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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.	B170888

Los Angeles County Superior Court No. GA052838
The Honorable Leslie E. Brown, Judge
(Trial Court Judge)

The Honorable Judson W. Morris, Jr., Judge
(Penal Code Section 1538.5 Motion)

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

In an information filed by the District Attorney of Los Angeles County, appellant was charged in with a sole count with possession of a controlled substance in violation of Health & Safety Code, section 11350, subdivision (a). The information further notified appellant that conviction of the offense would require registration pursuant to Health & Safety Code, section 11590, failure of which to perform would, pursuant to the provisions of Health & Safety Code section 11594, be a crime. (CT 48-49.)

Appellant was arraigned and pled not guilty. (CT 79.)

Appellant was advised of and personally waived his right to trial by court and trial by jury, his right of confrontation of witnesses and his privilege against self-incrimination. He was advised of the nature of the charges against him, the elements of the offense and possible defenses and was advised of the consequences of the plea of guilty or nolo contendare and the effects of probation. The court found that appellant knowingly waived the foregoing rights and vacated his plea of not guilty and entered a new plea of guilty. The court deferred entry of judgment on count 1. The court denied appellant's motion to dismiss, pursuant to Penal Code section 995. Execution of the

sentence was suspended and appellant was placed on deferred entry of judgment for a period of thirty-six months under the condition, among others, that he not use or possess narcotics nor associate with persons known by him to be narcotics or drug users or sellers, and that he report to a probation officer within forty-eight hours. (CT 141-143.)

Appellant appeals, *inter alia*, the denial of the motion to dismiss pursuant to Penal Code section 995. (CT 163-164.)

STATEMENT OF FACTS

As appellant pled guilty to the information following the denial of his motion to suppress evidence, pursuant to Penal Code section 1538.5 and his motion to dismiss, pursuant to Penal Code section 995, no trial was had and the facts relating to those motions will be repeated in the argument section.

APPELLANT'S CONTENTION

That his plea should be set aside due to the fact that the evidence upon which the charges are based was obtained pursuant to an illegal search and seizure in his home. (AOB 9-29.)

RESPONDENT'S ARGUMENT

There was no "search" conducted here, only a seizure, and the officers had a right to be where they were when they observed the contraband.

ARGUMENT

THERE WAS NO "SEARCH" CONDUCTED HERE, ONLY A SEIZURE, AND THE OFFICERS HAD A RIGHT TO BE WHERE THEY WERE WHEN THEY OBSERVED THE CONTRABAND

Appellant contends that his home was unconstitutionally searched and, as a result of that unconstitutional search, narcotics were found which he argues should have been suppressed. (AOB 9-29.) Respondent submits that there was no search, only a seizure, and that the officers were in a place they had a right to be when they made a plain view observation of material leading them to request the formal search warrant.

In the instant case, the relevant facts from the hearing on the motion to suppress are follows. Appellant Cesare Fuad Safieh was living at 3132 Estado Street, in Pasadena, on March 30, 2003. The home formerly belonged to his deceased parents and was left to his brother and himself. He has been living there since 1979, had a key to the residence, and had his clothing there. (CT 7.)

Inside the residence was a safe belonging to appellant and his brother. The safe operated with both a combination and a key. Appellant could open the safe. On March 30, 2003, appellant's brother had forgotten the combination and appellant was the only person who could open the safe that day. The safe was located in appellant's bedroom inside of a closet. (CT 7-11.)

On March 30, 2003, Officer Tracy Janice Ibarra, who was a supervisor assigned to Field Services Patrol for the Pasadena Police Department and who had been a police officer for fifteen years, proceeded to the location of 3132 Estado in the City of Pasadena. (CT 11.) The police department had received a call from the residents at 3119 Estado of a disturbance between a Middle Eastern woman and a male in the driveway of the residence at 3132 Estado. (CT 12.)

At some point in time Officer Ibarra contacted appellant, a resident of the location complained of, and had a conversation with him. During that conversation, appellant said that there had been a fight between himself and his girlfriend. (CT 12.) Officer Ibarra talked to the girlfriend, whose name was Carla, and she stated that she and appellant had been arguing initially inside the home, but during the argument, appellant had got upset with her and her children and he began to throw her property out onto the driveway and telling her to move out. Carla related that she stepped in front of appellant to stop him from throwing her items out onto the driveway and pushed him back, and he started to go at her, and that appellant's brother had grabbed a hold of appellant to prevent him from "going at" her. Officer Ibarra asked if appellant had injured her, and she said that she was not injured. Officer Ibarra noticed a one-inch bruise on her right forearm and asked her about it, but she said that this injury was not caused by him, although she did not recall where the injury came from. Appellant had a scratch on his left biceps and redness on the right arm. (CT 13-14.)

Officer Ibarra then "received information from Carla that [appellant] had a rifle and a pistol in their bedroom, and I asked [appellant] if - - I told him that I was aware of the fight between him and his girlfriend and that I was aware that he had weapons and asked him where they were because we needed to collect them for safekeeping." (CT 14.) Officer Ibarra made this inquiry pursuant to Section 12028 of the Penal Code which, according to her, mandated that "if there are firearms in the home, we need to collect them for safekeeping to prevent escalation from further injury or accidents between the parties involved." (CT 14-15.)

Appellant replied that it was "okay for him to keep them in the home because he was the only one who has access to them because they were in his safe." However, Officer Ibarra explained to appellant, "That's exactly why we

need to get to them because the incident involves him and his girlfriend, that we still would need to collect them for safekeeping, and he could contact detectives to return them back to him. I asked him if he could give the combination to his brother." Officer Ibarra made this request not knowing what type of weapons were in the safe because she "would rather someone else open the safe." (CT 15.)

Appellant then gave the combination to his brother, but his brother was unable to open the safe. (CT 15.) Officer Ibarra then asked appellant to open the safe and he did so. In plain sight, she observed several guns which she collected, among them an AK-47 which she believed to be an illegal assault rifle, and her attention drawn to the bottom shelf of the safe on the right hand side where there was an aluminum foil bindle of the type which she had seen "at least a 100, 150 times in her career." Officer Ibarra had received training in the recognition of narcotics and narcotic package at the academy and had been an undercover narcotics officer for approximately six months. (CT 17.)

When retrieving the bindle, Officer Ibarra looked inside and there observed two 1" X 1" gray ziplocked baggies containing a white powder substance. There was also a blue and gray folder piece of paper in a bindle style, which upon being opened, was shown to contain a white powder that appeared to be cocaine. Officer Ibarra stopped the search at that time. (CT 18.)

Appellant in the dining room when he was first asked to open the safe and was sitting at the dining room table. (CT 27.) After appellant first opened the safe, Officer Ibarra escorted appellant back into the living room. Officer John Calderon was sent to the station to write a search warrant. At that time, all that had been found was the guns, the powdered substance, and the marijuana. (CT 32.)

Appellant, here, erroneously characterizes what occurred as a "search" of his home. It was not. A search occurs when one looks into a certain place

to ascertain if an item which is sought is located in that place. Here, there was no question that the gun was in the safe. Appellant had admitted to the officers that the gun was in a safe, and the officers had found out from Carla, appellant's live-in girlfriend that appellant had a gun. Here, what was sought was retrieval of the gun, not discovery or confirmation of its location.

As such, what occurred here was that the officers demanded that the gun be surrendered to them and appellant, in compliance with that order, opened the safe in order to surrender the guns. The police officers, who were standing by, then made a plain view observation of materials including marijuana, a tin foil bindle, and what they thought were illegal assault weapons leading them to stop the seizure process and request a formal warrant.

Warrantless seizures of objects in plain view do not violate a suspect's reasonable expectation of privacy provided that: the object in question was observed from a place where an officer had a right to be; probable cause existed as to the incriminating object; and an officer had lawful right of access to the object. (*People v. Camacho* (2000) 23 Cal.4th 824, 832; *Horton v. California* (1990) 496 U.S. 128, 136-137.)

Accordingly, the determinative question is whether the officers were in a place where they had "a right to be" when they made the observation. Seen in this light, appellant, in order to demonstrate a constitutional violation, must first show that the officers had no right to demand that he surrender the gun. He cannot. Penal Code section 12028.5, subdivision (b), provides, in relevant part, that:

> ". . . a peace officer . . . who is at the scene of a domestic violence incident involving a threat to human life or a physical assault, shall take temporary custody of any firearm or other deadly weapon in plain sight or discovered pursuant to a consensual or other lawful search *as necessary*

for the protection of the police officer or other persons present."

(Pen. Code, § 12028.5.) The statute goes on to describe the procedures for giving the owner a receipt for the firearm and later recovery of the firearm upon an expiration of a forty-eight-hour period.

Here, the officer observed bruises on both domestic partners and one, Carla the Girlfriend, had alerted her to the presence of the gun. As such, there is no question that the officers had the predicate facts necessary to trigger their obligation to seize any firearm or deadly weapon. Here, however, appellant mistakenly reads the provisions addressing plain view and consensual search as relating to the ability of the police to *retrieve* the weapons. It does not. These provisions relate to the *method by which the police officers obtain knowledge of the existence* of the weapon.

The distinction makes a difference because if appellant is correct and the former interpretation is true, the police are limited, as appellant argues they are, *to seizing only* weapons in plain view or under other judicially recognized exceptions to the Fourth Amendment, such as exigent circumstances. If, to the contrary, respondent is right and the latter is true, once the officers obtain, under these circumstances, *knowledge of the existence of a weapon*, the right of the officers to retrieve it is only restricted by the constitutionality of the means by which they employ to effectuate retrieval of that weapon.

Respondent's interpretation is the correct one as can be seen by reviewing the language in the statute in context. The statute gives the officer the right to take custody of any "firearm or deadly weapon *in plain sight or discovered pursuant to*" a lawful search. It does not state that the officer has the right to take custody of any "firearm or deadly weapon *if* in plain sight or discovered pursuant to a lawful search." The absence of any limitation such as the word "if" clearly indicates that the officer has the right and duty to remove

any weapon on the premises of which he has knowledge. Such knowledge would, therefore, necessarily encompass being informed of the existence of the weapon.

Thus, properly restated, the officers are given the right to retrieve any deadly weapon in plain sight or discovered by any other constitutional means. Here the officers discovered the existence of the weapon by word of mouth. Appellant confirmed that the weapon was indeed located at the living premises in the safe. (CT 14.) As such, the only remaining question is whether the weapons, which the statute gave the officers the right and duty to retrieve, were retrieved by the officers in a manner that did not violate any of appellant's constitutional rights. As such, when appellant and his girlfriend advised Officer Ibarra about the existence of the weapon, whether or not the weapon itself was *then* in plain view, the officers had a duty to seize the weapon.

The next question that asserts itself is given the fact that the officers had an unquestionable right to seize the weapon, how was the officer's right to retrieve the weapon impacted by the fact that the weapon here was located in a locked safe. As indicated above, even though the weapon was secreted from view in a safe, this was not a search. There was no question that the weapon was in the safe, and therefore there was no need to search the safe for the weapon. Thus, what was ultimately effectuated by the police officers here was a seizure of the weapons and a plain observation at the time the seizure was made. Contrary to appellant's assertions, however, no constitutional violation intervened between the time that the officers learned of the weapon and when the safe was ultimately opened.

Reviewing the facts from above, the sole purpose of the officer was to retrieve what, at that point, she thought it was a single rifle inside of the safe. In fact, the officer, indicating her preference, first had appellant give the combination of the safe to appellant's brother so that appellant's brother could

remove the weapon and give it to the police. As stated above, Officer Ibarra testified that she "would rather someone else [besides appellant] open the safe." (CT 15.)

In other words, Officer Ibarra did not care who retrieved the weapon or how it was retrieved. Neither did she show any particular interest in being able to view the contents of the safe. Significantly, the officers did not demand the combination to the safe from appellant so that they could effectuate entry themselves. Appellant's brother, however, was unable to open the safe. At that point, although the police officers requested that appellant open the safe, appellant clearly could have requested that the officers allow some other person to be called to the home to open the safe thereby concealing its contents from the police officers. Appellant did not.

At this point, given the fact that appellant was a person involved in a domestic violence dispute, and the statute specifically speaks to the safety of the police officers as well as the combatants, appellant was ushered out of the room when he opened the safe and the observations were then made leading to the search warrant and the ultimate confirmation that appellant had illegal narcotics in the safe.

As can be seen from the above, at each step of the process, the police officers were in a place wherein they had a right to be when their observations were made. They had a right to demand that the weapons be made available to them. Appellant's brother was unable to open the safe and preserve appellant's secrecy as to the contents therein and at the same time retrieve the firearm for the officers. This being true, appellant should have requested that some other person be allowed by the police to come to the home to remove the weapon and preserve the secrecy of the contents of the safe. Had the officers then refused and demanded that appellant open the safe, appellant would have had an

arguable issue. Instead, he opened the safe himself thereby giving the officers the right to be present at the place where they made the observation.

What appellant did not acquiesce in was the seizure of the weapons. However, he had no right to withhold the weapons. What appellant did acquiesce in, however, was the method by which the safe was opened. Since the officers "had no idea" that narcotics were in the safe at the time they requested that it be opened (*see e.g. People v. Rightnour* (1966) 243 Cal.App.2d 663, 667), there was no "search" and no constitutional violation effectuated when appellant was asked to open the safe and complied with that order.

Simply put, although appellant may have acquiesced in surrendering the weapons to the police officers, he had no legal right to refuse to surrender the weapons to the police officers. The question of how the police officers came to get those weapons, i.e., the opening of the safe, involves a completely different question. As to that, appellant did have discretion. He could have surrendered the weapons to the officers in any other way that would have concealed the other contents of the safe except for (a) giving the combination to the officers and letting them retrieve the weapons, or (b) opening the safe himself which, for obvious reasons, would give the officers the right to place appellant into a position where he could not conceal the other contents of the safe. Instead, appellant selected one of the former two options which gave the officers a right to separate him from the weapons and be in a physical position to make the observations that led to his conviction.

As such, there was no unlawful search, but merely a plain view observation of the officers from a place where they had a right to be while attempting a lawful seizure. By not having someone else open the safe and retrieve the weapons to give to the officers, appellant himself was responsible for the officers being in the place they had the right to be when they made the

observation even though they ordered him to open the safe. His action of opening the safe was merely a custodial action designed to allow the officers to retrieve the weapon (i.e., effectuate the seizure) and was not a search.

Should this Court reject respondent's assertion above and hold that the opening of the safe represented a constitutional barrier requiring its own separate legal justification, then respondent submits that the police officers had the *implied* consent of Carla, appellant's live-in girlfriend, to the opening of the safe, and appellant's own actions in opening the safe at the command of the officers were, again, merely custodial actions utilized by the officers to effectuate the seizure pursuant to that legal implied consent by Carla.

It has long been the law that a warrant search may be reasonable not only if the defendant consents but also if a person other than a defendant with the authority over the premises voluntarily consents to the search. (*United States v. Madlock* (1974) 415 U.S. 164, 170.) The finding of consent even by one other than the defendant will be upheld where that finding can be supported by substantial evidence. (*People v. Alvarez* (1996) 14 Cal.4th 155, 182.) A consent even of a defendant can be *implied* when, under the circumstances, it is reasonable to assume consent would be given. (*See e.g., Rightnour, supra*, 243 Cal. App. 2d 668-669.) Respondent submits that if a defendant's consent can be implied from the circumstances, then so can the consent of a third party who has authority to consent to the search.

Here, the officers went to investigate a domestic violence dispute. It was Carla, the girlfriend, not the appellant, who first advised the officers of the presence of the rifle. The statute was written for the protection of domestic partners such as her. She was a live-in girlfriend and thus lived on the premises. (CT 12-13.) It can be inferred from the fact that she advised the officers of the presence of the rifle that she was concerned for her safety and

impliedly consented to the officers taking whatever steps were necessary to retrieve the gun for her safety.

As such, even had appellant refused to open the safe, Carla could have consented to *even a forcible entry* into the safe by the officers. This being true, the fact that appellant merely performed the custodial function of opening up the safe pursuant to her implied consent given to the police officers as embodied by her revealing the existence of the rifle to the police officers, gives rise to no constitutional violation of any rights that belonged to appellant.

Nor does it matter that Carla the girlfriend was not a wife or that appellant owned the home and that he and his brother had joint custody of the safe. The statute makes it clear that the officers had the right to retrieve any weapon on the property. It matters not that the weapon may have been located on part of the property exclusively under the dominion and control of one of the domestic partners. Again, underlying appellant's argument is the notion that the location of the weapon inside the safe insulated it from the operation of the statute, Penal Code section 12028.5. There is no authority for such an assertion and its premise is patently meritless. The purpose of the statute could be easily defeated if one of the domestic combatants could place the weapon in a place exclusively under his domain yet inside the residence and where the police could not intrude but for the existence of a warrant.

To the contrary, the existence of the gun on the property where both domestic partners lived gave one domestic partner the right to consent to a search of any other part of the property to retrieve that weapon pursuant to the law and, more pertinent to the case here, the right to consent to any seizure of that weapon once revealed and/or located. Here, by informing the officers of the existence of the gun, Carla gave the officers implied consent to open the safe to remove that threat. The fact that appellant himself may have actually opened the safe under submission to authority makes no difference.

As such, in conclusion, given the two valid bases of 1) the officers having a right to be next to appellant when he opened the safe and where they made the observation of the contraband and 2) the implied consent to the opening of the safe by Carla, the domestic partner for whose benefit the statute was written, appellant's contentions have no merit.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment (order denying the motion to suppress) be affirmed.

Dated: June 15, 2004

Respectfully submitted,

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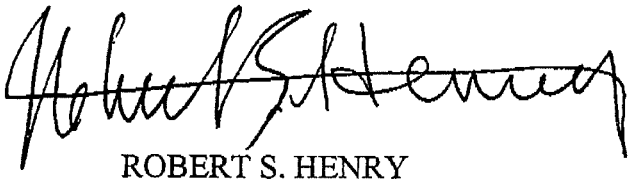

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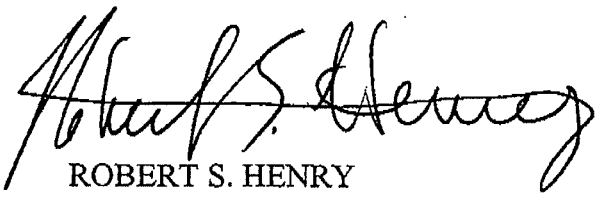
CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains **3,871** words.

Dated: June 15, 2004

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Cesare Fuad Safieh**

Appeal No. **B170888**
LASC No. **GA052838**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am 18 years of age or older and not a party to the within entitled cause; I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **June 15, 2004**, I placed two (2) copies of the attached

RESPONDENT'S BRIEF

in the internal mail collection system at the Office of the Attorney General, 300 South Spring Street, Los Angeles, California 90013, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage thereon fully prepaid, addressed as follows:

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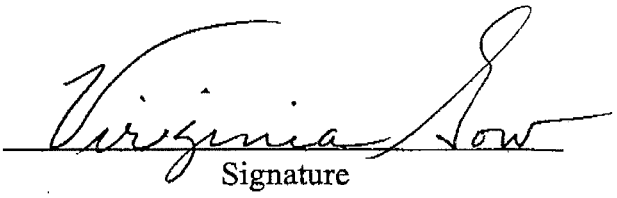
I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on **June 15, 2004**, at Los Angeles, California.

Virginia Gow
Declarant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ATTACHMENT
TO
DECLARATION OF SERVICE

Case Name: **People v. Cesare Fuad Safieh**

Appeal No. **B170888**
LASC No. **GA052838**

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