IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No. 13-cr-20180-STA/tmp**
	)	
KENDALL JOY,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION

Before the court by order of reference is defendant Kendall Joy's Motion to Suppress Evidence, filed on July 25, 2013. (ECF No. 19.) The government filed a response in opposition on August 5, 2013. On August 22, 2013, the court held a suppression hearing. The government called Officer Paul Haulum of the Millington Police Department ("Millington Police") as its only witness. Defendant Kendall Joy called Lieutenant Steven White, Detective Degruean Frazier, and Officer Robert Akers (all officers with the Millington Police), and Jimmie Brassfield, the maintenance supervisor at the Millington Oaks Apartments. The court also received into evidence a photograph of building at the Millington Oaks Apartments; the Millington Police incident report detailing the events surrounding Joy's arrest and the search of his apartment; and Detective Frazier's affidavit in support of the search warrant for Joy's apartment. After the hearing, on September 9, 2013, the

court entered an order directing the parties to file post-hearing briefs on two issues: (1) whether the officers violated Joy's Fourth Amendment rights by conducting a protective sweep of his apartment, and (2) assuming, *arguendo*, that the officers violated Joy's rights, whether suppression of the firearms found inside the apartment is the appropriate remedy for the violation. The transcript of the suppression hearing was filed on September 26, 2013. The government filed its post-hearing brief on September 27, 2013, and Joy filed his post-hearing brief on October 11, 2013 and his corrected brief on October 15, 2013.[1]

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[1]On October 23, 2013, Joy filed *pro se* a document styled "Defendant's Request for Judge to Consider Memorandum of Law in Response to Government Supplemental Brief of the United States in Response to Defendant's Motion to Suppress." (ECF No. 42.) On November 4, 2013, Joy filed *pro se* a document styled "Testimony of Pertinent Witness and Request for Franks Hearing." (ECF No. 52.) As the Sixth Circuit has explained, "[a]lthough a criminal defendant has a constitutionally protected right to present his own defense in addition to a constitutionally protected right to be represented by counsel, he has no right to hybrid representation." United States v. Flowers, 428 F. App'x 526, 530 (6th Cir. 2011) (citing United States v. Cromer, 389 F.3d 662, 680 (6th Cir. 2004); 28 U.S.C. § 1654); see also United States v. Dunn, No. 2:08–cr–20429–STA, 2012 WL 1680969, at *1 n.1 (W.D. Tenn. Mar. 27, 2012) (report and recommendation) ("It is well-settled that a litigant who is represented by counsel has no constitutional right to demand that the Court also consider *pro se* arguments, pleadings, or motions.") (citing United States v. Edwards, 101 F.3d 17, 19 (2d Cir. 1996); Ennis v. LeFevre, 560 F.2d 1072, 1075 (2d Cir. 1977)). "The statute governing the manner in which parties may appear in federal court is specifically phrased in the disjunctive: 'the parties may plead and conduct their own cases personally or by counsel.'" Dunn, 2012 WL 1680969, at *1 n.1 (citing 28 U.S.C. § 1654). The Court of Appeals and district courts within the Sixth Circuit have declined to consider *pro se* arguments raised by represented defendants. Flowers, 428 F. App'x at 530 (citing United States v. Martinez, 588 F.3d 301, 328 (6th Cir. 2009),

Based on the parties' memoranda of law in support of and in opposition to the motion to suppress, the evidence presented at the hearing, the parties' post-hearing briefs, and the applicable law, the court submits the following proposed findings of facts and conclusions of law, and recommends that the motion be denied.

I. PROPOSED FINDINGS OF FACT

On December 27, 2012, at approximately 1:00 p.m., Officer Paul Haulum responded to a police dispatcher's call of an aggravated assault by a male armed with a pistol at the Millington Oaks Apartments ("Millington Oaks") in Millington, Tennessee.[2] Approximately two minutes later, Officer Haulum arrived at Millington Oaks and went to a parking lot facing an apartment building located at .[3] Officer Haulum saw a tow

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United States v. Howton, 260 F. App'x 813, 819 (6th Cir. 2008), and United States v. Degroat, No. 97–CR–20004–DT–1, 2009 WL 891699, at *1 (E.D. Mich. Mar. 31, 2009) (striking defendant's *pro se* motion, noting "now that Defendant is represented by counsel, all filings must be made by the attorney of record."). Because Joy is represented by counsel, the court will not consider his *pro se* filings in analyzing his motion to suppress.

[2]The court finds the testimony of the witnesses to be credible.

[3]Exhibit 1 is a color photograph of the apartment building in which apartment #1 is located and the parking lot that faces the building. According to the officers' testimony, the apartment building is two stories high, with apartment units on the ground floor and second floor. Joy's apartment building has eight units. The front door to the apartment building opens into a common area, where each unit has its own interior front door. Apartment #1 is on the ground floor, and as depicted in Exhibit 1, appears to be less than twenty yards away from the parking lot where the assault occurred.

truck parked in front of the building and three men standing near the truck. One of the men, Derrick Jones, identified himself as a repossession agent who was the victim of the aggravated assault. The other two men were fellow employees of the repossession company.

Jones provided Officer Haulum with the following information: he came to the parking lot to repossess a vehicle, and while he was hooking the vehicle to his tow truck, a black male (later identified as Kendall Joy) came out of the apartment building and told Jones to release the vehicle. Joy told a woman (later identified as Joy's girlfriend, Jasmine Warren) to go get a gun. Warren went into the apartment building and returned shortly with a large, semi-automatic gun, which she handed to Joy. Joy pointed the gun at Jones's head and told Jones he would kill him if Jones did not release the vehicle. Jones complied with Joy's demand and released the vehicle. Joy then retreated back into the apartment building and Warren drove off in the vehicle that Jones had tried to tow.

Officer Haulum also questioned Jones's two co-workers, Jerickan McCracklin and Kenneth Minor. Both of the men confirmed Jones's version of the events. Officer Haulum then talked to Lakeisha King, a resident of Millington Oaks who lived in the same apartment building as Joy and who had eye witnessed the incident. King identified Joy and Warren as the residents of apartment #1

(located directly below King's apartment) and said that she saw Joy run back into his apartment.

Lieutenant Steven White, Officer Robert Akers, and another Millington Police Officer (an "Officer Wiggins"), arrived within five minutes of Officer Haulum's arrival.[4] Officer Haulum and Officer Akers knocked on the front door of apartment #1 and announced their presence. There was no response. Officer Haulum heard "some shuffling around" inside the apartment. Lieutenant White and Officer Akers then went to the rear of the apartment, knocked on the back door, and again announced their presence.[5] There was still no response. Lieutenant White heard something being moved inside the apartment, and thought that someone might be trying to barricade the door.

The officers then contacted Millington Oaks's maintenance department for assistance. Jimmie Brassfield, the maintenance supervisor, arrived at the scene with a key to the apartment. Brassfield attempted to unlock the front door, but was unsuccessful because the locks on that door had been changed. The officers then saw a man look out of the open front window of apartment #1, and then saw him quickly shut and lock the window. Jones, who also saw the man at the window, stated, "there he is in the window."

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[4]These officers were delayed due to a train crossing.

[5]The apartment only had two exits, the interior front door and a back door.

Brassfield and the officers attempted to lift open the front window, but were unsuccessful. Brassfield then went with the officers to back door, and using his key, unlocked the door. Lieutenant White announced his presence and entered through the back door, followed by Officer Akers with his police canine. Once inside, they found Joy in the living room area. The officers immediately placed him against the wall and handcuffed him. They patted him down, but did not find any weapons on him. The officers removed Joy from the apartment and secured him in Officer Haulum's police car. According to Officer Haulum, approximately twenty to thirty minutes elapsed from the time he first arrived on the scene until the time the officers entered the apartment.[6]

Prior to the officers' entry into the apartment, they did not know if there were children or other adults besides Joy inside the residence. The officers became aware shortly after entering the apartment that there were three young children (all under the age of six) in a back bedroom.[7] Lieutenant White asked the children if

[6]Brassfield testified that approximately fifteen to twenty minutes elapsed from the time he was called to the scene by the officers to the time he opened the back door to the apartment.

[7]Lieutenant White testified that the officers were aware, based on prior incidents at apartment #1, that children had been present in the apartment when the police responded to those prior calls. However, the officers did not know that there were children inside the apartment on this particular call until after they entered the residence. As Officer Akers testified, he initially brought his police canine into the apartment with him, but then took his canine out when he saw that children were present.

there were any firearms in the apartment, to which the children responded that there were.[8] The children did not tell the officers where the firearms were located.[9] The officers conducted a protective sweep of the apartment, looking inside closets and bedrooms to make sure no one else was in the apartment. Lieutenant White testified that, in conducting the sweep, the officers did not move anything around or look through drawers. During this sweep, the officers observed in plain view multiple firearms in the bedrooms and closets. They did not, however, seize the weapons at that time.

Afterwards, Millington Police Detective Degruean Frazier arrived on the scene. Detective Frazier, who had not been involved with the arrest or protective sweep, gathered information from the officers and then left to obtain a warrant to search the apartment. In the affidavit for the search warrant, Detective Frazier stated:

> On 12/27/2012 at or about 12:55 officers of the Millington Police Department were dispatched to the in Millington, TN regarding an assault. On

[8]At the suppression hearing, defense counsel stated that she intended to call as a witness Joy's daughter who, at the time of the hearing, was seven years old. However, defense counsel subsequently decided not to call Joy's daughter.

[9]The police incident report states, "[t]he children informed that there were multiple weapons in the residence, and told officers of their location." Lieutenant White, however, testified that the children only told the officers that there were weapons in the home, but did not tell the officers exactly where the weapons were located. The court credits the testimony of Lieutenant White. Further, this factual discrepancy is immaterial to the issues raised in the motion to suppress.

> arrival officers learned that a suspect later identified as Kendall Joy had threatened to shoot a wrecker driver, pointing a handgun at the driver's head, after he learned that the wrecker driver was attempting to repossess his vehicle. The wrecker driver, identified as Derrick Jones, described the suspect as a male black wearing no shirt and armed with a handgun. The wrecker driver advised responding officers that the suspect fled into the apartment at As officers approached the apartment, Lt. S. White observed a shirtless male black move the blinds from the window, then close them quickly as he saw the police. Lt. White heard children crying inside the apartment, and summoned apartment staff from the area to assist him with entry. Police officers made entry and secured the scene and the suspect. Derrick Jones, the victim of the aggravated assault, identified the suspect, KENDALL JOY, as the person who had pointed the handgun at his head. Your affiant asks that a warrant issue to search the residence at for weapons, ammunition, and any other illegal items.[10]

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[10]As discussed above, the officers had no knowledge of the presence of any children inside the apartment just prior to forcing entry. None of the officers heard any children crying from inside the apartment, contrary to that representation being made in the search warrant affidavit. However, the inclusion of this incorrect information is immaterial to the issues presently before the court. First, Joy did not challenge the legality of the search warrant in the motion to suppress. Second, even if such a challenge had been made, the court finds that Joy would not be entitled to a Franks hearing. In Franks v. Delaware, 438 U.S. 154 (1978), the Supreme Court held that, in certain circumstances, a criminal defendant is entitled to a hearing regarding the veracity of a sworn statement used by the police to procure a search warrant. "To obtain a Franks hearing, 'the defendant must make a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included in the affidavit.'" United States v. Hudson, 325 F. App'x 423, 425–26 (6th Cir. 2009) (quoting United States v. Stewart, 306 F.3d 295, 304 (6th Cir. 2002)). "The purpose of a Franks hearing is to allow the defendant to challenge the truthfulness of statements in an affidavit in order to challenge the legality of a search warrant issued on the basis of the affidavit." United States v. Sharp, No. 1:09–cr–98, 2010 WL 1427292, at *3 (E.D. Tenn. Mar. 18, 2010). As explained by the Sixth Circuit:

Detective Frazier made no mention in the affidavit that officers on the scene had knowledge of or had already seen firearms in the apartment. The warrant was executed at approximately 3:45 p.m. According to the police incident report, the officers found in one of the bedrooms, inside a basket, a Desert Eagle .44 magnum gun, which matched the description of the gun that Jones said Joy

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> A defendant who challenges the veracity of statements made in an affidavit that formed the basis for a warrant has a heavy burden. His allegations must be more than conclusory. He must point to specific false statements that he claims were made intentionally or with reckless disregard for the truth. He must accompany his allegations with an offer of proof. Moreover, he also should provide supporting affidavits or explain their absence. If he meets these requirements, then the question becomes whether, absent the challenged statements, there remains sufficient content in the affidavit to support a finding of probable cause.

United States v. Bennett, 905 F.2d 931, 934 (6th Cir. 1990) (citations omitted); see also Sharp, 2010 WL 1427292, at *4 (quoting Bennett). Based on the testimony at the suppression hearing, Joy has not sufficiently demonstrated that Detective Frazier included the statement with knowledge that the statement was false or with reckless disregard for the truth. At most, it appears that Detective Frazier may have received inaccurate information from the officers at the scene, or perhaps misconstrued what had transpired prior to him arriving on the scene. Moreover, the court finds that absent the challenged statement, there remains sufficient content in the affidavit to support a finding of probable cause. The affidavit states that Joy pointed a gun at the wrecker driver's head, threatened to shoot the driver, and ran back into apartment #1. The affidavit further states that responding officers saw a black male close the window when he saw the police, and after obtaining assistance from the apartment staff, entered the apartment and found Joy inside, who the victim later confirmed was the person who had pointed the gun at his head. Whether children were or were not present in the apartment or whether the officers heard children crying is irrelevant and, in any event, does not negate the existence of probable cause contained in the affidavit.

had used to threaten him. The officers also seized numerous firearms, magazines, and ammunition from the hallway closet, the two bedrooms, and a bedroom closet.

On May 30, 2013, a federal grand jury returned an indictment charging Joy with five counts of being a convicted felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). In Joy's motion to suppress, he argues that the officers violated his Fourth Amendment rights by entering his home and arresting him without a warrant. He further argues that no exigent circumstances justified the warrantless arrest. In response, the government contends that the warrantless arrest of Joy inside his apartment was justified based on two exigent circumstances: hot pursuit of a fleeing felon and risk of danger to police and others. At the conclusion of the suppression hearing, Joy raised the additional argument that the officers violated his rights by conducting a protective sweep of his apartment without a reasonable belief that the area swept harbored an individual posing a danger to those on the scene, in violation of Maryland v. Buie, 494 U.S. 325 (1990). Because Joy did not challenge the Buie sweep in his written motion, but instead raised this challenge for the first time at the suppression hearing, the court directed the parties to file post-hearing briefs in order to address this issue. Additionally, the parties were directed to address in their post-hearing briefs the issue of whether the exclusionary rule should apply, in the event

the court found a Fourth Amendment violation.

II. PROPOSED CONCLUSIONS OF LAW

A. Exigent Circumstances Exceptions to the Warrant Requirement

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

The Supreme Court has long declared that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." Payton v. New York, 445 U.S. 573, 586 (1980) (quoting United States v. United States District Court, 407 U.S. 297, 313 (1972)). As the Supreme Court has explained, "[i]n [no setting] is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home . . . . [T]he Fourth Amendment has drawn a firm line at the entrance to the house." Id. at 589-90. A person has a Fourth Amendment right "to retreat into his own home and there be free from unreasonable government intrusion." Silverman v. United States, 365 U.S. 505, 511 (1961); see also United States v. Saari, 272 F.3d 804, 812 (6th Cir. 2001). As a result, an arrest carried out inside the arrestee's home without a warrant is presumptively

unreasonable. Coolidge v. New Hampshire, 403 U.S. 443, 477-78 (1971); Ratliff v. City of Three Rivers, No. 4:05-CV-104, 2007 WL 475191, at *2 (W.D. Mich. Feb. 9, 2007).

"[T]he police may not enter a private residence without a warrant unless both 'probable cause plus exigent circumstances' exist." United States v. McClain, 430 F.3d 299, 304 (6th Cir. 2005) (citing Kirk v. Louisiana, 536 U.S. 635, 638 (2002) (per curiam) and United States v. Chambers, 395 F.3d 563, 572 (6th Cir. 2005)); see also United States v. Johnson, 457 F. App'x 512, 516 (6th Cir. 2012) (citing McClain). Probable cause exists where, given the totality of the circumstances, there are reasonable grounds for the belief of wrongdoing, which is "supported by less than prima facie proof but more than mere suspicion." Bennett, 905 F.2d at 934; see also United States v. Brown, 449 F.3d 741, 745 (6th Cir. 2006). In this case, the Millington Police had probable cause - based on the information provided by Jones, his two co-workers, and the upstairs neighbor (Lakeisha King) - that Joy committed the crime of felony aggravated assault. See Tenn. Code Ann. § 39-13-102 (providing that, under Tennessee law, a person commits felony aggravated assault when the person "[i]ntentionally or knowingly commits an assault as defined in § 39-13-101, and the assault . . . (iii) involved the use or display of a deadly weapon . . ."). The question, then, is whether exigent circumstances justified the officers' warrantless entry and arrest.

In order to overcome the presumption that a warrantless entry into a home is unconstitutional, police must be able to identify "one of a number of well defined exigent circumstances." United States v. Bass, 315 F.3d 561, 564 (6th Cir. 2002); O'Brien v. City of Grand Rapids, 23 F.3d 990, 996 (6th Cir. 1994). The burden rests upon the government to demonstrate the existence of exigent circumstances sufficient to except law enforcement from complying with the warrant requitement. United States v. Morgan, 743 F.3d 1158, 1162 (6th Cir. 1984). "Exigent circumstances are situations where 'real immediate and serious consequences' will 'certainly occur' if the police officer postpones action to obtain a warrant." Thacker v. City of Columbus, 328 F.3d 244, 253 (6th Cir. 2003) (quoting Welsh v. Wisconsin, 466 U.S. 740, 751 (1984)). A court must consider "the totality of the circumstances and the inherent necessities of the situation" when determining the existence of exigent circumstances. United States v. Plavcak, 411 F.3d 655, 663 (6th Cir. 2005). Exigent circumstances that can justify a warrantless entry into a home generally fall into one of four categories: (1) hot pursuit of a fleeing felon;[11] (2) imminent

[11]The Supreme Court has recently held that the hot pursuit doctrine is not strictly limited only to felony offenses. Stanton v. Sims, __ S. Ct. __, No. 12-1217, 2013 WL 5878007, at *3-4 (U.S. Nov. 4, 2013); see also United States v. Johnson, 106 F. App'x 363, 367 (6th Cir. 2004) (stating that "the fact that this case involves the commission of misdemeanors, rather than the more usual situation involving felonies, does not render the hot pursuit doctrine inapplicable").

destruction of evidence; (3) the need to prevent a suspect's escape; and (4) a risk of danger to the police or others. United States v. Rohrig, 98 F.3d 1506, 1515 (6th Cir. 1996). In the instant case, the government argues that two of these exigent circumstances apply: hot pursuit of a fleeing felon and risk of danger to the police or others.[12]

1. Hot Pursuit

The government first argues that the warrantless entry was justified because the officers had probable cause that Joy had just committed a violent felony and were in hot pursuit of a fleeing felon. "The hot pursuit doctrine typically involves a situation where a suspect commits a crime, flees and thereby exposes himself to the public, attempts to evade capture by entering a dwelling, and the emergency nature of the situation necessitates immediate police action to apprehend the suspect." Cummings v. City of Akron, 418 F.3d 676, 686 (6th Cir. 2005). The hot pursuit exception to the warrant requirement is "reserved for situations where speed is essential to protect a compelling government interest." Morgan, 743 F.2d at 1162 (citing Warden v. Hayden, 387 U.S. 294, 298-99 (1967); United States v. Elkins, 732 F.2d 1280, 1285 (6th Cir. 1984)). It "may not be invoked merely because

[12]The government does not contend that they feared an imminent destruction of the firearm, and because there were officers positioned at the front and back doors, the government does not argue that the officers needed to prevent Joy's escape.

police officers find it inconvenient to obtain a warrant before proceeding with an arrest." Id. As recently explained by the Sixth Circuit:

> Under the hot pursuit exception, an officer may chase a suspect into a private home when the criminal has fled from a public place. If, say, a drug dealer runs into a house when police approach her after a controlled buy and after they identify themselves, the officers may follow her into the house to make their arrest. *The "pursuit" begins when police start to arrest a suspect in a public place, the suspect flees and the officers give chase.* What makes the pursuit "hot" is "the emergency nature of the situation," requiring "immediate police action."

Smith v. Stoneburner, 716 F.3d 926, 931 (6th Cir. 2013) (internal citations omitted) (emphasis added) (concluding that officer's warrantless entry into suspect's home for the purpose of arresting him on a shoplifting offense was neither "hot" nor a "pursuit").

Typically, in order for the hot pursuit doctrine to apply, there must be a pursuit or "some sort of chase" while the suspect is still in the public view. In United States v. Santana, 427 U.S. 38 (1976), the police set up a drug buy with marked money to investigate drug dealers who were dealing out of the defendant's house. An undercover officer drove to the defendant's residence with a target of the sting, who went into the house and purchased heroin with marked bills. As they drove away from the house, the officer obtained the drugs from the buyer; he then stopped the car, displayed his badge, arrested the buyer, and asked her who had the money. After the undercover officer notified other officers that the marked money was in the defendant's possession, they drove

approximately two blocks back to the defendant's residence and spotted her standing in the doorway. Upon seeing the officers approach, she retreated into her house. The officers, acting without a warrant, followed her into the house and arrested her. At trial, the defendant moved to suppress the drugs and money found in her house. Id. The Court stated that when the police sought to arrest the defendant, she was "not merely visible to the public but was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house." Id. at 42. Thus, the Court concluded that when the police sought to arrest the defendant, she was not in an area where she had an expectation of privacy, id. (citing Katz v. United States, 389 U.S. 347, 351 (1967)), and the police were simply attempting to effect a warrantless arrest of her in a public place upon probable cause pursuant to United States v. Watson, 423 U.S. 411 (1976). Accordingly, the Court framed "[t]he only remaining question" as "whether [the defendant's] act of retreating into her house could thwart an otherwise proper arrest." Santana, 427 U.S. at 42. The Court concluded that "a suspect may not defeat an arrest which has been set in motion in a public place . . . by the expedient of escaping to a private place." Id. at 43. In reaching this conclusion, the Court stated that a pursuit "need not be an extended hue and cry in and about the public streets," but that "some sort of chase" must have occurred. Id. at 42-43; see also

Hazleton v. Trinidad, 488 F. App'x 349, 352 (11th Cir. 2012) (relying on Santana for the principle that in order for the hot pursuit doctrine to apply, there must be "some sort of chase"); United States v. Jackson, 139 F. App'x 83, 85 (10th Cir. 2005) (same); Johnson, 106 F. App'x at 367-68 (applying the hot pursuit exception when officers made a warrantless entry into a residence after watching the suspect fire a weapon from his porch and then retreat into the residence).

The police pursuit must be "immediate or continuous." Welsh, 466 U.S. at 753. In Welsh, a car that was being driven erratically swerved off the road and came to a stop in an open field. Id. at 742. A witness watched a man, who appeared to be intoxicated or sick, exit the vehicle and walk away from the scene. Id. Police arrived, talked to the witness, checked the registration of the vehicle, and proceeded to the driver's nearby home. Id. The officers entered the residence without a warrant and found the driver in his bed. Id. The Court rejected the government's argument that the warrantless arrest was justified under the hot pursuit doctrine "because there was no immediate or continuous pursuit of the [driver] from the scene of the crime." Id. at 753; see also Saari, 272 F.3d at 812 (rejecting application of hot pursuit doctrine "[b]ecause there was no immediate or continuous pursuit of the defendant from the scene of a crime" when police officers went to suspect's home based on information obtained from

witnesses that suspect stood in his ex-wife's window with a pistol and was heavily armed and dangerous); Saad v. City of Dearborn, No. 10-12635, 2011 WL 3112517, at *5 (E.D. Mich. July 26, 2011) (stating that the hot pursuit exception requires "immediate or continuous pursuit . . . from the scene of a crime."); Hickey v. Hayse, 188 F. Supp. 2d 722, 727 (W.D. Ky. 2001) (finding that hot pursuit exception applied where officer searched for suspect, saw a man fitting suspect's description and attempted to identify him, and then gave chase once the suspect ran away, and the fact that the officer caught up with the suspect inside a home "a mere ten minutes, at most, after [the suspect's] arrival, does not demonstrate that [the officer] was no longer in immediate or continuous pursuit.").

In O'Brien v. City of Grand Rapids, two police officers and a tow truck driver arrived at O'Brien's home to seize his vehicle. 23 F.3d at 993. O'Brien appeared behind the door of his home holding a rifle and yelling at the officers to leave before shutting his door. Id. The officers called for backup and surrounded the house. Id. at 993-94. The officers did not attempt to make entry into the house until six hours after the initial confrontation. Id. at 994. The court took this delay into account in determining that the officers had not been in hot pursuit, noting that even if the officers were in "pursuit" of O'Brien "during the six hours as they took control of the area, gathered

information, and developed a response plan," the officers were not in "hot" pursuit. Id. at 997; see also United States v. Daws, 711 F.3d 725, 728 (6th Cir. 2013) (finding that hot pursuit exception did not justify warrantless arrest where police had searched for suspect for two hours as they gathered information; however, court found that the risk of harm exception applied); Morgan, 743 F.2d at 1162 (finding that officers were not in hot pursuit when they had time to assemble at a local coffee shop to assess the situation).

The court also should consider the gravity of the offense in deciding whether the hot pursuit doctrine applies. United States v. Anderson, 688 F.3d 339, 344 (8th Cir. 2012) ("the Supreme Court instructed us [in Welsh] to consider two factors in determining whether 'hot pursuit' creates an exigency: (1) the gravity of the underlying offense, and (2) whether the government can demonstrate an 'immediate or continuous' pursuit of the suspect from the scene of the crime."); Jackson, 139 F. App'x at 86 ("in deciding whether circumstances rise to the level of exigency, it is important to consider 'the gravity of the underlying offense for which the underlying arrest is being made.') (quoting Welsh, 466 U.S. at 753). However, as the Supreme Court has recently held, the hot pursuit doctrine is not strictly limited to felony offenses, and in certain situations may excuse warrantless arrests inside a home for minor offenses. Stanton, 2013 WL 5878007, at *3-4.

Turning to the present case, the court finds that the

officers' warrantless entry into Joy's apartment does not fit within the hot pursuit exception. Although Joy committed a serious offense by pointing a firearm at the victim's head and threatening to kill him, the officers did not initiate a pursuit of Joy until after he was already inside his home. The officers did not witness the aggravated assault (as officers did in Johnson, 106 F. App'x at 364-65) or Joy's flight into his apartment (as officers did in Santana, 427 U.S. at 40-41). There was no immediate or continuous pursuit from the scene of the crime (just as there was not in Daws, 711 F.3d at 728, or Saari, 272 F.3d at 812). Importantly, given the short distance from the location of the crime to Joy's apartment - and the reasonable inference that Jones did not call the police while Joy was still standing outside with a gun in his hand - Joy was already inside his apartment before the officers were even notified of the crime. Although Officer Haulum arrived on the crime scene within two minutes of receiving the dispatcher's call, he interviewed (as he properly should have) several witnesses to investigate the crime before trying to make contact with Joy. During the time that the officers had the apartment surrounded, Joy never exposed himself to the public, except for a brief appearance at the window (just as in Cummings, 418 F.3d at 686), but he did so only for the apparent purpose of shutting and locking the window.

The court recognizes that in a case involving facts similar to the present case, the Sixth Circuit found that the hot pursuit

exception applied. See Bass, 315 F.3d 561. There, police officers responded to a call of gunshots being fired at an apartment complex. Id. at 563. A witness told the officers she had just witnessed a black male fire several gunshots at two other men, one of whom was her son, and then flee into a nearby apartment. As additional officers arrived, they formed a perimeter around the apartment building. Several officers went to the apartment and knocked on the door. A woman answered, and when asked by the officers who else was in the apartment, the woman answered that her children and her husband, defendant Shawn Bass, were there. Without permission, the officers entered the apartment, found Bass, and arrested him. Id. The court found that *both* the hot pursuit and risk of danger exceptions to the warrant requirement justified the warrantless entry. The court, relying on Warden v. Hayden,[13] reasoned as follows:

> The first and fourth categories [hot pursuit and risk of danger, respectively] are applicable here. James [the witness] informed the police that she had seen a person

[13]Although Warden is commonly cited as a "hot pursuit" case, as the Supreme Court in Santana observed, Warden did not really involve a pursuit:

> Warden was based upon the "exigencies of the situation," and did not use the term "hot pursuit" or even involve a "hot pursuit" in the sense that that term would normally be understood. That phrase first appears in Johnson v. United States, where it was recognized that some element of a chase will usually be involved in a "hot pursuit" case.

427 U.S. at 42 n.3 (internal citations omitted).

> later identified as Bass fire gunshots at two other people, and that the suspect had fled into a particular apartment . . . only minutes before their arrival. It was therefore reasonable for the police to enter that apartment to locate both the suspect and any weapon that might be used either against them or against other people in the apartment complex.

Id. at 564.

The gravity of the crime was much more severe in Bass than in the present case, as the defendant in Bass actually fired shots at two individuals before fleeing inside his home. Also, it appears that in Bass very little time elapsed from when the officers first arrived on the scene until they forced entry, as the officers questioned only one witness and were able to quickly enter the apartment because Bass's wife opened the door. In contrast, the Millington Police officers took approximately twenty to thirty minutes to enter Joy's apartment because they had to interview four witnesses, back up officers were delayed by a train, they had to wait for the maintenance supervisor to arrive, and they were confronted with a suspect who repeatedly refused to open the door. Moreover, to the extent the Bass court found that the hot pursuit exception applied even though the officers did not engage in a pursuit, that finding would appear to conflict with the body of cases that requires police pursuit of the suspect or some sort of chase in order for the hot pursuit doctrine to apply. See Welsh, 466 U.S. at 753; Daws, 711 F.3d at 728; Cummings, 418 F.3d at 686; Saari, 272 F.3d at 812; Morgan, 743 F.2d at 1162; United States v.

Fugate, No. 3:09-cr-165, 2013 WL 3207083, at *7 (S.D. Ohio June 24, 2013). For all of these reasons, the court submits that Bass does not require a finding that the hot pursuit exception applies in the present case.

2. Risk of Danger to Police or Others

A risk of danger to the police or others is another recognized category of exigent circumstances that can justify a warrantless entry into a residence. Rohrig, 98 F.3d at 1515. The inquiry as to whether a risk of danger is sufficient to justify a warrantless entry and arrest requires a totality of the circumstances analysis. Plavcak, 411 F.3d at 663. Just as with any other exigent circumstances analysis, the government interest at stake (officer and public safety) must be compelling to overcome the individual's right to privacy in his home. Morgan, 743 F.2d at 1162. The facts must show that the threat to the officers or the public was "immediate." Cummings, 23 F.3d at 997 (citing Morgan, 743. F.2d at 1162-63).

"[T]he presence of a weapon creates an exigent circumstance, provided the government is able to prove they possessed information that the suspect was armed and likely to use a weapon or become violent." Ratliff, 2007 WL 475191, at *6 (quoting United States v. Bates, 84 F.3d 790, 795-96 (6th Cir. 1996)) (internal quotation marks omitted); see Daws, 711 F.3d at 728 ("An exigency exists when officers can demonstrate that a suspect has a willingness to use a

weapon.") (quoting Bing ex rel. Bing v. City of Whitehall, 456 F.3d 555, 564 (6th Cir. 2006)) (internal quotation marks omitted). When officers are responding to a "shots fired" call, the threat of danger will usually be extreme enough to justify a warrantless entry and arrest. See Bass, 315 F.3d at 564; Johnson, 106 F. App'x at 368; Fugate, 2013 WL 3207083, at *7; United States v. Frost, No. 11-6461, 2011 WL 1466438, at *8-9 (W.D. Tenn. Mar. 14, 2011). But see Ratliff, 2007 WL 475191, at *7 (finding that even though suspects had reportedly fired shots during the course of a robbery earlier in the day, there was no indication that "exigent circumstances existed in the [] residence, as no shots were fired from within, no 911 calls were made from within, and there was no report by neighbors or witnesses of suspicious or illegal activity within the house or on the premises"). Courts are less likely to find that a threat of danger justifies a warrantless entry into a residence if the suspect did not fire a weapon or otherwise demonstrate a willingness to use it. See McGraw v. Madison, 231 F. App'x 419, 425 (6th Cir. 2007); Saari, 272 F.3d at 810; O'Brien, 23 F.3d at 997-98; Morgan, 743 F.2d at 1162-63. But see Daws, 711 F.3d at 728 (finding that even though suspect had not yet fired his weapon on that particular day, a threat of danger existed because the suspect "had used his gun in an armed robbery, aimed it at the victim's face, and threatened to kill him - *and had fired random shots from his home before*") (emphasis added).

In this case, the court finds that there was an insufficient threat of danger to the police or others to justify the warrantless entry. Although Joy had threatened Jones with the gun, he had not fired any shots. The officers had no information about Joy's background that would indicate that he had fired a weapon in the past or had any history of violence. Joy did not threaten the officers, and he did not respond when the officers knocked on the front and back doors. Although the officers knew, based on prior police visits to the apartment, that children were present on those occasions, the officers did not know that there were children inside the apartment until after they entered the residence. See Saari, 272 F.3d at 810 (finding risk of danger exception did not apply where there was no indication that anyone was being threatened inside home); cf. Bass, 315 F.3d at 564 (finding that risk of danger exception applied where officers knew that defendant had fired his gun at two other men just minutes before the officers arrived and that defendant's wife and children were also inside the apartment). Because there was no immediate threat to the safety of the police officers or others, the warrantless entry into Joy's apartment was not justified by exigent circumstances.

B. Protective Sweep

Under Maryland v. Buie, the police may conduct a protective sweep of "closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched" as a

precautionary matter and without probable cause or reasonable suspicion. 494 U.S. at 334. Beyond these places immediately adjoining the place of arrest, the Court has held that "there must be articulable facts which, when taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." Id.; see United States v. Talley, 275 F.3d 560, 563 (6th Cir. 2001). Regarding this latter category of more expansive sweeps, Buie authorizes police officers to perform such sweeps because of the compelling "interest of the officers 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." Buie, 494 U.S. at 333.

The Sixth Circuit has upheld the validity of Buie sweeps where the officers possessed specific information leading them to believe that other individuals might be inside the residence. United States v. Holland, 522 F. App'x 265, 276 (6th Cir. 2013) (concluding that officers had specific facts to support Buie sweep following robbery investigation because officers were told that another man was present in the apartment and they heard noises emanating from the nearby bedroom); United States v. Taylor, 666 F.3d 406, 410 (6th Cir. 2012) (finding justification for a Buie sweep where officers observed other individuals in the house and

had reason to believe they were armed); United States v. Biggs, 70 F.3d 913, 916 (6th Cir. 1995) (finding Buie sweep of a motel room valid where police officers had information that another person would be meeting the arrestee in the motel room). In United States v. Johnson, a case relied upon by the government, officers responded to a report that a man was firing a shotgun from a porch of a home. 106 F. App'x at 364. The dispatch report indicated residents of the home included children. Id. Officers arrived at the home and saw a black male (wearing a jersey) sitting on the front porch with a long gun in his lap. Id. The officers observed the man discharge the firearm into the air twice, which was a misdemeanor offense. Id. When the man heard someone say "police," he quickly ran into the house. Id. Without a warrant, the officers forced open the front door and saw a shirtless black man and a woman in the kitchen. Id. Not seeing the gun, the officers ran upstairs to search for the armed suspect and to determine if there were other occupants in the home. Id. The man and woman who had been found in the kitchen were secured, and in a large pantry located approximately eight to fifteen feet away, the officers found a shotgun. Id. The court found that the officers did not violate the Fourth Amendment when they looked in the pantry and seized the shotgun, because "the pantry closet was both large enough to hide a man and near enough to be accessible to Defendant." Id. at 366. The court also found that the officers

were justified in looking upstairs for other occupants, because the officers were not sure that the shirtless man they encountered in the kitchen was the same jersey-wearing man who had fired the shots on the porch. Id. at 367.

Here, the Millington Police officers exceeded their authority under Buie by conducting a sweep of the entire apartment. The officers' sweep went beyond the space immediately adjoining the place of Joy's arrest. Joy was arrested in the living room area, but the officers proceeded to conduct a protective sweep of the entire apartment, including the bedrooms and bedroom closets. To conduct this type of sweep, Buie requires that the officers have articulable facts showing that there may have been another individual on the scene who might jeopardize the officers' safety. The officers heard no noises or voices from inside the apartment while they were attempting to get inside. Witnesses stated that Joy's girlfriend, who had retrieved the gun from inside the apartment, had fled the scene before the officers arrived. Once inside, the officers knew they had the right person in custody because he was the same man who was seen closing the apartment window and who was identified by Jones (who had seen Joy looking out the window) as the perpetrator. Although there were three children found in one of the bedrooms, the officers had no reason to believe that there was anyone else in the apartment. The officers testified that they conducted the protective sweep because

they did not know who else might be in the apartment. The mere possibility of the presence of other individuals, without more, is not sufficient under Buie to support a sweep of areas beyond the spaces immediately adjoining the place of arrest. The officers exceeded the permissible scope of a Buie sweep, and therefore violated the Fourth Amendment.

C. Whether the Exclusionary Rule Should Apply

Although the officers violated Joy's Fourth Amendment rights by conducting a warrantless in-home arrest and an overly broad protective sweep, the court nevertheless concludes that the exclusionary rule should not be applied in this case. The inevitable discovery doctrine provides that where "tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered." Murray v. United States, 487 U.S. 533, 539 (1988); see also United States v. Witherspoon, 467 F. App'x 486, 490-91 (6th Cir. 2012) (applying inevitable discovery doctrine where officers followed illegal search with search warrant that did not include tainted evidence). The doctrine avoids "put[ting] the police in a worse position than they would have been in absent any error or violation." Nix v. Williams, 467 U.S. 431, 443 (1984). The Sixth Circuit has explained that the doctrine applies in two settings: (1) when an "independent, untainted investigation . . . inevitably would have uncovered the same evidence"; or (2) when

there exist "other compelling facts establishing that the disputed evidence inevitably would have been discovered." Witherspoon, 467 F. App'x at 490 (quoting United States v. Kennedy, 61 F.3d 494, 499 (6th Cir. 1995)) (internal quotation marks omitted). "Circuit precedent holds that an alternate, independent line of investigation is not required for the inevitable discovery exception to apply." Id. (quoting Kennedy, 61 F.3d at 499–500) (internal quotation marks omitted). The doctrine applies "where officers follow a potentially illegal search with a valid, warrant-supported search." Id. (citing Murray, 487 U.S. at 541–43 (remanding case for consideration of the inevitable discovery doctrine where police initially conducted an unlawful search of a warehouse but later obtained a search warrant and conducted a lawful search); United States v. Jenkins, 396 F.3d 751, 758–60 (6th Cir. 2005) (upholding the denial of a motion to suppress where initial unlawful search was followed by a lawful search); United States v. Keszthelyi, 308 F.3d 557, 574 (6th Cir. 2002) ("[T]he inevitable discovery exception to the exclusionary rule applies when . . . evidence discovered during an illegal search would have been discovered during a later legal search and the second search inevitably would have occurred in the absence of the first."). As the Sixth Circuit found in Johnson, 106 F. App'x 363:

> Even if the search in this case was unconstitutional, however, the shotgun is admissible evidence because it inevitably would have been discovered by lawful means. The officers had probable cause to believe that the

> shotgun was in the house because they had witnessed Defendant shoot it from the porch, reload it and then flee into the house with it. Had it not been found in the search for the suspect, the officers would have obtained a warrant after they secured the house. Inevitably, they would have found the shotgun upon opening the pantry closet door. Thus, application of the exclusionary rule would not be appropriate here.

Id. at 368 n.2 (internal citations omitted). As in Johnson, this court finds that even though the Millington Police officers violated Joy's rights by conducting the warrantless arrest and Buie sweep, they would have inevitably discovered the firearms by obtaining and executing the search warrant. The officers' only alternative to forcing entry into Joy's apartment would have been to secure an arrest warrant, which they could have obtained based on the ample probable cause that Joy had committed a violent felony. Jones identified Joy when he saw Joy looking out the window, and King identified Joy as her downstairs neighbor who she had seen running back into his apartment. Upon entering the apartment, the officers would have discovered that the gun was missing. The missing firearm, by itself, undoubtedly would have caused the officers to obtain a search warrant, as it is improbable that the officers would have walked away from the scene without the gun. See Witherspoon, 467 F. App'x at 491 ("Nor is there any reason to believe that the officers would refrain from searching the outbuilding absent the initial, unlawful search: if the marijuana surrounding the outbuilding failed to settle a sufficient cloud of suspicion over the building, fresh footprints led from the

marijuana seedlings directly to the building's entrance."). And, as in Witherspoon, the search warrant affidavit did not include any tainted evidence, i.e., the firearms observed during the sweep. Id. ("the search could not affect the issuing judge's decision to issue a warrant because the search warrant affidavit included no information gleaned from the unlawful search").[14]

In addition to the inevitable discovery doctrine, the court finds that the exclusionary rule should not apply for another reason. A finding of a Fourth Amendment violation does not automatically result in the exclusion of evidence. United States v. Buford, 632 F.3d 264, 270 (6th Cir. 2011). Instead, in order for the court to invoke the exclusionary rule, it must engage in a balancing test to assess whether the benefits of deterrence outweigh the costs. See Davis v. United States, 131 S. Ct. 2419, 2426 (2011); Herring v. United States, 555 U.S. 135, 140 (2009); see also United States v. Kinison, 710 F.3d 678, 685 (6th Cir. 2013) (explaining that, in light of Davis and Herring, "[n]ow, only police conduct that evidences a 'deliberate, reckless, or grossly negligent' disregard for Fourth Amendment rights may 'outweigh the

[14]The affidavit stated that the officers entered the apartment and secured Joy. As discussed above, however, prior to entering the apartment, witnesses had already identified Joy as the perpetrator and the man who lived in apartment #1. Thus, Joy's identity was known to the officers prior to their entry. In any event, even if the court were to disregard this "tainted" information, probable cause would still exist to support the issuance of the search warrant. See Jenkins, 396 F.3d at 757-60.

resulting costs.' By contrast, where police act with an 'objectively reasonable good-faith belief,' or where their actions involve only simple 'isolated' negligence, 'exclusion cannot 'pay its way.'") (internal citations omitted); United States v. Fugate, 499 F. App'x 514, 519-20 (6th Cir. 2012) (relying on United States v. McClain, 444 F.3d 556 (6th Cir. 2005), Herring, and Davis, in remanding case in order for district court to make findings regarding whether the exclusionary rule should apply); United States v. Master, 614 F.3d 236, 243 (6th Cir. 2010) ("The Supreme Court has effectively created a balancing test by requiring that in order for a court to suppress evidence following the finding of a Fourth Amendment violation, 'the benefits of deterrence must outweigh the costs.'") (quoting Herring); United States v. Ford, No. 1:11-cr-42, 2012 WL 5366359, at *16 (E.D. Tenn. Sept. 12, 2012) ("Thus, a crucial finding needed to suppress evidence is the balance between whether police misconduct is 'sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.'") (quoting Herring); United States v. Adams, No. 5:13-66-DCR, 2013 WL 3458074, at *10 (E.D. Ky. July 9, 2013) ("In considering the deterrent benefits of exclusion, the Supreme Court has directed lower courts to focus on the culpability of the law enforcement conduct at issue"). The exclusionary rule "serves to deter deliberate, reckless, or grossly negligent

conduct, or in some circumstances recurring or systemic negligence." Herring, 555 U.S. at 144; see also United States v. Shaw, 707 F.3d 666, 670 (6th Cir. 2013) (applying the exclusionary rule where police entered a house on false pretenses and remained there illegally because the police misconduct was different from the "isolated negligence" at issue in Herring). As the Supreme Court wrote in Davis,

> The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Amendment says nothing about suppressing evidence obtained in violation of this command. That rule — the exclusionary rule — is a "prudential" doctrine, created by this Court to "compel respect for the constitutional guaranty." Exclusion is "not a personal constitutional right," nor is it designed to "redress the injury" occasioned by an unconstitutional search. The rule's sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations. Our cases have thus limited the rule's operation to situations in which this purpose is "thought most efficaciously served." Where suppression fails to yield "appreciable deterrence," exclusion is "clearly . . . unwarranted."
>
> Real deterrent value is a "necessary condition for exclusion," but it is not "a sufficient" one. The analysis must also account for the "substantial social costs" generated by the rule. Exclusion exacts a heavy toll on both the judicial system and society at large. It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence. And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment. Our cases hold that society must swallow this bitter pill when necessary, but only as a "last resort." For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs.

131 S. Ct. at 2426-27 (internal citations omitted).

In the present case, the Herring/Davis cost-benefit balance

weighs against the application of the exclusionary rule. The court finds that the evidence was not obtained as a result of deliberate, reckless, or grossly negligent conduct, or any systemic negligence.[15] As an initial matter, although the court submits that Bass does not control the outcome of this case, the fact remains that the court in Bass found, on facts similar to the case at bar, that exigent circumstances justified the warrantless entry. Bass, at a minimum, supports a finding that the Millington Police officers' warrantless arrest was not deliberate, reckless, or grossly negligent. In addition, the officers were dealing with an armed gunman who had just threatened to kill someone. Although it took twenty to thirty minutes for the officers to enter the apartment, this delay was due in part to Officer Haulum taking reasonable steps to investigate the crime before attempting to initiate contact with the armed suspect. It was reasonable for Officer Haulum to not approach the apartment alone, and in fact, it would have been unwise for him to do so before the back up officers arrived. The officers attempted multiple times to draw Joy out of the apartment voluntarily, and rather than forcing the door open, they took the less drastic approach of opening the door with a key. It is worth noting that the officers did not use unreasonable force to arrest Joy. They ordered him to place his hands on the wall,

[15]Contrary to Joy's argument in his post-hearing brief, the evidence presented at the suppression hearing does not support a finding of systemic negligence in the Millington Police Department.

they handcuffed him and searched his person, and they escorted him to the patrol car without incident. The officers, once inside the apartment, knew that there was a gun missing and that three young children were in the bedroom. Although the government did not offer evidence about the approximate size or configuration of Joy's apartment, the photograph of the apartment building and police incident report suggest that it was a small apartment on a single floor. Given that the officers had already passed through the kitchen and living room areas to secure Joy, and that they were already in the back bedroom where the children were located, the court cannot say that the protective sweep of the remaining areas of the apartment was deliberate, reckless, or grossly negligent. Under these circumstances, the benefits of deterrence do not outweigh the costs. Master, 491 F. App'x at 595 (quoting Herring, 555 U.S. at 144) ("The crucial finding needed to suppress evidence is whether police misconduct is 'sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.").

III. CONCLUSION

For the reasons above, it is recommended that Joy's motion to suppress be denied.

Respectfully submitted,

s/ Tu M. Pham
TU M. PHAM
United States Magistrate Judge

November 16, 2013
Date

NOTICE

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE THEM WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.