STATE OF NORTH CAROLINA

COUNTY [redacted]

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

FILE NUMBER [redacted]

STATE OF NORTH CAROLINA

v.

MOTION TO SUPPRESS

[redacted]

Defendant.

NOW COMES the Defendant ("[redacted] by and through the undersigned counsel, and makes this motion to suppress all evidence of any kind in the above case on the grounds that 1) the evidence was obtained in violation of [redacted] federal and state constitutional rights to be free from unreasonable searches and seizures under the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Sec. 20, of the North Carolina Constitution; 2) the evidence was obtained in violation of [redacted] federal and state constitutional rights not to incriminate himself under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sec. 23, of the North Carolina Constitution; and 3) the evidence was obtained as a result of a substantial violation of the provisions of Chapter 15A of the North Carolina General Statutes, pursuant to N.C. Gen. Stat. 15A-974.

This motion is also made and hereby submitted as a motion to amend [redacted] December 15, 2005, Motion to Suppress filed by prior defense counsel.

In support of the motion, [redacted] shows the following:

1. An affidavit in support of this motion is attached hereto as Exhibit A and hereby incorporated by reference as if fully set forth herein.

FOURTH AMENDMENT ANALYSIS

2. [redacted] was the lawful occupant of the residence on the night of the search. [redacted] has never denied living in the residence, and there is no question regarding his standing to make the instant motion to suppress. "In order for defendant to establish standing to contest the search of the premises, he must show that he has a legitimate expectation of privacy *in the premises.*" *State v. Sanchez,* 147 N.C. App. 619, 626 (2001). Because he lived in the residence, [redacted] had a reasonable and legitimate expectation of privacy in the residence, and he has standing to file the present motion.

3. The entry of the law enforcement officers into [redacted] private residence was a search within the meaning of the Fourth Amendment. "[A]n intrusion into a residence *is* a search within the meaning of the Fourth Amendment, for 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" *State v. Barnes,* 158 N.C. App. 606, 610 (2003) (citations and internal quotes omitted). The *Barnes* court added that " '[a]t the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' *With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no."* *Id.* (citations omitted).

4. In the present case, the officers entered [redacted] private residence without a search warrant and without an arrest warrant. The State's discovery materials indicate that they had received information from a confidential informant about [redacted] selling drugs as early as November 5, 2003, and that they received additional information about [redacted] from the informant on other dates. Nevertheless, despite the information compiled by the informant and despite the passage of fifteen days from November 5 to November 20, the officers did not take the time to get a search warrant. Instead, they chose to enter [redacted] residence without a search warrant on November 20.

5. At the time they entered, the officers had no justification to engage in a warrantless search. [redacted] did not consent to their entry; he was grabbed through the front door and placed in handcuffs by Officer [redacted] before [redacted] even knew that Officer [redacted] was an officer. [redacted] was then taken into the house in handcuffs by Officer [redacted] These facts do not constitute the giving of consent.

6. The officers' Incident Report supports the contention that [redacted] did not give consent to the entry of the officers into his private residence. A copy of the report is attached hereto as Exhibit B. Under the heading of "how attacked or committed," the officers wrote "suspects engaged in controlled substance violation." For the question as to whether it was "forcible," the officers marked "yes." For the question regarding "weapon / tools," the officers entered "physical." Neither [redacted] nor [redacted] physically resisted the officers on the night of their entry into the apartment. They were unable to do so, because they were immediately placed in handcuffs. The only reason the officers could have put "forcible" and "physical" on the Incident Report is because the officers themselves acted in a forcible and physical manner to handcuff [redacted] and [redacted] and

then enter the apartment. The officers' forcible and physical entry into the apartment undercuts any contention that [redacted] consented to their entry.

7. The State may argue that because [redacted] did not physically resist the officers' entry into the apartment, he gave "implied consent" to the entry. The argument fails, however, for three reasons. First, [redacted] could not resist, because he was in handcuffs. Second, [redacted] should not be required to commit the crime of resisting a public officer under N.C. Gen. Stat. 14-223 in order to protect his constitutional right to be free from unreasonable searches and seizures. Third, the concept of "implied consent" is inconsistent with North Carolina's definition of "consent" to search. As shown in N.C. Gen. Stat. 15A-221(b), consent is an affirmative "statement to the officer, made voluntarily . . ., giving the officer permission to make a search." Accordingly, the lack of physical resistance to the officers' entry does *not* constitute consent to the entry.

8. The State may also argue that after the entry of the officers into the residence, [redacted] gave his consent to a search by giving the officers information concerning the location of marijuana within the residence. At that point, however, the officers had already conducted an initial, unlawful entry into the residence by entering without a warrant and without any justification for a warrantless search. The officers were not entitled to be in the residence in the first place, and all evidence they obtained thereafter is tainted and inadmissible as the fruit of the poisonous tree. "[E]vidence obtained after the defendant [gave consent] permitting police to search his house must be suppressed when the consent [was obtained] approximately five minutes after police made an illegal entry into the defendant's house." *State v. Nowell*, 144 N.C. App. 636, 644 (2001), *aff'd per curiam*, 355 N.C. 273 (2002).

9. In addition, no other justifications for a warrantless search were present. For example, it cannot be argued that the officers were arresting [redacted] and that their unlawful intrusion into the residence and/or the additional search of the residence constituted a search incident to arrest. A search of a residence incident to an arrest in the residence is a "protective sweep," and it "must be limited to a cursory inspection of places where a person may hide and last no longer than is necessary to dispel the reasonable suspicion of danger." *State v. Bullin*, 150 N.C. App. 631, 640 (2002) (citation omitted). The search of [redacted] residence by three officers and a drug dog was hardly "cursory," and it included areas such as a dresser drawer, which were plainly too small for a person to hide. It went far beyond a protective sweep.

10. The search also cannot be justified under the "plain view" principles. The State's discovery materials contain no indication that the officers saw incriminating evidence in plain view when [redacted] first opened the door in response to the knock of Officer [redacted] Even if the State made that contention, it would fail. Our courts have held that "plain view of objects inside a house will furnish probable cause but will *not*, without exigent circumstances, authorize entry to seize without a warrant." *State v. Nance*, 149 N.C. App. 734, 742 (2002) (emphasis added).

11. To the extent that the State attempts to justify the search based on the plain view of contraband seen by the officers *after* they entered [redacted] residence, this argument also fails. The first requirement of the plain view doctrine is that "the initial intrusion which brings the evidence into plain view must be lawful." *State v. Weakley*, --- N.C. App. ---, 627 S.E. 2d 315, 319 (2006). As shown above, the officers' initial

intrusion into [redacted] residence was not lawful; as a result, the evidence they saw in plain view after the unlawful entry is inadmissible.

12. Finally, the search cannot be justified as an "exigent circumstances" search. A search based upon exigent, or emergency, circumstances must be "strictly circumscribed by the exigencies which justify its initiation." *Georgia v. Randolph*, --- U.S. ---, 126 S. Ct. 1515, 1523 n.3 (2006) (citation omitted). "A generalized interest in expedient law enforcement cannot, without more, justify a warrantless search." *Id.* at 1524 n.5. Examples of exigent circumstances include hot pursuit of a fleeing suspect and preventing imminent harm to a law enforcement officer. *Id.* at 1524 n.6.

13. The State may argue that the odor of marijuana detected by the officers from outside [redacted] residence indicated that evidence was being destroyed and thus justified an exigent circumstance warrantless search. In light of decisions from the United States Supreme Court and the North Carolina appellate courts, however, the argument must be rejected. An odor of marijuana reveals nothing more than personal consumption of marijuana, which is a minor class 3 misdemeanor offense under North Carolina law. The destruction of evidence of a minor offense is not a sufficient exigent circumstance for the warrantless search of a private residence. Because of the "presumption of unreasonableness that attaches to all warrantless home entries," the United States Supreme Court has declared that

> [w]hen the government's interest is only to arrest for a minor offense, that presumption of unreasonableness is difficult to rebut, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate.

Welsh v. Wisconsin, 466 U.S. 740, 750 (1984). Cases from South Dakota, Idaho. Indiana, Nebraska, New Mexico, North Dakota, Washington, and Ohio therefore hold that the odor of burning marijuana is not an exigent circumstance justifying a warrantless search.

> Many other courts hold that the smell of burning marijuana does not evince a sufficiently grave offense to justify entering a residence without a warrant. These courts rely on the distinction between minor and serious offenses made by the United States Supreme Court in *Welsh v. Wisconsin*, 466 U.S. 740, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984). *See State v. Curl*, 125 Idaho 224, 869 P.2d 224 (Idaho 1993), *cert. denied*, 510 U.S. 1191, 114 S. Ct. 1293, 127 L. Ed. 2d 646 (1994); *Haley v. State*, 696 N.E.2d 98 (IndCtApp 1998); *State v. Beeken*, 7 Neb. Ct. App. 438, 585 N.W.2d 865, 872 (Neb 1998) (dictum); *State v. Wagone*r, 1998 NMCA 124, 126 N.M. 9, 966 P.2d 176 (NM CtApp), *cert. denied*, 964 P.2d 818 (NM 1998); *State v. Ackerman*, 499 N.W.2d 882 (ND 1993); *State v. Robinson*, 103 Ohio App. 3d 490, 659 N.E.2d 1292 (OhioApp 1995); *State v. Ramirez*, 49 Wn. App. 814, 746 P.2d 344 (WashApp 1987).

South Dakota v. Hess, 680 N.W.2d 314 (2004).

14. The undersigned has not found any North Carolina cases applying *Welsh* in the context of an odor of marijuana, but two similar North Carolina cases point to the same result. The first is *State v. Robinson*, 148 N.C. App. 422 (2002). In *Robinson*,

> the officers had acquired information from an anonymous informant and decided to investigate further. Upon investigation, the officers corroborated some of the information provided by the informant. The officers attempted to gain consent to search Defendant's house, but were denied. While attempting to gain consent, the officers discovered further evidence corroborating the informant's tip. The officers then entered the home to secure it and any evidence it might contain, and then went to apply for a search warrant. In the search warrant application, the affiant referenced as grounds for probable cause (1) the informant's tip, (2) Defendant's refusal to consent to a search of the house, and (3) and the corroborating evidence, *including the strong odor of marijuana*, obtained while legally on Defendant's property attempting to gain consent to search.

Robinson, 148 N.C. App. at 430 (emphasis added). The second North Carolina case is *State v. Ford*, 71 N.C. App. 748, 752 (1984), in which the court noted that "the detection of marijuana odors by a surveillance officer . . . constitute[d] adequate evidence from

which a magistrate could conclude that there was probable cause to believe that marijuana might be found by a search of the mobile home."

15. Both *Robinson* and *Ford* indicate that an odor of marijuana is evidence to be submitted to a magistrate in support of probable cause for the issuance of a search warrant. As in *Welsh* and the cases from the other states cited above, it is *not* seen as an exigent circumstance justifying the warrantless search of a private residence. The facts in *Robinson* are especially close to the facts in [redacted] case. The officers in both cases were investigating information provided by an informant, and in both cases they detected a strong odor of marijuana coming from the defendant's residence. The officers in *Robinson* followed the constitutional path of securing the residence and then getting a search warrant, using the odor of marijuana as part of the probable cause for issuance of the warrant. The officers in the instant case, however, followed the unconstitutional path of executing a warrantless search, even though the odor of marijuana and the information from the confidential informant would have constituted probable cause for the issuance of a search warrant.

16. In view of the unreasonable, warrantless entry and search of [redacted] residence, all evidence (including but not limited to the physical evidence seized in the residence and any statements made by [redacted] after the officers' entry into the residence) seized by the officers must be suppressed and excluded from evidence. The officers violated [redacted] federal and state constitutional rights to be free from unreasonable searches and seizures under the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Sec. 20, of the North Carolina Constitution. "[E]vidence must be suppressed if . . . [i]ts exclusion is required by the Constitution of the United States or

the Constitution of the State of North Carolina." N.C. Gen. Stat. 15A-974. "Our Supreme Court has held that under the exclusionary rule, '[w]hen evidence is obtained as the result of illegal police conduct, not only should that evidence be suppressed, but all evidence that is the 'fruit' of that unlawful conduct should be suppressed.'" *State v. Battle*, 136 N.C. App. 781, 783 (2000) (citation omitted).

FIFTH AMENDMENT ANALYSIS

17. In addition to the Fourth Amendment violations discussed above, the officers also violated [redacted] Fifth Amendment right not to incriminate himself by engaging in custodial interrogation without first advising [redacted] of his *Miranda* rights. [redacted] was in handcuffs throughout his interaction with law enforcement on the night in question. His residence was invaded by three officers, who also brought a drug dog. Given the totality of the circumstances, "a reasonable person in the defendant's position would believe that he was under arrest or the functional equivalent of arrest." *State v. Benjamin*, 124 N.C. App. 734, 738 (1996). [redacted] was in "custody" for the purposes of the Fifth Amendment *Miranda* analysis. In addition, he was questioned by the officers concerning various issues while in custody, including the presence of drugs and drug-related contraband in the residence.

18. As a result, [redacted] was subjected to "custodial interrogation," and he should have first been advised of his *Miranda* rights. "[N]o evidence obtained from a defendant through custodial interrogation may be used against that defendant at trial, unless the interrogation was preceded by (1) the appropriate warnings of the rights to remain silent and to have an attorney present and (2) a voluntary and intelligent waiver of those rights."

State v. Jackson, 165 N.C. App. 763, 769 (2004). [redacted] was not advised of his *Miranda* rights until 7:46 p.m. on the night of his arrest, after he had already been removed from his residence and taken to the police station. As shown by the Incident Report attached as Exhibit B, the officers entered [redacted] apartment at 5:00 p.m. They kept him in handcuffs and subjected him to custodial interrogation from 5:00 p.m. until 7:46 p.m. without giving him the required *Miranda* warnings. All of [redacted] statements to the officers concerning drugs and drug paraphernalia must be suppressed. The statements were taken in violation of his *Miranda* rights and therefore in violation of his federal and state constitutional rights not to incriminate himself under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sec. 23, of the North Carolina Constitution.

19. In addition to suppressing the statements themselves, the court should also suppress the drugs and drug paraphernalia that were found as a result of [redacted] statements, on the grounds that they were the "fruit of the poisonous tree." *See Wong Sun v. United States*, 371 U.S. 471 (1963). As noted above, the court must exclude all evidence that is obtained as the "fruit" of a constitutional violation. [redacted] also contends that his subsequent written statement at 7:46 p.m. at the Greenville Police Department must be suppressed, because it too was tainted by the earlier violation of his *Miranda* rights. Having already been questioned and given information to the officers at his residence in the absence of any *Miranda* warnings, a reasonable person in [redacted] position would have believed it was futile thereafter to invoke his *Miranda* rights and refuse to give the written statement.

WHEREFORE, the Defendant prays the court to grant this motion for the reasons stated above and to suppress any and all evidence seized in his case on November 20, 2003.

This the _____ day of _____, 20___.

LAW OFFICES OF KEITH A. WILLIAMS, P.A.

By: _____

KEITH A. WILLIAMS
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P.O. Box 1965
Greenville, North Carolina 27835
Tel: 252 / 931-9362
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N.C. State Bar Number 19333

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date shown below, he delivered a copy of the foregoing document to Assistant District Attorney John Doe by leaving it at the front desk of the Pitt County District Attorney's Office with an employee of the office in the Pitt County Courthouse, Greenville, North Carolina, in compliance with N.C. Gen. Stat. § 15A-951.

This the _____ day of _____, 20_____.

LAW OFFICES OF KEITH A. WILLIAMS, P.A.

By: _____

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EXHIBIT A: AFFIDAVIT OF [redacted]

STATE OF NORTH CAROLINA

COUNTY [redacted]

AFFIDAVIT OF [redacted]

NOW COMES the undersigned affiant, [redacted] ("[redacted] who does state the following under oath:

1. He is over the age of eighteen years and under no legal disability. The matters stated in this affidavit are based upon his personal knowledge, unless expressly stated to be based upon his information and belief.

2. On the afternoon of November 20, 2003, he was in his residence at 710 Patton Circle, Apartment 17, Greenville, North Carolina. The residence was rented to [redacted] and he was the lawful occupant of the residence. Also present was his then-girlfriend (and now wife), [redacted]

3. Someone knocked at the front door of the residence at approximately 5:30 p.m. [redacted] opened the door and saw a black male in street clothes standing there. The person did not identify himself; he said only that "Josh" had told him that he could get some "smoke" from [redacted]

4. [redacted] said that he had no idea what the black male was talking about, the black male said that it sure did smell like [redacted] had something. [redacted] told the black male again that [redacted] had no idea what the black male was talking about, and [redacted] began to shut the door. At that point, the black male grabbed [redacted] arm and pulled him outside the door and kept [redacted] hand behind his back. He then placed handcuffs on [redacted]

5. The black male then showed a badge to [redacted] and identified himself as a police officer. Shortly thereafter, he was joined by a black female officer. The black female officer was Rose [redacted] and the black male officer was V. [redacted] both officers of the Greenville, North Carolina, Police Department. Officer [redacted] called [redacted] to come outside the apartment, and when she did, Officer [redacted] handcuffed her.

6. [redacted] and [redacted] were taken back into the apartment in handcuffs by the officers. The officers asked whether anyone else was present in the residence, and [redacted] advised them that no one else was present.

7. The officers began looking around in the living room of the residence when Officer [redacted] noticed a postal scale on the table. Officer [redacted] told [redacted] that the scale was enough to allow the officers to search the apartment. At no point did

Officer [redacted] or Officer [redacted] indicate that they had either a search warrant for the residence or an arrest warrant for either [redacted] or [redacted]

8. Officer [redacted] asked [redacted] whether there was anything in the apartment that he would like to tell the officers about before the drug dog arrived. [redacted] advised that he had marijuana in the second drawer of his dresser in the bedroom. He also advised that he had a pipe in his left pants pocket as well as a two-gram bag of marijuana in the coffee table drawer and approximately a gram of marijuana in a medicine bottle on top of the table.

9. The officers advised [redacted] that they were going to wait for the drug dog to arrive before going into the bedroom to get the marijuana. While waiting for the dog, Officer [redacted] got a plastic bag from the kitchen and put the pipe, medicine bottle, scales, and the small bag of marijuana in it.

10. When the dog arrived at the residence, [redacted] and [redacted] were moved to the kitchen and joined by a white male officer. The dog was used to search the residence, and the drug dog officer advised that the dog had shown interest all around the dresser in the bedroom. The dog was also used to search the kitchen.

11. The dog was then taken out of the residence, and Officer [redacted] took the two bags of marijuana from the dresser drawer in the bedroom and put them with the other items in the plastic bag.

12. The officers let [redacted] and [redacted] sit on a small couch in the living room while the officers searched a second, larger couch. In the process of searching the second couch, Officer [redacted] found a rolled-up sandwich bag, and Officer [redacted] said that it was cocaine.

13. [redacted] was extremely surprised to see the cocaine, and he became visibly upset. Officer [redacted] told him that his bond was already $50,000.00 and that if kept on whining like "a little bitch," it would be $100,000.00. Bond was later set by the magistrate at $250,000.00.

14. Officer [redacted] and Officer [redacted] went into the kitchen to the clothes washer and dryer. They came back with a small brown bag containing another rolled-up sandwich bag, and they said that it had more cocaine in it. [redacted] was again extremely surprised to see the cocaine and again became hysterical. During this time, the drug dog officer was standing near the front door (without the dog) and saying that if [redacted] helped Officer [redacted] she would help him.

15. The drug dog officer left, and Officer [redacted] advised [redacted] that if he gave her some information, it would help [redacted] cause. [redacted] told her that [redacted] had supplied him with the marijuana earlier in the day and that he must have been the source of the cocaine. [redacted] also told Officer [redacted] that [redacted] had been in the residence earlier that day and that [redacted] was a marijuana

dealer from Farmville. [redacted] also told her a person by the name of [redacted] living at [redacted] was a marijuana dealer.

16. Officer [redacted] asked [redacted] if he knew any cocaine dealers, and [redacted] said that he did not because he did not associate himself around cocaine at all.

17. [redacted] and [redacted] were in handcuffs at all times in the apartment from when it is first noted above that they were placed in handcuffs. The handcuffs were not removed at any time while they were in the residence.

18. None of the law enforcement officers advised [redacted] of his *Miranda* rights while in the residence. That is, none of the officers advised him that he had the right to remain silent, that any statements he made could be used against him in court, that he had the right to have a lawyer present, and that he had the right to a court-appointed lawyer if he was not able hire his own.

Further the affiant sayeth naught.

_____

[redacted]
Affiant

SWORN TO AND SUBSCRIBED BEFORE ME
THIS THE _____ DAY OF MAY, 2006.

_____
NOTARY PUBLIC
My commission expires: _____