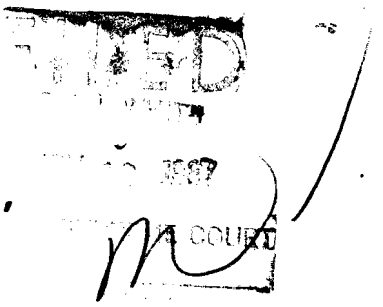
OA 12-4-87

IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,313



THE STATE OF FLORIDA,

Petitioner,

vs.

CARLOS FRANCO SUCO,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

ANSWER BRIEF OF RESPONDENT ON THE MERITS

EDWARD R. SHOHAT, ESQUIRE
IRA N. LOEWY, ESQUIRE

BIERMAN, SHOHAT & LOEWY, P.A.
200 S.E. First Street, #500
Miami, Florida 33131
(305)358-7477

COUNSEL FOR CARLOS FRANCO SUCO

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ISSUE PRESENTED

WHETHER THE DEFENDANT'S FOURTH AMENDMENT RIGHTS WERE INVADED BY THE UNREASONABLE SEARCH OF THE HOUSE WHICH WAS OWNED BY HIM BUT LEASED TO THE CODEFENDANTS, WHERE HE RETAINED AND EXERCISED A POSSESSORY INTEREST IN THE PREMISES AND WAS PRESENT ON THE PREMISES AT THE TIME OF THE SEARCH AND DID NOT CONSENT TO THE SEARCH?

STATEMENT OF THE CASE AND FACTS

Defendant believes that the state's presentation of the history and facts of this case is inadequate and inaccurate. Defendant will, therefore, present the following statement of the case and facts.[1] Fla.R.App.P. 9.210(c).

A. Course of Proceedings and Disposition Below.

Defendant SUCO was charged by information, together with codefendants Jorge Navarrette, Jorge Betancur, and Isabel Betancur, with one count of trafficking in cocaine and one count of conspiracy to traffic in cocaine (R. 1-3A, 4-6A, 7-8A). Defendant filed a motion to suppress illegally seized evidence (SR. 1-54) which, together with similar motions filed by codefendants Jorge and Isabel Betancur,[2] was heard by the Honorable Ellen Morphonios, Circuit Court Judge, on October 31, 1985 through November 4, 1985 (T. 1-800). Following the hearing, the court rendered an order granting in part and denying in part the motion to suppress (SR. 63-65). The state timely filed a Notice of Appeal[3] (R. 71). The Third District Court of Appeal, on

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[1] Petitioner, Appellant in the District Court of Appeal, will be referred to as the state. Respondent, Appellee in the court below, will be referred to alternatively by name or as the Defendant. The codefendants in the trial court will be referred to by name. The letter "R" will be used to refer to the Record on Appeal and "T" will designate the transcript. "SR" will be used to designate the Supplemental Record on Appeal (see Order of the District Court dated February 21, 1985).

[2] Codefendant Navarrette did not file a motion to suppress evidence.

[3] SUCO filed a Notice of Cross-Appeal from that part of the order partially denying his motion to suppress (R. 74). However, (continued...)

December 16, 1986, announced its opinion affirming the trial court order. On March 3, 1987, the court, in a written opinion, denied the state's motion for rehearing. See State v. Suco, 502 So.2d 446 (Fla. 3d DCA 1987).

B. Factual Recitation.

The evidence which the trial court suppressed was seized pursuant to a warrantless search of a single family home owned by the Respondent CARLOS FRANCO SUCO, who purchased it on August 31, 1984 (T. 202-205). In January, 1985, SUCO orally leased the home on a six-month basis to codefendants Jorge and Isabel Betancur, who commenced living on the premises with their three children (T. 619). Although SUCO did not reside at the house, he frequently was there to collect the rent and to ensure that proper maintenance was conducted and necessary repairs made to the house (T. 620, 673). Moreover, he possessed a key to the front door and had the right to enter the house whenever he chose, as there were no stated restrictions to his right of entry (T. 620).

On June 7, 1985, at approximately 9:00 p.m., SUCO, accompanied by codefendant Jorge Navarrette, walked up to the front door of the house and knocked. Isabel Betancur was in the laundry room of the house and did not hear the knock (T. 622). When no one answered the door, SUCO used his key to open the door and entered his house (T. 469). He proceeded to walk to the

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3/(...continued)
since the District Court had no jurisdiction to entertain such a cross appeal, see Fla.R.App.P. 9.140(b)(1); State v. Williams, 444 So.2d 434 (Fla. 3d DCA 1983), the cross appeal could not be pursued.

family room, where he sat down on a couch and began to watch television with the Betancur children.

At approximately the same time as SUCO first approached the front door of his house, Officers Norberto Gonzalez and Mark Silvia of the Metro-Dade Police Department were on vehicle patrol in the area, riding in plain clothes and in an unmarked car (T. 21-23). As Gonzalez and Silvia passed the premises, Officer Silvia observed SUCO and Navarrette standing at the front door. Silvia stated to Gonzalez that it looked like the men were making a delivery, but that it was late and he did not see a vehicle in the area (T. 29). Accordingly, Gonzalez turned the police vehicle around and came back past the house. As they passed the house, they observed that the two men were no longer standing in front of the house and did not observe a vehicle (T. 31). Gonzalez and Silvia stopped approximately one block from the house and commenced surveillance.

Gonzalez and Silvia conducted surveillance of the premises for approximately fifteen (15) minutes, during which they observed nothing unusual (T. 213). Despite the fact that neither of the officers made any observation which indicated that the two individuals they had seen at the house were anything other than law abiding individuals, they decided to call for a uniformed backup. Their call was received by uniformed Officer Roberto Morales, who proceeded to the scene and by Officers Leslie Cravens and Tom Gross, who were patrolling together in a white

van. Both of these officers were in plain clothes and they also proceeded to the area. (T. 214).

After the arrival of the backup units, Officers Gonzalez, Silvia and Morales approached the house. Morales, because he was in uniform, waited in front of the house, while Gonzalez and Silvia went around the rear of the house (T. 216, 460). Silvia stayed in the yard, while Gonzalez entered into the screened-in, pool/patio area of the house in order to see inside of the house (T. 216-217). From this vantage point, the officer could observe two children watching television in the livingroom area (T. 217). Seeing nothing that would appear to be unusual or suspicious, Officer Gonzalez decided to enter the premises in order to determine the whereabouts of the two men Officer Silvia had seen at the front door. Gonzalez then exited the pool/patio area and returned to the front of the house (T. 218).

While this was occurring, Officers Cravens and Gross observed a late model Buick parked in the driveway of the house and ran a tag check on the vehicle. The vehicle was not reported stolen and appeared to be registered to an individual with a Hialeah address (T. 272-273).

After returning to the front of the house, Officer Gonzalez, together with Officer Morales (both officers speak Spanish; Officer Silvia, Cravens and Gross do not) approached the front door and knocked. The door was intact, there being no indication that it had been kicked in or that the house had forcibly been entered (T. 250). It was answered by Isabel

Betancur, who was holding a small child in her arms (T. 277, 460-461). She was not crying or screaming and did not appear to have been harmed in any way (T. 277). Morales asked her in English if everything was okay and she responded with a puzzled look, which appeared to be based upon the fact that she did not speak English (T. 461). Gonzalez then asked Isabel Betancur, in Spanish, whether anything unusual had occurred and she responded "no" (T. 278).

While this was occurring, Officer Silvia continued to watch the house. When Officers Gonzalez and Morales knocked on the door, he observed one of the children inside of the house get up and move toward the front of the house. At approximately the same time, he observed SUCO walk out of the kitchen area, sit down and begin watching a Flintstone cartoon on the television (T. 84). Shortly thereafter, he observed the codefendant Jorge Navarrette walk from the kitchen area to the area where the television was, turn around and walk back in the same direction from which he had come (T. 35-36). Silvia observed nothing which would lead him to indicate that either of these men were armed or that there was a home invasion robbery or any other illegal activity occurring (T. 88).

Meanwhile, in front of the house, Officers Morales and Gonzalez continued their conversation with Isabel Betancur. After she had responded that everything was fine, Officer Gonzalez asked her if anybody had come to the door and she responded no (T. 278). Immediately thereafter, Officers Cravens

and Gross yelled to Officer Gonzalez to ask her whose car was parked on the west side of the house (T. 463-464). Officer Gonzalez then asked Isabel Betancur "whose car is this on the side of the house?" She responded by saying, "What car?" (T. 224). Officer Gonzalez, upon hearing this answer, directed Isabel Betancur to "come and take a look at the car." Leaving the door open, all of the officers (Gonzalez, Morales and Gross) walked with Isabel Betancur and her child to the west side of the house and asked her, "Whose car is this?" Her response was, "I don't know" (T. 225).

Following this question and answer, Officer Silvia yelled from around the corner to ask Isabel Betancur whether there was anybody else in the house. Officer Gonzalez then asked her if there was anybody in the house and she responded, "Just me and my kids." Silvia, who was approaching from the rear of the house, stated, "That is not true." Silvia then told Gonzalez that he had seen a man sitting in the room with the television (T. 227).

While this was occurring, the officers decided to search the vehicle parked on the west side of the house. The officers went through the glove compartment of the vehicle and discovered a Latin American passport (T. 505-506). It must be noted that all of the police officers were armed and that at least one of the officers, Morales, was carrying his firearm in a drawn position and that another officer, Cravens, was carrying a shotgun. Additionally, the officers had flashlights.

The officers then returned with Isabel Betancur to the front of the house. Officer Gonzalez told Isabel Betancur that "we think there is somebody in the house" and asked if they could go into the house to check it out. According to Officer Morales, the witness found to be most credible by the trial court (T. 520), Isabel Betancur appeared confused and concerned for her children and stated "go ahead" (T. 509-510). Officers Gonzalez, Cravens and Morales, with weapons drawn, then entered the home (T. 510).

Upon entering the house, all three officers saw SUCO sitting on the couch in the livingroom watching television. Mrs. Betancur, who had followed the officers into the house, seemed surprised to see SUCO in the house and asked him, "What are you doing here, how did you get in?" He told her that, "We came in the front, through the front door and we had just gotten here" (T. 469, 632). Mrs. Betancur asked him, "Who else came in with you?" and SUCO mentioned somebody else was in the house (T. 469). During this entire conversation, it was clear to Officer Morales who witnessed it and who overheard the conversation that Mrs. Betancur knew CARLOS SUCO and that Mr. SUCO was not an armed invader of the house (T. 501).

Officers Cravens and Morales, together with SUCO and Mrs. Betancur, then walked through the kitchen and dining area to the hallway leading to the bedrooms. Navarrette was observed standing by the door of the northwest bedroom (T. 470-471). Officer Cravens continued to walk down the hall and entered the

northeast bedroom, where he observed a table in the middle of the room with paper, rubberbands and writing implements on it. There were also two vinyl suitcases with the sides slashed. Cravens also saw a box on the floor which had a large amount of United States currency inside of it. He then entered the bedroom and approached the partially opened closet and looked inside, where he observed a bag with money in it (T. 388).

Officer Cravens kicked the box over to where Navarrette could see it and asked, in English, "Whose money?" Both Isabel Betancur and Navarrette who observed this (Cravens was already aware that Isabel Betancur did not speak or understand English) responded with a shrug (T. 388). Officer Cravens then exited the bedroom and returned to the livingroom area of the house (T. 391).

By this time, Officer Gross also had entered the house. The four officers, together with SUCO, Navarrette and Isable Betancur all gathered in the livingroom area. At this point, Cravens believed that he had stumbled upon a large amount of drug money. Cravens advised the other officers about the money he had found and they decided to notify the Organized Crime Bureau of the Metro-Dade Police Department and the Border Patrol.

At Cravens' direction, Gonzalez ordered everyone out of the house and they all assembled on the front porch, where the officers obtained identification from SUCO, Navarrette and Betancur. Officer Cravens testified that, at this point, to go back into the house and look for other items, other than what he

had already seen, would have been a pretense, which would have been "wrong", and that he felt it was necessary to obtain either a valid consent or a search warrant before any further search was conducted (T. 435). Nevertheless, while the three Defendants remained outside the house, Cravens and Gonzalez re-entered the house and went back to the rear bedroom to inspect the money. No permission was sought from any of the Defendants prior to taking this action. In the room, Gonzalez and Cravens inspected a ledger book which was found on the table and observed a cardboard box on the floor and a garbage type plastic bag which contained money. Gonzalez then pealed back one of the flaps on a slashed suitcase and observed coffee grounds on the inside lining (T. 242).

After a period of time, Officer Jose Fernandez and his partner, Officer Legato arrived at the scene. Officer Fernandez asked Officer Morales what was going on and was told that it was a narcotics investigation and that they had discovered money in a rear bedroom. Fernandez was then given a tour of the house by Officer Gross who brought him back into the northeast bedroom and showed him the money, the suitcases and the other material in the bedroom. Once again, no permission or consent was sought or obtained for this search (R. 526).

Meanwhile, Mrs. Betancur, SUCO, and Navarrette were being detained outside the house. Mrs. Betancur's three children were also outside and were running barefoot on the lawn. She was concerned for her children because the police were armed and were

throwing lit cigarettes on the lawn, where the children were running (T. 644-645). In addition, the mosquitoes were very bad and her baby started crying for his pacifier (T. 643-644). Eventually, she asked to go back inside the house, whereupon she, SUCO, and Navarrette were escorted inside by approximately seven officers (T. 645-646).

At this point, none of the individuals who had been found in the house would have been free to leave. Isabel Betancur was separated from the group and taken into the diningroom. There, Officer Fernandez, without first giving Miranda warnings, asked if there were any guns in the house and she said yes. He asked her to take them to the guns and Isabel Betancur brought the officers into the master bedroom where they found a revolver in the closet. The revolver was seized. Shortly thereafter, Sgt. Reis arrived and a decision was made to secure a consent to search (T. 527).

With the suspects all gathered in a group in the living-room, Officer Fernandez asked who owned the house. SUCO responded stating that he owned the house and he was then separated from the rest of the group. Officer Fernandez took SUCO into the diningroom area and read him his rights. SUCO would not acknowledge his rights or give a consent to search and Fernandez had no further conversation with him. Fernandez then decided to get a consent to search from Isabel Betancur and escorted SUCO back into the livingroom area (T. 528-529, 545-546).

It was now approximately 10:00 p.m. Officer Fernandez took Isabel Betancur into the diningroom. There he presented her with a Spanish Miranda waiver form. Fernandez had her read the first line of the form out loud and then told her to read the rest of it to herself (T. 535). He did not review the form with her or make sure that she understood it before she signed the form (T. 535-536, 563-566).

After Mrs. Betancur signed the Miranda waiver form, Officer Fernandez handed her a Spanish consent to search form (T. 537). Officer Fernandez told Mrs. Betancur that they wanted to search the house and that she should read the form and "if she agreed with it" should sign it (T. 537). He then had her read the top line of the form out loud. That line, translated to English reads, "this consent or permission should be obtained from the person who is in the custody of the police" (T. 548, 662).

Officer Fernandez did not review the rest of the consent form with Mrs. Betancur or make any attempt to explain it to her (T. 538, 546-547). Nor was she advised that she had a right to refuse consent to search.[4/] According to Mrs. Betancur, whose

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4/ The form itself is vague on this point, reading in translation as follows:

> Paragraph one: "You can negate--you can--you can refuse to consent that a search be effected and you can demand that a permit be obtained to effect a search in the place or vehicle that is described in the continuation.

(continued...)

testimony was believed by the court, she did not understand what she had read out loud and did not read the rest of the form before she signed it (T. 662-663). Later, on cross-examination, when the prosecutor asked Mrs. Betancur to read from a part of the form, she was unable to do so, as was the official court translator who advised the court that the word "pesquisas" was unknown to her[5/] (T. 684-685). Mrs. Betancur also testified that

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[4/](...continued)
(T. 578). The form does not state that such a "permit ... to effectuate a search" would have to be obtained from a court (T. 574).

[5/] The exchange reads as follows:

(By Mr. Cohen)

Q. Can you read it now and understand it what it says?

Do you have any trouble understanding if you read it here?

A. I don't know.

Q. Try this one here. It is not blocked by the tape.

A. I don't know what this word is.

Q. Which word is that?

Just look it over quickly.

MR. BLOOM: Have the interpreter identify the word.

THE INTERPRETER: To be very honest with you, I can't identify it either. I don't understand the word.

MR. BLOOM: Could we have the word read into the record in Spanish?

(continued...)

she was confused and nervous and that she signed the form because she was ordered to do so and had no alternative (T. 663).

Once the consent form was signed by Mrs. Betancur, the police commenced a general search of the house, during which they discovered money and cocaine in the attic, as well as physical evidence arguably connected to drug smuggling in the northwest bedroom.

The trial court granted in part and denied in part the Defendants' motions to suppress, ruling that the evidence which Officers Cravens observed in the northeast bedroom would be admissible under the plain view doctrine, but that all of the other evidence discovered during the later searches of the house must be suppressed (SR. 65; T. 795). The rationale for the court's ruling was stated both orally and in her written order:

5/(...continued)

THE INTERPRETER: It is pesquisas, p-e-s-q-u-i-s-a-s.

It says or search, so I assume it is another word for search.

THE WITNESS: Well, the word evidence I got to learn about while I was in jail.

MR. BLOOM: What is the word again?

THE INTERPRETER: Pesquisas.

THE COURT: That is the word unknown to the official court interpreter as well?

THE INTERPRETER: That is right.

THE COURT: All right. Right on.

2. The Court finds that the manner in which the police initially approached the house and set up the perimeter of the house does not present grounds for suppression of the evidence. In light of the fact that armed invasions of homes do occur in Dade County, Florida, this Court is unwilling to condemn this particular police action in this case. It was during the course of subsequent events that the police overreacted in this case.

3. With respect to the events that occurred between the time that Officers Morales and Gonzalez knocked at the door to 6977 S.W. 148 Terrace and the time that Officers Cravens, Morales and Gonzalez entered the home, the Court finds the testimony of Officer Morales to be the most credible and would rely upon that testimony. The Court believes that ISABEL BETANCUR consented to the initial entry of her home, but that this was very clearly intended to be a limited consent for the purpose of allowing the police to look for potential home invaders. The Court specifically notes the testimony that ISABEL BETANCUR was told by the police that they believed that there were two men in the house and that she was asked to give her consent for an entry into the house for the purpose of locating those two men. Accordingly, the Court finds that the officers' search of the house should have concluded when the Officers saw no persons other than CARLOS FRANCO SUCO, Jorge Navarrette, and the children.

4. The Court specifically finds that ISABEL BETANCUR did not freely consent to the subsequent search of the house either orally or in writing. This Court specifically finds that the consent form signed by Isabel Betancur was, under the totality of the circumstances, not freely, voluntarily, and knowingly signed. The Court finds, based upon the evidence, that the consent to search form and Miranda waiver form which were shown to ISABEL BETANCUR and which she was simply asked to read and sign, were not

> explained to her and that no adequate effort was made by Officer Fernandez to ensure that the forms were understood by ISABEL BETANCUR and that she was freely and voluntarily waiving her rights. The Court notes that the burden is upon the State to prove through clear and convincing evidence that ISABEL BETANCUR freely consented to the search of the home. In this case, not only has the State failed to meet its burden, but this Court is convinced by the clear and convincing evidence that ISABEL BETANCUR did not consent to the search of her home.

(SR. 63-64; T. 788-792).

The state appealed the suppression order only with respect to the Respondent SUCO. The issue presented to the District Court of Appeal was phrased by that court as follows:

> This is an appeal by the State from an order suppressing, in part, certain evidence obtained from the search of a private house. The central issue presented is whether a lessor's Fourth Amendment rights are invaded by an otherwise unreasonable search of his leased premises conducted by police where, as here, the lessor (1) retains and exercises a possessory interest in the said premises, and (2) is present on the premises with the permission of the lessee at the time of the search and does not consent to same.

State v. Suco, supra 502 So.2d at 447. The court concluded that SUCO had a reasonable expectation of privacy, which was violated by the police search of his house, based on both of these factors. Id. at 451-452.

The state's rehearing petition primarily addressed the second factor relied upon by the court, SUCO's presence on the

premises as an invited guest of Mrs. Betancur. On rehearing, the district court reaffirmed its earlier holding, stating:

> In any event, we adhere to our view that an invited guest has a reasonable expectation of privacy in the home while physically on the premises at the invitation of the home dweller.

Id. at 453.

The state sought discretionary review in this Court based solely upon that portion of the District Court's decision which held that an invited guest has standing. The state did not assert that the District Court's affirmance of the trial court's finding that SUCO had standing by virtue of the fact that he owned the house and, as lessor, retained and exercised a possessory interest in the house, was in conflict with any other Florida authority.

SUMMARY OF THE ARGUMENT

In the case at bar, the trial court found that SUCO had a reasonable expectation of privacy in the premises, based upon the totality of the evidence presented. This ruling comes to the reviewing court clothed with a presumption of correctness, and in testing the accuracy of these conclusions, the appellate court must interpret the evidence and all reasonable deductions and inferences which may be drawn therefrom in the light most favorable to the trial judge's conclusions. E.g., State v. Nova, 361 So.2d 411, 412 (Fla. 1978). In this case, the evidence fully supports the trial court's findings.

The evidence before the trial court in this case showed that Defendant SUCO was the owner of the house which was searched. Additionally, the testimony clearly established that he was intimately involved in the supervision and maintenance of this property, a single-family residence, and that he personally would come to the house to collect rent and to perform maintenance and repairs. He had a key to the front door of the house, a right of entry and the consent of the individuals who resided there to enter the house. On the night of the warrantless search of the house, SUCO had used his key to enter the house for purposes legitimately related to his ownership of the house and was physically on the premises at the time the police entered, detained him and searched the house. Under these facts, Defendant submits that this Court is required to uphold the trial court's determination that SUCO had a legitimate expectation of privacy in the premises and that because the police had not obtained a valid consent from Mrs. Betancur, the only individual whose rights in the premises were equal to or superior to those of SUCO, their warrantless search of the premises was illegal, requiring that the evidence which the police sought to utilize against SUCO be suppressed.

ARGUMENT

THE DEFENDANT'S FOURTH AMENDMENT RIGHTS WERE INVADED BY THE UNREASONABLE SEARCH OF THE HOUSE WHICH WAS OWNED BY HIM BUT LEASED TO THE CODEFENDANTS, WHERE HE RETAINED AND EXERCISED A POSSESSORY INTEREST IN THE PREMISES AND WAS PRESENT ON THE PREMISES AT THE TIME OF THE SEARCH AND DID NOT CONSENT TO THE SEARCH.

As the courts of this state have now recognized, the issue of "standing" is not to be decided separate and apart from the substantive Fourth Amendment issues raised in a case. Rather, the determination of whether the proponent of a motion to suppress is entitled to contest the legality of a search and seizure must take into consideration the substantive Fourth Amendment issues, as well as the concept of standing. Dean v. State, 478 So.2d 38, 40-41 (Fla. 1985); Sparkman v. State, 482 So.2d 421, 422 (Fla. 5th DCA 1985); Coster v. State, 392 So.2d 16, 17 (Fla. 3d DCA 1981); State v. Showcase Products, Inc., 501 So.2d 11 (Fla. 4th DCA 1986). Pursuant to Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421 (1978), the inquiry is simply whether the defendant's rights were violated by the allegedly illegal search and seizure. Dean v. State, supra at 40; United States v. Salvucci, 448 U.S. 83, 87 n.4, 100 S.Ct. 2547, 2551 n.4 (1980).

The trial court in the case at bar correctly recognized this principle when it rejected the state's assertion, made at the outset of the hearing, that Defendant SUCO, the owner of the house that was searched, lacked "standing" to move to suppress the evidence seized. SUCO further submits that the trial judge's ultimate determination, that SUCO's Fourth Amendment rights were

violated by the warrantless and nonconsensual[6/] search of the house, is amply supported by the evidence in this case and should be affirmed.

A trial court ruling granting a motion to suppress comes to a reviewing court with the same presumption of correctness that attaches to jury verdicts and final judgments, e.g., DeConingh v. State, 433 So.2d 501 (Fla. 1983). Thus, in testing the accuracy of the trial court's conclusions, this Court must interpret the evidence and all reasonable deductions and inferences which may be drawn therefrom in the light most favorable to sustaining the trial judge's ruling, e.g., State v. Nova, 361 So.2d 411 (Fla. 1978); McNamara v. State, 357 So.2d 410 (Fla. 1978); Johnson v. State, 438 So.2d 774 (Fla. 1983). Applying these principles to the facts of the case at bar, it is clear that this Court must affirm the trial court's conclusion that SUCO's rights were violated; a conclusion which is well-supported by the following factors:

First, it is undisputed by the state that SUCO owned the house which was the subject of the search in this case. Such a property interest should not lightly be disregarded. As pointed out by this Court in Norman v. State, 379 So.2d 643, 647 (Fla. 1980), quoting extensively from Rakas v. Illinois, supra:

6/ The state has not even challenged Judge Morphonios' finding that Isabel Betancur did not give a valid, voluntary third-party consent to the search of the house (SR. 64). See United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988 (1974); Padron v. State, 328 So.2d 216 (Fla. 11th DCA 1976), cert. denied, 339 So.2d 1172 (Fla. 1976).

> In a recent decision, Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), the Supreme Court noted that "property rights reflect society's explicit recognition of a person's authority to act as he wishes in certain areas, and therefore would be considered in determining whether an individual's expectations of privacy are reasonable." 439 U.S. at 153, 99 S.Ct. at 435 (Powell, J., concurring). Indeed, the majority held that "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." 439 U.S. at 144 n.12, 99 S.Ct. at 431 n.12.

Indeed, Florida courts have long recognized that, "to be afforded protection against an unreasonable search of premises and a seizure of property thereon, one must claim and prove himself to be the owner, occupant, or lessee of the premises searched." Mixon v. State, 54 So.2d 190 (Fla. 1951).

Florida is not the only jurisdiction to recognize the correlation between property rights and a legitimate expectation of privacy. In United States v. Forsythe, 560 F.2d 1127 (3d Cir. 1977), the court held that the "silent partner" in a bail bond agency had standing to move to suppress evidence seized during the search of the agency's premises.

Closer on point is Rosencranz v. United States, 356 F.2d 310 (1st Cir. 1966), in which the court held that the absentee holder of legal title could invoke the protection of the Fourth Amendment. The court reasoned as follows:

> That such an absentee holder of legal title as appellant DiPietro should have standing to invoke the Fourth Amendment does not offend us as creating

> constitutional rights by "subtle distinctions developed in the law of real property", as government counsel argues. As this case demonstrates, the purchase and ownership of real property with very little more can be significant links involving the owner in the chain of an alleged conspiracy. It does not seem unfair to allow the fact of ownership, which is used by the government against a defendant, to be used by that defendant to invoke constitutional rights.

Id. 356 F.2d at 313. The reasoning of Rosencranz seems especially apropos here, where the state's theory of prosecution is that SUCO rented the living quarters of the house to the Betancurs, but retained control over the attic, where he stored his cocaine.[7/] Indeed, under the state's theory of prosecution SUCO was the only individual who legitimately had an expectation of privacy in the attic.

Second, SUCO was no mere absentee landlord. Thus, it is significant that the state concedes,

> [t]hat leasing the house did not necessarily mean the defendant had to give up an expectation of privacy. If the defendant had retained some possessory rights in the house by the terms of his agreement with the Betancurs then perhaps he could prove an expectation of privacy.

(State's brief at 19). The state then proceeds to take issue with the trial court's factual determination that SUCO did retain and exercise certain possessory rights in the leased premises. In so doing, the state ignores the previously cited fundamental

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7/ Whether the state could prove its theory of prosecution was the subject of a sworn motion to dismiss, which was denied by the court prior to the hearing on the motion to suppress (R. 49-53, T. 7-10).

principle of law that the trial court's ruling is presumptively correct and a reviewing court should interpret the evidence and reasonable inferences and deductions drawn from the evidence in a manner most favorable to sustaining the trial court's ruling. Johnson v. State, supra; State v. Nova, supra.

Here, the testimony at the hearing clearly established that SUCO was involved intimately in the supervision and maintenance of his property which was, after all, a single family residence, not a multi-unit apartment house. SUCO personally would come to the house to collect the rent and to perform maintenance and repairs (T. 620, 673). SUCO also had a key to the front door of the house and he clearly had the consent of the Betancurs to use it. Indeed, SUCO's right of access is emphasized by the particular facts of this case, for here the testimony shows that SUCO used his key and let himself into the house when Mrs. Betancur, who was in the laundry room when he arrived, did not hear him knock (T. 469, 622). Once inside the house, SUCO, who had come for purposes legitimately related to his ownership of the house, certainly made himself at home by sitting down on the family room couch to watch television, while waiting for Mrs. Betancur to finish her work in the laundry room. Finally, at no time did Mrs. Betancur ever object to SUCO's entry or continued presence in the house. To the contrary, the testimony made it clear that SUCO had what amounted to an open invitation to enter and remain in the premises.

Third, SUCO personally was on the premises, with the consent of the lessees, at the time the search took place. Significantly, prior to coercing an invalid consent from Mrs. Betancur, the police already had handcuffed and detained SUCO, had identified him as the owner of the house and had sought his consent for a search (T. 473-474, 477, 493, 496-498). It was only after SUCO had refused to cooperate that Officer Fernandez sought Mrs. Betancur's signature for his consent form (T. 473-474, 493, 528-529, 545-546).

Under these circumstances, the state's reliance upon general landlord and tenant law to support its contention that SUCO did not have an expectation of privacy in property merely because he leased it to the Betancurs is misplaced. Such arcane distinctions developed in property and tort law ought not to control. Rakas v. Illinois, supra at 143, 99 S.Ct. at 430. A case whose facts provide strong guidance and support for SUCO's position in this case is the decision of the Supreme Court in Jones v. United States, 362 U.S. 257, 80 S.Ct. 725 (1960). Though the "automatic standing" rule established in Jones later was repudiated by the court in United States v. Salvucci, supra, the remainder of the Jones decision remains good law. The controlling facts of Jones, as well as why those facts established a reasonable expectation of privacy by Jones, were explained by the court in Rakas v. Illinois, supra at 149, 99 S.Ct. at 433:

> Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960) and Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), involved significantly different factual circumstances. Jones not only had permission to use the apartment of his friend, but also had a key to the apartment with which he admitted himself on the day of the search and kept possessions in the apartment. Except with respect to his friend, Jones had complete dominion and control over the apartment and could exlude others from it. Likewise in Katz, the defendant occupied the telephone booth, shut the door behind him to exclude all others and paid the toll, which "entitled [him] to assume that the words he utter[ed] into the mouthpiece [would] not be broadcast to the world." Id. at 352, 88 S.Ct. at 512. Katz and Jones could legitimately expect privacy in the areas which were the subject of the search and seizure each sought to contest. No such showing was made by these petitioners with respect to those portions of the automobile which were searched and from which incriminating evidence was seized.

The expectation of privacy which SUCO had in the premises searched in this case was, if anything, greater and more legitimate than that possessed by Cecil Jones. Here, as in Jones, the fact that another individual(s) (in this case the Betancurs, in Jones, a man named Evans who permitted Jones to use the apartment) had a greater right to the premises does not, ipso facto, mean that SUCO did not have any legitimate expectation of privacy in the premises, particularly in light of the fact that he was legitimately on the premises at the time of the search and was handcuffed and detained by the police even before any contraband

was found. Cf., State v. Scott, 481 So.2d 40 (Fla. 3d DCA 1985); State v. Beja, 451 So.2d 882 (Fla. 4th DCA 1984).

In this case, SUCO, as the owner of the house, who was actively involved in the care and maintenance of the house and who legitimately was on the premises at the time of the search, had rights to the premises which were superior to everyone else in the world except for the Betancurs. Under these circumstances, the most that can be said for the state's argument is that its assertion that SUCO had no authority, vis-a-vis the Betancurs, to give the police permission to search the house, might be correct, e.g., Blanco v. State, 438 So.2d 404 (Fla. 4th DCA 1983), but that the conclusion it seeks to draw from this is not. For the converse is not, as the state suggests, that SUCO had no interest in the premises, but is merely that Mrs. Betancur, as the tenant and occupant of the house, could have given the police valid consent to search. Inasmuch as the trial court made a specific finding of fact that Mrs. Betancur did not voluntarily consent to the search, a finding which has not been and cannot be disputed by the state, this can offer no solace to the state in this case.

The Tennessee case of State v. Smith, 656 S.W.2d 882 (Tenn. Ct. App. 1983), which the state terms "closest on point," is far from it. In Smith, the defendant, a fire captain, rented a house to one Terry Glover, another fireman in his engine company. Together, they concocted a scheme to set fire to the house in order to collect the insurance proceeds. As part of the

scheme, Smith planned to delay responding to the fire and to report it as being nonsuspicious in origin. However, three days after the fire, a suspicious arson inspector visited the scene and, based upon his observations, obtained a search warrant for the premises. In holding that Smith had no standing to challenge the arson inspector's initial visit to the premises, based upon his "bare title alone", the Tennessee court took pains to observe that the proof, "fails to show that Smith had done anything to assert a privacy interest in the house. There was, for example, no evidence that Smith had ever lived there, stored property there, or even frequented the house." These facts are considerably different from those of this case, in which SUCO was shown to have frequented the premises and was present at the time the search was conducted.

The states' reliance upon the decision in State v. Cribbs, 406 So.2d 1295 (Fla. 2d DCA 1981), is equally misplaced. The distinction between that case and the one at bar is immediately apparent from the district court's statement of the issue involved in that case:

> This case arises out of a three-count robbery information filed against Appellee and two others in Hillsborough County. The issue to be decided is whether a warrantless search of an automobile which results in the seizure of a shotgun is justified when a party, who is not the owner of the vehicle but apparently in possession of it, has given consent to that search. We hold that the search in this case was legally conducted and reverse the trial court's order. (Emphasis supplied).

Id. at 1295-1296. Aside from the fact that the Supreme Court has, on numerous occasions, pointed out that cars are not to be treated identically with houses or apartments for Fourth Amendment purposes, see Rakas v. Illinois, supra at 148, 99 S.Ct. 433; United States v. Chadwick, 433 U.S. 1, 12, 97 S.Ct. 2476, 2484 (1977); United States v. Martinez-Fuerte, 428 U.S. 543, 561, 96 S.Ct. 3074, 3084 (1976); Cardwell v. Louis, 417 U.S. 583, 590, 94 S.Ct. 2464, 2469 (1974)(plurality opinion), a fact which is emphasized by the numerous decisions of the Supreme Court which hold that the police do not need a warrant to search a vehicle once they have probable cause to believe that there is contraband inside of it, see, e.g., Florida v. Meyers, 466 U.S. 380, 104 S.Ct. 1852 (1984); Michigan v. Thomas, 458 U.S. 259, 102 S.Ct. 3079 (1982); Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975 (1970), in Cribbs, the individual to whom the owner had entrusted the car consented to the search. Cribbs might very well be persuasive authority in the case at bar had the trial court found that Mrs. Betancur had consented freely and voluntarily to the search of the house, for under such circumstances the language which the state quotes out of context from the Cribbs decision would have some applicability. However, since it is undisputable that Mrs. Betancur did not freely and voluntarily consent to the search of the house in the case at bar, Cribbs offers not authority for the state's proposition that SUCO had no expectation of privacy in the house because she was living there.

To the contrary, under the facts of this case, the rationale and holding of State v. Barrowclough, 416 So.2d 47 (Fla. 3d DCA 1982), is far more persuasive. In Barrowclough, this Court held that an individual's legitimate expectation of privacy in a residence does not evaporate merely because the right to exclude others is a shared right. In the case at bar, the evidence shows that even though SUCO may have given up some of his rights in the premises to the Betancurs, he had not given up all of his rights. Accordingly, under the facts of this case, where it was proved to the satisfaction of the trial judge that Mrs. Betancur had not freely consented to the search of the house, a search which occurred while SUCO, the owner of the house, was present on the premises, in his capacity as owner of the house, the state's argument that SUCO had no "standing" to challenge the search must be rejected.

Finally, the state's grasping-at-straws argument that SUCO should be denied standing to challenge the search of the house because he disclaimed knowledge of the contents of the northeast bedroom makes no legal or logical sense. Indeed, the state's position literally is a non sequitur in light of the fact that Judge Morphonios upheld the initial entry into this room and ruled that this evidence would be admissible (SR. 63-65). At the very least, this argument is premature and will not become ripe until SUCO's right to appeal accrues.[8/] For assuming, arguendo,

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8/ The district court observed:

(continued...)

that such a statement was made by SUCO on the night of his arrest, the most that could be said is that this could be considered a waiver of his expectation of privacy in the contents of that particular room, but that such a waiver certainly did not extend to the entire house.9/

Though the state can cite this Court to several Florida and federal cases holding that mere invitees did not have a reasonable expectation in premises which were searched, none of these cases involve facts which are vaguely comparable to those of the case at bar. In Daniels v. State, 411 So.2d 1034 (Fla. 1st DCA 1982), the facts and holding were as follows:

> The evidence in the instant case established that Mr. Daniels was, in effect, a guest of a guest. At the time of the search, he had been in the trailer only a few hours. He testified he had been in no part of the trailer except the front room, that he did not even "know" that the trailer had a back bedroom, although he assumed that it did. When

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8/(...continued)

> We have no occasion to pass on the state's argument that the defendant Suco waived, in effect, his reasonable expectation of privacy in the northeast bedroom of the house by disclaiming any knowledge of its contents to the police. As previously stated, the present appeal does not involve the propriety of the police search of the northeast bedroom and we express no views thereon.

Id. 502 So.2d at 452, n.4.

9/ In any case, the analogy which the state seeks to draw between the house which was searched in this case and the boxes seized from a grocery cart, found in Jones' possession in the case of State v. Jones, 454 So.2d 774 (Fla. 3d DCA 1984), is tenuous at best.

> police sought his permission to search the trailer, he deferred to Mr. Hawkins because he was "just visiting." Under the circumstances we conclude that the search of the **back bedroom** and the seizure of the marijuana therein did not violate Mr. Daniels' Fourth Amendment rights.

Id. at 1037.

In State v. Mallory, 409 So.2d 1222 (Fla. 2d DCA 1982), the court held that the defendant, as a mere overnight guest in the house, had no reasonable expectation of privacy therein. In so doing, the court noted that its holding might have been different if the defendant had more of a personal interest in the premises:

> Although ownership is not the only criteria in determining the privacy question, it is certainly important to note that Mallory claimed no financial or ownership interest in the residence.

Id. at 1224.

In State v. Loomis, 418 So.2d 482 (Fla. 4th DCA 1982), the defendant who was held not to have standing (Donovan Peters), was a social invitee on the premises who had been invited there on the day of the search. He was arrested, "in the backyard in the midst of four or five foot high marijuana plants which were easily observable from public view." Id. at 482. The evidence which was sought to be suppressed was found in the garage of the home, an area in which Peters had not entered and in which he had no reasonable expectation of privacy.

In United States v. Rackley, 742 F.2d 1266 (11th Cir. 1984), the court held only that the movants in that case had no

standing to contest the search of the premises, where their claim to a reasonable expectation of privacy in the searched premises was based solely upon the fact that they were guests:

> The evidence elicited at the suppression hearing clearly establishes that Rackley and Crosby were mere guests on the premises leased by Sanders. While one's status as a guest does not necessarily exclude one from an expectation of privacy in the searched premises, the ability to object to a search is ordinarily limited to only those persons whose privacy is invaded by the search. United States v. Colbert, 474 F.2d 174, 176 (5th Cir. 1973). Neither Rackley's nor Crosby's privacy was invaded by the search conducted at the house. Neither man had any valid expectation of privacy in either the garage, the plastic garbage bags obtained from the garage, the house itself, or the Lincoln Continental automobile parked in front of the house.

Id. at 1270. At the suppression hearing, the lessee of the house testified that Rackley had a key to the house and had stayed there several times during the month preceding the search, but admitted that Rackley did not stay in the house immediately preceding the search and seizure and never kept a full wardrobe in the house when he was there. Based on this testimony, the court concluded that Rackley may have had an expectation of privacy in the guest bedroom where he stayed, but that since no evidence was seized from the guest bedroom, his expectation of privacy in the guest bedroom was of no legal consequence. The other defendant, Crosby, had never stayed overnight and, therefore, did not possess a valid privacy expectation in the house. Neither defendant had any ownership interest in the house and it

must be noted that both defendants insisted "that neither of them ever exercised any dominion or control over the narcotics or the premises where they were found." Id. at 1270.

Defendant respectfully submits that the state's contention that he lacked "standing" to challenge the search of his house and the seizure of evidence therein merely because the house was orally leased to the Betancurs must be rejected by this Court. Under the facts of this case, wherein the Defendant not only owned the house but was involved intimately with the care and maintenance of the house, frequently visited the house for legitimate purposes directly related to his ownership of the house and was on the premises at the time that the search took place, had been identified as the owner by the police and had refused to consent to the search, the trial judge was eminently correct in concluding that SUCO had a legitimate expectation of privacy in the premises and that, in the absence of a valid consent to search from Mrs. Betancur, SUCO had a right, under the Fourth Amendment to the United States Constitution and Article I, Section 12 of the Florida Constitution, to have the evidence seized pursuant to that search suppressed.

CONCLUSION

Based on the foregoing reasons and citations of authority, the Respondent respectfully submits that this Court should approve the result reached by the District Court of Appeal and affirm the trial court's order granting SUCO's motion to suppress.

Respectfully submitted,

BIERMAN, SHOHAT & LOEWY, P.A.
Attorneys for Respondent SUCO
200 S.E. First Street, #500
Miami, Florida 33131
(305)358-7477

BY Ira N. Loewy
EDWARD R. SHOHAT
IRA N. LOEWY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail this 9th day of November 1987 to: HONORABLE RICHARD L. KAPLAN, Assistant Attorney General, Department of Legal Affairs, 401 N.W. Second Avenue, Suite 820, Miami, Florida 33128.

BY Ira N Loewy
IRA N. LOEWY