IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, STATE OF FLORIDA

STATE OF FLORIDA CRIMINAL DIVISION "R"

vs. CASE NO: 01-9565CF A02

****
Defendant.
_____/

DEFENDANT'S MOTION TO SUPPRESS EVIDENCE ILLEGALLY SEIZED WITHOUT A WARRANT

Pursuant to Fla. R. Crim. P. 3.190(h)(1)(A), article I, section 12 of the Florida Constitution, and the fourth and fourteenth amendments to the United States Constitution, Mr. ********, through undersigned counsel, requests that this Court grant this motion and in support thereof states the following:

1. Mr. ******** is charged by information with one count of possession of cocaine with intent to sell.

2. Mr. ******* is requesting that the following evidence be suppressed:

a. Crack cocaine

b. Razor blade

c. Plastic ziplock bags

FACTS OF CASE

On August 30, 2001 at approximately 10:23 p.m., West Palm Beach Police Officer Paul Creelman was dispatched to a disturbance at 5865 North Haverhill Road in front of building # 23. *See* Officer Creelman's police report (hereinafter "police report"), a copy of which is attached to this motion.

Officer Creelman's attention to his duties was diverted by a vehicle that was pulling into the complex. Said vehicle had its radio turned up so loudly that car alarms nearby were set off. Officer Creelman decided to stop the vehicle and issue the driver a citation for loud car stereo. *See* attached police report.

As the vehicle drove by, Officer Creelman flagged the driver down. Clark, the driver, rolled his window down and turned the music off. Officer Creelman told Clark to pull the car over and stop. However, concealing something behind his back, Clark accelerated his vehicle away from Officer Creelman. Clark then jumped out of the car and began to run away along with an unidentified passenger. *See* attached police report.

Officers Rizzo and Creelman began running after Clark. They chased him to the other side of the development where he ran into an occupied apartment (later discovered to be the residence of Mr. and Ms. *****) at 5865 North Haverhill Road, apartment # 805. *See* attached police report.

As Clark ran into apartment # 805, he pushed a pregnant female (later discovered to be Ms. *****) out of his way saying, "get out of my way", and ran to the second floor. Ms. ***** later provided a written statement that said she was standing in the doorway when she was pushed by the suspect Clark and ordered to "get out of the way." *See* attached police report.

Officers Rizzo and Creelman began climbing up the stairs chasing after Clark. As Officer Creelman reached the top of the stairs, Mr. ***** came walking down the stairs. According to Officer Creelman, Mr. ***** simply walked down the stairs to the front door and then went outside and did not appear to be surprised by the presence of Rizzo and Creelman. *See* attached police report.

Officer Creelman then looked around the corner and saw Clark coming out of the master bedroom of the apartment. He could see Clark trying to shut the door but a stereo speaker prevented him from doing so. *See* attached police report.

Creelman grabbed Clark as he exited the room and tried to push his way past Creelman to go down the stairs. Creelman wrestled with Clark and took him to the floor. Clark began to actively resist arrest by flailing his elbows and kicking his legs. In his attempt to get away from Creelman, Clark struck him with his elbows and kicked him numerous times. As Officer Creelman wrestled with Clark, Officer Rizzo ordered Clark to stop resisting but Clark refused to do so. Finally, Creelman was able to control Clark by forcing his body weight on top of him and initiating pressure points to the area underneath Clark's ear along with knee strikes to the meaty part of Clark's thigh. *See* attached police report.

Rizzo assisted Creelman by placing handcuffs onto Clark's wrists. As Creelman walked Clark out of the residence, Clark tried to pull away from Creelman numerous times and then turned to the pregnant female and said, "I know you, don't do this to me." According to Officer Creelman, Clark's statement sounded as though it were a threat to the female not to prosecute. Officer Rizzo took custody of Clark and walked him back to the police vehicles. *See* attached police report.

Officer Creelman then walked back upstairs to see if he could find anything that Clark may have dropped or gotten rid of while he was upstairs inside the master bedroom. *See* attached police report.

After walking into the master bedroom, Creelman stated that he could see, in plain view, a large piece of an off-white substance that he recognized to be crack cocaine

in the form of a large "cookie," small transparent ziplock bags, and a single-edged razor blade. *See* attached police report.

Creelman then contacted Sergeant Smigel, the on-duty supervisor, to inform him of the situation. The ***** residence was thereafter held as a crime scene until members of the West Palm Beach Police Department Criminal Apprehension Team (C.A.T.) arrived on scene to take control. Clark was issued two citations--driving while license suspended and loud music. Clark also had three outstanding arrest warrants and was, therefore, taken to the Palm Beach County Jail without further incident. *See* attached police report.

D'Andre ***** was subsequently charged by information with one count of possession of cocaine with intent to sell following the search of his home by law enforcement.

APPLICABLE LAW AND BURDEN OF PROOF

Initially, and as a predicate to complaining about an illegal search, a defendant must establish his own standing or reasonable expectation of privacy in the premises. *State v. Bell*, 417 So. 2d 822, 823 (Fla. 4th DCA 1982). It is the totality of the circumstances in any given case that must be looked to in determining whether a defendant has a reasonable expectation of privacy in the premises searched. *State v. Suco*, 521 So. 2d 1100, 1102 (Fla. 1988). A residence where a person resides is regarded as a dwelling where there is a legitimate expectation of privacy. *See State v. Parker*, 399 So. 2d 24, 28 (Fla. 3d DCA 1981).

The fourth amendment protects the individual's privacy in a variety of settings.

Payton v. New York, 445 U.S. 573 (1980). In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home--a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." *Id.* at 589. That language unequivocally establishes the proposition that "[at] the very core [of the fourth amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Id*. at 589-590. In terms that apply equally to seizures of property and seizures of persons, the fourth amendment has drawn a firm line at the entrance to the house. *Id*. at 590. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant. *Id.* at 590.

In the absence of consent or exigent circumstances, the United States Supreme Court has consistently held that the entry into a home to conduct a search or to make an arrest is unreasonable under the fourth amendment unless done pursuant to a warrant. *Steagald v. United States*, 451 U.S. 204, 101 S.Ct. 1642 (1981). The Florida Supreme Court has, in turn, endorsed this rule of law. *See Saavedra v. State*, 622 So. 2d 952, 956 (Fla. 1993) and *Norman v. State*, 379 So. 2d 643, 646 (Fla. 1980).

Although declining to consider the scope of any exception for exigent circumstances that might justify warrantless home arrests in *Payton*, the United States Supreme Court has emphasized that exceptions to the warrant requirement are "few in number and carefully delineated" [*United States v. United States District Court,* 407 U.S. 297, 313 (1972)] and that police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests. *Welsh v. Wisconsin*, 466 U.S. 740, 104 S.Ct. 2091 (1984). Thus, the burden of proof is on the State to demonstrate

an urgent need justifying a warrantless search or arrest based on alleged exigent circumstances. *See Welsh v. Wisconsin*, 466 U.S. 740, 104 S.Ct. 2091 and *Vasquez v. State*, 870 So. 2d 26, 29 (Fla. 2d DCA 2003).

An entry based on exigent circumstances must be limited in scope to its purpose. *Rolling v. State*, 695 So. 2d 278, 293 (Fla. 1997). Therefore, the police may not continue the search once it is determined that an exigency no longer exists. *Id*. *If the police determine the exigency that initially allowed their entry into the residence no longer exists, any subsequent search is illegal and any contraband discovered pursuant to the illegal search is inadmissible. Id*. (italics added).

In addition to exigent circumstances, another exception to the warrant requirement is a search conducted pursuant to consent. *See Norman v. State*, 379 So. 2d 643, 646 (Fla. 1980) and *Saavedra v. State*, 622 So. 2d 952, 956 (Fla. 1993). However, in order to rely upon consent to justify the lawfulness of a search, the State has the burden of proving that the consent was in fact freely and voluntarily given. *Norman v. State*, 379 So. 2d 643, 646 (Fla. 1980). In Florida, the prosecution must show by clear and convincing evidence that the defendant freely and voluntarily consented to the search. *Id.*

The voluntariness of the defendant's consent to search is to be determined from the totality of circumstances. *Norman v. State*, 379 So. 2d 643, 646 (Fla. 1980). *But when consent is obtained after illegal police activity such as an illegal search or arrest, the unlawful police action presumptively taints and renders involuntary any consent to search. See Norman* at 646 and 647 and *Horvath v. State,* 524 So. 2d 741 (Fla. 4th DCA 1988). The consent will be held voluntary only if there is clear and convincing proof of

an unequivocal break in the chain of illegality sufficient to dissipate the taint of prior official illegal action. *Norman* at 647.

ARGUMENT

I. Mr. ***** has standing to challenge the warrantless search of his residence.

On or about August 30, 2001, Mr. ***** resided at 5865 North Haverhill Road, # 805, West Palm Beach, Florida. Along with his wife, Mr. ***** was present in his residence on the night of August 30, 2001. Mr. ***** had a legitimate expectation of privacy in his residence which was seized and then searched. *See State v. Parker*, 399 So. 2d 24, 28 (Fla. 3d DCA 1981) and *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371 (1980). Thus, Mr. ***** has standing to challenge the warrantless search and seizure of his residence.

II. The warrantless search of Mr. *****'s residence was illegal and the evidence seized should be suppressed.

A. THE POLICE ILLEGALLY EXCEEDED THE SCOPE OF ENTRY BASED ON EXIGENT CIRCUMSTANCES.

Officer Creelman intended to issue a citation to the driver Clark for "loud car stereo," that being a noncriminal traffic infraction. When Clark ran from his vehicle, Officers Creelman and Rizzo gave chase. Clark's action in shoving aside Mrs. ***** and running into the ***** residence may have arguably provided the police with exigent circumstances to make a warrantless entry of the ***** home for the purpose of securing the safety of the residents. However, once the exigency that permitted entry into the ***** premises ended, any further search of the residence was illegal.

Officer Creelman reports subduing and arresting Clark at the top of the stairs after Clark exited the upstairs bedroom. Officer Rizzo assisted Officer Creelman in placing handcuffs on Clark. At this point, Mr. and Mrs. ***** were both downstairs and not in any danger. With Clark in handcuffs and now inside the police vehicle, Officers Creelman and Rizzo had no legal justification to re-enter the ***** premises without a warrant. However, as Officer Creelman admits in his report, "**I walked back up stairs to see if I could find anything that CLARK may have dropped or gotten rid of while he was up inside of the master bedroom.**" *See* attached police report (emphasis added). There was no legal basis for this search and, in particular, no fourth amendment exception to justify Officer Creelman's search of the master bedroom when the exigency that justified the entry into the ***** home ended with Clark's arrest.

Where a deputy received a dispatch of a possible burglary of an apartment, his warrantless entry of the apartment to see whether there was a burglary in progress was legally justified under exigent circumstances only up to the point where he determined that there was no intruder and that no one was in need of assistance inside the apartment. *Anderson v. State*, 665 So. 2d 281, 283 (Fla. 5th DCA 1995). Where the deputy continued to further search the apartment in an attempt to find papers showing the location of the owner and discovered and seized drug "tally sheets," the appellate court reversed the denial of the motion to suppress because the exigency that allowed the deputy to enter the apartment ended when the deputy found no intruder. Thus, there was no valid exigency that justified a continuing search of the residence to find information concerning the tenant's whereabouts. *Anderson* at 283-284.

In *Klosieski v. State*, 482 So. 2d 448 (Fla. 5th DCA 1986), the issue was whether the search was justified by exigent circumstances. In *Klosieski*, five police officers went to a residence occupied by individuals with fugitive warrants for their arrest based on charges of trafficking in controlled substances. *Klosieski* at 449. A police officer testified that the police had information that Stephen and Robin Klosieski were known to have firearms although there was no information of any prior crimes of violence. *Id*. There had been extensive surveillance of the house and no occupants other than the Klosieskis had been observed. *Id*. After briefly talking with the Klosieskis, the police forced their way into the home and arrested them. *Id*. With both Klosieskis under arrest and under control in the front yard, the officers proceeded into the house ostensibly to see if there were any other persons inside. *Id*. While inside, the officers noted drug paraphenalia and marijuana, the basis for the criminal charge in the case. *Id.*

On appeal, the Klosieskis contended that the officers erred when they searched the home for other persons after they themselves were under arrest and in police control. *Klosieski* at 450. In agreeing with the defendants, the *Klosieski* Court stated:

> [T]he police had no reason to believe that other individuals, dangerous to their safety, were inside the house. None had been observed during any surveillance. The Klosieskis were in custody outside. Obviously, the safety of the officers was placed in greater jeopardy by their entry into the house than it would have been had they simply left the premises with the Klosieskis, the purpose of the arrest warrants having been fulfilled. The fact that the police did not know, as an absolute certainty, whether more people were in the house, as found by the trial court, cannot justify entry into the house. There was no exigency, and it was error to deny the motion to suppress. Hence we reverse the convictions of the appellants.

Klosieski at 450.

Probable cause and exigent circumstances failed to justify the warrantless seizure of a gun where officers had complete control of the property from the moment they arrived on the scene and where they had ample time to secure a warrant while officers guarded the area once the suspect was taken into custody. *State v. Parker*, 399 So. 2d 24, 28-29 (Fla.3d DCA 1981). In *Parker*, the search of the premises did not begin until the defendant had been arrested, handcuffed, and taken away. *Parker* at 29. The search and seizure of the gun violated the defendant's constitutional rights, and the trial court's order suppressing the evidence was affirmed. *Parker* at 30.

In the present case, Officer Creelman failed to articulate any facts in his report tending to show that exigent circumstances existed after Clark was subdued, handcuffed, escorted downstairs by Officers Creelman and Rizzo, and placed in a police vehicle by Officer Rizzo that would justify Officer Creelman going back upstairs to search the master bedroom for anything Clark may have dropped or gotten rid of while he was inside that room. Clearly, the exigency that permitted the warrantless entry into Mr. *****'s home ended with Clark's arrest. There was no reason why Officers Creelman and Rizzo could not have then obtained a search warrant. Officer Creelman's subsequent search of Mr. *****'s master bedroom was, therefore, illegal.

It was not until Officer Creelman walked back upstairs after Clark's arrest and entered the master bedroom that he could "see, in plain view, a large piece of an off white substance that I recognized to be crack cocaine." *See* attached police report. It was not until after examining this and evidence of drug paraphenalia in the master bedroom that Officer Creelman called the on duty supervisor and held the residence as a crime scene. *See* attached police report.

A warrantless seizure of evidence in plain sight is constitutionally permissible only where three requirements are met: (1) the evidence must be observed in plain sight without the benefit of a search; (2) the police must have a legal right to be where they are at the time of the observation; and (3) the police must have probable cause to believe that the evidence observed constitutes contraband or fruits, instrumentalities, or evidence of crime. *State v. Parker*, 399 So. 2d 24, 29 (Fla. 3d DCA 1981).

In Mr. *****'s case, Officer Creelman reported that he saw the evidence in plain sight only after Clark was in custody, and he went back upstairs to search the master bedroom to see if Clark dropped anything or had gotten rid of anything there. But at the time he observed this, Creelman did not have a legal right to be where he was because the exigency that had permitted a warrantless entry of the ***** home ended with Clark's arrest. Thus, two of the three requirements for the plain-view exception to the warrant requirement are not met in this case. That being the case, Officer Creelman's search of Mr. *****'s master bedroom was illegal, and the evidence seized therein should be suppressed.

B. ANY ALLEGED CONSENT TO SEARCH MR. *****'S RESIDENCE WAS OBTAINED AFTER ILLEGAL POLICE ACTIVITY THAT, IN TURN, TAINTED THE CONSENT AND RENDERED IT INVOLUNTARY

Mrs. *****'s subsequent consent to search her home was tainted and rendered involuntary due to Officer Creelman's prior illegal search of the ***** master bedroom in the absence of any legal right to do so after the exigent circumstance that permitted the warrantless entry into Mr. *****'s home ended with Clark's arrest.

The case of *Horvath v. State*, 524 So. 2d 741 (Fla. 4th DCA 1988) is instructive:

> Police officers who had a warrant for the arrest of Debra Downs saw her enter the home of appellant Stephen Larry Horvath. They knocked on the door, and Horvath told them to wait a while. When they were admitted and asked for Debra, Horvath told them she was in the bedroom. When they entered the bedroom they discovered she was in the adjoining bathroom.
>
> A female officer entered the bathroom and came out with Debra Downs. Detective Pollock then went into the bathroom, where he saw traces of a powdery substance on the toilet seat and a plastic bag in the waste basket.
>
> When Pollock came out of the bathroom he asked Debra why she took so long in the bathroom. Debra said Larry Horvath had come in and dumped cocaine down the toilet.
>
> Half a dozen officers were in the house. There was conflicting testimony of officers as to whether Horvath was already under detention or not, on account of his involvement with a stolen vehicle found near the house, when Pollock asked Horvath for permission to search the house, explaining that if he gave no permission the police could obtain a search warrant on the strength of the powder and baggie that Pollock had seen in the bathroom, and that Horvath would be held for the three or four hours it might take to get the warrant. Horvath consented to the search. A similar colloquy occurred when a safe was discovered, and Horvath opened the safe. Physical evidence seized as the result of the search included a substantial cache of cocaine, guns, exploding ammunition and VIN tags removed from automobiles.

Horvath at 741.

Pleading *nolo contendre* to charges of trafficking in cocaine, possession of exploding ammunition, and unauthorized use of driver's license, Horvath preserved the suppression issue for appeal. *Horvath* at 741. The Fourth District Court of Appeal held that the physical evidence should have been suppressed because the search was nonconsenual. *Id*. The Court stated:

> The police conduct principally effectuating this result is Detective Pollock's search of the bathroom and use of his observation to obtain Horvath's consent to the housewide search. There is no Fourth Amendment exception that can justify Pollock's search of the bathroom after another officer had brought the person who was the subject of the arrest warrant

> out of that room. Because that search was illegal, use of the result of the search of the bathroom to persuade Horvath to allow a search of the entire house was coercive. *Moreover, a consensual search after a search has begun illegally is per se illegal.*

Horvath at 741 (italics added).

In *State v. Sakezels*, 778 So. 2d 432 (Fla. 3d DCA 2001), an apartment owner came home to find that police had made a warrantless entry into his apartment, detained his co-resident, and started searching the apartment with the consent of his co-resident. The apartment owner then gave his consent to search as well. *Sakezeles* at 435. Finding illegal police conduct in the warrantless entry of the apartment and the detention of the co-resident, the appellate court upheld the trial court's determination that the apartment owner's consent to search did not dissipate the taint arising from the officers' illegal warrantless entry and that there was not clear and convincing evidence that the consent was voluntary. *Id*. The trial court's ruling that the evidence was to be suppressed was affirmed. *Id.*

Where officers responded to an aggravated assault call, the victim accused the defendant of threatening her with a firearm. *McCauley v. State*, 842 So. 2d 897, 898 (Fla. 2d DCA 2003). An officer then went to the home of the mother of defendant's girlfriend and arrested the defendant in the front room. *McCauley* at 899. Shortly after McCauley's arrest, his girlfriend went to retrieve her infant child from a bedroom in the back of the home and the police officers followed her, deciding to conduct a protective sweep of the home. *Id.* When asked whether there were any weapons in the home, the girlfriend responded that there was a firearm in the bedroom. *Id.* An officer looked under the mattress of a bed in the bedroom and found a firearm. *Id*. The officer did not obtain the girlfriend's consent to search the room prior to looking under the mattress. *Id*. The

mother of defendant's girlfriend arrived just after the defendant had been arrested and the firearm discovered, and she signed a consent to search her home. *Id*.

In the trial court, McCauley's girlfriend denied telling the officers that there was a firearm under the mattress. *McCauley* at 899. She also asserted that McCauley had not possessed a weapon during the earlier incident with the victim. *Id.* The girlfriend's mother testified that she signed the consent under duress after being threatened by the police. *Id*.

Although the State argued that the search in *McCauley* was actually permissible as a protective sweep, the court found that the police exceeded the permissible limits of a precautionary or protective sweep by looking under the mattress in the bedroom. *McCauley* at 899. The State also argued that McCauley's girlfriend consented to the search. *Id*. However, there was no testimony that she consented to a search of the premises. *Id*. Finally, the court concluded that the after-the-fact consent to search by the girlfriend's mother did not justify the search and seizure in that case because *"[i]t is well-settled that consent obtained after illegal police activity is presumptively tainted and renders the consent involuntary." Id*. (italics added).

Where a defendant's wife simply acquiesced to a police request to enter her home in order "to speak with her", such mere acquiescence did not constitute a voluntary consent to search. *Gonzalez v. State*, 578 So. 2d 729, 733 (Fla. 3d DCA 1991). The police, suspicious of defendant's alleged involvement with a drug operation, fanned out and conducted a room-to-room search for alleged security purposes. *Gonzalez* at 731-733. Subsequently, defendant's wife signed a consent form which purported to formalize her prior verbal consent to search the house. *Gonzalez* at 731. As a result of the search,

evidence of drugs was seized, and the defendant was charged by information with trafficking in cocaine. *Id*.

The *Gonzalez* court found it unlikely that defendant's wife voluntarily allowed the police to enter her house where five officers confronted her at night and were already trespassing on both sides of her house for supposed security purposes. *Gonzalez* at 733. Her invitation to enter the house was a mere acquiescence to authority--not a voluntary consent. *Id.* The appellate court also found that the subsequent room-to-room "protective sweep" was actually a warrantless search of the Gonzalez home. *Id*.

The illegal search of the Gonzalez home tainted and rendered involuntary the subsequent verbal and written consent given by Mrs. Gonzalez to search the premises. *Gonzalez* at 733. The court found nothing in the record which would serve to dissipate the taint of the illegal police search and concluded that the trial court erred in denying the defendant's motion to suppress. *Gonzalez* at 734.

On rehearing, the *Gonzalez* court clarified that when the State seeks to rely upon consent to justify the lawfulness of a search, it indisputably has the burden of establishing that the consent to search was freely and voluntarily given. *Gonzalez* at 735. *Where the consent is obtained after illegal police action, such as an illegal arrest or search, the State has a higher burden of establishing by "clear and convincing evidence" that there has been an unequivocal break in the chain of illegality sufficient to dissipate the taint of the prior illegal police action and thus render the consent freely and voluntarily given. Gonzalez* at 736 (italics added).

In Mr. *****'s case, Officer Creelman's search of the master bedroom *after* Clark was already outside the home, handcuffed, and placed in a police vehicle by Officer

Rizzo, was illegal. Any subsequent consent to search by Mrs. ***** was indisputably tainted by that prior illegal police activity and was, therefore, a mere acquiescence to authority and not a voluntary consent.

Also, there is no evidence of an unequivocal break in the chain of illegality sufficient to dissipate the taint of the prior official illegal action. Mr. *****'s home was held as a crime scene until the arrival of the Criminal Apprehension Team. Therefore, all of the evidence seized from Mr. *****'s home should be suppressed pursuant to article I, section 12 of the Florida Constitution, and the fourth and fourteenth amendments to the United States Constitution.

WHEREFORE, Mr. *****, through undersigned counsel, requests that this Court grant this motion.

_____
Ronald S. Chapman
Counsel for Defendant

CERTIFICATE OF SERVICE

I do certify that a copy hereof has been furnished by fax to the Office of the State Attorney, Division "R," 401 North Dixie Highway, West Palm Beach, Florida this 27th day of December, 2005.

_____
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