

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

ENTERED
FEB 14 2005
U.S. DISTRICT COURT
ELKINS, WV 25011

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CRIMINAL ACTION NO. 2:04-CR-30

KARL KEVIN HILL,

Defendant.

REPORT AND RECOMMENDATION

On the 26th day of January, 2005, and again on the 8th day of February, 2005, came the Defendant, Karl Kevin Hill (hereinafter "Hill"), in person and by his counsel, S. Sean Murphy, and also came the United States by its Assistant United States Attorney, Stephen D. Warner, for hearings on Defendant's Motion to Suppress All Evidence and Memorandum in Support of Motion to Suppress All Evidence [Docket Entry 16].

This matter came to be heard upon the following: Hill's motion to suppress all evidence [Docket Entry 16]; the United States' Objection to Defendant's Motion to Suppress All Evidence [Docket Entry 17]; the duly sworn testimony of Mitchell Payne, Mark B. Cunningham, Christopher Shrader, and Donna Phillips; the exhibits tendered and admitted for both Hill and the United States; the post-hearing exhibit, an audiotape of a preliminary hearing held in a corresponding State of West Virginia proceeding; and the argument of counsel for the United States and counsel for Hill.

I. Procedural History

Hill was indicted by the grand jury attending the United States District Court for the Northern District of West Virginia on December 15, 2004. The three-count indictment and forfeiture allegation alleges and charges Hill with being involved in: 1) a conspiracy to manufacture and

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distribute methamphetamine, also known as "crank," a controlled substance (Count One); 2) possession with intent to distribute marijuana (Count Two); 3) possession of a firearm in furtherance of a drug crime (Count Three); and 4) a forfeiture allegation by which the United States seeks the forfeiture of certain enumerated firearms allegedly used in the commission of the conspiracy offense alleged in Count One of the indictment.

Hill was arraigned on the indictment on December 29, 2004, and a scheduling order was entered on the same date, scheduling the within matter for trial on March 3, 2005 [Docket Entry 13].

By order entered December 27, 2004 [Docket Entry 10], the undersigned Magistrate Judge was authorized to conduct any necessary hearings to resolve motions or in preparation for submission of proposed findings of fact and recommendations for disposition relative to pre-trial motions filed on behalf of either the United States or Hill.

On January 14, 2005, Hill filed his Motion to Suppress All Evidence and Memorandum in Support of Motion to Suppress All Evidence [Docket Entry 16]. On January 20, 2005, the United States filed its Objection to Defendant's Motion to Suppress All Evidence [Docket Entry 17].

An initial hearing was held on the issues raised by Hill's motion on January 26, 2004. The undersigned afforded the parties opportunity to submit additional written briefs on issues raised by the undersigned during the hearing. Contemporaneous with receipt of the additional briefings, the undersigned entered an order scheduling an additional evidentiary hearing relative to Hill's motion [Docket Entry 18].

On February 8, 2005, again came the Hill in person and by his counsel, S. Sean Murphy, and the United States by Stephen D. Warner, its Assistant United States Attorney. Additional sworn testimony was received from State Police Sergeant Mark B. Cunningham (hereinafter "Sergeant

Cunningham”) and Trooper Christopher Shrader (hereinafter “Trooper Shrader”) after which the record was closed.

The matter is now pending before the undersigned for Report and Recommendation to the District Court.

II. Statement of Relevant Facts

On or about September 2, 2004, a Barbour County, West Virginia, magistrate issued a capias for the arrest of Kyle Lantz (hereinafter “Lantz”). Government Exhibit No. 1. The capias was brought to the attention of Mitchell Payne, Chief of Police for the City of Philippi (hereinafter “Chief Payne”), Barbour County, West Virginia.

Between September 2, 2004, and September 22, 2004, Chief Payne entered into a store owned or managed by Keith Jones, a councilman for the City of Philippi. As Chief Payne entered the store, he passed by Lantz’s father. Chief Payne had no direct communication with Lantz’s father. While in the store, Chief Payne was told by Keith Jones that Lantz’s father said his son (Kyle Lantz) was staying (with Hill) at Mud Gut Road.¹

Chief Payne knew that Mud Gut Road was located outside of the Philippi city limits and, therefore, outside his jurisdiction. Within a couple hours of talking with Keith Jones, Chief Payne encountered Sergeant Cunningham and told him of the capias and his conversation with Mr. Jones. Chief Payne asked Sergeant Cunningham if he would check the matter out as he got the opportunity.

Some time after receiving the information from Chief Payne and obtaining a copy of the capias against Lantz, Sergeant Cunningham was involved with the Barbour County Sheriff on an

¹ No details such as to :1) what time frame was Lantz’s father referring relative to his son’s staying at Hill’s residence and 2) when or how Lantz’s father learned that his son was staying at Hill’s house, were provided.

unrelated matter and decided to act on the *capias*.² Sergeant Cunningham had no idea what Hill looked like and where his house was located on Mud Gut Road .

At approximately 10:30 or 11:00 on the evening of September 22, 2004, Sergeant Cunningham, while at the offices of the Barbour County Sheriff, conducted, or had someone else conduct, a computer search for information concerning the location of the residence of Hill on Mud Gut Road. During a "27" (drivers license) search or NCIC search, Sergeant Cunningham "stumbled on" and confirmed information indicating Hill was a convicted felon. An unidentified law enforcement officer told Sergeant Cunningham and/or Trooper Shrader that Lantz ran before and suggested that, when confronted by police, Lantz might attempt to flee.

Within a short time of receiving this information, Sergeant Cunningham, Trooper Shrader, the Sheriff of Barbour County, West Virginia, and a Deputy Sheriff of Barbour County, West Virginia, proceeded to Mud Gut Road in four (4) separate police vehicles in search of the Hill residence.

Sergeant Cunningham did not have a picture of Lantz nor did he personally know Lantz. He also had no idea what Lantz looked like. Trooper Shrader had been told by an unidentified person that Lantz was a "small-framed, scruffy white guy." No evidence was presented to suggest that any of the police involved in seeking the whereabouts of Lantz at Hill's residence on Mud Gut Road did anything to confirm details of the report that Lantz was staying at Hill's residence or that Lantz was, in fact, at Hill's house on the night of September 22, 2004, or to verify his physical identity. The

² The evidence is disputed whether Sergeant Cunningham acted on the information Chief Payne gave him within a day or two or within a week or so. Sergeant Cunningham was unable to tell the undersigned whether it was a couple of days or five days between the time Chief Payne got the information concerning Lantz staying with Hill on Mud Gut Road and when he decided to execute the *capias*.

police did not apprise themselves of the underlying charges that gave rise to the *capias* for Lantz.

As the four (4) police cars progressed on Mud Gut Road, they observed a person talking on a cellular phone near a carport. The officers stopped, and Sergeant Cunningham inquired if the person knew Hill. The unidentified individual told Sergeant Cunningham that he was just visiting in the area and did not know Hill or where he lived.

The police caravan continued its search for Hill's residence on Mud Gut Road. The officers came upon another house and stopped. The plan was for the Sheriff and Sergeant Cunningham to approach the front of the house and the other officers to go around to the rear of the house once it was located. As the police exited their cruiser as shown on Defendant's Exhibit 1, a man exited the house and approached the Sheriff. The Sheriff asked the unidentified individual if the house was Hill's house. The individual answered "yes." While the Sheriff continued to talk with the unidentified individual³, Sergeant Cunningham proceeded to the front porch of the residence. Sergeant Cunningham is unclear whether the screen door was open or whether he opened it. He knocked on the door. Sergeant Cunningham gives no explanation why he did not look through the glass door pane before he knocked on the door. As he knocked on the door, it opened a couple of inches.⁴ Sergeant Cunningham could see several individuals inside the residence "scurrying around." He could not state that the men were or were not moving around in the house before he knocked on

³The Sheriff inquired as to the whereabouts of Lantz. The unidentified individual told the Sheriff that Lantz had been there but had left. From the motion hearing testimony and the State preliminary hearing testimony, it is unclear what was said and who was contemporaneously present to hear it.

⁴ There was some dispute or contradiction in Sergeant Cunningham's testimony as to whether he opened the screen door or if it were already standing open. Based upon a review of the transcript of the preliminary hearing in the State case, the undersigned concludes that Sergeant Cunningham opened the screen door.

the door. He did not know any of the people in the house at the time he saw them through the door. He could not identify what any of the people were doing except that they were "scurrying around." He did not identify anything or observe anything that appeared to be criminal in nature.⁵ He saw no weapons. Nonetheless, Sergeant Cunningham was concerned with seeing the movement (people scurrying around); not knowing if Lantz was inside the house and might run; that one of the people inside the house had seen him and seemed to ignore his presence; and that he was at a convicted felon's house. He was also concerned that the individuals may be getting a weapon or Lantz may have been in the process of fleeing.

As a result of these concerns, Sergeant Cunningham opened the front door of the house completely. He did not see any guns or drug paraphernalia as he looked through the glass pane in the door or as he looked through the open door after pushing it open. Sergeant Cunningham did not enter the room immediately. He did not unlatch the protective thumb latch to the holster of his sidearm. He did not put his hand on the side arm. He does not recall having a flashlight much less holding it at the ready like a club. He stood there in the doorway observing what was going on and asking for Hill.

Hill entered the front room/livingroom from a bedroom and proceeded to sit in a recliner located to the right of the front door. After Hill sat down, Sergeant Cunningham, stepped across the

⁵ There was conflict in the testimony between Sergeant Cunningham and Hill's female friend/fiancee, Donna Phillips, relative to what Sergeant Cunningham could have seen through the paned glass of the front door because, according to Phillips, a Venetian-type mini blind, as shown in Defendant's Exhibit _____, was usually closed. The undersigned concludes that there is no direct evidence that the mini blind was closed on the night when Sergeant Cunningham was looking through the glass window in the front door or, that if it were partially blinded, he could not have seen what he described as people "scurrying around" during his testimony.

front door threshold into the front room/livingroom and stood beside of Hill's recliner. Sergeant Cunningham testified Hill did not invite him into the residence. Sergeant Cunningham asked Hill if Lantz was at the residence. Hill told Sergeant Cunningham that Lantz had been there but had left. Sergeant Cunningham requested Hill's permission to search the residence for Lantz. A spirited colloquy occurred between Sergeant Cunningham and Hill over Sergeant Cunningham's apparent refusal to take the word of Hill that Lantz was not present. Sergeant Cunningham relaxed after entering the house and while talking with Hill. Hill, unequivocally, and using colorful language, denied Sergeant Cunningham's request to search the residence. As of that moment, Sergeant Cunningham still had not seen, heard or smelled anything illegal nor had he observed any behavior that indicated aggression toward him. Sergeant Cunningham testified he did not recall ordering or directing any of the individuals to stop, stay in place, sit down or otherwise command them to do anything.

Sergeant Cunningham turned toward the three individuals who were sitting on the couch and in a chair in the front room/livingroom and one individual standing in the doorway to the kitchen across the room and questioned each, in turn, as to his identity. He explained that he asked them their identities because he did not know what Lantz looked like. The last asked person identified himself as J. R. Harris. Remembering that there may have been a capias for an individual with that name, Sergeant Cunningham turned to speak to the Sheriff, who was outside the residence and asked if there was a capias for J. R. Harris. As Sergeant Cunningham spoke to the Sheriff, Harris ran through the house toward the back, exited the back door, and ran right into the waiting arms of Trooper Shrader and a Deputy Sheriff of Barbour County, both of whom had circled the house in anticipation that Lantz might flee if confronted. Sergeant Cunningham followed J. R. Harris

through the house and, after seeing that the officers had Harris under control, turned and proceeded back toward the front of the house. As he did so, he asked Hill why J. R. Harris had left in such a hurry. At approximately the same point in time, Sergeant Cunningham looked toward the bedroom and saw a firearm leaning against the wall near the bed in plain view. Sergeant Cunningham then asked Hill, "Aren't you a convicted felon?" Hill responded that he was.

On questioning by the Court during the initial hearing and the renewed hearing, Sergeant Cunningham testified he did not seek a search warrant for the Hill house prior to leaving the Sheriff's detachment to go to Mud Gut Run because he did not have probable cause. He also stated during his testimony at the renewed hearing that he believed he did not need a search warrant because he had a *capias*. Sergeant Cunningham further testified that once at Hill's residence, he did not ask permission to step across the threshold and enter Hill's residence. Sergeant Cunningham testified that once inside the residence, Hill did not tell him to get out. Sergeant Cunningham further testified that, after Hill told him Lantz was not at the residence, and before he started questioning the identities of the people in the house who were sitting on the couch, chair and standing, he: 1) had not observed anything that would indicate to him that a crime was in progress; 2) had nothing other than the statement by the councilman backed up by Hill's statement to confirm that Lantz had ever been at Hill's residence; 3) was not in hot pursuit of anyone at the Hill residence; 4) did not perceive any fear of injury to any person or property if an arrest of Lantz were delayed, even assuming that Lantz was in the Hill residence; 5) understood a county/state magistrate was readily available for the issuance of a warrant to search Hill's residence; and 6) knew there were officers available to keep watch on the premises while such a search warrant was sought. It is uncontradicted that the residence was Hill's residence, and it must be concluded that the officers never suspected that Lantz

had ever been anything but a visitor or guest at Hill's home at some point in time prior to September 22, 2004.

Further testimony revealed that at some point after Harris was subdued outside of the back of the Hill house, Trooper Shrader noticed an odor and called for Sergeant Cunningham to come and investigate. Sergeant Cunningham exited the front room/livingroom of Hill's residence and proceeded toward the rear of the house. Before Sergeant Cunningham was called by Trooper Shrader, he had not smelled any noxious odor as he approached the Hill residence or while he was in the residence (a period of a couple of minutes). No one had radioed him that a noxious odor had been smelled outside until after Harris ran from the house and the other officers apprehended him somewhere behind the house. Sergeant Cunningham continued toward the mobile home-type trailer in the back yard. As he arrived at or near the trailer, he smelled what he thought was a methamphetamine lab. He also noticed a plastic jug with a small hose coming out of it spewing vapor on the ground near a mobile home-type trailer. He observed that the mobile home-type trailer had a hasp and a lock. The hasp was closed and the lock was hanging in it, but was not locked.

Sergeant Cunningham directed that Hill be arrested. He returned to the front yard and asked Hill for permission to search the mobile home-type trailer. Hill denied any interest in the trailer or ownership in the trailer and indicated that if the officers wanted to search it, they would have to get permission from his sister, Donna Sue Campbell (hereinafter "Ms. Campbell"). He pointed in the direction of her house.

Sergeant Cunningham instructed the other officers to transport the people in the house, including Hill, to the detachment while he went to Hill's sister's residence to obtain consent for a search.

Sergeant Cunningham approached Hill's sister, Ms. Campbell, and told her why the officers were there and explained that there may be some danger of a fire or explosion in the trailer if there were a methamphetamine lab located there and if it were left cooking unattended. Ms. Campbell expressed concern about damage or destruction of family heirlooms that may have been left in the mobile home-type trailer by her late father and gave permission to Sergeant Cunningham to search the mobile home-type trailer. The permission was given on a handwritten consent to search form. Government Exhibit No. 3. Trooper Shrader testified it was his clear understanding that the written consent to search signed by Ms. Campbell authorized only a search of the trailer even though it stated "property owned by me."

Using the consent to search, the officers entered the mobile home-type trailer. The odor and fumes were very strong, and they exited quickly after determining there were no stoves or fires actively cooking what they believed to be methamphetamine.

Sergeant Cunningham dispatched Trooper Shrader to a county/state magistrate to obtain a search warrant not only for mobile home-type trailer but also for the Hill residence, both of which were located on the same piece of property. It was not disputed that Hill had posted "No Trespassing" signs at various points around the house and property.⁶

Trooper Shrader called the 911 dispatch operator while he was in route to the Sheriff's office at the Barbour County Courthouse to request that the on-duty county/state magistrate meet him for the issuance of a search warrant. Upon his arrival at the Sheriff's office, he used the Sheriff's

⁶ Some of the "No Trespassing" signs were posted after the events of September 23-24, 2004, and, therefore, Defendant's Exhibits 3 and 4 may not be accurate with respect to the "No Trespassing" signs shown.

computer to prepare the Application For Search Warrant. No one else assisted in the typing of the information on the application or the wording of the affidavit he signed in support of the issuance of the warrant. When the magistrate arrived, other than the usual pleasantries, no information was provided to the magistrate aside from that which had been typed by Trooper Shrader on the application. The county/state magistrate did not ask Trooper Shrader any questions, and Trooper Shrader did not volunteer any additional information. The county/state magistrate simply asked Trooper Shrader if he swore to the contents in the Application For Search Warrant to which he responded that he did. He then signed it and the county/state magistrate, without more, issued it and left.

Trooper Shrader returned with a State search warrant. Sergeant Cunningham asked Trooper Shrader if he got the warrant. Trooper Shrader told his sergeant that he had. Sergeant Cunningham did not ask to read, and did not read, the warrant prior to executing it. Searches of the mobile home-type trailer, as well as the Hill house, were conducted.

Trooper Shrader testified that all the evidence seized and ultimately removed from the residence and the mobile home-type trailer were photographed in place prior to being removed. He further testified, based upon his credible recollection, where each item of evidence, as shown on the inventory and criminal investigation report, was located and seized. It is undisputed that none of the firearms listed in the search and seizure inventory or criminal investigation report and in Count Three and the forfeiture allegation of the indictment was found in the mobile home-type trailer. All of those firearms were found in Hill's residence. Trooper Shrader marked each item removed from the Hill residence with "H" and each item removed from the trailer with "T".

III. Contentions of the Parties

Hill contends that the evidence seized during the searches of his home and mobile home-type trailer located behind his home should be suppressed for the following reasons:

1. The law enforcement officers lacked probable cause and a valid search warrant to search his home.
2. No exceptions to the warrant requirement of the Fourth Amendment existed which excused the warrantless search of Hill's home.
3. The evidence seized during the search of the mobile home-type trailer located behind Hill's residence is subject to suppression under the fruit of the poisonous tree doctrine.
4. All evidence was obtained as a result of the violation of Hill's Fourth Amendment Constitutional rights and, therefore, should be suppressed, not only as fruit of the poisonous tree but under the exclusionary rule adopted "to deter future unlawful police conduct."⁷

The United States contends:

1. Pursuant to the language of *Payton v. New York*, 445 U.S. 573 (1980), the officers had a right to enter Hill's home to look for Lantz, whom they had reason to believe was living at Hill's residence.
2. Even if the *capias* did not give authority to enter the Hill residence, Sergeant Cunningham had a right to knock on the front door and speak with Hill through the opened door and inquire as to the identity of the persons in plain view before him and, further, upon learning that one of those individuals was a person, J. R. Harris, who was the subject of a fugitive warrant, had the right to attempt to apprehend him, and it was during this pursuit that Sergeant Cunningham observed a firearm near the headboard of Hill's bed in an open bedroom.
3. Hill does not have standing to object to the search of the mobile home-type trailer inasmuch as he denied any ownership interest therein.⁸

IV. Discussion

⁷ Hill's brief does not clearly address the real legal issues as they appeared during the hearing of January 26, 2005.

⁸ The United States' brief does not clearly address the real legal issues as they appeared during the hearing of January 26, 2005.

1. **An arrest warrant, as opposed to a search warrant, is not adequate to protect the Fourth Amendment interests of persons not named in the warrant, when their homes are searched without their consent and in the absence of exigent circumstances.**

The Supreme Court of the United States has “consistently held that the entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant.” *Steabald v. United States*, 451 U.S. 204, 211, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981) citing *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); *Johnson v. United States*, 333 U.S. 10, 13-15, 68 S.Ct. 367, 369-369, 92 L.Ed. 436 (1948).

“In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house.” Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.” *Steabald v. United States*, 451 U.S. 204, 211, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981) citing *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980).

In the instant case, Sergeant Cunningham was armed with a *capias* (arrest warrant) for Lantz. However, as in *Steabald*, the Fourth Amendment interest is being raised by Hill, a person not named in the arrest warrant.

As pointed out in *Steabald, supra* at 212, “[t]he purpose of a warrant is to allow a neutral judicial officer to assess whether the police have probable cause to make an arrest or conduct a search.” “[T]he placement of this checkpoint between the Government and the citizen implicitly acknowledges that an ‘officer engaged in the often competitive enterprise of ferreting out crime,’ may lack sufficient objectivity to weigh correctly the strength of the evidence supporting the contemplated action against the individual’s interests in protecting his own liberty and the privacy

of his home.” (Internal citations omitted).

Even though both the arrest warrant and the search warrant are subject to a probable cause determination, “the interests protected by the two warrants differ. An arrest warrant is issued by a magistrate upon a showing that probable cause exists to believe that the subject of the warrant has committed an offense, and, thus, the warrant primarily serves to protect an individual from an unreasonable seizure. A search warrant, in contrast, is issued upon a showing of probable cause to believe that the legitimate object of a search is located in a particular place and, therefore, safeguards an individual’s interest in the privacy of his home and possessions against the unjustified intrusion of the police.” *Steabald, supra* at 213.

2. Judicially untested determinations are not reliable enough to justify an entry into a person’s home for objects in the absence of a search warrant.

In the instant case, as in *Steabald*, the arrest warrant for Lantz authorized the police to seize him in a public place or at his home because there was probable cause to believe that he had failed to appear at the Barbour County Magistrate Court as required. However, Sergeant Cunningham and the officers associated with him believed they only needed the *capias* to enter the home of Hill, a third party who was foreign to the *capias*, in an attempt to locate Lantz. “Regardless of how reasonable this belief might have been, it was never subjected to the detached scrutiny of a judicial officer.” Accordingly, “while the warrant in this case may have protected (Lantz) from an unreasonable seizure, it did absolutely nothing to protect (Hill’s) privacy interest in being free from an unreasonable invasion and search of his home. Instead, (Hill’s) only protection from an illegal entry and search would be the agent’s (Sergeant Cunningham) personal determination of probable cause.” Such a determination is “not reliable enough to justify an entry into a person’s home to ...

search . . . a home for objects in the absence of a search warrant.” *Steabald, supra* at 213.⁹

The Court in *Steabald*, at 215, recognized that permitting “the police, acting alone and in the absence of exigent circumstances” to “decide when there is sufficient justification for search the home of a third party for the subject of an arrest warrant – would create a significant potential for abuse.” For instance, the police with a warrant for the arrest of a single person could search all of the homes of his friends and acquaintances, *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966) or the police could use an arrest warrant as a pretext for entering a home in which the police suspect but do not have probable cause to believe illegal activity is taking place. *Chimel v. California*, 395 U.S. 752, 767, 89 S.Ct. 2034, 2042, 23 L.Ed.2d 685 (1969). In the instant case, it must be pointed out that the undersigned inquired of Sergeant Cunningham why, before leaving the Sheriff’s office for Mud Gut Road, he did not seek a search warrant for Hill’s residence based on the information provided by Lantz’s father indirectly through the city councilman. Sergeant Cunningham stated he did not believe he needed a search warrant since he already had a *capias* for Lantz, and, further, he did not believe he had probable cause for the issuance of a search warrant for Hill’s house.

Even before *Steabald*, the Fourth Circuit addressed the issue in *Wallace v. King*, 626 F.2d 1157 (1980). The police were seeking a woman named in a valid arrest warrant for violation of a court order in a domestic relations case involving secreting of a minor child. Pursuant to a call by the woman’s estranged husband, the police were advised that the woman, Susan Swain, was at her parents’ home. The estranged husband led the police to the parents’ home and pointed out a car he identified as hers. It turned out the car was registered to Swain’s parents. The officers were

⁹ Sergeant Cunningham, however, admits he lacked probable cause and never considered probable cause because he erroneously believed a *capias* was sufficient authority to give him access to Hill’s home.

admitted to the parents' residence and stated they wanted to search for Mrs. Swain because of the bench warrant. The homeowners asked if the officers had a search warrant to which the officers responded that they did not need one since they had the bench warrant. A walk through search was conducted. About a month later, a similar situation occurred with respect to the residence owned by friends of Mrs. Swain. Again, the homeowner's inquiry about a search warrant was met by the officer's statement that he had a bench warrant and that was sufficient to authorize the search. The search was conducted.

In reversing and remanding, in part, the dismissal of the civil suit brought by the homeowners against the police based on the warrantless searches, the Fourth Circuit held:

For search for person named in arrest warrant to be constitutionally conducted on premises of third person without search warrant, officers must have probable cause to believe named person is on premises and there must be exception to warrant requirement, e.g., consent of owner or occupier or exigent circumstances, including hot pursuit or justifiable fear of injury to persons or property if arrest is delayed and among factors to be considered are availability of a magistrate in area of entry, availability of another officer to watch premises while search warrant is sought, nature of premises to be entered and whether officers have reasonable cause to believe that subject of arrest warrant owns or resides therein." *Wallace, supra*, 1161. (1980).

Sergeant Cunningham stepped across the threshold of Hill's front door and entered Hill's house without Hill's permission and proceeded to conduct inquiries of people within Hill's residence without a search warrant issued under the scrutiny of a detached and independent judicial officer in violation of Hill's rights under the Fourth Amendment.

3. Exigent circumstances did not exist justifying police entry into Hill's home without a search warrant issued by a detached judicial officer.

Even if Sergeant Cunningham believed Lantz had been in Hill's residence prior to September 22, 2004, no exigent circumstances existed which supported Sergeant Cunningham's entry into Hill's residence.

Exigent circumstances permit a warrantless search when probable cause exists and the officers reasonably believe that contraband or other evidence may be destroyed or removed before a search warrant can be obtained. *Mincey v. Arizona*, 437 U.S. 385, 392-94 (1978); *United States v. Taylor*, 90 F.3d 903, 907 (4th Cir. 1996); *United States v. Turner*, 650 F.2d 526, 528 (4th Cir. 1981).

In the instant case, Sergeant Cunningham was unable to meet either of the threshold tests. He stated in his testimony that the reason he did not seek a search warrant in the first instance was that he did not believe he had probable cause.¹⁰ At the moment he stepped over the threshold into Hill's residence, his lack of probable cause had not improved. The undersigned questioned Sergeant Cunningham relative to any exigent circumstances which may have existed for his warrantless entry into Hill's residence. Sergeant Cunningham's testimony was that when he stepped into Hill's residence and before he started questioning the occupants for their identities: 1) he had not observed any illegal conduct;¹¹ 2) he could have gone or sent someone to a county/state magistrate for a

¹⁰Sergeant Cunningham testified at the January 25, 2005 hearing:

"There wasn't any probable cause to get a search warrant in those days."

When asked if he had the opportunity to get a search warrant for the Hill residence prior to going there to look for Lantz on September 22, 2004, he testified:

"Without probable cause I wouldn't have had the opportunity, sir."

¹¹Sergeant Cunningham testified at the January 25, 2005 hearing:

Q. "You didn't see any guns or drug paraphernalia when you looked through the window or crack in the doorway?"

A. "No, sir. All I saw was several subjects moving around."

Q. "Did you see any weapons?"

A. "At that point no, sir."

search warrant but did not do so;¹² 3) the perimeter of the Hill house was under control and there was surveillance by the police;¹³ 4) there was no thought that someone would be hurt or that property would be destroyed if apprehension of Lantz was delayed;¹⁴ 5) the premises was located on a country road with little means of escape; and 6) the only reasonable basis he had that Lantz was in the Hill house was the unverified information that indirectly came from Lantz's father as much as a week earlier.¹⁵ The following steps are used to determine whether exigent circumstances may justify a search without a warrant:

¹²It is obvious that a magistrate was available because a search warrant was later obtained by Trooper Shrader on September 23, 2004. Government Exhibit 2.

¹³Sergeant Cunningham testified at the January 25, 2005, hearing:

- Q. "What would have stopped you or other officers once you had the house surrounded, and you did that immediately upon arriving, correct sir?"
- A. "Right. I had guys go watch the back corner. Yes, sir."
- Q. "What would have been the inhibitor or the stopping of you from then sending someone or going yourself to a magistrate within Barbour County and seeking out a warrant to search?"
- A. "I don't know that there was an inhibitor, per se, Your Honor. I had the capias and just merely going to the location and knock on the door and ask for him."

¹⁴Sergeant Cunningham testified at the January 25, 2005, hearing:

- Q. "Was there any indication to you that there might be injury to persons or property if the arrest of this fellow, Lantz, would be delayed beyond the point when you were out there at the Hill residence?"
- A. "No, sir. No, sir, I don't think . . ."

¹⁵Sergeant Cunningham testified at the January 25, 2005, hearing:

- Q. "What other information did you have which assured you Lantz would be there at that residence?"
- A. "Nothing, sir."
- Q. "You're unable to tell me how long it was between the information that the chief got and when you actually went out?"
- A. "It was a few days. To be specific, no, Your Honor. I can't tell you if it was two days, three days, five days. I can't, Your Honor. It was so short a period of time."

- (1) The degree of urgency involved and the amount of time necessary to obtain a warrant;
- (2) The officers' reasonable belief that the contraband is about to be removed or destroyed;¹⁶
- (3) The possibility of danger to the police guarding the site;¹⁷
- (4) Information indicating the possessors of the contraband are aware that the police are on

their trail; and

- (5) The ready destructibility of the contraband. *U.S. v. Kelly*, 650 F.2d 526, 528 (4th Cir. 1981).

Sergeant Cunningham did testify that he was uncomfortable, nervous, and concerned as he saw individuals moving about in the house and one individual looked at him and appeared to recognize that the police had arrived but did not acknowledge Sergeant Cunningham.¹⁸ However,

¹⁶Sergeant Cunningham testified at the January 25, 2005, hearing:

- Q. "You had not seen anything or not smelled anything that you would have considered evidence of a crime?"
- A. "Not myself. No, sir. No."
- Q. "Had anyone radioed you that we got a strange smell out here up to that point?"
- A. "No, sir."
- Q. "And they'd been around back?"
- A. "Yes, sir. We're talking about a very short time there in conversation of Mr. Harris bolting. But no, sir."
- Q. "How much time would you say you were standing there in front of the recliner, either talking to Mr. Hill or talking to the other individuals within the living room area before Mr. Harris bolted?"
- A. "I would say the whole conversation couldn't have been more than a couple of minutes."

¹⁷Sergeant Cunningham testified at the January 25, 2005, hearing:

- Q. "Did you have any information that Lantz had been involved in some sort of violence or had threatened violence or threatened destruction of property, anything of that nature?"
- A. "Not that I knew, sir. I knew there was a capias on him for failure to appear."

¹⁸During the January 26, 2005, hearing Sergeant Cunningham testified:

"As I went up to the porch, somewhat enclosed with plastic at the time if I remember correctly, I opened up the screen door and knocked on the door." . . . "I don't remember if the screen door was open or if it was on a closure. If I opened it and knocked. I think I

during re-examination on the same subject matter during the February 8, 2005, hearing, Sergeant Cunningham testified he did not take hold of his sidearm or even release the inside thumb strap that held his sidearm in its holster prior to stepping through the wooden door he had opened and into the living room of Hill's residence.

Applying the steps to the facts of the subject case, the undersigned concludes that the police had no probable cause for a warrant and that no exigent circumstances were considered or were in existence as of the moment Sergeant Cunningham crossed the threshold into Hill's house. By his own admission, there was no urgency. By the facts, a magistrate was available. By Sergeant Cunningham's admission, the officers had the Hill residence surrounded and secure, and the officers knew of no contraband. The police did not know of any danger and did not even know the

opened it up and knocked on the wooden door." . . . "No, sir. I don't recall precisely whether I opened the screen door to knock on the hardwood door or if the door was standing open. I do not recall." . . . "The door has a big glass pane in it and I could see inside the house at that point."

Q. "Since it had a glass pane in it, were you able to see inside the room?"

A. "Yes, sir. I was." . . . "When I looked in, there were several subjects really moving and scurrying around the living room and off to the right where I couldn't see. There was a lot of movement inside." . . . "I think one person even looked towards the door and just kind of ignored that I was even there and knocking." . . . "The one thing that really concerned me, Your Honor, was when one of the subjects turned and looked at the door, and I know he had to see me there because I could see him clearly, and just ignored me and went on. I mean, that was one thing that really concerned me about the situation." . . . "Well, it was a concern that they knew we were there apparently. One person even kind of looked and acknowledged, and I don't remember which one it was, . . ., which I shouldn't say acknowledged, saw me there and made no, you know, real effort."

Q. "So they could have been in movement before you even knocked on the door?"

A. "It's possible. Yes, sir." . . . "So I opened the door to make sure what was going on. I was at a convicted felon's door. There was a lot of movement inside and I asked for Kevin Hill." . . . "I was concerned about what was going on in there. You know, what was going on? Was they getting guns? Were they, you know, just trying to hide something? Was Kyle Lantz trying to go out a window? Exactly what was going on." . . . "It wasn't the normal movement in a house, you know, of multiple people, one or two up stirring around. It was a lot of movement."

underlying basis for the capias against Lantz. They did know from the capias that it had been issued by a county/state magistrate for non-appearance. The closest the police came to an exigent circumstance is information that Lantz might flee, but the police covered that contingency by surrounding the house and watching the exits. The police knew that Lantz did not own the residence. The information the police had relating to Lantz living at Hill's was stale by September 22, 2005, and they had no knowledge contemporaneous with their arrival at the Hill residence that Lantz was actually at the Hill residence.¹⁹

Sergeant Cunningham was not invited to enter Hill's residence. The first person who saw him apparently ignored the Sergeant's existence. Sergeant Cunningham testified on questioning by the undersigned during the hearing of January 25, 2005: Q. "Had he [Hill] invited you in?" A. "No, sir. I wouldn't say he had invited me in." On the same subject, Sergeant Cunningham testified on cross-examination: Q. "Mr. Hill didn't come out of another room in the house and say, 'Oh, hey, Sergeant Cunningham, old buddy, old pal. Come on in'?" A. "No, sir." Q. "So he didn't invite you to come into the house. You kinda just met him there and started asking questions." A. "Right. There as a conversation ensued as I was entering or as he was exiting and setting down. I know I didn't immediately enter. I was kind of watching what was going on and asking for him."

Sergeant Cunningham unequivocally knew that Hill refused consent to search his house.

¹⁹Sergeant Cunningham testified at the January 25, 2005 hearing:

- Q. "Other than the fact that there was a capias for this Lantz and other than the sheriff had told you, not the sheriff, the chief of police had told you that he'd gotten information that Lantz was living out at Hill's?"
- A. "Yes, sir."
- Q. "What other information did you have which assured you Lantz would be there at that residence?"
- A. "Nothing, sir."

Before Sergeant Cunningham started asking Hill's guests for their identities, Sergeant Cunningham knew from Hill that Lantz was not in the house.²⁰ Instead of withdrawing, Sergeant Cunningham, while standing inside Hill's residence without invitation, without a search warrant and without exigent circumstances, began interrogating Hill's guests, none of whom Sergeant Cunningham knew.

4. **Hill had no Fourth Amendment interest in the mobile home-type trailer located behind his house and, therefore, has no standing to object to the search or to the use of any evidence seized as a result of the warrantless consent to search or later warranted search of that mobile home-type trailer.**

Hill denied ownership or control of the mobile home-type trailer located approximately thirty-five (35) feet behind his residence. He told the police to get in touch with his sister, Ms. Campbell, if they wanted to search the mobile home-type trailer and pointed in the direction of her residence. Accordingly, Hill lost any standing he may have had to protest or contest the search of the mobile home-type trailer, whether the search was done pursuant to the written consent to search signed by Hill's sister or the later obtained search warrant. *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980); *United States v. Carter*, 300 F.3d 415, 421 (4th Cir. 2002). To the extent Hill argues his sister's consent was involuntary, 1) no evidence was offered to support a challenge to her signed written consent to search, and 2) he has no standing to raise his sister's claim, if any, that her consent was involuntary. Hill's argument of involuntariness of his sister's consent is without merit.

But for Hill's lack of standing, search of the mobile home-type trailer may be suspect as the fruit of the poisonous tree created by Sergeant Cunningham's unlawful entry into Hill's residence and subsequent questioning of the identities of his guests, which triggered Harris' flight to the

²⁰There is some conflict created by the evidence, but it appears the unidentified person who remained talking to the Sheriff outside of Hill's residence while Sergeant Cunningham went inside told the Sheriff that Lantz had left and gone to Maryland. It is not clear from the evidence whether Sergeant Cunningham knew this as he approached Hill's house.

backyard. However, Hill had no standing to challenge the search of the trailer, and, therefore, the search of the mobile home-type trailer was proper.

5. The search warrant

Trooper Shrader left the Hill residence to obtain a State search warrant after: 1) J. R. Harris ran out of the house and was apprehended in the back yard; 2) Sergeant Cunningham identified a smell in the area of the mobile home-type /trailer which he associated with a methamphetamine lab; 3) Hill had denied any interest in the mobile home-type trailer and directed the officers to his sister for any permission to search the same; 4) Hill's sister had given written consent to search; 5) a cursory search of the mobile home-type trailer had been conducted; and 6) Hill had been arrested as a felon in possession of a firearm.²¹

Trooper Shrader appeared before State Magistrate Kathi S. McBee on September 23, 2004, and swore to the following: "Any type of weapons, drugs, or drug paraphernalia, cash, papers, items or any magnetically, optically, electronically stored information detailing the processes involved in manufacturing or the selling of a controlled substance is concealed in brown wood sided residence approximately 30 feet off the roadway edge of Mud Gut Road and a white mobile home with red trim unattached to the right rear of the residence approximately 35 feet away. Further located 1.6 miles East of St. Rt. 92 on Mud Gut Road turning right and continuing on for .2 miles to the residence also listed as Rt 2, Box 270 Belington, WV, 26250 and the facts for such belief are: *on Thur 09-23-04 Tpc C.B. Shrader traveled to the above mentioned residence to ascertain if a subject that a capias had been issued for was staying at the residence. Upon being invited in a*

²¹Sergeant Cunningham observed a firearm near the bed in Hill's bedroom and asked Hill if he was, in fact, a convicted felon only after his warrantless entry into Hill's residence.

male subject fled out of the rear of the residence which this officer pursued after. Upon catching the subject near the trailer behind the residence, this officer observed a strong chemical odor around the trailer that resembled that of the smell of chemicals used to manufacture methamphetamine. Upon obtaining consent to search the property from the owner this officer observed several items that appeared to be processing methamphetamine.” (Emphasis added by the Court).²²

Notwithstanding the concerns the undersigned has expressed with respect to the facts asserted in the Trooper Shrader’s affidavit to obtain the search warrant, it is inescapable that the warrant was issued by State judicial officer and authorized the search of the Hill house as well as the mobile home-type trailer. The Court must show “great deference” to the probable cause determination made by the issuing county/state magistrate. *United States v. Blackwood*, 913 F.2d 139, 142 (4th Cir. 1990). The Court does not conduct a *de novo* determination of the State magistrate’s determination of probable cause. The review is limited only to a determination whether there is substantial evidence in the record supporting the issuance of the warrant. *Massachusetts v. Upton*, 466 U.S. 727, 728 (1984). To conduct such review, the Court is limited to “only the

²²The officer made statements in the affidavit which are contradictory of facts as testified to by himself as well as his superior during the hearing of September 26, 2004. For example: 1) He swore in the affidavit that “[u]pon being invited in . . .” when, in fact, Sergeant Cunningham testified he entered the Hill residence without an invitation and when Trooper Shrader could not have known what occurred at the front door of the residence since he was already in route to the rear or was at the rear of the residence to prevent escape of Lantz if he were in the residence and ran. 2) He neglected to advise the magistrate that Hill had disclaimed any control or property interest in the trailer. 3) He neglected to advise the magistrate that it was Hill’s sister, Ms. Campbell, who gave consent and that it was only the trailer that was discussed as the object of the proposed consent which was then being sought. 4) He implied he recognized the odor he smelled as being associated with methamphetamine manufacture when he testified he had not smelled meth before and did not know what it was until Sergeant Cunningham was called from the front of the house and told him what he thought it was.

information presented to the magistrate who issued the warrant.” *Blackwood, supra* 142.

As previously mentioned, the averment that Trooper Shrader was at a third party’s residence looking for another person who was named in a capias lends no support to the probable cause analysis.

The police were not invited in to Hill’s residence. The subject who ran out of the house (Harris) only did so after the police entered Hill’s house: 1) without being invited; 2) without a search warrant for the house to look for Lantz; and 3) after Sergeant Cunningham started questioning the three guests inside of Hill’s residence as to their respective identities. It cannot be ignored that all of this took place upon Hill’s emphatic and unequivocal refusal to permit a search of his home and that Sergeant Cunningham did not at that moment have probable cause to believe a crime was being committed.

It was not until Trooper Shrader caught Harris “near the trailer behind the residence” that he “observed a strong chemical odor.” The odor was observed around the mobile home-type trailer. There is nothing in the averment in support of the search warrant which ties the odor to the Hill residence. The testimony at the hearing did not tie the odor associated with methamphetamine manufacture to the residence prior to Sergeant Cunningham’s warrantless entry into Hill’s residence. This is supported by the fact that the police then proceeded to obtain “consent to search the property from the owner.” While the averment in the affidavit and complaint for search warrant (Government Exhibit 2) does not state who the owner of the mobile home-type trailer was, the only consent to search obtained by the police was from Ms. Campbell. She stated in the hand written consent: “I . . . hereby give Sgt Cunningham and other officers involved permission to search property owned by me on Mud Gut Rd.” Government Exhibit 3. The reason the police went to Ms. Campbell in

the first place was that Hill had already disclaimed any interest in the mobile home-type trailer.

According to the records, all the issuing county/state magistrate knew was what was contained in the affidavit. She was not told by Trooper Shrader that Hill was the controller of the residence or that his sister, Ms. Campbell, gave consent to search the trailer. The affidavit goes on to state that only after obtaining "consent to search the property from the owner, this officer observed several items that appeared to be processing methamphetamine." The property searched was the mobile home-type trailer. The officers did not search the Hill residence pursuant to any authority they may have had under Ms. Campbell's consent to search property she owned. The reason they did not was made clear by Trooper Shrader in his February 8, 2005, testimony. The police knew that Ms. Campbell's consent extended to the trailer only. The record, as it existed in fact and in the affidavit before the county/state magistrate prior to the issuance of the warrant, was that the only place which contained items that appeared to be processing methamphetamine was the mobile home-type trailer.

Under the search warrant that was issued, the police were given permission to search for "any type of weapons, drugs" Government Exhibit 2. At the point in time when Trooper Shrader sought and obtained the search warrant, the only gun was the firearm which Sergeant Cunningham observed in the bedroom of the Hill residence as he returned to the living room from chasing Harris out the back door. This particular firearm was the product of the unlawful warrantless entry and search of Sergeant Cunningham and cannot serve as a probable cause basis for a later warranted search. There was nothing of any other firearm mentioned in the search warrant affidavit. The hearing testimony was devoid of any knowledge on the part of the police of any firearms in the mobile home-type trailer. There is not a single mention in the affidavit in support of the search

warrant that any drugs or drug manufacturing equipment or paraphernalia were observed by Sergeant Cunningham or any other police in the Hill residence prior to the search conducted pursuant to the search warrant issued by the county/state magistrate.

Once the irrelevant statements mentioned herein and the following tainted statements "upon being invited in, a male subject fled out of the rear of the residence which this officer pursued after. Upon catching the subject" are excluded from the affidavit, the county/state magistrate would be left with the following to support, or not support, a probable cause determination to search Hill's residence:

On Thur. 09-23-04 TFCCB Shrader traveled to the above mentioned residence. Near the trailer behind the residence this officer observed a strong chemical odor around the trailer that resembled that of the smell of chemicals used to manufacture methamphetamine. Upon obtaining consent to search the property from the owner this officer observed several items that appeared to be processing methamphetamine.

Based on the above analysis, the undersigned is unable to find any probable cause within the affidavit submitted to support the issuance of the warrant to search the Hill residence. As to Hill's residence, the affidavit is bare bones. *United States v. Wilhelm*, 80 F.3d 116, 121-22 (4th Cir. 1996). Based on the affidavit, a judicial officer could reasonably conclude there was probable cause to search the mobile home-type trailer owned by Ms. Campbell, Hill's sister. The action of Trooper Shrader in preparing and submitting the affidavit containing false and misleading averments deprived the state/county magistrate of her opportunity to use independent judicial judgment in determining whether there was or was not probable cause for the issuance of the warrant. Instead, by his actions, Trooper Shrader led the judicial officer toward a the only conclusion she could reach: that both properties (the trailer and the residence) were owned and controlled by Hill. Trooper Shrader's action prevented the judicial officer from knowing there were two separately owned or separately controlled

properties (the house residence controlled by Hill and the trailer owned by Ms. Campbell).

Even after giving the United States an additional opportunity (Renewed Hearing on February 8, 2005), to present evidence to support the issuance of the search warrant, none was presented because no evidence outside of that in the affidavit was ever provided to the county/state magistrate by Trooper Shrader which, when added to the affidavit, would support probable cause to search the residence. The undersigned concludes there is not substantial evidence in the record supporting the issuance of the warrant to search Hill's residence. *Massachusetts v. Upton, supra 728*.

6. Good Faith Exception

Evidence obtained from an invalid search warrant will ordinarily still be admitted in evidence provided it was "objectively reasonable" for the officers who executed the warrant to rely on it and provided further that they were not dishonest or reckless in preparing their affidavit. *United States v. Leon*, 468 U.S. 897, 922 and 926 (1984). The evidence does not support a conclusion that Trooper Shrader was dishonest in preparing the affidavit in support of the State search warrant.

During the hearing of February 8, 2005, on questioning by the undersigned, Trooper Shrader, in an effort to explain how it was that he made the two significant "typographical mistakes" in his affidavit, stated that he was in a hurry. When the undersigned examined him on why he would have been in a hurry when: 1) he knew Hill and the other guest in his house had been removed and transported by the police; 2) he knew the trailer had been preliminarily searched for things that would cause fire or explosion and none had been found; and 3) he knew that police officers had been left at the Hill residence to maintain surveillance, Trooper Shrader was only able to offer that he wanted to get back because he had left fellow officers at the Hill residence.

From a totality of the evidence, no legally justifiable explanation exists for the misstatements

made in the affidavit submitted by Trooper Shrader.

The statements: 1) “[u]pon being invited in a male fled out the rear of the residence” and 2) “upon obtaining consent to search the property from the owner” amount to 1) a reckless misstatement of fact known to be untrue by the officer (that the police had not been invited into Hill’s residence) and 2) a reckless misrepresentation of a fact (by stating he obtained consent to search the property of the owner, he implied to the magistrate Hill consented to the search of his residence).²³ Had the magistrate been presented with an accurate statement of facts, she would have known that: Hill controlled the residence; Hill did not invite the police into the residence; Hill did not consent to a search of the residence; and Ms. Campbell consented to a search of the mobile home-type trailer because that is what the police said they wanted to search. The record reflects only Trooper Shrader knew the true state of facts.

“The Fourth Circuit has noted the ‘four situations in which an officer’s reliance on a search warrant would not be reasonable,’ that is, where the ‘good faith exception’ would not apply:

- (1) the magistrate was misled by information in an affidavit that the officer knew was false or would have known was false except for the officer’s reckless disregard of the truth;
- (2) the magistrate wholly abandoned his detached and neutral judicial role;
- (3) the warrant was based on an affidavit that was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and

²³ Trooper Shrader testified at the February 8, 2005, hearing that he made “typographical errors” in stating that he had been “invited in” when the truth was that he had not been, and his sergeant had not been invited into Hill’s residence, and when he gave the county/state magistrate misleading information that the owner of the “property” had consented to the search when he knew that the truth was that Ms. Campbell had only consented to a search of the trailer.

- (4) the warrant was so facially deficient, by failing to particularize the place to be searched or the things to be seized, that the executing officers cannot reasonably presume it to be valid.

United States v. Hyppolite, 65 F.3d 1151, 1156 (4th Cir. 1995), quoting *Leon*, 468 U.S. at 923. Accord *Bynum*, 293 F.3d at 195 (restating four circumstances in which good faith exception would not apply).” Fourth Circuit Criminal Handbook, P. 47. (Horn, 2003 Edition).

The undersigned finds the police were not justified in relying on the State magistrate’s search warrant because the police knew, or by the exercise of reasonable diligence should have known, the information Trooper Shrader included in his sworn affidavit was, in pertinent part, false and, in pertinent part, misleading and was in reckless disregard of the actual truth as he then knew it.

The undersigned further finds the warrant, insofar as it authorized the search of Hill’s residence, was based on an affidavit that was so lacking in indicia of probable cause as to render the police’s reliance on the same unreasonable.

Accordingly, having found situations (1) and (3) of *United States v. Hyppolite, id.*, applicable to the facts surrounding issuance of the State search warrant for Hill’s residence, the undersigned concludes the “good faith exception” does not apply.

7. Inevitable Discovery

If the search of Hill’s residence is not justified under the State search warrant, it remains to be determined whether the discovery of the evidence in Hill’s residence (guns and drugs and drug paraphernalia) was inevitable.

The inevitability doctrine, first articulated in *Nix v. Williams*, 467 U.S. 431, 444 (1984), provides that evidence otherwise improperly seized may be admitted “[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have

been discovered by lawful means.”

The United States did not argue the inevitable discovery doctrine nor attempt to prove its applicability during the initial hearing in this case. However, recognizing that such argument may be available to the United States, the undersigned reconvened the hearing to give the United States and Hill an additional opportunity to present evidence relative to the inevitable discovery doctrine and its applicability in this case. The United States did not offer any evidence to support inevitable discovery.

Unlike *United States v. George*, 971 F.2d 1113, 1121 (4th Cir. 1992), for the reasons stated herein, there was no probable cause to arrest Hill and there was no probable cause to search Hill’s residence. Therefore, there would have been no basis to discover the guns and other contraband during the course of a protective sweep search or other search of the residence.

The inevitability of discovery of the guns and other contraband cannot be justified by Sergeant Cunningham’s seeing the gun in the bedroom of Hill’s residence. Such sighting was the result of Sergeant Cunningham’s warrantless entry into Hill’s residence. The inevitable discovery doctrine “requires the fact or likelihood that makes discovery inevitable arise from circumstances other than those disclosed by the illegal search itself.” *United States v. Thomas*, 955 F.2d 207, 210 (4th Cir. 1992).

In the absence of proof amounting to a preponderance of the evidence offered up by the United States, the undersigned has been left to speculate whether the officers might have discovered the methamphetamine lab in the mobile home-type trailer and might then have been led to a subsequent search of the Hill residence through lawful means. Such speculation has been disapproved by the Fourth Circuit. *United States v. Allen*, 159 F.3d 832-43 (1998).

Based on the foregoing the undersigned concludes that a preponderance of the evidence presented does not support a non-speculative conclusion that the police would have inevitably discovered the guns, drugs and drug paraphernalia in the Hill residence through lawful means.

V. Recommendation

For the reasons herein stated, the undersigned RECOMMENDS:

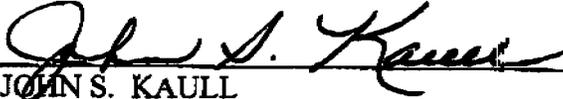
1. That Hill's Motion to Suppress All Evidence [Docket Entry 16] be **GRANTED, IN PART, and DENIED, IN PART.**
2. That the evidence seized from the mobile home-type trailer (marked on Government Exhibit 4 with a "T") **NOT BE SUPPRESSED.**
3. That the evidence seized from the Hill residence (marked on Government Exhibit 4 with a "H") **BE SUPPRESSED.**

Any party may, within ten (10) days after being served with a copy of this Report and Recommendation, file with the Clerk of the Court written objections identifying the portions of the proposed Report and Recommendation to which objection is made and the basis for such objection. A copy of such objections should also be submitted to the Honorable Robert E. Maxwell, United States District Judge. Failure to timely file objections to the proposed Report and Recommendation set forth above will result in waiver of the right to appeal from a judgment of this Court based upon such proposed findings and recommendation. 28 U.S.C. § 636(b)(1); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984), cert. denied, 467 U.S. 1208 (1984); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *Thomas v. Arn*, 474 U.S. 140 (1985).

The Clerk of the United States District Court for the Northern District of West Virginia is

directed to mail a copy of this Report and Recommendation to counsel of record.

DATED: February 14, 2005



JOHN S. KAULL
UNITED STATES MAGISTRATE JUDGE