1N THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JONATHAN OSORIO,

Appellant,

v. CASE NO. 4D17-654

STATE OF FLORIDA, Lower tribunal case no: 502015CF006056A

Appellee.
_____/

# INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court of the Fifteenth Judicial Circuit,
In and For Palm Beach County, Florida
[Criminal Division]

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## PRELIMINARY STATEMENT

Appellant was the defendant, and appellee the prosecution, in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida.

In this brief, Appellant is referred to as Appellant and the State is referred to as the State.

The following symbols will be used:

"R" Record on appeal, followed by the page numbers.

"TR" Transcript, followed by page number, then line numbers

## STANDARD OF REVIEW

Review of a trial court's ruling on a motion to suppress is a mixed question of law and fact; the appellate court defers to the trial court's findings of fact, provided they are supported by competent, substantial evidence. Ho v. State, 201 So.3d 726, 727-728 (Fla. 4th DCA 2016); Delhall v. State, 95 So.3d 134, 150 (Fla.2012); Connor v. State, 803 So.2d 598, 605 (Fla.2001). But the trial court's application of the law to the facts is reviewed *de novo*. Id.

## STATEMENT OF THE CASE

Two veteran agents of the Palm Beach County Sheriff's Office obtained consent from a rural homeowner to enter upon his property to investigate suspected criminal activity by one of the man's neighbors. The property changed hands, Appellant and his family moved in, and the consent given by the prior owner, as a result, no longer existed. Three years later, specifically on June 16, 2015, the same agents, admittedly acting on a whim, and not knowing the property had been sold, decided to visit the property again. After three years, any consent that might have existed had long grown stale.

Moreover, Appellant's home, as a matter of law, possessed all the indicia of a property in which the occupants had reasonably expected their privacy to be respected: (1) the home is located in a rural area; (2) the perimeter of the property is fenced; (3) the property is surrounded by tall trees, dense shrubbery and foliage; (4) the property is patrolled by an "unfriendly," and "aggressive" dog that confronted the agents; (5) "no trespassing" signs are posted on the property; (6) the mailbox is located at the perimeter of the property (sixty yards away from the house); and (7) the only pathway leading to the house is a dirt road with few or no streetlights, and that is too narrow for more than one-way traffic. Hence, especially considering the vigilantly protective disposition of Appellant's dog, and the "no trespassing" signs,

Appellant had no reasonable expectation of unsolicited visits, whether by postal carriers, salesmen, or anyone else.

The property contains two residences: the main house at which Appellant's father and other family members resided, and a former barn converted into a residence that was occupied by Appellant and his brother. The agents conceded without hesitation that they knew, based on their visits some three years earlier, that the barn had been converted into a residence.

The two veteran agents did not go to the front door of the main house; rather, based upon their prior visits to the property about three years before and the consent then given by the prior homeowner, the agents went to a side door of the main home. This side door cannot be seen from the road. The lead agent, very experienced in drug interdictment, testified that, there at the side door, he smelled "the light odor of marijuana" coming from the direction of the converted barn about ninety-five feet (or one-third of a football field) away. However, the other veteran agent, also with many years of experience in narcotics investigations, testified that he did *not* notice any such smell. In addition, evidence showed that, at the time of the agents' visit, the wind was carrying any smells in the vicinity away from the agents, not towards them.

With no response to their knocking on the side door, the agents retreated back to their truck in direct response to being confronted by the family's hostile dog. With

apparently no one home, and the agents riding in an unmarked truck, the agents faced no exigency compelling them to undertake a warrantless search of the property. Nevertheless, dispensing with application for a search warrant, (available relatively quickly through remote, digital e-application), the agents unlawfully proceeded to the second building on the property, the former barn that been converted into a residence occupied by Appellant and his brother.

At the open front doors of the converted barn, the lead agent smelled the "overwhelming" scent of marijuana. Despite the fact that he had no warrant, nor any exigency compelled him to proceed without a warrant, the agent then crossed the threshold of Appellant's residence. Peering into the slightly open door of Appellant's bedroom, where Appellant lay asleep with his girlfriend, the agent observed a large amount of marijuana. Waking and then ordering Appellant and his girlfriend out of bed, the agent's unlawful search yielded more than twenty pounds of marijuana as well as related paraphernalia. The agents confronted Appellant with the evidence. Appellant confessed, was arrested, and charged accordingly.

All evidence obtained by law-enforcement officers in this case was acquired in violation of the Fourth Amendment of the United States Constitution that prohibits unreasonable searches and seizures. Appellant filed a dispositive motion to suppress all the incriminating evidence.

After conducting an evidentiary hearing on the matter, the trial court issued a written opinion denying Appellant relief. The trial court held that the agents' warrantless search was justified because, as a legitimate "knock and talk," the agents had in good faith followed the instructions of the previous homeowner when the latter gave the agents consent to be on the property.

However, absent from the trial court's opinion are the undisputed facts, conceded by the agents, that any such consent, having been given (1) by the prior homeowner, and (2) about *three years* before their visit to Appellant's property in June of 2015, had long grown stale. Hence, in denying Appellant's motion to suppress, the trial court overlooked the doctrine of staleness and the limitations of knock-and-talk queries by police.

Entering into a plea agreement requiring him to serve a year in the county jail and three years of probation, Appellant reserved his right to appeal the trial court's denial of his dispositive motion to suppress.

## STATEMENT OF THE FACTS

### Procedural Background

For events that occurred on June 16, 2015, the State, by amended Information, charged Appellant Jonathan Osorio with (A) trafficking, sale, or manufacturing of a controlled substance, a second degree felony; (B) possession of marijuana with intent to sell, a third degree felony; (C) possession of a place for purposes of trafficking, sale, or manufacture, a second degree felony, and (D) possession of butane honey oil extractors and/or marijuana grow, a first degree misdemeanor. Ex. I (Information).

The State also charged Appellant's father, Carlos Osorio, and Appellant's twenty-three old brother, Fernando Osorio, with the same first two counts identified above.

On June 8, 2016, co-defendant Carlos Osorio (Appellant's father) filed a "Dispositive Motion To Suppress," Ex. II. As allowed by the trial court, Appellant, through his trial attorney, adopted the motion. TR: 7, 2-7.

On August 22, 2016, the lower court, Circuit Court Judge Honorable Dina A. Keever conducted a hearing on Appellant's motion. Ex.III.

On October 24, 2016, the trial court denied Appellant's motion to suppress by written order. Ex. IV. On February 6, 2017, Appellant entered into a plea agreement, expressly reserving his right to appeal the trial court's adverse ruling on his motion

to suppress. Ex. V: p.9, 9-14. Pleading guilty to three felonies and one misdemeanor,[1] Appellant agreed to serve 364 days in the county jail, and to be placed on probation for three years. Ex. VI. (Judgment & Sentence).

Appellant timely filed a notice of appeal.

[1] Appellant pleaded guilty, in case number 15CF006056A, "to count one, manufacture of a scheduled one substance, a second degree, felony, count two, possession of a place for purposes of trafficking, sale or manufacture, a second degree felony, count three, possession of marijuana with intent to sell, a third degree felony, and count four, possession of paraphernalia for purposes of use, a first degree misdemeanor." Ex.V: p.4, 4-17 (transcript of plea hearing Feb. 6, 2017.)

## STATEMENT OF FACTS

### The Investigating Officers

At the time of the instant controversy in the summer of 2015, Agent John Bango had worked for the Palm Beach County Sheriff's Office for about sixteen (16) years, TR8:2-6, The most recent ten (10) of those years were in narcotics. TR8-9-13. Agent Bango's training and experience in narcotics was extensive, and on a day-to-day basis the officer testified, "[w]e investigate anything narcotic related in Palm Beach County." TR8:11-20.

At the time of this incident, Agent Kabis had worked for the Palm Beach County Sheriff's Office about eighteen (18) years, the prior nine (9) years with the narcotics division. TR76:14-19. Agent Kabis also has had extensive training and experience in narcotics interdictment. TR76-77:22-6. On the day of this incident, the agents drove an unmarked pickup truck. TR85:12-15.

### The Circumstances and Purpose of the Visit

Agent Bango testified that in previous visits to 5626 Gun Club Road in West Palm Beach, he had used the location to undertake surveillance of a neighboring property. TR9:14-16. According to Agent Bango, the then-owners gave him permission to be on the property, giving him instructions that if they were not home, the agent should speak to their son who lived in the barn. TR10:9-14; TR16:5-7.

Agent Bango's sole connection to the property was with the *previous* homeowner. TR58-59:19-3.

In contrast, Appellant's family had owned the property since November of 2012.[2] So Agent Bango (and Agent Kabis for that matter,) had not visited the property in at least thirty-two (32) months, TR120:9-12,16-20, TR57:23-25, a period of almost three years. TR59:1-3.[3]

Agent Bango could not recall the names of the people who had lived there. TR10:8-10. Moreover, Agent Bango, the lead agent in this case, testified: "Had I known the Osorio's lived there, I probably would have never gone there." TR63:11-12. And Agent Bango conceded that none of the members of the Osorio family had invited him onto the property. TR39:9-11.[4] Nor did he receive consent to enter the property from any of them. TR59:4-7.

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[2] The instant controversy took place on June 16,2015. TR9:5. The property appraiser's report, admitted as Defense Exhibit No. 1, showed the last sale was in November of 2012. TR34:17-18. Appellant's brother and co-defendant in the case testified that he had been living at 5626 Gun Club Road since November of 2012. TR132:24-25, and that his family moved to the property in November of 2012. TR133:14-17.

[3] Agent Bango had erroneously estimated it had been about six months since he had been on the property, or perhaps "a little more than that. It could have been eight or nine, maybe even eight or nine, maybe even a year since I had been on that property." TR17:7-10; TR33:14-17.

[4] Agent Bango is familiar with the property located at 5626 Gun Club Road as, before the instant controversy that took place on June 16, 2015, he had been to the location "probably three or four times." TR8-9:21-2.; TR33:11-12. TR68:8-10.

## The Agents Entered The Property On A Whim

In its order denying Appellant's motion to suppress, the trial court noted that "[t]he agents had not received any anonymous tips, nor did they have any reason to believe that the residents of 5626 Gun Club Road were involved in any illegal activity." Ex.VI: p.2, par.1; TR17-18:23-1. Indeed, Agent Bango and Agent Kabis entered upon Appellant's property on a whim. According to Agent Kabis,

> I don't think we were even driving down [the road that leads to Appellant's home] with the intention of going to look at that house. I don't remember which one of us thought of it, that there was – I think someone saw 56 and said I wonder if that guy's even down there anymore, because he knew that we had found him back there. I just assumed that he was probably going to abandon that property since he knew that we were there.

TR124-125:25-7.

Agent Kabis knew that the person originally investigated and prosecuted had been found guilty and received a sentence of one year of probation, and that term of probation had ended more than two years before the instant controversy. TR124:8-23.

## The Rural Property and The House

As admitted by Agent Bango, Appellant and his family were living on a rural property, TR37:17-19, on which stood two buildings, a "standard house" and a barn. TR11:14-22.

The only entrance to Appellant's property is an unpaved road. TR38:25-3. The pathway called 56th Terrace on which Appellant's property is located is an "unpaved dirt road," TR38:3-4, and it's "pretty narrow." TR37:5-8. It's so narrow, according to Agent Bango, "it's kind of one way." TR37: 4-12. There are no street lights or perhaps two of them, and "it's very dark down there." TR71:13.

Agent Bango confirmed that the front door of the main house stands about one-hundred seventy (170) feet, the equivalent of sixty (60) yards, [half a football field] from the front gate of the property. TR38-39:21-2; TR138:12-15.

**The Side Door To The House**

In recollection of his dealings with the previous owners about three years before, Agent Bango testified: "When we use to be on the property the owner told us to always use the side door, that they use the side door as their front door." TR12:16-18; TR10:13-14. So, according to Agent Bango, when he arrived with Agent Kabis on June 16, 2015, they walked up to *the side* door and knocked. TR18:22-23; TR19:12-13. As determined by State's primary witness Agent Bango, the side door cannot be seen from the street. TR19:4-5; TR39:14-21. The veteran officers, TR8:2-13, TR46:14-19, did not have a warrant. TR43:12. The agents knocked "a couple of times," but no one answered.TR60:8-13. The front door has a bell, but the agents never went to the front door of the main house. TR111:9-11; TR60:17-18.

## The Converted Barn

According to Agent Bango, "[t]he previous owner's son lived in the barn. And the owner had told us that if they're not home, to just simply get with their son and let him know that we're on the property." TR16:3-7. Agent Kabis remembered the person living in the barn as the prior owner's nephew. TR79:1-6. In this case, after he and Agent Kabis had been confronted by Appellant's dog, the agents "slowly backed up to [Agent Bango's] truck" TR20:8, and Agent Bango said "let's go to the barn and tell the son and ask him to put his dog away." TR20:8-10.

Agent Bango incorrectly estimated that the barn stood about fifty feet, "maybe a little more," from the house. TR:15-16:24-2. The undisputed evidence produced at the hearing showed the actual distance is almost twice as great at ninety-five and a half (95.5) feet., TR138:18-21, the equivalent of about thirty-two (32) yards, (about one-third the length of a football field.)

Agent Bango had never previously been inside the former barn. TR:16:10. The agent, who had only been on the property "three or four times" previously, testified that "it's just a standard barn with a barn door that's usually kept wide open." TR16:13-14.

But Agent Bango knew that "the previous owner's son lived in the barn." TR16:3-5; TR16:19-21; TR21:16-20. Agent Bango knew the barn was a residence. TR67:5-8. Agent Kabis knew there was a residence in the main house and a

residence in the barn. TR121:15-17. On the day he entered Appellant's property, Agent Bango believed that there was a person living in the barn. TR16:19-20; TR21:16-20. Appellant's brother also had a bedroom in the barn. TR133:21-22.

**The Property is Surrounded by High Trees, Dense Foliage, and Shrubbery for the Purpose of Privacy**

As described by Agent Bango,

> They've got some foliage going pretty much the entire length of the property right here. There's trees, bushes, there's a fence. I mean, you can see the house driving past there but, I m mean, they're not trimming the bushes or anything like that. I don't know if they're doing it for concealment or privacy. I don't know. But everyone on that road pretty much has the same type of foliage.

TR.14:2-8.[5]

As confirmed by Appellant's brother, the dense shrubbery and trees, some of which exceed a height of thirty (30) feet, are there for the purpose of privacy. TR139:9-12; TR43:8-11.

**The Entire Property Is Also Surrounded By A Fence for the Purpose of Privacy**

[5] See also TR36:5-6 (Agent Bango:"There [was] a lot of shrubbery."); TR37:20-23 (Agent Bango: Some of the trees are more than 20-30 feet high "It's overgrown".); TR14:9-10 (Agent Bango conceding the foliage is overgrown.); TR72:21-25 (there are very tall trees and overgrown shrubbery and bushes on the whole street.); TR110:23-25 (Agent Kavis agreeing that the trees and shrubbery around the property are twenty to thirty feet tall, "especially on the north side.").

Agent Bango confirmed a fence surrounds the property, "I believe it encloses the entire property, but I have not walked this entire property." TR14:17-20. In fact, as confirmed by Appellant's brother, the fence surrounds the entire property. TR138-139:25-3, and in order to protect the privacy of Appellant's family. TR139:2-3.

**The Gate**

At the time of the instant controversy, according to Agent Bango, "there was a gate . . . a standard three-prong metal gate [at the front entry to the property], like a cattle gate, and it was swung open on that day." TR14-15:25-3. The gate is narrow, only about ten feet wide. TR72:15-16. There was no lock on the gate. TR15:4-6. According to Agent Bango, "The gate was wide open." TR18:7. TR59:13. About three years earlier, the prior owners of the property had kept a "very aggressive dog," TR59:14-19. So, had the gate been closed upon his arrival in June of 2015, Agent Bango "probably would have beeped my horn until someone came out." TR:59:14-19. Agent Kabis testified that there was no gate at the front of the property, so he and Agent Bango just drove through a gap in the fence. TR:81:21, 82:14-16.

**The "No Trespassing" Signs**

On the way in to the house, there are "no trespassing" signs on the left side about a hundred feet from the gate. TR143:6-14. Agent Bango did not recall if there were any "no trespassing" signs, "but had there been, we still would have gone to the property because we believed the previous owner still owned it." TR15, 9-11.

## The Remotely-Placed Mailbox

Agent Bango tesified he did not see a mailbox anywhere. TR.15:22-23. But the agent later confirmed the probable accuracy that the mailbox is located out by the gate on the perimeter of the property, TR39:5-7, about sixty yards from the main house. TR38-39:21-2; TR138:12-15.

## The "Unfriendly" and "Aggressive" Watch Dog

The Osorios kept a Staffordshire Terrier, commonly referred to as a Pit Bull, on the property there to protect his territory, TR42-43:24-1, to keep away trespassers, TR43:2-5, and for protection TR140:17-20. The dog was an "unfriendly Pit Bull." TR39:3-4. According to Agent Bango's description, the dog was "aggressive." TR62:4-13.

As described by Agent Kabis when the officers knocked on the side door, they heard a dog growling behind them TR86:8-9. Agent Bango "heard a dog growling behind me. I turned around and saw a Pit Bull." TR19-20:25-2. The dog "was growling behind us while we were knocking on the door." TR60:21-22. TR86:8-9. Agent Bango remembered "the previous owners also had a Pit Bull. I thought it was the same dog." TR19-20:25-2. Agent Bango also testified, "I remembered it did not like us back then either." TR:20:4-5. As a result, the two agents moved back to their truck. TR86:21-25. The dog caused the agents to back away. TR43:6-7; TR86:21-25.

In encountering the dog, Agent Bango was concerned because the dog was aggressive. TR:62:4-13, so concerned that he backed away and, accompanied by Agent Kabis, the two took refuge in his pickup truck. TR62:4-13; TR86:21-25 . And they did so quickly. TR87: 3-5.

In retrospect, Agent Bango further testified that he entered into his pickup truck because, "I wasn't so much worried about myself, I didn't want to harm the dog. I wasn't so much worried about getting bit; I didn't want to shoot it." TR:62:14-18. Despite his foreknowledge that an aggressive dog was patrolling the property, and despite having been confronted by the dog, Agent Bango, having entered the property without permission of the homeowners, would have put himself in a position to shoot and kill the dog. TR62:19-22. Demonstrating his indifference to killing the animal, Agent Bango commented, "It was just a dog." TR63:6.

Because of his fear of the "very aggressive dog" of the previous owners, Agent Bango didn't know if he would have opened the gate if it had been closed. TR59:14-19. Agent Bango testified that he "probably would have beeped my horn until somebody came out." TR59:14-19.

**Agent Bango Smells A Light Odor of Marijuana**

According to the testimony of Agent Bango, "the driveway leads to the side door [of the main house]." TR12:9. Standing at the side door of the main house, Agent Bango testified that "I was able to detect the light odor of marijuana. TR19:12-15;

TR39:22-25. "It wasn't super strong coming from this property, or from this structure, but I did smell it in the air." TR19:19. However Agent Kabis also a veteran officer, and also with many years experience in narcotics investigations, TR76-77:22-6, did not notice any smell of marijuana. TR86:101-11. In addition, evidence at the hearing showed that the wind was blowing at a speed of eight miles per hour east southeast, TR:42:2-10. (Defense Exhibit 3), The wind was thus blowing *towards* the barn that contained the marijuana, carrying any scent of the cannabis in the opposite direction from the house where Agent Bango testified he first smelled it. TR35-36:23-12; TR41:13-16.

**Raw Marijuana or Harvested Marijuana**

At the hearing on Appellant's motion to suppress, Agent Bango admitted that in prior deposition, he had testified that when he was at the barn door, he smelled the overwhelming odor specifically of "raw" marijuana (live marijuana plants) coming from the barn TR:43:16-20.: But the agents did not find such "raw" marijuana growing in the barn TR43:21-23; TR65:23-24.

Drawing a distinction, Agent Bango testified the marijuana they discovered had not been raw, it was already "harvested." TR43:21-23. Harvested marijuana consists of the clippings, the leaves that are left over after the harvest. TR101:2-6. And Agent Bango, in his many years as a law enforcement officer, has worked on many such marijuana cases. TR43-44:24-3. According to Agent Bango, growing

(raw) marijuana and harvested (burnt) marijuana smell "almost identical." TR73:9-10, "It smells the same." TR73:15-19.

But according to Agent Kabis, with the prior nine of his eighteen years work for PBSO in the narcotics division, TR76:14-19. there is a *big* difference between the smell of freshly harvested marijuana and raw marijuana. TR95:17-20. Raw marijuana smells much stronger than harvested marijuana, similar to the difference between a fresh vegetable and one that has been picked and been sitting in the store for a while. TR95:4-14.

**Without a Warant, Agent Bango Crossed the Threshold of the Converted Barn, and then Entered Appellant's Bedroom.**

When Agent Bango approached the barn, "one half of the barn door was wide open." TR:21:1. The barn door was "wide open." TR21-22:25-1; TR:61:12. In spite of the threatening disposition of the pit bull, TR61-62:20-1, Agent Bango left his car in order to enter the barn. TR61:13-14.; TR:61:10. TR:61:15-19. And to reach the inside of Appellant's bedroom, Agent Bango had to go through two doors. TR75:5-8.

Although he did not have a warrant, nor any indication of exigent circumstances, Agent Bango crossed the threshold of the door of the converted bar: "just inside the door. Maybe ten feet, maybe a little less there is [bedroom] door and that door was partially open. It was probably a little more than – it wasn't like half-

open, it was probably a little less than half open. But that door was open. There was another [bedroom] door to the left that was closed." TR22:6-10 The door to Appellant's bedroom was "already half-opened" when Agent Bango "pushed it the rest of the way open." TR45:3-8.

Before opening Appellant's bedroom door, Agent Bango yelled a couple of times; but he did not knock on the door. TR67:14-15. There was no response to Agent Bango's yells. TR67:16-18. Agent Bango had yelled before opening the door, but expressed his belief that Appellant did not hear him, TR47:14, because the air-conditioner was running right next to Appellant's head TR47:14-18. (Agent Kabis was outside the converted barn, but Agent Bango did not know whether the other agent could hear his, Agent Bango's. yells. TR67-68:23-1.)

Before entering Appellant's residence, Agent Bango believed he saw "marijuana grow supplies, such as buckets, fertilizer, [and] cases of ammunition." TR22:12-14. However, Agent Bango conceded that these things are equally consistent with non-criminal conduct. TR44:4-21, and that in fact, he saw nothing illegal in the converted barn before opening Appellant's bedroom door. TR47:6-9.

While, as noted above, Agent Bango testified that outside the barn door, the smell of [raw] marijuana was "overwhelming," TR43:16-20, Agent Bango testified that, after entering the structure, upon approaching Appellant's bedroom door, the

scent of marijuana was "getting stronger," TR23:14-16, and with a flashlight, the agent was able to see bags of marijuana laying on the ground. TR23:14-20.

Upon opening the bedroom door, Agent Bango saw Appellant and his girlfriend asleep in bed. TR23:21-22. The agent ordered them out of the bed, and with handcuffs, detained the two. TR24-21-24.

**Before Advising Appellant of his Miranda Rights, Agent Bango Confronted Appellant With the Marijuana.**

Before advising Appellant of his Miranda rights, Agent Bango confronted Appellant with the marijuana in the room, and Appellant gave a self-incriminating response. TR:47-48:24-11. Appellant declined the agents' request for consent to search the house and the barn. TR25-26:25-1, TR48-49:14-2.

**The Trial Court's Written Opinion Denying Appellant's Motion To Suppress**

In her opinion denying Appellant's motion to suppress dated October 24, 2016, the trial court wrote

> . . . Because the law enforcement agents acted in good faith by driving onto the property through an open and unlocked gate and knocking on the side door of the residence, which due to the layout of the property and based upon the previous owners' instructions was the preferred method of contacting the residents, they were legally on the property.

Ex.IV: p.5.

The trial court continued:

> The agents were on the premises to conduct a legitimate "knock and talk"[3] encounter with residents whom they believed still resided on the property.[4] A "knock and talk" citizen's encounter does not constitute a search and seizure, as long as it does not violate a reasonable expectation of privacy. *See State v. Navarro,* 19 So.3d 370, 372-373 (Fla. 2d DCA 2009) and *United States v. Holmes,* 143 F.Supp.3d 1252, 1272 (M.D. Fla. 2015). By driving onto the property through the unlocked gate and knocking on the side door, the agents did nothing different than any member of the public, including an "occasional deliveryman, salesperson, other solicitor, or neighbor," might do to contact the occupants of the premises, therefore the agents did not violate any reasonable expectation privacy. *See Niemanski* at 529. Because the agents were legitimately on the property and knew from previous encounters with the residents that a member of the family lived in the barn and owned a pit bull, the "knock and talk" encounter was still reasonable and legal when, after no one answered their knock on the side door of the residence, the agents approached the barn to speak with the owner of the dog.

Ex. IV: pp.5-6.

The footnotes to the trial court's opinion read as follows:

> [3] "A knock and talk is a 'purely consensual encounter' that an officer may initiate without any objective level of suspicion." *Ho v. State,* 41 Fla. L.Weekly D2127a (4th DCA Sept. 14, 2016) (quoting *Hardin v. State*, 18 So.3d 1246, 1247 (Fla. 2d DCA 2009) (citations omitted) Citizens have no constitutional safeguards during such encounters. *See Popple v. State*, 626 So.2d 185, 186 (Fla. 1993).
>
> [4]This Court finds that the agents acted in good faith and were under no obligation to check property records to determine the individuals that they previously knew to be the lawful owners and residents still resided on the property.

Ex.IV, p.5

## SUMMARY OF THE ARGUMENT

The Fourth Amendment of the United States Constitution, and Article I, section 12 of the Florida Constitution, prohibit "unreasonable" searches and seizures U.S. Const., amend. iv.. As held by the Florida Supreme Court, warrantless searches of a home are *per se* unreasonable. Delhall v. State, 95 So.3d 134, 151 (Fla. 2012). In addition, the United States Supreme Court has also held that the chief evil to which the Fourth Amendment is directed is physical entry into the home." Byrd v. State**,** 16 So.3d 1026, 1027 -1028 (Fla. 2d 2009) (citing Payton v. New York, 445 U.S. 573, 585 (1980)) and that the Fourth Amendment draws a firm line at the entrance to a house. Mestral v. State, 16 So.3d 1015, 1016 -1017 (Fla. 3d DCA 2009) (quoting Payton v. New York, 445 U.S. 573, 590, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980).

Consistent with these principles, this Court has held "[t]he threshold to the entrance of a house may not reasonably be crossed without a warrant, absent exigent circumstances. Diaz v. State, 34 So.3d 797, 801 (Fla. 4th DCA 2010) (internal quotation marks and citation omitted). And also according to this Court, "[*e*]*ven if they have probable cause*, 'police officers may not enter a dwelling without a warrant, absent consent or exigent circumstances.'" Diaz 34 So.3d at 802 (emphasis added) (quoting Levine v. State, 684 So.2d 903, 904 (Fla. 4th DCA 1996).

In this case, veteran agents of the Palm Beach County Sheriff's Department undertook a warrantless search of Appellant's residence, the lead agent crossing the threshold of Appellant's home, and then Appellant's bedroom, with neither consent authorizing, nor exigent circumstances compelling, such action. Assuming *arguendo*, the lead agent was lawfully on the curtilage of Appellant's residence, and assuming *arguendo*, the same agent smelled the "overwhelming" scent of marijuana, the Fourth Amendment, despite the putative existence of probable cause, still prohibited the agents, without consent or exigent circumstances, from crossing the threshold of Appellant's home without a warrant.

The agents had not obtained Appellant's consent, and there were no exigent circumstances; indeed before agents unlawfully discovered Appellant and his girlfriend from their sleep, there was no indication that anyone was on the property or that anyone had seen the agents, who had arrived in an unmarked vehicle. In short, nothing about the circumstances compelled the agents from dispensing with obtaining a search warrant. Nevertheless, the agents proceed to undertake a warrantless search of Appellant's home. As a consequence, the marijuana and paraphernalia consequently obtained by the agents became "tainted fruit of the poisonous tree," requiring suppression.

As held by this Court: "The state bears the burden to demonstrate that 'procurement of a warrant was not feasible because the exigencies of the situation

made that course imperative.'" Diaz v. State, 34 So.3d 797, 802 (Fla. 4th DCA 2010) (quoting Hornblower v. State, 351 So.2d 716, 717 (Fla. 1977); Rowell v. State, 83 So.3d 990, 994 (Fla 4th DCA 2012). But in this case, the record shows that the State failed to carry such a burden.

By written order, the trial court denied Appellant's motion to suppress, finding the agents had acted in good faith on instructions given them almost three years earlier by the prior homeowner when, at that time, the agents obtained consent to enter onto the property. But with the change in ownership of the land, the prior consent had ended, and with the passage of thirty-two months, any consent had long grown stale. In addition the property, at the time of this incident, showed all the indicia of the occupants' reasonable expectation that their privacy would not be disturbed, and that they did not expect occasional visitors, even from postal carriers. Such indicia included the presence of an "unfriendly" and "aggressive" pit bull dog who confronted the agents when they appeared on the property, as well as the presence of "no-trespassing" signs.

Here, admittedly acting on a whim, law-enforcement agents of the Palm Beach County Sheriff's Office entered upon the property, and crossed the threshold of Appellant's home and bedroom in June of 2015, without a warrant, without consent, and without exigent circumstances. All the indicia of Appellant's rural property and home, such as the presence of a guard dog and the posting of no-

trespassing signs, indicate that, as a matter of law, Appellant had a reasonable expectation of privacy from uninvited, warrantless intrusion.

## ARGUMENT

**BECAUSE AGENT BANGO CROSSED THE THRESHOLD OF APPELLANT'S HOME WITHOUT A WARRANT, WITHOUT APPELLANT'S CONSENT, AND WITHOUT EXIGENT CIRCUMCSTANCES, THE MARIJUANA CONSEQUENTLY DISCOVERED WAS UNLAWFULLY OBTAINED. HENCE, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS.**

### Unreasonable Searches and Seizures Are Prohibited

The Fourth Amendment to the United States Constitution guarantees the right of the people to be protected from unreasonable searches and seizures by the government, and mandates that no search warrant shall issue "but upon probable cause, supported by oath or affirmation...." U.S. Const. amend. IV. Florida's Constitution similarly protects against unreasonable searches and seizures by the government: "No warrant shall be issued except upon probable cause, supported by affidavit...." Art. I, § 12, Fla. Const.. Florida Statutes codifies the same prohibition. See § 933.04, Fla.Stat. (2015).

### Warrantless Searches Are Per Se Unreasonable

According to the Florida Supreme Court, it is well-settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant based on probable cause is "per se unreasonable." Delhall v. State, 95 So.3d 134, 151 (Fla.

2012). (quoting Schneckloth v. Bustamente, 412 US. 218, 219 (1973)) (internal quotation marks and citations omitted).

**The Chief Evil of the Fourth Amendment: Entry Into The Home**

"The United States Supreme Court has long held that physical entry into a home is the chief evil to which the Fourth Amendment is directed." Byrd v. State, 16 So.3d 1026, 1027 -1028 (Fla. 2d 2009) (citing Payton v. New York, 445 U.S. 573, 585 (1980)), "'[T]he Fourth Amendment has drawn a firm line at the entrance to the house.'" Mestral v. State, 16 So.3d 1015, 1016 -1017 (Fla. 3d DCA 2009) (quoting Payton v. New York, 445 U.S. 573, 590, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980).

As this Court has held, "[a] private home is an area where a person enjoys the highest reasonable expectation of privacy under the Fourth Amendment," Rowell, 83 So.3d at 994, and "[t]he threshold to the entrance of a house may not reasonably be crossed without a warrant, absent exigent circumstances. Diaz v. State, 34 So.3d 797, 801 (Fla. 4th DCA 2010) (internal quotation marks and citation omitted); See also Payton v. New York, 445 U.S. 573 (1980). "The state bears the burden to demonstrate that "procurement of a warrant was not feasible because the exigencies of the situation made that course imperative." Diaz v. State, 34 So.3d 797, 802 (Fla. 4th DCA 2010) (quoting Hornblower v. State, 351 So.2d 716, 717 (Fla. 1977). "Exigent circumstances exist where the occupants of a house are aware of the

presence of someone outside, and are engaged in activities that justify the officers in the belief that the occupants are actually trying to escape or destroy evidence." Rowell, 83 So.3d at 994.[6] "Even if they have probable cause, "police officers may not enter a dwelling without a warrant, absent consent or exigent circumstances." Diaz 34 So.3d at 802 (quoting Levine v. State, 684 So.2d 903, 904 (Fla. 4th DCA 1996). "The state must prove that the police lacked sufficient time to obtain a warrant." Diaz, 34 So.3d at 802.

**The Law Gives the Curtilage of the Home The Same Protection as the Home Itself**

According to this Fourth District Court of Appeal, "*any area within the curtilage of the home* deserves the same protection as the home itself . . .[and] [c]urtilage can include the backyard of a residence." Bryan v. State, 62 So.3d 1244, 1246 (Fla. 4th DCA 2011) (emphasis added);.[7] As noted above, "the area

[6] "In sum, because there was time to secure a warrant and the officers did not have a reasonable belief that third persons were inside appellant's apartment who might destroy evidence or pose a threat to safety, the warrantless of appellant's [home] cannot be justified under the 'exigent circumstances' doctrine . . ." Rowell, 83 So.3d at 995.

[7] See also State v. Cunningham, 891 So.2d 1199 (Fla. 4th DCA 2005) ("backyard was clearly within the curtilage of defendant's home"); P.B.P. v. State 955 So.2d 618, 627 n.3 (Fla. 2d DA 2007) ("[T]he zone of protection under the Fourth Amendment extends to the curtilage of a home, including the backyard.) (Kelly, J. concurring): State v. Rickard, 420 So.2d 303, 306 (Fla.1982) (noting that courts will not allow a warrantless search or seizure in a constitutionally protected area such as one's backyard); Glass v. State, 736 So.2d 788 (Fla. 2d DCA 1999) (stating that officers

immediately surrounding and associated with the home" [is] "part of the home itself for Fourth Amendment purposes." 133 S.Ct.1409, 1414 (2013) (quoting Oliver v. United States, 466 U.S.170, 180 (1984) (internal quotation marks omitted).

"The private property immediately adjacent to a home is entitled to the same protection against unreasonable search and seizure as the home itself." U.S. v. Taylor, 458 F.3d 1201, 1206 (11th Cir. 2006) (citing Oliver v. United States, 466 U.S. 170, 180 (1984). "At common law, the curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life'. . . and therefore has been considered part of the home itself for Fourth Amendment purposes." Id. at 1206.

**People Have A Constitutionally-Protected Privacy Interest**

**in the Side Areas of Their Homes**

> [W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment's very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. This right would be of little practical value if the State's agents could stand in a home's porch *or* side garden and trawl for evidence with impunity.

Florida v. Jardines, 133 S.Ct.1409, 1414 (2013) (quoting Silverman v. United States, 365 U.S. 505, 511 (1961) (internal quotation marks omitted)

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were not justified in entering a backyard of a residence without consent, a warrant, or exigent circumstances); State v. Sarantopoulos, 604 So.2d 551 (Fla. 2d DCA 1992).

"The constitutional protection and expectation of privacy *in the side* and backyard area of the home does not depend on whether someone might be home, *or if visitors may sometimes be received at a location other than at the front door*." Lollie v. State, 14 So.3d 1078, 1079 (1st DCA 2009) (emphases added). "Indeed the Florida Supreme Court's decision in [State v. ] Morsman [394 So.2d 408 (Fla. 1981)], and the case law such as Maggard [v. State,] 736 So.2d 763 (Fla. 2d DCA 1999)] which accords with that ruling, clearly *establishes that residents have a constitutionally protected privacy interest in the side* and backyard area of their home." Lollie v. State, 14 So.3d 1078, 1079-80 (1st DCA 2009) (citations omitted) (emphasis added). "The constitutional protection which Morsman confirms in the side and backyard area of a home is consistent with the pronouncements of the United States Supreme Court." Lollie v. State, 14 So.3d 1078, 1080 (1st DCA 2009). "[A]ny contrary decisions of the lower federal courts, in the variety of circumstances involved in those cases, do not diminish that protection in Florida." Id. Thus, the "area immediately surrounding and associated with the home" [is] "part of the home itself for Fourth Amendment purposes." Jardines as 1414 (quoting Oliver v. United States, 466 U.S.170, 180 (1984) (internal quotation marks omitted).

**Reasonable Expectation Of Privacy**

A governmental "search," as a matter of law, violates the Fourth Amendment when the state action infringes on an individual's justifiable or reasonable

expectation of privacy. See Katz v. United States, 389 U.S. 347 (1967). "Whether a defendant has a reasonable expectation of privacy is a threshold inquiry." Niemanski v. State, 60 So.3d 521 (Fla. 2d DCA 2011) (citing Rakas v. Illinois, 439 U.S. 128 (1978). State action infringes on a person's Fourth Amendment rights if (1) the person who is accused of criminal wrongdoing demonstrates that he or she had an actual, subjective expectation of privacy in the property searched, and (2) the same person shows that society would recognize that subjective expectation as objectively reasonable. See Brown v. State 152 So.3d 619 at 623-624 (Fla. 3d DCA 2014, *rehearing denied*, (citation omitted); Minnesota v. Olson, 495 U.S. 91, 95 (1990); Smith v. Maryland, 442 U.S. 735, 740-41 (1979).

**ANALYSIS**

In the case at bar, acting on a whim, TR124-125:25-7, concerning an investigation that had taken place almost three years earlier, TR120:9-20, TR57:23-25, TR59:1-3, Agent Bango and Agent Kabis, without a warrant, TR43:12, entered onto the property immediately surrounding and associated with Appellant's home including (A) the curtilage of the converted barn, TR21:1, and then (B) crossing the threshold of the front doors,TR75:5-8, followed by (C) entry into the interior of the building, specifically Appellant's bedroom where, at the time of the agent's unlawful entry, Appellant and his girlfriend lay asleep in bed. TR23:21-22.

These searches were unreasonable because the agents had not obtained consent from Appellant to search the said areas of his home, and nor did the agents face any exigency. The law defines exigent circumstances as awareness by the occupants of a house "of the presence of someone outside, and are engaged in activities that justify the officers in the belief that the occupants are actually trying to escape or destroy evidence." Rowell, 83 So.3d at 994 "The state bears the burden to demonstrate that "procurement of a warrant was not feasible because the exigencies of the situation made that course imperative." Diaz v. State, 34 So.3d 797, 802 (Fla. 4th DCA 2010) (quoting Hornblower v. State, 351 So.2d 716, 717 (Fla. 1977).

In this case, the record shows the State did not, because it could not, make any such demonstration. While Agent Bango testified that, standing outside the doors of the converted barn, he smelled the "overwhelming" odor of "raw" marijuana, TR43:16-20, "[e]ven if they have probable cause, "police officers may not enter a dwelling without a warrant, absent consent or exigent circumstances." Diaz 34 So.3d at 802 (quoting Levine v. State, 684 So.2d 903, 904 (Fla. 4th DCA 1996). "The state must prove that the police lacked sufficient time to obtain a warrant." Diaz, 34 So.3d at 802. At the hearing below, the State provided no evidence that the agents lacked time to obtain a warrant; to the contrary, at the time Agent Bango smelled marijuana in front of Appellant's residence, there was no sign

of any other people on the property, and as the agents discovered as their unlawful search continued, Appellant was *asleep* with his girlfriend. TR23:21-22. The record shows no evidence of any impediment that prevented the agents from applying for a warrant. Moreover, Agent Bango testified that warrants are now obtainable remotely, without having to leave the scene, through electronic, digital application, TR26:9-12, thus accelerating the process.

As the record shows, there was no indication that anyone else was present on the property, or that anyone had seen the agents who were driving a black, unmarked pick-up truck TR85:14-15. See Diaz, 34 So.3d at 803 ("Further, the state presented no evidence that the defendant or Scott know of the police presence outside their home.") Hence, *a fortiori*, there was no suggestion that the agents observed any activity by Appellant indicating he was trying to escape or destroy evidence. See id.

Appellant had a reasonable expectation of privacy because as this Court has held, "[a] private home is an area where a person enjoys the highest reasonable expectation of privacy under the Fourth Amendment," Rowell, 83 So.3d at 994. And the "chief evil" against which the Fourth Amendment is directed is entry into the homes. Byrd, supra. Reinforcing the inherently "highest reasonable expectation of privacy," Rowell, supra, that Appellant expected to enjoy, (1) the fenced rural property was surrounded by tall trees and dense foliage, TR14:2-8; (2) the property was posted with no-trespassing signs, TR143:6-14; and (3) agents testified that

Appellant's "unfriendly" and "aggressive" pit bull dog roamed the premises, TR42-43:24-1, TR43:2-5, TR140:17-20, confronting the agents when they arrived. Indeed the dog's growling, TR60:21-22, impelled the law enforcement officers to retreat and seek refuge in their truck.TR86:21-25; TR43:6-7.

Agent Bango did not have a warrant to enter the curtilage of Appellant's residence, and rendering the agent's action even more knowing and willful, veteran Agent Bango and veteran Agent Kabis testified that they knew someone lived in the converted barn. TR16:3-5; TR16:19-21; TR21:16-20; TR67:5-8.

In its order denying Appellant's motion to suppress, the trial court concluded,

> Because the law enforcement agents acted in good faith by driving onto the property through an open and unlocked gate and knocking on the side door of the residence, which due to the layout of the property and based upon the previous owners' instructions was the preferred method of contacting the residents, they were legally on the property.

Ex.IV: p.5.

But fatally absent from the trial court's order is the fact that "the previous owners' instructions" were conveyed to the agents almost three years earlier, TR120:9-20, TR57:23-25, TR59:1-3, when, not Appellant, but the prior owner, had given the agents consent to be on the property. Hence, whatever information the agents obtained from the prior owners of the property, the passage of almost three years rendered that information completely stale. See e.g., Pilieci v. State, 991 So.2d 883, 890 (Fla. 2d DCA 2008) (finding that, in Florida, it is a "rule of thumb" that

information alleging probable cause of criminal conduct is rendered stale after the passage of thirty (30) days.) (citing Rodriguez v. State, 297 So.2d 15, 18 (Fla. 1974).)[8] In addition to the fact that the change in ownership of the property terminated the prior owner's permission for the agents to be on the property, the three-year-old consent had grown stale long before.

And the record provides no evidence that the agents were ever given consent to cross the threshold of Appellant's residence in the converted barn. In other words, the agents in this case were also acting far beyond the scope of the original consent. See Walter v. United States, 447 U.S. 649, 656-57 (1980) (consensual search cannot exceed the scope of consent provided); Florida v. Jimeno, 500 U.S. 248, 251-252 (1991) (consensual search is reasonable if it remains within the scope of the consent provided); So even if the consent from 2012 given by the prior owner would be somehow considered valid in 2015 when the property was under different ownership, the agents exceeded the scope of the original consent by crossing the threshold of Appellant's home.

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[8] In Pilieci, the Second District Court of Appeal noted that a relevant American Law Review article reviewed staleness in cases involving intervals from one week to six months. Id. at 891. See also Cruz v. State, 788 So.2d 375, 378 (Fla. 4th DCA 2001) ("Most importantly, we cannot overlook the fact that staleness is a very important factor in this case and weighs heavily against a finding of probable cause. Not only was there a gap [of six months] in time from the initial complaint to the first trash pull, but there was also a gap [of six months] between the first and second trash pulls.")

## The Agents' Initial Search Did Not Constitute A Lawful "Knock and Talk" Query

In its order denying Appellant's motion to suppress, the trial court concluded that "[t]he agents were on the premises to conduct a legitimate 'knock and talk' encounter with the residents whom they believed still resided on the property." Ex.IV:,p.5,par.2. (footnote omitted). As correctly noted by the lower court, a "knock and talk" is consensual encounter. Id. at n.3. See also Hardin v. State, 18 So.3d 1246, 1247 (Fla. 2d DCA 2009).

However, the trial court overlooked the fact that the implied license given to a governmental agent to enter upon a person's property can be revoked by such things as the presence of fences, the posting of "no trespassing" signs and the presence of unfriendly dogs. See Robinson v. State, 164 So.3d 742 (Fla. 2d DCA 2015) (knock and talk violated Fourth Amendment where semirural property was surrounded by fence with closed but unlocked gate, bearing "No Trespassing" and "Beware of Dog" signs); Ferrer v. State, 113 So.3d 860 (Fla. 2d DCA 2012); See also Bainter v. State, 135 So.3d 517 (Fla. 5th DCA 2014), Brown v. State, 152 So.3d 619 (Fla. 3d DCA 2014); Niemanski v. State, 60 So.3d 521, 522 (Fla. 2d DCA 2011) (finding entry onto curtilage for knock and talk lawful but specifically "in the absence of" signs warning potential visitors against trespassing or the presence of a hostile dog.)

In addition, it should be noted that in this case, the agents were not responding to an anonymous tip, or a complaint. See e.g., Niemanski, The agents testified that they were acting on something of a whim, TR124-125:25-7, and that had they known that the prior owner had moved, they would not have even visited the property. TR63:11-12.

## CONCLUSION

WHEREFORE, the evidence obtained in this case constitutes "tainted fruit of the poisonous tree," having been obtained in violation of Appellant's right to be free from unreasonable searches and seizures as guaranteed by the Fourth Amendment of the Constitution, and Article I section 12 of the Florida Constitution. See Wong Sun v. United States, 371 U.S. 471 (1963); See also State v. Jones, 483 So.2d 433 (Fla. 1986).

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to this Court by email, and served on Celia Terenzio, Assistant Attorney General, 1515 N. Flagler Drive, ninth floor, West Palm Beach, Florida 33401, via email at CrimAppWPD@myfloridalegal.com.

this, 24th day of August 2017.

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## CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that this brief has been prepared in 14 point Times New Roman font, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Grey Tesh_