IN THE COUNTY COURT IN AND FOR
BROWARD COUNTY, FLORIDA

STATE OF FLORIDA, CASE NO.: 04-[redacted]

vs. JUDGE: ZACK

[redacted],

Defendant
_____/

RESPONSE TO DEFENDANT'S WRITTEN ARGUMENT ON DEFENDANT'S MOTION TO SUPPRESS

The State of Florida, by and through the undersigned attorney, hereby submits its response to Defendant's Written Argument on Defendant's Motion to Suppress that was heard before the Honorable Court on July 28, 2005, and continued on August 18, 2005. In support of its Response, the State submits the following argument:

PRELIMINARY STATEMENT

Defendant asserts that his rights under the Fourth Amendment to the United States Constitution were violated when agents of the State, having detected the odor of a potentially illegal and explosive substance emanating from an airport hangar, entered Defendant's leased commercial property at the Fort Lauderdale/Hollywood International Airport. Defendant believes that the agents' failure to obtain either (1) a warrant or (2) Defendant's consent renders the State's entry into Defendant's place of business an illegal search. In this Response, the State will show that (1) the exigent circumstances under the facts of this case justified warrantless entry into Defendant's leased airport hangar, (2) the lessee of a commercial property used in a closely-regulated industry has a reduced expectation of privacy that justifies warrantless entry under exigent circumstances, and (3) the State agents here were properly acting on a tip corroborated by suspicious details revealed by an independent investigation conducted under the authority granted to them by the Florida Legislature.

BRIEF STATEMENT OF THE FACTS

Defendant is the owner of a commercial airline business, [redacted], which transports both people and freight between Fort Lauderdale/Hollywood International Airport and various foreign points. Defendant leases space in an airport hanger that houses several airplanes.

On October 6, 2003, Lieutenant Richard Sierra, an experienced fire safety inspector with the Broward Sheriff's Office, learned from an individual wearing a pilot's uniform that indoor spray painting, which is an illegal activity under the Florida Fire Prevention Code, would be taking place at Defendant's place of business that evening. Shortly thereafter, Lt. Sierra and his supervisor, Captain John Nance, who is also an experienced fire prevention expert, detected what they believed to be the odor of a flammable substance emanating from the [Defendant's] hangar. An unusual number of cars were parked outside the hangar (*Transcript of July 28 Hearing*, attached hereto as *Exhibit 1*, at 18), and the lights inside were on (*id*. at 9), which strongly suggested the presence of people inside the hangar. Fearing for the safety of anyone inside the hangar, and also fearing a potential explosion or fire at the airport, Capt. Nance called the Hazardous Materials (Hazmat) Team to investigate. The Hazmat Team tested the air outside and around the hanger for hazardous substances before entering Defendant's commercial property for further testing. While no airborne hazardous materials were ultimately found, clear evidence of very recent indoor spray painting of aircraft was abundant (*Exhibit 1* at 13, 14, 34, 35).

ARGUMENT

I. The potential for an explosion at the Fort Lauderdale/Hollywood International Airport constitutes an exigent circumstance that justified warrantless entry into Defendant's leased airport hangar

"[I]f truly exigent circumstances exist, no warrant is required under general Fourth Amendment principles." *U.S. v. Karo*, 468 U.S. 705, 718 (1984). The "central requirement" of the Fourth Amendment "is one of reasonableness." *Illinois v. McArthur*, 531 U.S. 326, 330 (2001).

"When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable." *Id*.

Spray paint, in its concentrated form, is "automatically flammable, which means it has a flash point under 100 degrees Fahrenheit." *Exhibit 1* at 37. As explained by Capt. Nance, a seasoned fire prevention expert who is familiar with both structure fires and hazardous materials, "[t]he flash point is the temperature at which a product can produce vapors sufficient for ignition as long as there's an ignition source available, such as a spark, light switch, a box band. Something that would produce a spark." *Id*. Spray paint is so easily flammable because "[o]nce the paint products are atomized or aerated, broken down into smaller particles, […] the flash point drops significantly and can ignite much more readily." *Id*.

Both Lt. Sierra and Capt. Nance testified that the electric lights in the Air Sunshine hangar were turned on that evening. *Exhibit 1* at 21, 38. Light switches are a potential ignition source for aerated paint fumes (*Exhibit 1* at 21, 37), which is precisely why indoor spray painting is illegal under the Florida Fire Prevention Code. Thus, based on the distinctive paint odor recognized by Lt. Sierra and Capt. Nance on October 6, 2003, there was a real possibility that a spark from an active light switch inside a paint-fume-filled airport hanger could have ignited an explosion at the airport that evening. In the present climate of concern over public safety at airports, there are few circumstances more "exigent" than the real possibility of an airport hangar explosion.

Additionally, Lt. Sierra testified that he was concerned that someone inside the hangar could have been suffocating from the hazardous fumes. *Exhibit 1* at 19. Capt. Nance could not see more than half of the interior of the hanger from his vantage point. *Id*. at 40. The United States Supreme Court has long "distinguished between the general interest in crime control and more immediate threats to public safety." *Illinois v. Caballes*, 125 S.Ct. 834, 847 (2005). "[W]here the risk to

public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable' -- *for example, searches now routine at airports*." *Chandler v. Miller*, 520 U.S. 305, 323 (1997) (emphasis added). The real potential of an explosion of a structure or the asphyxiation of a person at the airport presented a reasonable possibility of immediate danger to public safety, and thus constituted exigent circumstances in this case.

II. Defendant has a reduced expectation of privacy in a leased commercial property that is used in the closely-regulated airline industry.

A. Privacy expectations in a "commercial property" and in a "home" cannot be conflated

Defendant has attempted to conflate the search of a "home" with the search of a "commercial property," two circumstances governed by distinctly different standards under Fourth Amendment jurisprudence. While "the Fourth Amendment's prohibition on unreasonable searches and seizures is applicable to commercial premises," the "expectation of privacy in commercial premises […] is different from, and indeed less than, a similar expectation in an individual's home." *New York v. Burger,* 482 U.S. 691, 699, 700 (1987). In support of his argument, Defendant refers to a string of cases involving searches of private homes for narcotics. *Defendant's Written Argument* at 6, 7. These cases are inapposite to the instant case, which involves neither the Defendant's home nor narcotics, but rather a potentially explosive and toxic substance at a commercial airplane hanger that Defendant leases from a public airport. Here, unlike any of the private home searches at issue in the cases referred to by Defendant, a team of experienced fire safety professionals investigated whether the potentially explosive or toxic paint fumes that persist for hours after indoor spray painting posed an imminent threat to public safety.

B. Commercial properties used in "closely-regulated industries" have an even further reduced privacy interest

The privacy "expectation is particularly attenuated in commercial property employed in 'closely regulated' industries" that historically have been the subject of government oversight.

Burger, 482 U.S. at 700. Because of the reduced expectation of privacy in a closely-regulated industry, the traditional warrant and probable cause prerequisites for a reasonable government search under the Fourth Amendment have "lessened application" to the owner or operator of such commercial premises. *Id*. at 702.

Very few industries are as "closely regulated" as the commercial airline industry: Defendant's business is subject to regulation by the Federal Aviation Administration, the Transportation Security Administration, the Department of Transportation, the Interstate Commerce Commission, and numerous other federal and state agencies. Defendant's legitimate expectation of privacy in his leased airport hanger was accordingly reduced. Further still, Defendant was a *lessee*, not the owner, of the commercial airport property at issue here, reducing his expectation of privacy vis-à-vis his lessor, the airport and its security personnel, even further.

"[W]here the privacy interests of the owner are weakened and the government interests in regulating particular businesses are concomitantly heightened, a warrantless inspection of commercial premises may well be reasonable within the meaning of the Fourth Amendment." *Burger,* 482 U.S. at 702. In the present day and age, no one can seriously argue that the government's interest in airport safety is not "heightened." In the instant case, when the State's entry into Defendant's closely-regulated commercial airline property is coupled with the exigent circumstances outlined in Section I above, the United States Supreme Court's standard for warrantless entry is easily met.

C. "Consent" and "exigent circumstances" are two separate and distinct legal standards for warrantless entry, thus Defendant's "consent" arguments are irrelevant on these facts

Defendant ignores that the United States Supreme Court has recognized several well-established and distinct exceptions to the warrant requirement. "Consent" of the property owner is one such exception; the existence of "exigent circumstances" is another. *See Soldal v. Cook*

County, Ill., 506 U.S. 56, 66 (1992); *Welsh v. Wisconsin*, 466 U.S. 740, 743, n1 (1984).[1] Thus, Defendant's arguments that Defendant's consent was never obtained become irrelevant and misleading once sufficiently exigent circumstances are demonstrated, as State has done in Section I, above.

D. An anonymous tip corroborated by suspicious circumstances revealed by an independent investigation meets the Florida Supreme Court's reliability standard.

The Defendant also mischaracterizes the Florida Supreme Court's position on the reliability of anonymous tips. In *J.L. v. State*, 727 So.2d 204, 207 (Fla. 1998), which Defendant refers to but fails to quote, the anonymous tip concerned "innocent details" about an arrestee's clothing. The suspect in *J.L.* had been subject to a *Terry* stop based on an anonymous tip that he had a gun. *Id*. at 205. However, "'the officers' independent investigation added nothing to the reliability of the tip' -- the officers merely verified that the defendant was in fact standing by the bus stop and wearing a plaid shirt, neither of which is suspicious." *Id*. at 207 (citing *Butts v. State,* 644 So.2d 605 (Fla. 1st DCA 1994)). Unlike *J.L.*, which concerned a weapon on a suspect's person, the instant case involved a matter of public safety at a leased commercial airplane hangar.

More importantly, the State agents here *did* independently observe suspicious details that corroborated the information given to Lt. Sierra by the individual wearing the pilot's uniform. Lt. Sierra and Capt. Nance were able to pinpoint the odor of a potentially hazardous material as emanating from the Air Sunshine structure. *Exhibit 1* at 11. Moreover, it was precisely the *suspicious detail itself*, not an "innocent detail," that Lt. Sierra and Capt. Nance independently observed, *i.e.*, the odor of a potentially explosive or toxic substance emanating from an airport hanger, that presented a potential immediate danger to public safety here.

[1] "The state trial court never decided whether there was consent to the entry because it deemed decision of that issue unnecessary in light of its finding that exigent circumstances justified the warrantless arrest." *Welsh*, 466 U.S. 740, 743, n1.

III. The State agents were operating within the authority properly granted to them by the Florida Legislature

The Florida Legislature, in enacting Florida Statute 633.0215, has invested the State Fire Marshall with the authority to adopt the Florida Fire Prevention Code, "which shall contain or incorporate by reference all firesafety laws and rules that pertain to and govern…the enforcement of such firesafety rules." Fla. Stat. 633.0215(1). Under the legislative directive in the same statute, the State Fire Marshal has adopted, as the law of the State of Florida, the National Fire Protection Association's Standard 1, Fire Prevention Code, which reads in relevant part:

> To the full extent permitted by law, any authority having jurisdiction engaged in fire prevention and inspection work shall be authorized at all reasonable times to enter and examine any building, structure, marine vessel, vehicle, or premises for the purpose of making fire safety inspections. Before entering a private dwelling, the authority having jurisdiction shall obtain the consent of the occupant thereof or obtain a court warrant authorizing entry for the purpose of inspection except in those instances where an emergency exists. As used in this section, *emergency* means circumstances that the authority having jurisdiction knows, or has reason to believe, exist and that reasonably can constitute immediate danger to life and property.

NFPA Fire Prevention Code 1-4.6 (2000).

These three sentences speak directly to the facts of this case. First, Lt. Sierra, Capt. Nance, and the Hazmat Team all work for authorities having jurisdiction to engage in fire prevention work at Fort Lauderdale/Hollywood International Airport. *Exhibit 1* at 4, 23, 27. Second, the statute specifically contemplates the difference between a "private dwelling" and other structures, and no "private dwelling" was involved in this case, but rather a leased commercial property used in a closely-regulated industry at an airport. Third, an "emergency" existed here because Lt. Sierra and Capt. Nance had "reason to believe" that the odor they detected "reasonably could constitute immediate danger to life and property at the airport." *Id*. at 9, 14, 19, 24, 32, 34.

Further, the Florida Fire Prevention Code also states that

> [t]he incident commander conducting operations in connection with the extinguishment and control of any […] hazardous materials incident […] shall have

> authority to direct all operations of […] mitigation of a hazardous materials incident […] and to take necessary precautions to save life, protect property, and prevent further injury or damage.
>
> NFPA Fire Prevention Code 1-12.1 (2000).

Thus, although private home searches "generally must be conducted pursuant to a warrant in order to be reasonable under the Fourth Amendment, legislative schemes authorizing warrantless administrative searches of commercial property do not necessarily violate the Fourth Amendment" because adequate privacy protection may be provided "by regulatory schemes authorizing warrantless inspections." *Donovan v. Dewey,* 452 U.S. 594, 598, 599 (1981). The Florida Legislature has seen fit to develop just such an administrative scheme through adoption of the Florida Fire Prevention Code, under the authority of which all of the State agents in this case acted.

CONCLUSION

The facts of this case squarely meet the "reasonableness" requirement of the Fourth Amendment for warrantless entry: (1) the exigent circumstance of a possible airport hangar explosion or the asphyxiation of a person; (2) the reduced expectation of privacy for a leased commercial property that is used in a closely-regulated industry; (3) a sufficiently reliable tip, independently corroborated by an independent investigation that revealed suspicious circumstances that posed a potential immediate threat to human life and safety; and (4) State agents properly acting under authority granted to them by the Florida Legislature.

For all of these reasons, the Defendant's Motion to Suppress should be denied.