IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY CRIMINAL DIVISION

STATE OF FLORIDA

CASE NO: 07-CF-022347

vs.

FRANK NOYAS III

DIVISION: L

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DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

COMES NOW the Defendant, FRANK NOYAS, III, pursuant to Rule 3.190(h) Fla.R.Crim.P., and respectfully requests this Court suppress evidence seized by law enforcement in this case from Defendant's person, and as grounds therefore states as follows:

I. EVIDENCE TO BE SUPPRESSED:

The Defendant respectfully requests this Honorable Court to suppress any and all evidence of narcotics found as a result of the stop and search of Defendant's person, more specifically, a small black vinyl case with a zipper and its entire contents including one small baggie of white powder (field tested positive as cocaine, approximately 1 gram), one large baggie (field tested negative as cocaine), and a small colored paper envelope which contained approximately 25 (twenty-five) pills.

II. GROUNDS FOR SUPPRESSION:

The Defendant was seized and searched in contravention of the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 12 of the Florida Constitution, and any evidence obtained because of the illegal seizure is the fruit of the poisonous tree and should be suppressed. *Wong v. United States*, 371 U.S. 471 (1963).

The evidence was obtained as a result of an illegal search, without a warrant, in violation of the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9

and 12 of the Florida Constitution.

The evidence was obtained in violation of Defendant's right to privacy guaranteed by Article I, Section 23, of the Constitution of the State of Florida.

III. FACTUAL BASIS:

1.On or about October 25, 2007, Officer Michael Skypack of the Tampa Police Department was stopped by a citizen and informed that a silver 4-door Honda was seen driving recklessly a few blocks from Officer Skypack's location.

2. At approximately 4:00 p.m., Officer Skypack conducted a traffic stop of the Defendant's vehicle at Florida and Humphrey in Hillsborough County, Florida, and made contact with the driver of the vehicle.

3. The Defendant was the driver and sole occupant of the vehicle and produced identification in the form of a Florida Driver's License and vehicle registration.

4. In Officer Skypack's Affidavit in Support of Forfeiture dated December 7, 2007, Officer Skypack stated that Mr. Noyas "...was stuffing something down his shorts...I was calling for backup, but was concerned for my safety." (See Affidavit in Support of Forfeiture, paragraph 6, attached as Exhibit "A").

5.Officer Skypack ordered and removed Mr. Noyas from the vehicle to conduct an exterior pat down for weapons.

6. In the Affidavit in Support of Forfeiture, Officer Skypack stated he felt a large object in the waistband of Mr. Noyas' pants and observed in plain sight a black vinyl case which was partially open and revealed its contents. (See attached Exhibit "A").

7. Once the black vinyl case was removed from Mr. Noyas' waistband, Officer Skypack observed several small bundles of green paper in the vinyl case. (See attached Exhibit "A").

8. Officer Skypack stated in the Affidavit in Support of Forfeiture that when he observed the black vinyl case he recognized it to be a travel shaving kit, not a weapon.(See attached Exhibit "A").

9. Officer Skypack stated in the Affidavit that "Based on my training, experience and numerous narcotics arrests, I believed the bundles were narcotics."(See attached Exhibit "A").

10. Officer Skpack opened the vinyl case and unwrapped the green bundles which contained a large baggie of white powder, a small baggie of white powder and a small paper envelope containing approximately twenty-five (25) pills. (See attached Exhibit "A").

11. The large baggie tested negative for cocaine, the small baggie field-tested positive for cocaine, and Officer Skypack stated the pills were Xanex. (See attached Exhibit "A").

12. Mr. Noyas was arrested and charged with possession of cocain and possession of a controlled substance.

IV LEGAL AUTHORITY:

Florida's Stop and Frisk Law states that whenever any law enforcement officer authorized to temporarily detain any person under the provisions of Florida Statute §901.151(2) has probable cause to believe that the detainee...is armed with a dangerous weapon and therefore offers a threat to the safety of the officer or any other person, the officer may search such person so temporarily detained only to the extent necessary to disclose, and for the purpose of disclosing, the presence of such weapon. Florida Statute §901.151(5). The search may not extend beyond a pat down of a suspect's outer clothing unless the pat down or other circumstances leads the officer to conclude that the suspect has a weapon on his person. *Dunn v. State,* 382 So. 2d 727 (Fla. 2d DCA 1980); *Baldwin v. State,* 418 So.2d 1219 (Fla. 2d DCA 1982); *Meeks v. State,* 356 So.2d 45 (Fla. 2d DCA 1978). If such a search discloses such a weapon or any evidence of a criminal offense, it may be seized. Florida Statute §901.151(5). *See*

Johnson v. State, 537 So.2d 117, 119 (Fla. 1st DCA 1988).

Florida Courts have allowed a limited exception to the warrant requirement authorized by *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), but have strictly limited the exception to searches necessary to protect the officer's safety. During a legitimate frisk for weapons, police may only seize weapons or objects which reasonably could be weapons, despite the fact that the officer may reasonably suspect that the object may be evidence of a crime. *Doctor v. State*, 596 So.2d 442 (Fla. 1992). The courts have limited searches and seizures to objects thought to be weapons to prevent law enforcement officers from conducting searches for contraband with less than probable cause on the premise of looking for weapons. *Id* at 444.

In *Doctor*, a highway patrol cruiser stopped Doctor's vehicle in a known drug area citing a broken taillight. Because the vehicle's windows were heavily tinted, the officer asked the vehicle occupants to exit the vehicle. As Doctor exited the vehicle, he attempted to hide the front of his body from the police officers. The trooper noticed a bulge in Doctor's groin area and thought it might be a weapon. Doctor was asked to remove the bulge from his pants and, when he refused to comply, a deputy at the scene performed a pat-down and realized the bulge was not a weapon. Instead of a weapon, the deputy felt what he believed was a package of cocaine. The deputy based his belief upon feeling the texture of a plastic bag and the "peanut brittle type feeling in it" which the deputy equated to the texture of rock cocaine. The State argued that the police had probable cause to seize the cocaine. *Id* at 445. The court held that the totality of the circumstances gave the officer probable cause to believe that Doctor was carrying crack cocaine in his groin area based on Doctor's suspicious manner of exiting the vehicle, the officers observed a large bulge which Doctor attempted to hide, and the deputy offered extensive testimony that he had knowledge acquired through specific experience with the unique texture

of crack cocaine as well as this typ of concealment. *Id.*

An officer who develops probable cause during a stop and frisk may lawfully seize the contraband. *Dunn v. State*, 382 So.2d 727, 728 n. 1 (Fla. 2d DCA 1980). The burden is initially on the State to prove the officer had probable cause for the seizure. Relevant to the inquiry of whether a police officer has sufficient probable cause to believe that a suspect is carrying illegal contraband will depend on the totality of the circumstances existing at the time and the officer's specific experience with respect to the particular narcotic in question. *P.L.R. v. State*, 455 So. 2d 363 (Fla. 1984), *cert. denied*, 469 U.S. 1220, 105 S.Ct. 1206, 84 L.Ed.2d 349 (1985); *Doctor v. State,* 596 So.2d 442 (Fla. 1992). An officer's training and experience are relevant to the extent that they provide specific facts from which the officer could reasonably conclude that a crime was being committed during the situation in question. The State must present the court with facts upon which a determination of probable cause can reasonably be made. The court in *Doctor* held that the State must provide the specific factual basis of the officer's experience to establish its claim of probable cause, not merely a generalized statement or conclusion that the officer was experienced. 596 So.2d 442 at 445. In *Doctor,* the State offered evidence in the form of the deputy's testimony that the deputy had made approximately 250 arrests for possession of a controlled substance, had been present during approximately 1000 arrests, and had seen or felt crack cocaine approximately 800 times. The deputy further testified that he had discovered cocaine hidden in the groin area on 70 occasions. The court found that the officer's testimony of specific statistics evidencing his significant experience with drug trafficking, his knowledge acquired through specific experience with the unique texture of crack cocaine as well as with this type of concealment gave the officer probable cause to believe that Doctor was carrying crack cocaine in his groin area. *Id.* Further, the court held that the package's size, shape and texture severely limited the possibility that it contained

a substance other than crack cocaine. *Id.*

In the instant case, the only evidence presented by the State is Officer Skypack's Affidavit in Support of Forfeiture which fails to provide Officer Skypack's his knowledge acquired through specific experience with the unique texture of white powder cocaine and Xanex pills as well as with this type of concealment, the number of arrests for possession of white powder cocaine and Xanex pills, the number of times he has felt white powder cocaine and Xanex pills, or the number of times he has discovered white powder cocaine and Xanex pills hidden in a waistband area (Attached as Exhibit "A").

In *Baldwin v. State,* 418 So.2d 1219 (Fla. 2d DCA 1982), the court found that the police officer exceeded permissible scope of a pat down or frisk incident to investigatory stop of a defendant where a wallet was seized from defendant's person, and where officer admitted that when he felt the bulge in defendant's back pocket, he knew it was a wallet and had no apprehensions that the bulge was a weapon. *Id.* at 1220. Since the officer knew the bulge was not a weapon and never considered the bulge to be a weapon, he could not legally reach into defendant's pocket and the seizure did not conform with acceptable procedure.

In determining whether an officer had probable cause to seize an item felt during a frisk for weapons, probable cause does not arise anytime an officer feels an object that the officer reasonably suspects to be contraband. *State v. J.D.,* 796 So. 2d 1217 (Fla 4th. DCA 2001;.*See also Harris v. State,* 790 So.2d 1246, 1249 (Fla. 5the DCA 2001)(seizure of film canister containing cocaine from defendant's front pocket not justified by plain feel doctrine where officer had nothing but mere suspicion that object he felt was contraband); *Cole v. State,* 727 So.2d 280 (Fla. 2d DCA 1999)(seizure

of crack pipe from defendant's pants during pat-down search exceeded scope of weapons pat-down where officer never testified that it was immediately apparent to him upon feeling pipe that it was contraband); *Howard v. State,* 645 So.2d 156 (Fla. 4th DCA 1994)(the sound of pebbles shaking around in a film canister supplied reasonable suspicion, but not probable cause, to believe that object was contraband fo officers who lacked level of experience to say there was high probability that canister contained contraband).

In *State v. J.D.,* the officer conducted a traffic stop on appellee for a traffic violation. When appellee dismounted his bicycle, the officer noticed a bulge in appellee's pocket. Fearing the object to be a weapon, the officer conducted a pat-down search and felt a "plastic-type" bag with a substance inside it. The officer testified that the he recognized upon touching the item that the soft substance was not a weapon, but based on his "knowledge and experience" he believed that the substance was "possible suspect cannabis". 796 So. 2d at 1218. At the suppression hearing, the State argued that the seizure was proper based on the plain feel doctrine established in *Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993). In *Dickerson,* the Supreme Court held that "if a police officer feels something during a pat-down that is immediately identifiable as contraband, there is no additional invasion of privacy and the retrieval of the item is proper, so long as the initial pat-down was justified by a search for weapons." *Id.* at 366. The court in *State v. J.D.* upheld the trial court's ruling that the state failed to meet its burden of proving probable cause where the officer merely described the item he felt but did not testify about his experience in identifying marijuana by its feel or state that there was anything unique or distinctive about the seized item's texture, shape, size or method of packaging that made the illicit nature of the time immediately apparent to him. 796 So.2d at 1220.

Similar to the facts in *State v. J.D.*, the State has failed to provide evidence that Officer Skypack noticed or felt something unique or distinctive about the seized item's method of packaging that made the illicit nature of the item immediately apparent to him. Officer Skypack merely described the packaging as a black vinyl case, similar to a travel case, and observed green bundles inside. Officer Skypack did not state that he felt anything that was "immediately identifiable as contraband". Further, the State has offered no evidence of Officer Skypack's training and experience in identifying cocaine or Xanex by its feel or by this specific method of concealment and packaging. Therefore, the State has failed to meet it burden of proving that Officer Skypack had probable cause. The unlawful search and seizure was conducted without probable cause and, therefore, the evidence seized should be suppressed.

WHEREFORE, based on the forgoing facts and case law stated herein, the Defendant moves this Honorable Court to suppress all evidence seized by law enforcement.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished to the OFFICE OF THE STATE ATTORNEY, Hillsborough County Courthouse Annex, 800 E. Kennedy Blvd., Tampa, Florida 33602, by U.S. Mail this 4 day of March, 2008.

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IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CIVIL ACTION

IN RE:	FORFEITURE OF 2000 HONDA VIN#1HGCG1652YA101341	))	Case No.: 07-15155 Division: C

Claimant: Frank Noyas III

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AFFIDAVIT IN SUPPORT OF FORFEITURE

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

THE UNDERSIGNED, having been duly sworn, deposes and says:

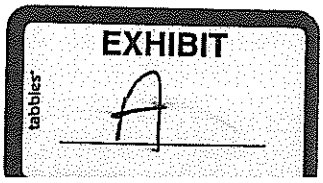
1. My name is Michael Skypack and I have personal knowledge of all matters set forth herein that are attributed to me, and I am competent to testify to the matters set forth in this affidavit.

2. At all times material to this affidavit, I was employed as a certified law enforcement officer with the Tampa Police Department.

3. On or about October 25, 2007, while assigned to the Tampa Police Department's District II, I was backing up a fellow patrol officer, when I was flagged down by a citizen about a reckless driver in a silver Honda 4-door. She thought he may have hit a pedestrian a few blocks back.

4. The citizen then pointed to a car that was going northbound on Florida Avenue from Waters Avenue. I got behind the vehicle as it continued northbound, and I observed driver weave across the lane several times.

5. I conducted a traffic stop, and made contact with the defendant who appeared to be very nervous, and was fumbling with his wallet. He initially handed me



a credit card, but then handed me his driver's license and registration. The driver was identified as Frank Noyas III.

6. Noyas began twisting his body towards me while keeping his back away from me. He was stuffing something down his shorts, near his buttocks area. I gave him numerous verbal commands to show his hands; however, he refused, and continued to push the item further down his shorts. I was calling for backup, but was concerned for my safety.

7. I removed Noyas from the car, and once his hands were secured, I conducted an exterior pat down. I felt a large unknown object in the buttocks area of his pants. I looked just past his waistband and saw a black vinyl case (similar to a travel shaving kit) which I removed.

8. The case was partially open, and I could see several small items bundled up in green paper. Based upon my training, experience and numerous narcotics arrests, I believed the bundles were narcotics.

9. I unwrapped the bundles and located a large baggie of white powder, a small baggie of white powder, and a small paper envelope with approximately 25 pills. The small baggie field-tested positive for cocaine. The large bag tested negative for cocaine, but has been sent to the F.D.L.E. lab for analysis. The pills were Xanex and Noyas did not have a prescription for them

10. Post-Miranda, Noyas stated that he had just purchased what he thought was cocaine and the Xanex from someone over in west Tampa. Noyas stated that he had paid $400.00 for everything. He said had been very depressed over the recent death of his father, and that he (Noyas) was having some medical problems.

11. Noyas was arrested and charged with possession of cocaine and possession of a controlled substance.

12. Based upon the fact that the vehicle was used to transport felony narcotics, the property listed in the above case style is subject to forfeiture under the Florida Contraband Forfeiture Act (Sections 932.701-932.707, Florida Statutes) as it was used or intended to be used in the commission of a felony violation of Florida Statutes Chapter 893.

Further Affiant Sayeth Not.

MICHAEL SKYPACK, Affiant

Sworn to and subscribed before me this 7th day of December 2007, by Michael Skypack, who is personally known to me or who has produced law enforcement credentials or other photographic identification.

Signature of Notary Public
Or Sworn Law Enforcement Officer

Commissioned Name of Notary
or Printed Name of Sworn LEO

Notary Public State of Florida
Janel Ann Kasper
My Commission DD667190
Expires 06/26/2011