IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CESARE FUAD SAFIEH, Defendant and Appellant.	Court of Appeal Case No: B170888 Superior Court Case No: GA052838 **APPELLANT'S OPENING BRIEF**

TO THE HONORABLE PRESIDING JUSTICE VAINO SPENCER AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA:

INTRODUCTION

The trial court erroneously denied Appellant's motion to suppress evidence pursuant to Penal Code Section 1538.5 because members of the Pasadena Police Department conducted a search of Appellant's closed, locked, combination/key safe, located in the closet of his bedroom, without a warrant or exigent circumstances which would excuse the necessity of procuring a search warrant. The warrantless search and seizure of the

closed, locked safe violated Appellant's right against unreasonable searches and seizures under the Fourth Amendment of the United States Constitution and Article 1, Section 13 of the California constitution.

PROCEDURAL HISTORY

Cesare Fuad Safieh ("Mr. Safieh" "Appellant") was named in a felony complaint in the Superior Court of California, County of Los Angeles, Northeast District, entitled "*The People of the State of California, Plaintiff, v. Cesare Fuad Safieh, Defendant*," case number GA052838.

On April 1, 2003, the felony complaint was filed with the Superior Court alleging that Appellant committed the following violations on March 30, 2003: (1) Penal Code Section 12280(b), possession of an assault weapon, a felony; (2) Penal Code Section 12280(b), possession of an assault weapon, a felony; (3) Penal Code Section 12520, possession of a firearm silencer, a felony; (4) Health and Safety Code Section 11370.1(a), possession of a controlled substance with a firearm, a felony; and (5) Penal Code Section 243(e)(1), battery against a spouse/fiancée, a misdemeanor.

On April 1, 2003, Appellant entered not guilty pleas to the felony complaint in the Superior Court, Northeast Division. On May 8, 2003, the scheduled date of the preliminary hearing, the People moved the court to amend count four of the felony complaint, violation of Health and Safety

Code Section 11370.1, through interliniation to reflect violation of Health and Safety Code Section 11350, a felony, and moved to dismiss all remaining counts. The court granted the People's motion. On May 30, 2003, counsel for Appellant, Steve Escovar, filed a motion pursuant to Penal Code Section 1538.5 to suppress evidence. (CT at pgs. 55-63). The matter was continued to June 12, 2003.

Appellant's preliminary hearing was held on June 12, 2003, in the Superior Court of California, Northeast District, Pasadena Courthouse, by the Honorable Judson W. Morris. (CT at pg. 1). Appellant appeared with counsel at the preliminary hearing, and counsel argued the motion pursuant to Penal Code Section 1538.5 to suppress evidence (CT at pgs. 1-47). The court denied Appellant's motion to suppress evidence and ordered him held on amended count four, violation of Health and Safety Code Section 11350, possession of a controlled substance, a felony. (CT at pg. 46).

On June 27, 2003, Appellant was arraigned and pled not guilty to the single of the felony count in the information. (CT at pg. 79). The matter was continued on several occasions to conduct pretrial conferences and motions. (CT at pgs. 79-80).

On September 8, 2003, Appellant filed a motion to set aside the information pursuant to Penal Code Section 995. (CT at pgs. 81-89). The People filed opposition to Appellant's motion to set aside the information on September 16, 2003. (CT at pgs. 138-140).

A hearing on Appellant's motion to set aside the information pursuant to Penal Code Section 995 was conducted on September 17, 2003, in Department Northeast F of the Superior Court, the Honorable Leslie E. Brown, presiding. (Reporter's Transcript on Appeal at pgs. 1-23). The court denied Appellant's motion to set aside the information. (Reporter's Transcript on Appeal at pg. 15, lines 14-20). Following the hearing, Appellant withdrew his "not guilty" plea and entered a plea of "guilty" to Count 1, violation of Health and Safety Code Section 11350(a), possession of a controlled substance, to wit cocaine, a felony. (Reporter's Transcript on Appeal at pg. 20, lines 4-8). Appellant was sentenced to Deferred Entry of Judgment pursuant to Penal Code Section 1000.2, for eighteen (18) months under various terms and conditions of probation. (Reporter's Transcript on Appeal at pg. 20, lines 21-28, pg.30, lines 1-12).

On October 24, 2003, Appellant filed a petition for finding of factual innocence and for relief pursuant to Penal Code Section 851.8(d) and order. (CT at pgs. 144-160). The matter was heard on October 30, 2003, in Department Northeast F of the Superior Court, the Honorable Leslie E. Brown, presiding. The court ordered that any reference to Appellant's arrest for the dismissed charges of Penal Code Section 12280(b) (two counts), Penal Code Section 12520 and Health and Safety Code Section 11370.1(a) should be exonerated, obliterated, and sealed. (CT at pg. 161). Additionally,

the court granted Appellant's motion for return of Mr. Safieh's passport and currency, pursuant to Penal Code Section 1536. (CT at pg. 161).

STATEMENT OF APPEALABILITY

On October 16, 2003, Appellant filed and served a Notice of Appeal of Guilty Plea pursuant to Penal Code Section 1538.5(m). (CT at pgs. 163 to 168). Appellant timely filed and served a Notice of Appeal from his judgment of conviction and sentence rendered on September 17, 2003. This appeal is taken pursuant to Penal Code Section 1538.5(m) and is based solely on the grounds involving a warrantless search and seizure, the validity of which was contested pursuant to Penal Code Section 1538.5(a).

STATEMENT OF THE FACTS

On March 30, 2003, at approximately 5:12 p.m., Sergeant Tracy Ibarra of the Pasadena Police Department arrived at 3132 Estado Street, City of Pasadena, in response to a disturbance call between a woman and a man in a driveway. (CT at pgs. 11-12, lines: 18; 1-2). Upon arrival at the location, Sergeant Ibarra did not observe any domestic disturbance on the property. (CT at pg. 21, lines 19-21). Sergeant Ibarra subsequently contacted Tewfic Safieh and William Rizk, outside their home, and questioned them regarding the alleged disturbance. (CT at pgs. 21-22, lines

22-28; 1-8). Sergeant Ibarra advised Appellant's brother, that she needed to check inside the home in order to insure that no one was injured. (CT at pg. 22-23, lines 9-11; lines 4-11).

Once inside the home, Sergeant Ibarra observed Appellant sitting on a chair in the living room and Carla Baidieri standing in the living room. (CT at pg. 23, lines 13-16). Sergeant Ibarra escorted Carla Baidieri, the alleged victim, out of the home and questioned her. (CT at pg. 23, lines 17-23). During the time that Sergeant Ibarra interviewed Ms. Baidieri some thirty feet from the residence, Appellant was inside the residence alone and unsupervised for approximately seven to eight minutes. (CT at pg. 23-24, lines 24-28; lines 1-21). Sergeant Ibarra testified that while she was speaking to Ms. Baidieri, Officer John Calderon arrived upon the scene. (CT at pg. 24, lines 9-11). Sergeant Ibarra testified that she quickly briefed Officer Calderon before she directed him to contact Appellant inside the residence. (CT at pg. 24, lines 16-24). Sergeant Ibarra testified that she could not see what Officer Calderon was doing once inside the residence. (CT at pg. 24, lines 19-21).

Sergeant Ibarra testified that she received information from Ms. Baidieri that Appellant had a rifle and a pistol in their bedroom. (CT pg. 14, lines 15-16). After concluding her conversation with Ms. Baidieri, Sergeant Ibarra reentered the residence and spoke with Appellant. (CT pg. 25-26, lines 27-28; 1-3). Sergeant Ibarra informed Appellant that "[she] was

aware of the fight between him and his girlfriend and that [she] was aware that he had weapons and asked him where they were because [the police] needed to collect them for safekeeping." (CT, page 14, lines 17-20).

Sergeant Ibarra testified that it is her department's policy and procedure to inquire if weapons are present in the home, and if so, to collect them for safekeeping. (CT at pg. 26, lines 17-27). Sergeant Ibarra testified that she had the authority to collect any weapons at the residence because of Penal Code Section 12028.5. (CT at pg. 26, lines 9-11). Sergeant Ibarra testified that not only did she have authority to collect any weapons in the residence, but that it was her duty to collect those firearms, pursuant to Penal Code Section 12028.5. (CT at pg. 15, lines 6-8). At this time, Sergeant Ibarra approached Appellant, who was still sitting in the dining room, and told him that she had "the legal right to collect the guns for safekeeping." (CT at pg. 27, lines 8-13). Appellant was told that he had to open the safe. (CT at pg. 16, lines 1-3).

Initially, Appellant questioned Sergeant Ibarra's necessity to collect the guns, specifically, because they were contained in a safe. (CT at pg. 15, lines 12-14). Sergeant Ibarra persisted that she would need to collect those guns, and testified that she told Appellant, "because of the domestic violence in the home, we [the police] had the *legal right* to collect the guns for safekeeping." (CT at pg. 27, lines 8-13) (emphasis added). Next, Sergeant Ibarra instructed Appellant to provide the combination to the safe

to his brother. At Sergeant Ibarra's directive, Appellant provided his brother with the combination to the safe. (CT at pg. 15, lines 19-26). Appellant's brother, however, was not able to open the safe. (CT at pg. 15, lines 27-28). Once more, Sergeant Ibarra approached Appellant and ordered him to open the safe. (CT at pg. 16, lines 1-3). Approximately between 5:45 and 6:00 p.m., approximately forty-five minutes after Appellant was initially contacted, Appellant opened the closed, locked, combination/key safe. (CT at pg. 16, lines 4-5; pg. 27-28, lines 26-28, 1-2).

Once the safe was opened, Sergeant Ibarra escorted Appellant back to the living room and Officer Calderon opened the door of the safe and searched the safe. (CT at pg. 28, lines 19-28; pg. 29, lines 1-2). Inside the safe, officers saw several guns and an aluminum foil bindle. (CT at pg. 16, lines 6-16). Officers did not know what was inside the foil bindle, which was discovered some two hours after the initial call to the residence. (CT pg. 31, lines 10-21). The items contained within the safe were then removed from the safe and spread across the bed for inventory. (CT at pg. 32, lines 15-19). According to Sergeant Ibarra, Officer Calderon told her that while he was searching the safe, he discovered marijuana. (CT at pg. 31, lines 22-27). Sergeant Ibarra did not know where the alleged marijuana was located or whether Officer Calderon looked within a container to find it. (CT at pg. 32, lines 1-9). While the items were being inventoried, Officer Calderon returned to the station to write a search warrant. (CT at pg. 32,

lines 21-26). After the search warrant was served, Officer Shawn Porter, of the Pasadena Police Department, found a blue plastic container in a jacket pocket, alleged to contain cocaine. (CT at pg. 34, lines 18-21). The items recovered prior to the issuance of the search warrant were the guns, some alleged marijuana and a tin foil bindle. (CT at pg. 35, lines 24-28).

Appellant was then arrested on alleged violations of Penal Code Sections 12280(b) (two counts), 12520, 243(e)(1) and violation of Health and Safety Code Section 11370.1.

ARGUMENT

I. STANDARD OF REVIEW

In reviewing the action of the lower courts, the appellate court will uphold those factual findings of the trial court that are supported by substantial evidence. The appellate court, however, exercises independent judgment on the question of whether the search was unreasonable and whether appellant's constitutional rights were violated. People v. Calderon, 23 Cal. 4th 824 (2000); People v. Lebya, 29 Cal. 3d. 591 (1981); People v. Superior Court (Keithley), 13 Cal.3d 406, 410 (1975).

II. THE WARRANTLESS SEARCH OF MR. SAFIEH'S HOME AND EFFECTS WAS UNCONSTITUTIONAL PURSUANT TO THE FOURTH AMENDMENT OF THE UNITED STATES CONSITUTION AND ARTICLE 1, SECTION 13 OF THE CALIFORNIA CONSTITUTION.

The Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment in Mapp v. Ohio, 367 U.S. 643 (1961), grants the fundamental right of persons' to be free from unreasonable searches and seizures. The Fourth Amendment mandates "the right of 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. Constitution, amend IV. At the epicenter of the places and effects, which are to be protected from government intrusion, are those found within the home. The history of our nation's jurisprudence has regarded the home as "the center of one's private life, the bastion of which one has a legitimate expectation of privacy" Griffin v. Wisconsin, 483 U.S. 868, (1987). The United States Supreme Court has consistently held that "searches and seizures inside a home without a warrant are presumptively unreasonable." Payton v. New York, 445 U.S. 573 (1980). The interest in protecting one's dwelling from

unreasonable searches and seizures has been characterized by the courts as "the chief evil against which the wording of the Fourth Amendment is directed." United States v. United States District Court, 407 U.S. 297, 313 (1972).

The principal protection against unnecessary intrusions into private dwellings by agents of the government who seek to enter the home for purposes of search or arrest, is the warrant requirement imposed by the Fourth Amendment. See Johnson v. United States, 333 U.S. 10, 13-14 (1948). Before law enforcement agents may invade the sanctity of the home, the burden is on the government to demonstrate that exigent circumstances exist that would overcome the presumption of unreasonableness that attaches to all warrantless home entries. See Payton, 445 U.S. at 586.

In the present case, Sergeant Tracy Ibarra, member of the Pasadena Police Department, testified that the warrantless search of Appellant's person, home and effects was premised upon her authority to retrieve weapons in cases of domestic violence pursuant to Penal Code Section 12028.5. (CT at pg. 26, lines 9-11). Consistent with the practice of Pasadena Police Department, Sergeant Ibarra testified that she relied on the statutory authority of Penal Code Section 12028.5 for the proposition that officers can make a warrantless search and of a residence to seize weapons. (CT at pg. 26, lines 17-27). Sergeant Ibarra testified that the warrantless

search of Appellant's home and effects was conducted "because of the domestic violence in the home, we [the police] had the legal right to collect the guns for safekeeping" pursuant to Penal Code Section 12028.5. (CT at pg. 27, lines 8-13).

Penal Code Section 12028.5(b), does not authorize unbridled, warrantless searches of private residences for the purpose of retrieving weapons. The legislative history simply states that the scope of a search in which an officer is authorized to take temporary custody of firearms at the scene of domestic violence incident are subject to judicially recognized exceptions to the warrant requirement. Firearms and Deadly Weapons Seized by Law Enforcement From Scene of Domestic Violence Incidents, 2002: Hearings on S.B.1807 Before the Senate Comm. On Public Safety, 2001-2002 Regular Session. In the present case, the search and seizure of Appellant's home and effects did not fall within a judicially recognized exception to the warrant requirement according to Penal Code Section 12028.5, the Fourth Amendment of the United States Constitution, and Article 1, Section 13 of the California Constitution.[1]

[1] Mr. Cesare Fuad Safieh has standing to challenge the warrantless search of the house and safe within because he has resided at the residence since 1979. The closed, locked combination/key safe was located in the closet of his bedroom of his home. (CT at pg. 6, lines 27-28 to pg. 10, lines 1-12.)

III. PENAL CODE SECTION 12028.5(B) DID NOT AUTHORIZE THE WARRANTLESS SEARCH AND SEIZURE OF MR. SAFIEH'S RESIDENCE AND EFFECTS, SPECIFICALLY THE CLOSED, LOCKED COMBINATION/KEY SAFE.

Penal Code Section 12028.5(b) provides that "a peace officer who is at the scene of a domestic violence incident involving threat to human life or physical assault, shall take temporary custody of any firearm or other deadly weapon in *plain sight* or discovered pursuant to a *consensual search* or *other lawful search* as necessary for the protection of the peace officer or other persons present." CAL. PEN. CODE § 12028.5(B) (West 2004) (emphases added).

The initial analysis that police officers summoned to the location of a disturbance must make is whether the incident involves "domestic violence and the threat to human life or physical assault." CAL. PEN. CODE § 12028.5(B) (West 2004). If facts exists to support that an incident involves domestic violence and the threat to human life or physical assault, then the statute expressly authorizes peace officers to search and seize weapons within the parties' possession without a search warrant under three lawful principles: (1) plain sight; (2) consent; and (3) other "lawful searches". CAL. PEN. CODE § 12028.5(B) (West 2004).

In this case officers of the Pasadena Police Department did not conduct a search of Appellant's closed, locked safe and residence under any of the exceptions to the warrant requirement stated in Penal Code Section 12028.5, or judicially recognized under Fourth Amendment jurisprudence. Any evidence seized as a result of the warrantless search in this case, is in violation of Appellant's constitutional rights and must be suppressed. Wong Sun v. United States, 371 U.S. 471, 488 (1963).

A. PASADENA POLICE OFFICERS DID NOT OBSERVE ANY FIREARMS OR UNLAWFUL CONTRABAND IN PLAIN VIEW.

One of the lawful principles under which a warrantless search and seizure is authorized pursuant to Penal Code Section 12028.5 is the plain view exception. Horton v. California, 496 U.S. 128 (1990). In the present case, the weapons seized from Appellant's home were all contained within a closed, combination/key safe, located in the closet of Appellant's bedroom. (CT at pg. 8, lines 11-13, 21-22; at pg. 15, lines 12-20). Pasadena Police officers did not observe any weapons or any unlawful contraband immediately apparent to them and in plain view. All of the physical evidence, which was subsequently the basis of the charges in the felony complaint filed against Appellant, were items contained within the closed,

combination/key safe. Therefore, the plain view exception to a search warrant is not applicable in this case.

Furthermore, in the People's reply brief to Appellant's motion to suppress evidence, the People admitted that officers of the Pasadena Police Department did not find any weapons in plain sight. (See People's Response to Defendant's Motion to Suppress Evidence ("1538.5 Opposition"), CT at pg. 53, line 19).

B. MR. SAFIEH DID NOT GIVE VALID CONSENT TO THE SEARCH OF THE CLOSED, LOCKED, COMBINATION/KEY SAFE.

The second exception, under which the police officers are authorized to search and seize the firearms contained within the safe, pursuant to the Section 12028.5 and in accordance with Fourth Amendment jurisprudence, is with Appellant's valid consent. People v. Rios, 16 Cal.3d 351, 355-356 (1976).

To the extent that the government relies on this exception to justify the warrantless search of the safe, the government has the additional burden of proving that that "the defendant's manifestation of consent was the product of his free will and not a mere submission to an express or implied assertion of authority." People v. Johnson, 68 Cal.2d 629, 632 (1968).

In every case, the voluntariness of consent is "a question of fact to be determined in light of all the circumstances." In re DMG, 120 Cal App. 3d 218, 225 (1981); People v. James, 19 Cal. 3d 99 (1977). In reviewing the resolution of the issue, the trial court applies the standard evidence standard. People v. Superior Court (Keithley), 13 Cal. 3d 406, 410 (1975); People v. James, supra, 19 Cal. 3d 99, 107.

In this case, the trial court erred if it concluded that Appellant voluntarily consented to a search of the safe. First, the People failed to meet their burden of proving that defendant's manifestation of consent was voluntary. In the People's reply brief to Appellant's motion to suppress evidence, the People admitted Appellant did not consent to the search,

> "The Police did not inadvertently find the weapons in plain sight. They did not ask for permission to search...It is the People's position that once the police learned of the presence of weapons, they were under a duty to seize them the same as if they had found them inadvertently or pursuant to a consensual search. The statute [Penal Code Section 12028.5] actually required it, and the Fourth Amendment did not proscribe it."

(CT, page 53, lines 19-24).

Second, the record is void of any substantial evidence, in light of all the circumstances, that Appellant's statement was a voluntary and not without coercion. Appellant disclosed the information about the presence of firearms in the home only after Sergeant Ibarra asserted that the police had a "legal right" to collect the guns and repeatedly ordered.

1. MR. SAFIEH OPENED THE CLOSED, LOCKED, COMBINATION/KEY SAFE UPON THE ASSERTION BY PASADENA POLICE SERGEANT IBARRA THAT SHE HAD "A LEGAL RIGHT" TO COLLECT THE GUNS.

A consent search is unreasonable if it is coerced. In establishing this rule, the court recognized the twin goals of guarding against coerced consent and preserving consent searches that are actually reasonable and valid. One of the grounds upon which California courts have invalidated findings of consent is upon a police officer's false claim of authority to search. In re DMG, 120 Cal App. 3d at 225; People v. James, 19 Cal. 3d 99, 116 (1977).

The courts have held that verbal assertion of police authority in no less coercive, "in that the request for permission to search was accompanied by a claim of the right to proceed regardless of consent." People v. James, 19 Cal. 3d at 116 ; *See also* People v. Brown, 53 Cal.App.3d Supp. 1 (1975); People v. Shelton, 60 Cal. 2d 740 (1964); Lane v. Superior Court, 271 Cal.App.2d 821 (1969); Bumper v. North Carolina, 391 U.S. 543 (1968).

Deception has been found to negate the voluntariness of the consent. In the seminal case Bumper v. North Carolina, the Supreme Court held that "when a law officer claims authority to search a home under a warrant, he

announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent." Ibid. at 550.

Under the facts of this case, it is clear that Appellant opened the safe only after Sergeant Ibarra had expressed her "legal right" to seize the weapons pursuant to Penal Code Section 12028.5. (CT at pg.27, lines 8-15). Sergeant Ibarra's claim of a legal right to possession the weapons is analogous to the claim made by the officers in Bumper, which asserted their right to search the home. In both cases, the Officers asserted legal authority, thereby misleading the defendants into believing that they did not possess the right to resist. In the case of Bumper, the officer claimed the authority of a search warrant. In this case, Sergeant Ibarra invoked her "legal right," pursuant to Penal Code Section 12028.5. (CT at 27, lines 8-15).

The case of People v. Fields, 95 Cal.App.3d 972 (1979), the court discusses that the manner in which the request to search is made by the police officer, is indicative of coercion. In Fields, the court held that "[w]hen the police ask someone to perform an act which facilitates their access as distinguished from asking permission to search, it cannot be said that there has been no complicit assertion of authority." Id. at 976. The importance of asking permission, as an indicia of voluntariness, was also explained by the court in People v. James, 19 Cal.3d 99, 116 (1979).

In this case, Appellant was told that the Pasadena Police Department had the "legal right" to possess the guns and was then asked to open the safe. No controversy exists among the parties that Appellant was asked to open the safe. (CT at p.15, lines 19-20, "I asked him if he could give me the combination to his brother; CT at p.16, lines 1-2, "Yes," in response to the question if Sergeant Ibarra asked the defendant [Appellant] to open the safe). In addition to being asked to open the safe pursuant to the officer's legal right to have the guns, Appellant had been detained in his home by the Pasadena Police Department for approximately forty minutes, prior to the time he was asked to open the safe. The police also instructed Appellant to open the safe several times.

For all the reasons stated above, the trial court erred in finding that Appellant's statement that he possessed weapons and ultimately opening the safe was consensual, and therefore constitutes a lawful search. (CT at pg.43, lines 9-21).

C. "OTHER LAWFUL SEARCH" PURSUANT TO PENAL CODE SECTION 12028.5 DOES NOT INCLUDE A "DOMESTIC VIOLENCE INCIDENT" EXCEPTION.

The trial court referred to Appellant's statement that weapons were present in the closed safe, as a factor justifying the officer's warrantless

entry into the safe. (CT at pg.42, lines 19-28; pg. 43, line 1). The trial court, however, attaches this conclusion to its ultimate ruling that the search of Appellant's residence fell under the "lawful search" tenant of Penal Code Section 12028.5. (CT at pg.43, lines 11-14). The trial court, therefore, denied Appellant's motion to suppress evidence pursuant to Penal Code Section 1538.5, upon the interpretation that a "lawful search" includes a warrantless search, without exigent circumstances, so long as it involves a "domestic disturbance" incident. (CT at pg.42, lines 3-13).

The lower court clearly erred in its interpretation of Penal Code Section 12028.5. The "other lawful search" provision of the statute in no way defines or authorizes broad, expansive warrantless searches of home and effects simply because an officer is called to the scene of a domestic disturbance. To understand the meaning of "other lawful searches," the court should refer to the legislature's intent.

Senate Bill 1807 added any "other lawful" search to the existing "consensual" or "plain view" conditions for the mandated seizure of firearms and weapons in domestic violence circumstances. Firearms and Deadly Weapons Seized by Law Enforcement From Scene of Domestic Violence Incidents, 2002: Hearings on S.B.1807 Before the Senate Comm. On Public Safety, 2001-2002 Regular Session. The purpose of the "other lawful search" provision was to extend the scope, previously limited to plain view searches and consensual searches, upon which law enforcement

officers must retrieve weapons. The legislature recognized that there are other judicially recognized exceptions to the warrant requirement, which would be a lawful basis to retrieve weapons at a domestic violence scene. Such lawful searches include a search incident to an arrest Chimel v. California, 395 U.S. 752 (1969); the emergency aid exception Mincy v. Arizona, 437 U.S. 385 (1978); People v. Higgins, 19 Cal. App.4th 247 (1994)); and searches pursuant to a warrant U.S. Constitution, amend IV.

Far from creating the novel exception upon which the Pasadena Police Department and the People invoke in this case, search incident to a "domestic violence incident," it seems to follow that the legislature's purpose of including "other lawful search" was to include other judicially recognized exceptions to the warrant requirement.

To the extent the lower court has created a new "domestic violence" exception to the Fourth Amendment, this court should reject such reasoning and reverse that ruling.

IV. THE PEOPLE FAILED TO MEET THEIR BURDEN THAT EXIGENT CIRCUMSTANCES EXISTED TO JUSTIFY THE WARRANTLESS SEARCH OF THE CLOSED, LOCKED, COMBINATION/KEY SAFE.

The government can only point to exigent circumstances as a possible justification to conduct a warrantless search of the closed, locked

safe under Penal Code Section 12028.5, "other lawful search." The legislature clearly considered exigent circumstances to be a condition precedent for police officers may invoke Penal Code Section 12028.5 because that statute only applies at the scene of "domestic violence and the threat to human life or physical assault." CAL. PEN. CODE § 12028.5(B) (West 2004).

As a general rule, a warrantless search and seizure carried out in a private residence is considered presumptively unreasonable. A warrantless search and seizure, however, may be conducted in the presence of exigent circumstances. Exigent circumstances are "those in which a substantial risk of harm to persons involved or to the law enforcement process would arise if the police were to delay a search until a warrant [or search] could be obtained." United States v. Salvador, 740 F.2d 752, 758 (9th Cir. 1984), (quoting United States v. Robertson, 606 F.2d 853, 859 (9th Cir. 1979)). (brackets in original). The burden is on the government to show the "existence of such 'an exceptional situation' as to justify creating a new exception to the warrant requirement." Mincy v. Arizona, 437 U.S. 385 (1978). See also Vale v. Louisiana, 399 U.S. 30, 34 (1970); United States v. Salvador, supra, 740 F.2d at 758. In the present case, the government has failed to meet its burden.

A. THE SEARCH OF MR. SAFIEH'S HOME AND EFFECTS WAS NOT INCIDENT TO HIS LAWFUL ARREST.

A search incident to arrest is an exception to the general rule against searches without a warrant. The justification for permitting a warrantless search is the need to seize weapons or other things, which might be used to assault an officer or assist an escape, as well as the need to prevent the loss or destruction of evidence. See Preston v. United States, 376 U.S. 364 (1964). In Chimel v. California, 395 U.S. 752, 763 (1969), legitimate search incident to arrest was limited to the arrestee's person and the area "within his immediate control."

In this case, Appellant was not under arrest when officers of the Pasadena Police Department conducted the warrantless search of the closed, locked safe. (CT at pg. 27, lines 8-13). In addition, all weapons and evidence retrieved from Appellant's possession were contained within the closed, locked safe located in a closet, which was not within [Appellant's] "immediate control." (CT. at pg.35, lines 24-28). The government cannot point to a search incident to a lawful arrest as a possible justification for the search under Penal Code Section 12028.5.

B. "DOMESTIC VIOLENCE INCIDENT" DOES NOT CREATE SUFFICIENT EXIGENT CIRCUMSTANCES TO CONDUCT THE WARRANTLESS SEARCH OF MR. SAFIEH'S HOME AND EFFECTS.

The courts have sanctioned the warrantless entry of a residence under the exigent circumstances exception in incidents where police are responding to a domestic disturbance call. People v. Higgins, 16 Cal. App.4th 247 (1994); People v. Poulson, 69 Cal.App.4th Supp. 1 (1998). The emergency aid exception is one of the caretaking functions of the police, therefore, it provides for the warrantless entry of a dwelling. People v. Poulson, 69 Cal.App 4th Supp at 5.

The case law does not, however, excuse the warrant requirement for the unbridled search of home and effects in a case involving a domestic violence incident. "The privilege to render aid does not, of course, justify a search of the premises for some other purpose. An arrest may not be used as a pretext to conduct a general search of one's premises for incriminating evidence, and it has been said that where the right to conduct a search is obtained ostensibly for one purpose it may not be used in reality for another." People v. Roberts, 47 Cal.2d 374, 378 (1956).

In People v. Higgins, the officers responded to an anonymous report of a domestic disturbance involving a "man shoving a woman." Id. at 249. Upon knocking at the residence, the officers encountered a woman that

appeared to be "extremely frightened" and " 'little red mark' under one eye and sight darkness under both [eyes]." Id. at 249. Upon the officer's belief that other may be in peril inside and the threat of continued harm to the alleged victim, the officers made a warrantless entry into the home. While talking the defendant, Higgins, police officers smelled marijuana, saw a triple beam scale on the floor, saw a plastic baggie containing marijuana and a bindle of cocaine. At this point, Higgins consented to a search of the residence and the officers found more contraband. Ibid. at 249. The Higgins court held that exigent circumstances justified the warrantless entry and denied defendant's suppression motions.

Similarly in Pouson, the defendant was arrested in his home after a warrantless entry by the police and charged for driving under the influence of alcohol, causing and accident and injury and hit and run. In this case, as in the case of Higgins, the warrantless entry into the home was premised on the need for officers to render aid and assistance to defendant's wife after observing blood on a walkway leading up to the front door; blood smeared on the doorframe; and observing a woman in the home with blood on her face and a cut over her right eye. Id. at 3. Here the court held that the officer's plain observations of the residence and the woman inside provided reasonable suspicion to justify the warrantless entry. Ibid. at 5.

This present case is distinguishable from both Higgins and Pouson because officers of the Pasadena Police Department did not view any

contraband in plain sight and Appellant did not consent to the search of the closed, locked safe. Also, in the present case, all of the evidence seized was contained within the closed, locked safe.

C. THE MERE PRESENCE OF A FIREARM DOES NOT CREATE AN EXIGENT CIRCUMSTANCE.

The mere presence of a firearm in a residence does not create an exigent circumstance to conduct a warrantless search. United States v. Gooch, 6 F.3d 676, 680 (1993). Courts, however, have found that the police have a right to secure firearms that are unattended and pose a risk that the public will find the weapons, where the delay in procuring a search warrant would frustrate these efforts. New York v. Quarles, 467 U.S. 649, 656 (1984) (holding that officer's questioning about the discarded gun was and exception to the Miranda requirement because public safety required officers to retrieve a gun and not leave it where members of the public could find it); Cady v. Dombrowski, 413 U.S. 433 (1973) (finding police officer's opening of a trunk without a warrant did not violate the Fourth Amendment because the trunk was vulnerable to vandals). Under the facts of this case, the weapons seized pursuant to the warrantless search were not left unattended nor posed a risk to the general public.

In United States v. Gooch, officers received information that the defendant was "hurting people" at a campground and that shots had been

fired. The officers, without seeking a search warrant, ordered Gooch out of the tent were he was residing, patted him down an arrested him. Still lacking a warrant, the officer's searched the tent for weapons. The government argued that officers needed to search the tent immediately because the firearm presented a potential danger. The Ninth Circuit court held that the search was not justified by exigent circumstances because "no one remained in the tent at the time of the search. It would not have been difficult to prevent children or anyone else form entering the tent at the time of the search until a warrant was obtained." Id. at 680. The court also observed that the officers present were "not forced to react quickly in an inaccessible locale that could not be reached[...]." Id. at 680.

The case is analogous to the facts and circumstances that were considered by the Ninth Circuit in Gooch. The officers of the Pasadena Police Department detained Appellant to conduct an investigation. At the time Appellant was asked to open the safe, approximately forty-five minutes had elapsed. (CT at pg. 16, lines 4-5; pg. 27-28, lines 26-28, 1-2). In the course of the investigation, anywhere from four to five officers were present at the residence. (CT at pg. 25, lines 3-7). The officers had complete containment of the residence and Appellant and the others present were allowed to leave the premises. There was no evidence presented by the People to indicate that the officer's believed Appellant or the surrounding area posed an immediate threat to self or the citizenry. No evidence was

presented by the government to support the proposition that evidence could be destroyed.

V. CONCLUSION

The warrantless search of the closed, locked safe, therefore, was not justified by exigent circumstances. As such, the People cannot rely on Penal Code Section 12028.5, "other lawful search" exception as a justification for the warrantless search of the safe. The novel and overbroad "domestic violence" exception that the government proposes for an exception to the warrant requirement is contrary to the Fourth Amendment of the United States constitution, Article 1, Section 13 of the California constitution, the plain language of Penal Code Section 12028.5, and the legislative intent of the "other lawful search" provision.

In the present case, the record reflects that far from relying on the well delineated, and judicially recognized exceptions to the warrant requirement, the Pasadena Police Department and the government simply rely on their interpretation that a "domestic violence incident" justifies the warrantless search and seizure.

To allow law enforcement to conduct warrantless searches and seizures of a home on the grounds that it involved a "domestic violence

incident" without a finding of exigent circumstances, would obliterate the protection of the Fourth Amendment for an entire category of cases.

For all the reasons set forth above, the warrantless search of Appellant's home and effects was unlawful and all of the evidence obtained and used against him should have been suppressed by the trial court as "fruit" of the poisonous tree. Wong Sun v. United States, 371 U.S. 471, 488 (1963). A search warrant obtained on information acquired by the illegal search is itself illegal. Raymond v. Superior Court, 19 Cal. App. 3d 321, 326 (1971).

Appellant respectfully requests that the Court of Appeal reverse the denial of Appellant's motion to suppress.

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Respectfully submitted,

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