allow them to search was voluntary on his part and that defendant could stop the search at any time. Defendant said he understood.

The detectives then lifted the couch cushions and found a pipe and a loaded .32 caliber semi-automatic pistol. The defendant admitted the gun was his; he said he carried it for protection. Upon continuing their search of the residence, the detectives also found a sawed-off shotgun, a .22 caliber rifle, numerous rounds of live ammunition, drug paraphernalia and scales with meth residue, and a small amount of marijuana. During the search, defendant was interviewed by the detectives. Among other things, defendant stated that all the guns were his, and he admitted that he was a drug dealer.

When the detectives concluded their search, they locked the front and back doors and secured the residence. Defendant was then transported to the Warm Springs Detention Facility. Defendant was subsequently indicted in this case for being a felon in possession of the three firearms that were seized from his residence on April 21, 2008.

## **II. LEGAL ARGUMENT**

The detectives in this case acted reasonably and complied with the Fourth Amendment at all stages of their investigation.<sup>4</sup> As discussed below, Ninth Circuit precedent firmly supports the

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<sup>4</sup> Tribal police actions are governed by the Indian Civil Rights Act, which “imposes an identical limitation on tribal government conduct as the Fourth Amendment.” *United States v.*

detectives' actions in this case.

**A. The Detectives Lawfully Saw The Marijuana Pipe in Plain View through Defendant's Front Window**

The detectives lawfully saw the marijuana pipe in plain view through the front window of defendant's residence. As recognized by defendant, the Ninth Circuit has long held that anyone may "openly and peaceably, at high noon, [ ] walk up to the steps and knock at 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, salesman, or an officer of the law." *Davis v. United States*, 327 F.2d 301, 303 (9<sup>th</sup> Cir. 1964).

**1. Detectives' Purpose Was to Contact Defendant, Not Search Premises**

Even assuming, *arguendo*, that Detective Webb was on the curtilage of defendant's property when he was standing next to the front door of defendant's residence (which the government contends he was not), the Ninth Circuit has held that "[l]aw enforcement officers may encroach upon the curtilage of a home for the purpose of asking questions of the occupants." *United States v. Hammett*, 236 F.3d 1054, 1059 (9<sup>th</sup> Cir. 2001). While the defendant's motion fails to mention the principle, the Ninth Circuit stated ten years ago in *Hammett* that "we now make it clear that an officer may, in good faith, move away from the front door when seeking to contact the occupants of a residence." *Id.* at 1060; *see also*, *United States v. Garcia*, 997 F.2d 1273, 1279 (9<sup>th</sup> Cir. 1993) (same).

The Ninth Circuit's analysis therefore hinges on the officers' purpose for approaching the

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*Becerra-Garcia*, 397 F.3d 1167, 1171 (9<sup>th</sup> Cir. 2005) (quotation omitted). Fourth Amendment precedent is therefore used to evaluate the reasonableness of tribal officers' conduct. *Id.*

defendant's residence. If the officers' intent is to search, then they generally are not permitted to enter the curtilage. However, if, as here in the present case, the officers' intent is to make contact with the occupant or protect themselves, then they are permitted to enter the curtilage of defendant's residence.

Indeed, in *Hammett* the officers' actions were much more intrusive than the detectives' actions in the present case:

Once the officers reached the home, they knocked on the door and shouted "Police." When they received no answer, the officers looked through the window next to the door, but saw no inhabitants. [The officer] again yelled through the window, and again received no answer.

The officers then proceeded to circle the house, calling out "Police" and knocking on the walls as they went. The officers testified that they circled the home for the purposes of: (1) locating a back entrance; (2) contacting people behind the structure willing to speak with them; and (3) ensuring their safety. When the officers were approximately ten to fifteen feet away from having completely circled the home, [an officer] observed a small crack in the overlapping pieces of corrugated steel siding forming the walls of Hammett's residence. The crack was one-half to one inch wide. Through the crack, the officers observed at least three marijuana plants inside the residence.

*Hammett*, 236 F.3d at 1056-57.

In contrast, in the present case, Detective Webb responded to hearing movement inside defendant's residence by looking through a front window with open curtains for the purpose of contacting the residence's occupants and to ensure the detectives' own safety. Even though the officers' conduct in *Hammett* was more intrusive than the present case, the Ninth Circuit found the officers' conduct there to be lawful:

Hammett next argues that the officers violated his Fourth Amendment rights by moving away from his front door and circling his house. Our precedent demonstrates otherwise. Hammett's allegation that the police could not legally move away from the front door is squarely at odds with our decision in *Garcia*, in



which we held, “[t]his circuit and other circuits have [ ] recognized that officers must sometimes move away from the front door when they are attempting to contact the occupants of a residence. Generally, the subsequent discovery of evidence in plain view does not violate the Fourth Amendment.” *Garcia*, 997 F.2d at 1279.

We bolstered our holding in *Garcia* by noting the First Circuit case of *United States v. Daoust*, 916 F.2d 757 (1<sup>st</sup> Cir 1990), in which the court held that if the front door is inaccessible, “there is nothing unlawful or unreasonable about going to the back of the house to look for another door, all as part of a legitimate attempt to interview a person.” *Id.* at 758. We also relied upon the Eighth Circuit’s holding in *United States v. Anderson*, 552 F.2d 1296 (8<sup>th</sup> Cir. 1977), in which the court stated, “[w]e cannot say that the agents’ actions in proceeding to the rear after receiving no answer at the front door was so incompatible with the scope of their original purpose that any evidence inadvertently seen by them must be excluded as the fruit of an illegal search.” *Id.* at 1300.

To the extent our previous holdings have failed squarely to resolve the issue, we now make it clear that an officer may, in good faith, move away from the front door when seeking to contact the occupant of a residence.

Here, [the officer] testified that he and [another officer] walked around the house in an attempt to locate someone with whom they could speak. [The officer] additionally stated that he circled the house with the intent of locating another door and “for officer safety reasons.” Thus, the officers’ actions in the present case were entirely within the purview of the law, and did not run afoul of the Fourth Amendment.

*Hammett*, 236 F.3d at 1060.

The detectives did not conduct an unlawful search when they saw a full marijuana pipe through the front window of defendant’s residence.

## **2. The Area From Which The Pipe Was Viewed Was Not Curtilage**

The lawfulness of the detectives’ actions in this case when they looked through the front window of defendant’s residence should be resolved in the government’s favor if the Court credits the detectives’ anticipated testimony at the evidentiary hearing that: (1) they traveled to defendant’s residence to interview him regarding the stolen rifle; (2) they knocked on the front

door and no one answered; and (3) they looked through the front window to make contact with the occupant of the house and to ensure their own safety.

The government additionally and alternatively contends, however, that the area from which the detectives first viewed the marijuana pipe was not curtilage, as the area did not harbor “the intimate activity associated with the sanctity of a man’s home and the privacies of life.” *See United States v. Dunn*, 480 U.S. 294, 300 (1987) (quotation omitted). In *Dunn*, the Supreme Court outlined the following four factors when determining whether an area falls under the curtilage of a home: “[1] the proximity of the area claimed to be curtilage to the home, [2] whether the area is included within an enclosure surrounding the home, [3] the nature of the uses to which the area is put, and [4] the steps taken by the resident to protect the area from observation by people passing by.” *Id.* at 301.

Analysis of curtilage questions is a fact-specific inquiry. Here, the testimony and exhibits at the evidentiary hearing will show that the area in front of defendant’s window was not “so intimately tied to the home itself that it should be placed under the home’s ‘umbrella’ of Fourth Amendment protection.” *Id.* The officers were in a lawful location when they observed the marijuana pipe through the defendant’s front window with open curtains.

#### **B. The Officers’ Cursory Protective Sweep Was Justified**

The detectives in this case were confronted with a dangerous and uncertain situation when they arrested the defendant outside the back of his residence. Their subsequent protective sweep of the residence was justified.

In *Maryland v. Buie*, 494 U.S. 325, 333 (1990), the Supreme Court held that when a suspect is arrested in his residence, officers have an interest “in taking steps to assure themselves

that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack.” Therefore, officers may conduct a “cursory inspection of those spaces where a person may be found” if they have reasonable suspicion, based on articulable facts, that there might be other individuals in the house who pose a danger to the officers or others. *Id.* at 335. Officers may also conduct a protective sweep of a residence if they reasonably believe that entry is “necessary to prevent . . . the destruction of relevant evidence.” *United States v. Alaimalo*, 313 F.3d 1188, 1192-93 (9<sup>th</sup> Cir. 2002) (quoting *Bailey v. Newland*, 263 F.3d 1022, 1033 (9<sup>th</sup> Cir. 2001)).

In *United States v. Hoyos*, 892 F.2d 1387 (9<sup>th</sup> Cir. 1989) (overruled on other grounds by *United States v. Ruiz*, 257 F.3d 1030 (9<sup>th</sup> Cir. 2001)), the Ninth Circuit found that a protective sweep may also be justified when a defendant has been arrested outside, rather than inside, his house. There, the court reasoned that “[a] bullet fired at an arresting officer standing outside a window is as deadly as one that is projected from one room to another. The likelihood of the destruction of evidence is the same whether the arrest is indoors or in an outside area within the sight or hearing range of an accomplice within the residence.” *Id.* at 1397.

In the present case, the following reasonable and articulable facts, among others, were present to justify the detectives’ belief that a cursory protective sweep of the residence was necessary for officer safety and to prevent the destruction of evidence: (1) Six weeks earlier, on March 8, 2008, Warm Springs officers responded to a reported domestic disturbance at defendant’s residence, at which time defendant was observed to be high on methamphetamine while holding his infant daughter. A stolen rifle, live shotgun shells, methamphetamine and two smoking pipes were recovered from his residence, and two other intoxicated adults were present;

(2) When officers knocked on the door of defendant's residence on April 21, 2008, instead of answering the door, the defendant (or someone else) moved around inside, then defendant grabbed a full marijuana pipe in plain view, ignored the commands of a detective (with a drawn weapon) to show his hands and come out the front door, and then defendant ran and disappeared from view; (3) Defendant, who has a long and violent criminal history including firearms offenses, ran out the back door of the residence, without the marijuana pipe, and then initially refused repeated requests by detectives to get on the ground; (3) After the defendant refused to answer the detectives' questions about whether anyone else was in the house, the detectives knocked on the back door to the residence and yelled, "Police." However, a male inside the house did not immediately open the door, but instead said in a muffled voice that it was not his house; (4) Only then did defendant yell for the male inside the house to open the door, which the male finally did.

At this point, based on the above factors, the officers were justified in conducting a cursory protective sweep of the residence to ensure no one else was in the residence who may destroy evidence or harm an officer or another person. During the protective sweep, which was short and limited to areas that might harbor a person, the detectives noticed a .22 rifle in plain view on a bed, but they did not seize the rifle.

In assessing the facts involving officer safety, "[c]ourts must be careful not to use hindsight in limiting the ability of police officers to protect themselves as they carry out missions which routinely incorporate danger." *United States v. Castillo*, 866 F.2d 1071, 1079 (9<sup>th</sup> Cir. 1989) (quotation omitted). Here in the present case, the detectives' limited protective sweep of defendant's residence (in which nothing was even seized) was justified given the dangerous

circumstances of the situation and the fact that the defendant had already attempted to hide a full marijuana pipe immediately prior to his arrest. The detectives' actions were lawful.

**C. Defendant Voluntarily Consented To The Search of His Residence**

Following defendant's arrest, he voluntarily consented to a search of his residence. "The government bears the burden of proving that consent was voluntary." *United States v. Brown*, 563 F.3d 410, 415 (9<sup>th</sup> Cir. 2009). In *United States v. Cormier*, 220 F.3d 1103 (9<sup>th</sup> Cir. 2000), the Ninth Circuit discussed the factors used to analyze the voluntariness of consent:

"An individual may waive his Fourth Amendment rights by giving voluntary and intelligent consent to a warrantless search of his person, property or premises. The validity of [defendant's] consent is a question of fact, and its resolution depends upon the totality of the circumstances. . . .

This Court considers the following five factors in determining whether a person has freely consented to a search: (1) whether the defendant was in custody; (2) whether the arresting officers had their guns drawn; (3) whether *Miranda* warnings were given; (4) whether the defendant was told he had the right not to consent; and (5) whether the defendant was told that a search warrant could be obtained."

*Id.* at 1112.

In the present case, defendant was in custody when he gave consent, but "[a] person in custody is capable of giving valid consent to search." See *United States v. Crasper*, 472 F.3d 1141, 1149 (9<sup>th</sup> Cir. 2007) (quotation omitted). All four other factors weigh in favor of voluntariness. The detectives did not have their guns drawn when they requested defendant's consent to search his residence.<sup>5</sup> Defendant was read his *Miranda* rights and Warm Springs

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<sup>5</sup> The Ninth Circuit has reasoned that it does not "tip the scales in [defendant's] favor" when officers first approach a defendant with guns drawn but later do not have their weapons displayed during the time the officers request a defendant's request to search. *Brown*, 563 F.3d at 416.

Confederated Tribes Advice of Rights, which defendant said he understood. Defendant was told by the detectives at least twice before the search that it was completely voluntary on his part whether to consent and that he could stop the search at any time.<sup>6</sup> The detectives granted defendant's request to be present during the search, and defendant cooperated with the search. And, finally, the defendant was not told that a search warrant could be obtained.

In response to the detectives' thorough advice of rights and request for consent to search, defendant said, "Let's do it," and "Let's just do this." Once inside the house, the detectives again advised the defendant that his consent to allow them to search was voluntary on his part and that defendant could stop the search at any time. Defendant said he understood, and then the detectives began their search. Defendant clearly gave voluntary consent for the detectives to search his residence. The search was lawful. Therefore, the officers legally seized the guns, ammunition, drugs, and drug paraphernalia found in the residence.

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<sup>6</sup> Additionally, a defendant's "very long, detailed, and thorough experience with law enforcement" has been found by the Ninth Circuit to "increase[] the likelihood that [defendant] was already aware of his rights to refuse consent and to remain silent." *Cormier*, 220 F.3d at 1112.

### III. CONCLUSION

Based on the reasons stated above, at the conclusion of the evidentiary hearing in this matter, the government will respectfully request that Defendant's Motion to Suppress Evidence and Statements be denied.

DATED this 14<sup>th</sup> day of February, 2011.

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/s/ Craig J. Gabriel  
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