

8-10-2012

State v. Ruck Clerk's Record v. 2 Dckt. 39830

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LAW CLERK

IN THE SUPREME COURT

OF THE

STATE OF IDAHO

STATE OF IDAHO,

Plaintiff- Respondent,

vs.

MATT EUGENE RUCK

Defendant-Appellant.

Appealed from the District Court of the Second
Judicial District of the State of Idaho, in
and for the County of Latah

HON. CARL KERRICK, DISTRICT JUDGE

GREGORY R. RAUCH

ATTORNEY FOR APPELLANT

LAWRENCE WASDEN

Attorney General

ATTORNEY FOR RESPONDENT

Filed this ___ day of _____, 2012.

STEPHEN W. KENYON, CLERK

By _____
Deputy

SUPREME COURT CASE NO. 39830

VOLUME II OF II VOLUMES

39830

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CASE NO CR05-2960

2011 AUG -3 AM 11:48

CLERK OF DISTRICT COURT
LATAH COUNTY

BY MB DEPUTY

LATAH COUNTY PROSECUTORS OFFICE
WILLIAM W. THOMPSON, JR.
PROSECUTING ATTORNEY
Latah County Courthouse
P.O. Box 8068
Moscow, Idaho 83843-0568
Phone: (208)883-2246
ISB No. 2613

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO,	)	Case No. CR-2005-02960
Plaintiff,)	
)	
V.	)	REQUEST FOR HEARING
	)	AND DECISION ON THIRD
	)	PARTY MLDC GOVERNMENT
MATT E. RUCK,	)	SERVICES, CORP'S, ICR 41(e)
Defendant.	)	MOTION FOR RETURN OF
_____	)	PROPERTY

COMES NOW the State of Idaho, by and through the Latah County Prosecuting Attorney, and respectfully moves this Court to schedule a hearing on the Idaho Criminal Rule 41(e) motion for return of property of third party MLDC Government Services, Corp.

In support, the undersigned respectfully represents to and informs the Court as follows:

1. On June 22, 2011, agents of the Idaho Department of Correction, Division of Probation and Parole, namely Sr. Probation Officer Jackye Squire-Leonard and Probation

ORIGINAL

0128

and Parole Officer Andrew Nelson, conducted a home visit and ultimately seized various items of property from the defendant's residence.

2. The following day, attorney Gregory R. Rauch, on behalf MLDC Inc., contacted the undersigned by telephone and letter regarding a computer that was seized during the course of the probation search. A copy of Mr. Rauch's June 23, 2011, letter is attached as Exhibit 1 and the undersigned's written reply is attached as Exhibit 2.

3. Subsequently, the defendant's employer, MLDC Government Services, Corp., filed a "Petition for Return of Property and Request for Immediate Temporary Injunction and Ex-Parte Restraining Order on the Contents of the Property Seized and Memorandum in Support Thereof" which was assigned Latah County Case No. CV-2011-00645. A copy of that petition is attached as Exhibit 3.

4. In order to preserve the status quo pending a final determination of the issues, the parties entered into a "Stipulation Regarding Computer and Computer Data" providing for the preservation of the subject computer and its data. A copy of the stipulation is attached as Exhibit 4 and the resulting "Order Regarding Computer and Data" is attached as Exhibit 5.

5. On July 13, 2011, the undersigned authored a letter to the Honorable John R. Stegner, District Judge, who was assigned to the CV-2011-00654 case, raising the question of whether the petition should have more properly been brought in the instant criminal

case. A copy of that letter is attached as Exhibit 6, and a copy of Mr. Rauch's July 14, 2011, reply is attached as Exhibit 7.

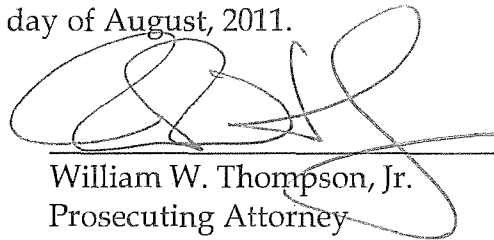
6. On July 15, 2011, the undersigned and William M. Loomis, Deputy Attorney General and counsel for the Idaho Department of Correction and officers Jackye Squire-Leonard and Andrew Nelson, filed a "Response to Petition for Return of Property" with an appended affidavit of Jackye Squire-Leonard and attachments comprised of copies of this Court's May 2, 2007, probation order, the Department of Correction's "Agreement of Supervision - Revised," and a copy of the inventory/receipt of property seized during the course of the June 22, 2011, probation search. A copy of that response and all of the attachments are attached hereto as Exhibit 8.

7. On July 21, 2011, Mr. Rauch, on behalf of MLDC Government Services, Corp., filed his reply to the July 15 "Response to Petition for Return of Property," a copy of which is attached as Exhibit 9.

8. Thereafter, the case proceeded to hearing on July 23, 2011, before the Honorable John R. Stegner, District Judge. A copy of the transcript of that hearing is attached hereto as Exhibit 10. As the transcript relates, Judge Stegner elected to stay the civil case (CV-2011-00645) pending this Court's consideration of the I.C.R. 41 motion.

Based on the above, the State respectfully prays that the Court schedule a hearing on MLDC Government Services, Corp.'s, I.C.R. 41(e) motion. The State respectfully represents that the burden of going forward remains on MLDC Government Services, Corp, pursuant to the language of I.C.R. 41(e) and State v. Meier, 149 Idaho 229 (Ct.App., 2010). The undersigned respectfully reserves the right to offer additional evidence and testimony as may become necessary or appropriate, and to submit argument on any issues raised.

Respectfully submitted this 3rd day of August, 2011.



William W. Thompson, Jr.
Prosecuting Attorney

CERTIFICATE OF DELIVERY

I hereby certify that true and correct copies of the foregoing Request for Hearing and Decision were served on the following in the manner indicated below:

Gregory R. Rauch	<input checked="" type="checkbox"/> U.S. Mail
Magyar, Rauch & Thie, PLLC	<input type="checkbox"/> Overnight Mail
326 E. 6th St.	<input type="checkbox"/> Fax
Moscow, ID 83843	<input type="checkbox"/> Hand Delivery

William M. Loomis	<input checked="" type="checkbox"/> U.S. Mail
Deputy Attorney General	<input type="checkbox"/> Overnight Mail
1299 North Orchard, No. 100	<input type="checkbox"/> Fax 208-327-7485
Boise, ID 83706	<input type="checkbox"/> Hand Delivery

Dated this 3rd day of August, 2011.

Kate Micham

THE LAW OFFICES OF
Magyar, Rauch & Thie, PLLC

Est. 1974

326 E 6th Street • Moscow, Idaho 83843 • Tel: 208 882-1906 • Fax 208 882-4540 • www.mrt-law.com

June 23, 2011

William Thompson
Moscow, Idaho 83843
Hand Delivered

Re: MLDC Inc. and Matt Ruck

Dear Bill:

This letter is in regards to the matter that we spoke about this morning. A laptop was seized from Matt Ruck. There is concern regarding the laptop because the computer has many privileged communications between myself and clients Matt Ruck and MLDC. Inc. There are also emails from various co-counsel and counsel from other civil matters and possible privileged information from original criminal proceedings and former and current criminal counsel.

Furthermore there are communications between MLDC. Inc, Riley Fitt-Chappell and Matt Ruck, that are business communications that have an expectation of privacy for Mr. Fitt-Chappell's business.

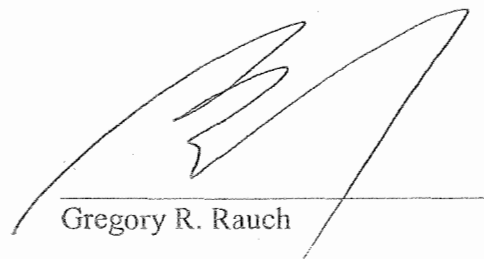
We would request that the laptop be returned to MLDC Inc and/or Mr. Ruck and that in any event the privileged communications be protected. I appreciated your assurances this morning that the attorney client privilege will be protected and honored by your office and the probation department. This letter serves as my understanding of our communication this morning. I also wanted to inform you and put your department on notice that there will be communications from various attorneys that will be strictly privileged, so if you could let the probation department know that there will be more communications other than what comes from my office or his local criminal attorney.

If anyone has any questions if someone is or is not an attorney or is from one of their offices, please contact me immediately and I can let you know to expedite your search and to eventually return the laptop once your search is completed.

Thanks,

The Law Offices of
Magyar, Rauch & Thie, PLLC

William Thompson
Jun 23, 2011
Page - 2



Gregory R. Rauch

Cc: MLDC Inc
Enc: None

OFFICE OF THE PROSECUTING ATTORNEY
LATAH COUNTY, IDAHO
Latah County Courthouse
P.O. Box 8068
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(208) 883-2246
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Prosecuting Attorney
WILLIAM W. THOMPSON, JR.
Senior Deputy Prosecuting Attorney
MICHELLE M. EVANS

Deputy Prosecuting Attorneys
JUDITH L. POTTER
MICHAEL G. CAVANAGH
ADRIENNE K. WILLEMS

June 23, 2011

Gregory R. Rauch
Magyar, Rauch & Thie, PLLC
Attorneys at Law
326 E 6th St
Moscow, ID 83843

Sent via Facsimile - 882-4540

RE: State of Idaho v. Matt Ruck, Latah County Case 2005-02960

Dear Greg:


I am in receipt of your hand delivered June 23, 2011, letter and by copy of this letter am forwarding the same to the Department of Correction.

We are already in the process of making arrangements to protect any legitimate attorney-client communications from being compromised. In light of your representations that there are multiple attorneys involved, I am writing to ask that you provide us with a list of all attorneys and/or law firms for which Mr. Ruck asserts an attorney-client privilege.

Your letter also makes reference to business communications between Mr. Ruck, MLDC and Mr. Fitt-Chappell. I am unaware of any recognized privilege for those communications and, in fact, Mr. Ruck's consent and agreement to the conditions of his probation (including his waiver of any Fourth Amendment protections) authorize the Department of Correction to access any such communications as part of their probation supervision and enforcement responsibilities.

As I said, the Department of Correction is in the process of making arrangements for a forensic examination of the seized laptop and other items seized from Mr. Ruck. Consequently, I would appreciate receipt of a list of all attorneys and law firms for which an attorney-client privilege is claimed as soon as possible.

Sincerely,


William W. Thompson, Jr.
Prosecuting Attorney

WWT/kim

pc: Jackye Squire Leonard, Probation and Parole, w/enc
Andrew Nelson, Probation and Parole, w/enc

CASE NO _____

2011 JUN 27 AM 11:07

Magyar, Rauch & Thie, PLLC
Gregory R. Rauch, ISB# 7389
326 E. 6th
Moscow, Idaho 83843
Tel: (208) 882-1906
Attorney for Plaintiff

CLERK OF DISTRICT COURT
LATAH COUNTY
BY _____ DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

MLDC GOVERNMENT SERVICES, CORP

Plaintiff.

vs.

COUNTY OF LATAH, DEPARTMENT OF
PROBATION AND PAROLE, JACKYE
SQUIRE LEANORD, ANDREW NELSON,
STATE OF IDAHO, LATAH COUNTY
SHERIFF'S DEPARTMENT,
DEPARTMENT OF CORRECTIONS

Defendants.

Case No. CV 2011- *00645*

PETITION FOR RETURN OF
PROPERTY AND REQUEST FOR
IMMEDIATE TEMPORARY
INJUNCTION AND EX-PARTE
RESTRAINING ORDER ON THE
CONTENTS OF THE PROPERTY
SIEZED AND MEMORANDUM IN
SUPPORT THEROF

The plaintiff, MLDC Government Services, Corp, through its attorney, moves the court for return of property pursuant to Rule 41 of the Idaho Rules of Criminal Procedure. Plaintiff also moves for a temporary injunction and restraining order under Rule 65 of the Idaho Rules of Civil Procedure on the contents of the seized property until a hearing can be had on the Rule 41 turnover.

Idaho Rules of Criminal Procedure 41 allows for the filing of a motion for return of property in its own civil matter if a criminal matter has not been initiated.

ASSIGNED TO
HON. JOHN R. STEGNER
DISTRICT JUDGE 0136

On or about, June 21, 2011, a laptop was taken without a warrant from an employee of the plaintiff. The employee informed the probation and police department that the laptop was not his and was property of the corporation which he does not have an ownership in.

A request was made to return the laptop and the request indicated that the corporation has a reasonable expectation of privacy in its papers, things, and effects. A corporation enjoys the same fourth amendment rights as an individual. *G. M. Leasing Corp. v. U. S.*, 429 U.S. 338, 97 S. Ct. 619, 50 L. Ed. 2d 530 (1977).

Computers have a reasonable expectation of privacy. *See United States v. Heckenkamp*, 482 F.3d 1142, 1146 (9th Cir. 2007) (finding reasonable expectation of privacy in a personal computer); *United States v. Buckner*, 473 F.3d 551, 554 n.2 (4th Cir. 2007) (same); *United States v. Lifshitz*, 369 F.3d 173, 190 (2d Cir. 2004) ("Individuals generally possess a reasonable expectation of privacy in their home computers."); *Trulock v. Freeh*, 275 F.3d 391, 403 (4th Cir. 2001); *United States v. Al-Marri*, 230 F. Supp. 2d 535, 541 (S.D.N.Y. 2002) ("Courts have uniformly agreed that computers should be treated as if they were closed containers."); *United States v. Reyes*, 922 F. Supp. 818, 832-33 (S.D.N.Y. 1996) (finding reasonable expectation of privacy in data stored in a pager); *United States v. Lynch*, 908 F. Supp. 284, 287 (D.V.I. 1995) (same); *United States v. Chan*, 830 F. Supp. 531, 535 (N.D. Cal. 1993) (same); *see also United States v. Andrus*, 483 F.3d 711, 718 (10th Cir. 2007) ("A personal computer is often a repository for private information the computer's owner does not intend to share with others. For most people, their computers are their most private spaces." (internal quotation omitted)).

A corporation does not surrender its reasonable expectation of privacy merely because an employee takes his work home with him on the weekends. If the mere usage of a document or a machine by an employee would terminate the corporation's fourth amendment rights, then a

corporation would never have any fourth amendment protections, because as a legal entity its only dealings are with employees, stockholders, and owners. To hold otherwise would subject a corporation to lose all of its fourth amendment protections in ANY documents, trade secrets, privileged materials, that are stored in portable media or even in a probationer employee's head.

A corporation cannot lose its protections merely because it employs someone with a past that includes probation. To impose that kind of restriction would be to deter companies from employing and/or promoting to management positions anyone with a questionable past, even though those people would be deserving. In *State v. Turek* 250 P.3d 796 (Idaho App.,2011) the Idaho Court of Appeals recognized the fine balance between privacy and supervision, quoting *Roman* below:

As the supreme court recognized in *Roman v. State*, 570 P.2d 1235 (Alaska 1977), there is a price to be paid for adopting a rule that probationers and parolees give up all of their Fourth Amendment rights simply because they are on probation or parole: Fourth amendment protection will be diminished not only for parolees, but also for the family and friends with whom the parolee might be living. Those bystanders may find themselves subject to warrantless searches only because they are good enough to shelter the parolee, and they may therefore be less willing to help him—a sadly ironic result in a system designed to encourage reintegration into society. *Roman*, 570 P.2d at 1243 (quoting Note, *Striking the Balance Between Privacy and Supervision: The Fourth Amendment and Parole and Probation Officer Searches of Parolees and Probationers*, 51 N.Y.U. L. REV 800, 816 (1976)). *State v. Turek* 250 P.3d 796, 801 (Idaho App.,2011)

This would also affect the ability of a corporation to keep any records that would have to be viewed by an employee in the course of business. Other employee records kept for retention of workers could be discovered by someone's probation officer, merely on a whim. A probation officer could simply ask for another employees status from the probationer without a warrant, merely because the probationer has given up his fourth amendment rights when the other employee has done nothing wrong but show up to work or apply for a job. This cannot be the

result. Corporate information cannot be seized merely because a probation officer wants to know some information, not without having a detached and neutral magistrate issue a warrant with probable or even reasonable cause. Our constitution mandates as much.

The employee that the laptop was seized from is on probation and has surrendered some of his fourth amendment rights, however the employee has no right to surrender any fourth amendment protections on behalf of a corporation that he doesn't own.

Moreover, when the laptop was taken, the employee informed the probation department and police that it wasn't his personal laptop, however, he pointed out that he had multiple personal computers, laptops, and I-Pads in the house. These computers were not taken, including Probationers own personal portable laptop. The only one that was seized was the business computer. Therefore this appears to be a warrantless search of a business without probable cause or any finding by a neutral and detached magistrate.

Therefore, because a laptop was seized without a warrant which is property of an independent corporation, the laptop and any information duplicated must be returned immediately or will be in violation of our United States Constitution.


Plaintiff Corporation has not committed a crime; therefore there is no probable cause to suspect that the corporation has committed a crime. If no probable cause exists, a more likely than not standard, then the probation and parole department has engaged in an unlawful search of a corporation, an intentional violation of our United States Constitution.

Further, and in the alternative, the laptop contains literally hundreds of attorney client privileged communications with this counsel and with several others attorneys. This laptop needs to be sealed and restrained from further analysis and copy until a court can determined

what is privileged on the computer and what is not. The computer should then be only inspected in Camera to determine what is and what is not privileged.

Plaintiff has signed this petition and has made written efforts to gain the return of the laptop under Rule 65 (b) and because there are privileged communications on the laptop, irreparable harm exists. Therefore, Plaintiff requests a temporary injunction and restraining order with or without notice until this motion/petition can be heard.

Because the proprietary rights in the laptop are unquestioned. And because the search was unquestionably without a warrant, the laptop must be returned. If not immediately then a restraining order sealing the laptop, its contents, and/or any copies made must be ordered until a hearing can be had on the return of the corporate property to preserve the constitutional rights of the Plaintiff.




Gregory R. Rauch
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 27 day of June, 2010, I caused a true and correct copy of the foregoing documents to be served on the following in the manner indicated below:

William Thompson Attorney for Defendants PO Box 8068 Fax 208-883-2290	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Hand Delivery
--	--



Gregory R. Rauch
Attorney for Plaintiff

VERIFICATION

STATE OF IDAHO)
) ss.
COUNTY OF Latah)

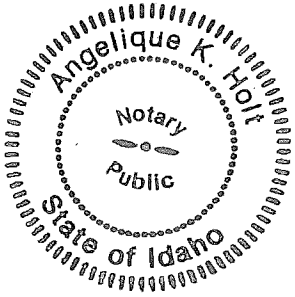
I, Riley Fitt-Chappell, an officer of the Plaintiff corporation in this matter, have read the foregoing Complaint and verify that, to the best of my knowledge, all facts alleged therein are true and accurate.




Riley Fitt-Chappell
President, MLDC Govt Services, Corp

On this 27th day of June, ~~2010~~ ²⁰¹¹, before me, Angelique Holt, a notary public, personally appeared Riley Fitt-Chappell, to me known to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal on the day and year first above written.





NOTARY PUBLIC for Idaho
Residing at Moscow
My commission expires on: July 2, 2014

Magyar, Rauch & Thie, PLLC
Gregory R. Rauch, ISB# 7389
326 E. 6th
Moscow, Idaho 83843
Tel: (208) 882-1906
Attorney for Plaintiff

CASE NO. _____
2011 JUN 27 PM 3: 25
CLERK OF DISTRICT COURT
LATAH COUNTY
BY _____ DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

MLDC GOVERNMENT SERVICES, CORP

Plaintiff.

vs.

COUNTY OF LATAH, DEPARTMENT OF
PROBATION AND PAROLE, JACKYE
SQUIRE LEANORD, ANDREW NELSON,
STATE OF IDAHO, LATAH COUNTY
SHERIFF'S DEPARTMENT, DEPARTMENT
OF CORRECTIONS

Defendants.

Case No. CV 2011-00645

STIPULATION REGARDING
COMPUTER AND DATA

COMES NOW the Plaintiff, MLDC GOVERNMENT SERVICES, CORP., by and through its attorney of record, Gregory R. Rauch, of the firm Magyar, Rauch, & Thie, PLLC, defendants Latah County, and Latah County Sheriff's Department by and through their attorney of record Michele Evans, of the Latah County Prosecuting Attorney's Office, and defendants Department of Probation and Parole, Jackye Squire Leanord, Andrew Nelson, State of Idaho, and Department of Corrections by and through their attorney of record William Loomis, Deputy Attorney General, State of Idaho, and hereby stipulate that:

1. The department of corrections will maintain possession of the Panasonic Laptop (Identified as Item no. 38, Serial No. 8HKPR08735 on page 3 of the Community Corrections Division Property Report/Receipt as property obtained from Matt Ruck on June 22, 2011 at 2110);

STIPULATION REGARDING
COMPUTER AND COMPUTER DATA

- 1

Law Offices of Magyar, Rauch & Thie, PLLC
326 E. 6th St., Moscow ID 83843
(208)882-1906

0143

EXHIBIT 4

2. The laptop, and any copies made of the data contained on the laptop will be sealed, with all data therein remaining unviewed and uninspected, until a hearing can be held to determine the rights and protections regarding ownership of said media;

DATED this 27th day of June, 2010.

Magyar, Rauch, & Thie, PLLC




Gregory R. Rauch
Attorney for Defendant



William Loomis
Deputy Attorney General, State of Idaho

Latah County Prosecutor



Michele Evans
Deputy Prosecuting Attorney

STIPULATION REGARDING
COMPUTER AND COMPUTER DATA

- 2

Law Offices of Magyar, Rauch & Thie, PLLC
326 E. 6th St., Moscow ID 83843
(208)882-1906

0144

Magyar, Rauch & Thie, PLLC
Gregory R. Rauch, ISB# 7389
326 E. 6th
Moscow, Idaho 83843
Tel: (208) 882-1906
Attorney for Plaintiff

CASE NO. _____
June 28, 2011 3:56 pm
CLERK OF DISTRICT COURT
LATAH COUNTY

BY _____ DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

MLDC GOVERNMENT SERVICES, CORP

Plaintiff.

vs.

COUNTY OF LATAH, DEPARTMENT OF
PROBATION AND PAROLE, JACKYE
SQUIRE LEANORD, ANDREW NELSON,
STATE OF IDAHO, LATAH COUNTY
SHERIFF'S DEPARTMENT, DEPARTMENT
OF CORRECTIONS

Defendants.

Case No. CV 2011-00645

**ORDER REGARDING COMPUTER
AND DATA**

Based on the stipulation of parties and good cause appearing, IT IS HEREBY
ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. The department of corrections shall maintain possession of the Panasonic Laptop (Identified as Item no. 38, Serial No. 8HKPR08735 on page 3 of the Community Corrections Division Property Report/Receipt as property obtained from Matt Ruck on June 22, 2011 at 2110);
2. The laptop, and any copies made of the data contained on the laptop shall be sealed, with all data therein remaining unviewed and uninspected, until a hearing

ORDER REGARDING COMPUTER AND
COMPUTER DATA

0143
EXHIBIT 5

can be held to determine the rights and protections regarding ownership of said media;

DATED this 28 day of June, 2011.

John R. Stegner

Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 28 day of June, 2011, I caused a true and correct copy of the foregoing document to be served on the following in the manner indicated below:

Michele Evans
Latah County Prosecutor's Office
*Attorney for Defendants Latah County, and
Latah County Sheriff's Department*
P. O. Box 8068
Moscow, ID 83843

- U.S. Mail
- Overnight Mail
- Facsimile (208) 883-2290
- Hand Delivery

William Loomis
Office of the Attorney General
*Attorney for Defendants Department of
Probation and Parole, Jackye Squire
Leanord, Andrew Nelson, State of Idaho, and
Department of Corrections*
1299 W. Orchard Street Ste. 110
Boise, ID 83706-2266

- U.S. Mail
- Overnight Mail
- Facsimile (208) 327-7485
- Hand Delivery

Gregory R. Rauch
Magyar, Rauch, & Thie, PLLC
326 E. 6th St.
Moscow, ID 83843

- U.S. Mail
- Overnight Mail
- Facsimile (208) 882-4540
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Sue Anderson

Clerk

OFFICE OF THE PROSECUTING ATTORNEY
LATAH COUNTY, IDAHO

Latah County Courthouse
P.O. Box 8068
Moscow, Idaho 83843-0568
(208) 883-2246
FAX (208) 883-2290

Prosecuting Attorney
WILLIAM W. THOMPSON, JR.

Senior Deputy Prosecuting Attorney
MICHELLE M. EVANS

Deputy Prosecuting Attorneys
JUDITH L. POTTER
MICHAEL G. CAVANAGH
ADRIENNE K. WILLEMS

July 13, 2011

The Honorable John R. Stegner
District Judge
Latah County Courthouse
Moscow, ID 83843

RE: MLDC v. Latah County, et. al., Latah County Case CV-2011-00654

Dear Judge Stegner:

In reviewing the Petitioner's initial pleading, I have discovered two preliminary issues that I felt should be brought to your and counsel's attention.

First, the facts underlying the petition stem from Mr. Ruck's felony probation. As the Court will recall, Your Honor voluntarily recused yourself in State of Idaho v. Matt Ruck, CR-2003-00518 in 2006. At approximately this same time Mr. Ruck's current felony probation case (CR-2005-02960) was pending. In fact, the probation violations in the 2003 case were handled by Judge Kerrick, the new judge in the 2005 case.

Although the 2003 case is now closed (the period of probation following retained jurisdiction having expired) I thought it important to bring to the Court's attention that you voluntarily recused yourself from dealing with Mr. Ruck and I don't know whether the reasons for recusal extend to the current proceedings.

Second, Idaho Criminal Rule 41 provides that petitions for return of seized property be filed in the underlying criminal case. The facts of this case involve a probation officer's search pursuant to the pending 2005 case over which Judge Kerrick is presiding. Judge Kerrick will be the presiding judge in any probation violation proceedings regarding Mr. Ruck and would presumably have the authority to decide whether the search and seizure was legal for probation compliance purposes. Having two separate cases potentially invites conflicting rulings. Consequently, it would appear that the I.C.R. 41 proceeding should probably be heard in that case as well.

The Honorable John R. Stegner
July 13, 2011
Page 2 of 2

I wanted to bring these issues to the forefront as soon as possible so they can be addressed as you deem appropriate. Mr. Loomis, who represents the Department of Correction, concurs. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Bill Thompson, Jr.", with a long horizontal line extending to the right.

William W. Thompson, Jr.
Prosecuting Attorney

WWT/kim

pc: Gregory R. Rauch
Bill Loomis

0148

THE LAW OFFICES OF
Magyar, Rauch & Thie, PLLC

Est. 1974

326 E 6th Street • Moscow, Idaho 83843 • Tel: 208 882-1906 • Fax 208 882-4540 • www.mrt-law.com

July 14, 2011

The Honorable John R. Stegner
District Judge
Latah County Courthouse
Moscow, ID 83843

Re: MLDC Govt Services Inc v. Latah County, et. al., CV 11-654

Dear Judge Stegner:

I am in receipt of William Thompson's letter to you. I apologize for the format of letter instead of a motion, however, before any decisions were made that ultimately affected my suit, I wanted to respond in kind briefly and quickly, however I realize that most of this content should be heard by motion and briefed.

First, your voluntary disqualification. You have remained on MLDC matters previous to this one after your voluntary disqualification in 2003. I see no reasons why this matter should be treated any different. Both my client and I have the utmost confidence that there is no prejudice, and my client would be the one affected if there was any conceivable reason for it. We would urge you to stay on, however, will respectfully honor your decision as you see fit.

Second, Rule 41 mandates that the matter be filed in civil district court. Contrary to Mr. Thompson's position that Rule 41 provides that "petitions for return of seized property be filed in the underlying criminal case." (Thompson Letter 4:1-2). I respectfully disagree. Before filing in your court I took a great deal of time researching and interpreting the rule. The plain language of the rule reads "The motion for the return of the property shall be made only in the criminal action if one is pending, but if no action is pending a civil proceeding may be filed in the county where the property is seized or located." Idaho Rules of Criminal Procedure 41(e) [emphasis added]. Here the criminal case is closed and no further action was pending when I filed the petition, none when I composed this letter, and I presume none will be filed after. Indeed, the Idaho State Judiciary Repository even lists the underlying probation violation as a closed matter. Because no matter is pending, the civil arena was appropriate and mandated.

Finally, Mr. Thompson attempts to merge these issues into one event, indicating that he feels that there should be one probation violation hearing to exclude evidence. The Fourth Amendment protections of a corporation exist and it has rights, as does the probationer in his case (if an open violation existed which it does not), however, the two have different standards of proof, different constitutional rights and protections, are completely different parties, and ultimately are different matters. Further, unless a probation violation is solely contrived for this matter, there has not been one filed and thus nothing to consolidate. It seems odd for the state to take a position that it

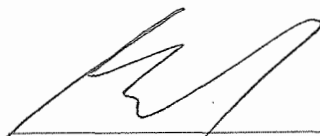
Judge Stegner
July 13, 2011
Page - 2

is correct for the government to take and keep a separate corporation's property without a warrant, hold it in limbo, unless and until a probation violation is filed at some future time.

Again, I apologize for the format of the letter, however, I saw no other way to combat the points raised in opposing counsel's letter.

Thank You For Your Time,

The Law Offices of
Magyar, Rauch & Thie, PLLC



Gregory R. Rauch

Cc: Bill Loomis, William Thompson
Enc: None

CASE NO.....

2011 JUL 15 PM 2: 25

CLERK OF DISTRICT COURT
LATAH COUNTY

BY..... DEPUTY

LAWRENCE G. WASDEN
Attorney General

PAUL PANTHER #3981
Deputy Attorney General
Lead Counsel Corrections Section

WILLIAM M. LOOMIS #4132
Deputy Attorney General
Department of Correction
1299 North Orchard, No. 110
Boise, ID 83706
Telephone: (208) 658-2097
Facsimile: (208) 327-7485

Attorney for Defendants Idaho Department of Correction,
Jackye Squire Leonard and Andrew Nelson

WILLIAM W. THOMPSON, JR. #2613
Latah County Prosecuting Attorney
Latah County Courthouse
P.O. Box 8068
Moscow, ID 83843
Telephone: (208) 883-2246
Facsimile: (208) 883-2290

Attorney for the State of Idaho

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH**

MLDC GOVERNMENT SERVICES, CORP)
)
Plaintiff,)
)
vs.)

CASE NO. CV 2011-00645
RESPONSE TO PETITION
FOR RETURN OF PROPERTY

RESPONSE TO PETITION FOR
RETURN OF PROPERTY: Page -1-

EXHIBIT 8 0151

COUNTY OF LATAH, DEPARTMENT OF)
 PROBATION AND PAROLE, JACKYE)
 SQUIRE LEONARD, ANDREW NELSON,)
 STATE OF IDAHO, LATAH COUNTY)
 SHERIFF'S DEPARTMENT, DEPARTMENT)
 OF CORRECTIONS)
 Defendants.)

COME NOW the State of Idaho, by and through the Latah County Prosecuting Attorney, and the Idaho Department of Correction, by and through its undersigned Deputy Attorney General, and respectfully respond to the petition herein.

Plaintiff has moved pursuant to Idaho Criminal Rule 41 for the return of a laptop computer seized during the course of a felony probation search conducted by agents of the State of Idaho and Idaho Department of Correction. Attached is an affidavit of Jackye Squire Leonard which describes the circumstances of the search, the basis for the search and an explanation of the items seized. Ms. Squire Leonard, as reflected by the affidavit, was physically present during and conducted most of the search and seizure, and has direct personal knowledge of the events.

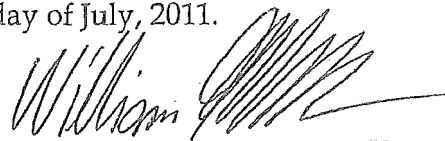
Based on the above-referenced affidavit and its attachments, and applicable law, the undersigned respectfully represent that the laptop computer and other items were

not illegally seized within the meaning of Idaho Criminal Rule 41(e) and, therefore, the petition should be denied.

RESPECTFULLY Submitted this 15 day of July, 2011.



William W. Thompson, Jr.
Attorney for Latah County and the
Latah County Sheriff's Office



William M. Loomis
Attorney for Idaho Department of
Correction, Jackye Squire Leonard and
Andrew Nelson

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing Response to Petition
for Return of Property was

mailed, United States mail, postage prepaid

hand delivered

sent by facsimile, original by mail

to the following:

Gregory R. Rauch
Magyar, Rauch & Thie, PLLC
326 E. 6th St.
Moscow, ID 83843

Dated this 15th day of July, 2011.

Kate Mulham

LAWRENCE G. WASDEN
Attorney General

PAUL PANTHER #3981
Deputy Attorney General
Lead Counsel Corrections Section

WILLIAM M. LOOMIS #4132
Deputy Attorney General
Department of Correction
1299 North Orchard, No 110
Boise, Idaho 83706
Telephone (208) 658-2097
Facsimile (208) 327-7485

Attorney for Defendants Idaho Department of Correction,
Jackye Squire Leonard and Andrew Nelson

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

MLDC GOVERNMENT SERVICES, CORP)

PLAINTIFF;)

v.)

COUNTY OF LATAH et. al,)

Respondents.)

) Case No: CV2011-00645

) AFFIDAVIT OF JACKYE SQUIRE
) LEONARD

COMES NOW your affiant and swears as follows:

- I. I am a Sr. Probation and Parole Officer (PPO) employed by the Idaho Department of Correction (IDOC), am over the age of 18 and make this affidavit on my own

AFFIDAVIT OF JACKYE SQUIRE LEONARD

1

0155

personal knowledge. I am one of the PPOs assigned to supervise offender Matt Ruck #73306 on a seven year term of probation which was imposed on April 23, 2007, (*nunc pro tunc* to September 27, 2006) in Latah County case CR-2005-02960 pursuant to a conviction for Forgery. In conjunction with other probation officers, I have periodically supervised Mr. Ruck since approximately July 27, 2004.

2. Attached hereto are true and correct copies of:

Exhibit A – Amended Order Suspending Execution of Sentence and Order of Probation in CR-2005-02960. The Amended Order states, in part, that “the defendant shall submit to search of defendant’s person, vehicle, residence and/or property conducted in a reasonable manner and at reasonable times by any agent of the division of Probation and Parole of the Idaho State Board of Correction in order to determine whether or not the defendant is complying with the terms and conditions of his probation.” (Condition number 9). The amended order also states that the “defendant shall not leave Idaho . . . without first obtaining written permission of defendant’s supervising probation officer” (condition number 4), and that the “defendant shall not be a party to any credit agreement or arrangement, and shall not be a signatory to nor be named on or have an ownership interest in any bank accounts, without the prior written consent of his supervising probation officer.” (Condition number 14).

Exhibit B – IDOC Agreement of Supervision – Revised, signed by Mr. Ruck.

The Agreement states, in part, that "[t]he defendant shall consent to the search of his/her person, residence, vehicle, personal property, and any other real property or structures owned or leased by the defendant or for which the defendant is the controlling authority conducted by an agent of the Idaho Department of Correction or law enforcement officer . . . [t]he defendant waives his/her Fourth Amendment Rights concerning searches." (Condition number 11). Additionally, the agreement provides that the "defendant shall not leave the State of Idaho or the assigned district without first obtaining permission from his/her supervising officer." (Condition number 5).

3. On June 22, 2011, PPO Andrew Nelson and I conducted a home visit of Mr. Ruck. While Mr. Ruck was showing PPO Nelson around the house, I began looking through a backpack that Mr. Ruck said was his. In the backpack, I found receipts and boarding passes indicating Mr. Ruck had traveled to New Orleans. I also found receipts and information about American Samoa. After initially denying it, Mr. Ruck admitted he traveled to American Samoa. He did not have permission for either trip.

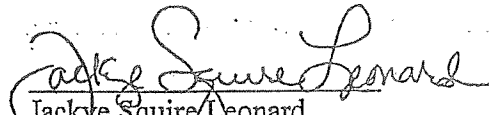
4. Two computers (a laptop and an iPad) and other contents of the backpack were seized. Mr. Ruck indicated the computers were work computers (Mr. Ruck reports he is employed by MLDC), but they were contained within the same backpack which he had claimed was his and in which I had found other indicators that Mr. Ruck had violated the terms of his probation such as the travel documentation referred to above. The computers were seized with the intention

of searching them for further indications of Mr. Ruck violating the terms of his probation.

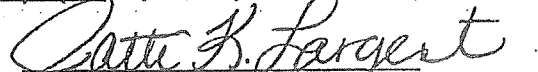
5. Mr. Ruck's wallet was on a bed and contained credit cards with MLDC Government Services on them, and debit cards with his name (Matt E. Ruck) on them. The cards were seized.
6. In total, 50 items were seized during this probation search. A true copy of the inventory of those items is attached as Exhibit C.

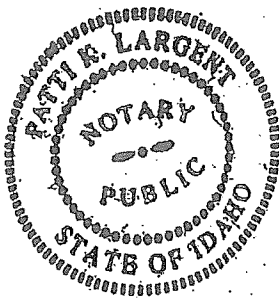
Further sayeth your affiant not.

Dated this 14th day of July, 2011


Jackye Squire Leonard

SUBSCRIBED AND SWORN TO before me this 14th day of July, 2011


NOTARY PUBLIC for the State of Idaho
Commission Expires 08-10-13



RECEIVED
MAY 07 2007
CCD, DISTRICT 2

REC'D May 2, 2007 AT
A.M. 1:44 P.M. LEWISTON, IDAHO
BY (1) [Signature]

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO,)

Plaintiff,)

V.)

MATTE RUCK,)

DOB: [REDACTED])

SSN: [REDACTED])

Defendant.)

Case No. CR-2005-02960

AMENDED ORDER SUSPENDING
EXECUTION OF SENTENCE AND
ORDER OF PROBATION

On the 23rd day of April, 2007, the defendant MATTE RUCK, defendant's counsel, James E. Siebe, and the State's Attorney, William W. Thompson, Jr., appeared before this Court for review of retained jurisdiction.

The Court considered the report of the Jurisdictional Review Committee of the Idaho Department of Correction filed herein, any evidence of circumstances in aggravation

and in mitigation, the arguments of counsel and any statement of the defendant.

Good cause appearing,

THE COURT HEREBY ORDERS that the remainder of the sentence imposed by this Court on September 27, 2006, be **SUSPENDED**, and that the defendant be placed on **PROBATION** to the Idaho State Board of Correction for a **PERIOD OF SEVEN (7) YEARS COMMENCING SEPTEMBER 27, 2006**, upon the following terms and conditions:

- (1) **Laws and Cooperation:** The defendant shall respect and obey all city, county, state and federal laws and have no law violations (other than a traffic infraction as defined by the State of Idaho), and shall comply with all lawful requests of his supervising probation officer including, but not limited to, participation in the intensive supervision caseload.
- (2) **Residence:** The defendant shall not change residence without first obtaining permission from defendant's supervising probation officer.
- (3) **Reports:** The defendant shall submit a written, truthful report to defendant's supervising probation officer each and every month and shall report in person on dates and at times specified by such probation officer.
- (4) **Travel:** The defendant shall not leave Idaho or defendant's assigned probation district of Lewis, Idaho, Clearwater, Nez Perce, and Latah counties without first obtaining written permission of defendant's supervising

probation officer.

- (5) **Employment:** The defendant shall seek and maintain gainful employment and, once such employment is secured, shall not change that employment or cause it to be terminated without first obtaining written permission from defendant's supervising probation officer; or, in the alternative, if defendant chooses to pursue education in a program approved by defendant's supervising probation officer, defendant shall enroll in such a program and not change his course of study or drop out without prior written permission of such probation officer.
- (6) **Alcohol:** The defendant shall not consume or possess alcoholic beverages in any form and will not enter upon any establishment where the sale of alcohol for consumption on the premises is a primary source of income; the defendant shall submit to tests of defendant's bodily fluids for traces of alcohol at the defendant's own expense whenever requested by defendant's supervising probation officer or any agent of the Division of Probation and Parole of the Idaho State Board of Correction. The defendant shall submit to any testing deemed necessary by the defendant's probation officer to determine if the defendant has an alcohol abuse problem. The defendant

shall also submit to any counseling for alcohol abuse deemed warranted by the defendant's probation officer.

- (7) **Controlled Substances:** The defendant shall not use or possess any controlled substance unless lawfully prescribed for defendant's use by a licensed physician or dentist; the defendant shall submit to tests of defendant's bodily fluids for traces of controlled substances at the defendant's own expense whenever requested by defendant's supervising probation officer or any agent of the Division of Probation and Parole of the Idaho State Board of Correction. The defendant shall submit to any testing deemed necessary by the defendant's probation officer to determine if the defendant has a substance abuse problem. The defendant shall also submit to any counseling for substance abuse deemed warranted by the defendant's probation officer.
- (8) **Weapons:** The defendant shall not purchase, carry, or have in his possession any firearms or weapons.
- (9) **Search:** The defendant shall submit to a search of defendant's person, vehicle, residence, and/or property conducted in a reasonable manner and at reasonable times by any agent of the Division of Probation and Parole of the

Idaho State Board of Correction in order to determine whether or not the defendant is complying with the terms and conditions of his probation.

- (10) **Costs of Probation Supervision:** The defendant will comply with Idaho Code 20-225 by paying a fee of not more than \$50.00 per month to the Idaho Department of Correction to help defray the costs of defendant's probation supervision at such times and in such amounts as his probation officer may direct.
- (11) **Association:** The defendant shall not associate with person(s) with whom defendant's supervising probation officer directs him not to associate.
- (12) **Duration:** Probation has been ordered for a specific length of time; however, probation shall not be terminated until the Court has both reviewed the performance of the probationer and has signed an order discharging the probationer. Probation is subject to extension for non-payment of costs, fines, and restitution or for unsatisfactory performance.

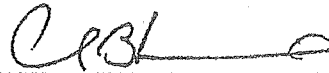
Special Conditions of Probation:

- (13) **Self Employment:** The defendant shall not be self employed, and shall immediately commence liquidating his business.

- (14) **Bank Accounts and Credit Agreements:** The defendant shall not be a party to any credit agreement or arrangement, and shall not be a signatory to or be named on or have an ownership in any bank accounts, without the prior written consent of his supervising probation officer.
- (15) **Polygraphs:** The defendant shall submit to polygraphs examinations, at his own expense, whenever requested to do so by his probation officer.

PROVIDED FURTHER the defendant shall report to Probation and Parole immediately upon his release from the Latah County jail.

DATED this 2nd day of May, 2007, nunc pro tunc to April 23, 2007.



Carl B. Kerrick
District Judge

CERTIFICATE OF SERVICE

I do hereby certify that full, true, complete and correct copies of the foregoing AMENDED ORDER SUSPENDING EXECUTION OF SENTENCE AND ORDER OF PROBATION were delivered to the following as indicated:

James E. Siebe
Siebe Law Offices
P.O. Box 9045
Moscow, ID 83843

U.S. Mail
 Overnight Mail
 Fax
 Hand Delivery

William W. Thompson, Jr.
Latah County Prosecuting Attorney
Latah County Courthouse
Moscow, ID 83843

U.S. Mail
 Overnight Mail
 Fax
 Hand Delivery

Latah County Sheriff's Office
Attn: Lt. Jim Loyd, Jail
Latah County Courthouse
Moscow, ID 83843

U.S. Mail
 Overnight Mail
 Fax
 Hand Delivery

Latah County Sheriff's Office
Attn: Karen Johnson, Records
Latah County Courthouse
Moscow, ID 83843

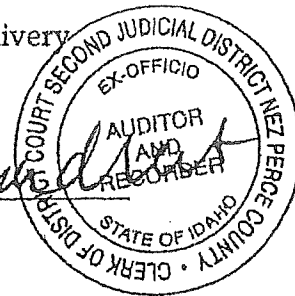
U.S. Mail
 Overnight Mail
 Fax
 Hand Delivery

Probation and Parole
Department of Correction
P.O. Box 1408
Lewiston, ID 83501

U.S. Mail
 Overnight Mail
 Fax
 Hand Delivery

on this 3rd day of May, 2007.

Jimmy Lewis
Deputy Clerk



Walt Ruck

Idaho Department of Correction
Agreement of Supervision - Revised

1. Supervision Level: The defendant's level of supervision, including case type and electronic monitoring shall be determined by the Idaho Dept of Correction. (W)
2. Laws and Conduct: The defendant shall obey all laws, municipal, county, state and federal. The defendant shall comply with all lawful requests of any agent of the Idaho Dept of Correction. The defendant shall be completely truthful at all times with any agent of the Idaho Dept of Correction. During any contact with law enforcement personnel the defendant shall provide their identity, notify the law enforcement officer(s) that they are under supervision and provide the name of their supervising officer. The defendant shall notify their supervising officer of the contact within 24 hrs. (W)
3. Residence: The defendant shall not change residence without first obtaining permission from an authorized agent of the Idaho Dept of Correction. (W)
4. Reporting: The defendant shall report to his/her supervising officer as directed. The defendant shall provide truthful and accurate information or documentation whenever requested by the Idaho Dept of Correction. (W)
5. Travel: The defendant shall not leave the State of Idaho or the assigned district without first obtaining permission from his/her supervising officer. (W)
6. Extradition: If the defendant does leave the State of Idaho, with or without permission, the defendant does hereby waive extradition to the State of Idaho and will not contest any effort to return the defendant to the State of Idaho. (W)
7. Employment/Alternative Plan: The defendant shall seek and maintain gainful, verifiable, full-time employment. The defendant shall not accept, cause to be terminated from, or change employment without first obtaining written permission from his/her supervising officer. In lieu of full-time employment, the defendant may participate in full-time education, a combination of employment and education, vocational program or other alternative plan based on the offender's specific situation and as approved by his/her supervising officer. (W)
8. Alcohol: The defendant shall not purchase, possess, or consume alcoholic beverages in any form and will not enter any establishment where alcohol is a primary source of income. (W)
9. Controlled Substances: The defendant shall not use or possess any illegal drug. The defendant shall not use or possess any paraphernalia for the purpose of ingesting any illegal drug. The defendant shall not use or possess any controlled substances unless lawfully prescribed for him/her by a licensed physician or dentist. The defendant shall use medications only in the manner prescribed by their physician or dentist. (W)
10. Firearms/Weapons: The defendant shall not purchase, carry, possess or have control of any firearms, chemical weapons, electronic weapons, explosives or other dangerous weapons. Other dangerous weapons may include, but are not limited to: knives with blades over two and one half inches in length, switch-blade knives, brass knuckles, swords, throwing stars and other martial arts weapons. Any weapons or firearms seized will be forfeited to IDOC for disposal. The defendant shall not reside in any location that contains firearms unless the firearms are secured and this portion of the rule is exempted in writing by the District Manager. (W)
11. Search: The defendant shall consent to the search of his/her person, residence, vehicle, personal property, and other real property or structures owned or leased by the defendant or for which the defendant is the controlling authority conducted by any agent of the Idaho Dept of Correction or law enforcement officer. The defendant waives his/her Fourth Amendment Rights concerning searches. (W)
12. Cost of Supervision: The defendant shall comply with Idaho Code 20-225 which authorizes the Idaho Dept of Correction to collect a cost of supervision fee. The defendant shall make payments as prescribed in his/her monthly cost of supervision bill. (W)

EXHIBIT B

14. Substance Abuse Testing: The defendant shall submit to any test for alcohol or controlled substances as requested and directed by any agent of the Idaho Dept of Correction or law enforcement officer. The defendant may be required to obtain tests at their own expense. If the results of the test indicate an adulterant has been used to interfere with the results, that test will be deemed to have been positive. W

15. Evaluation and Program Plan: The defendant shall obtain any treatment evaluation deemed necessary and as ordered by the Court or any agent of the Idaho Dept of Correction. The defendant shall meaningfully participate in and successfully complete any treatment, counseling or other programs deemed beneficial and as directed by the Court or any agent of the Idaho Dept of Correction. The defendant may be required to attend treatment, counseling or other programs at their own expense. W

16. Cooperation with Supervision: When home, the defendant shall answer the door for the probation officer. The defendant shall allow the probation officer to enter their residence, other real property, place of employment and vehicle for the purpose of visitation, inspections and other supervision functions. The defendant shall not possess, install or use any monitoring instrument, camera, or other surveillance device to observe or alert them to the approach of his/her probation officer. The defendant shall not keep any vicious or dangerous dog or other animal on or in their property that the probation officer perceives as an impediment to accessing the defendant or their property. W

17. Absconding Supervision: The defendant will not leave or attempt to leave the state or the assigned district in an effort to abscond or flee supervision. The defendant will make himself/herself available for supervision and program participation as instructed by the probation officer and will not actively avoid supervision. W

18. Court Ordered Financial Obligations: The defendant shall pay all costs, fees, fines and restitution in the amount and manner ordered by the Court. The defendant shall make payments as ordered by the Court or as designated in a Payment Agreement and Promissory Note to be completed with an agent of the Idaho Dept of Correction and signed by the defendant. W

19. Confidential Informant: The defendant shall not act as a confidential informant for law enforcement except as allowed per Idaho Dept of Correction policy. W

20. Intrastate/Interstate Violations: If allowed to transfer supervision to another district or state, the defendant agrees to accept any violation allegation documents purportedly submitted by the agency/officer supervising the defendant in the receiving district or state as admissible into evidence as credible and reliable. The defendant waives any right to confront the author of such documents. W

21. Additional Rules: The defendant agrees that other supervision rules may be imposed depending on the district or specific field office that provides his/her supervision. At all times, these additional rules will be imposed only after considering the successful supervision of the defendant and the secure operation of the district or specific field office. All additional rules will be explained to the defendant and provided to him/her, in writing, by an agent of the Idaho Dept of Correction. W

I have read, or have had read to me, the above agreement. I understand and accept these conditions of supervision. I agree to abide by and conform to them and understand that my failure to do so may result in the submission of a report of violation to my sentencing authority.

[Signature]
Defendant Signature

[Signature]
Witness Signature

7-22-10
Date

Warren Lemphig 0167
Witness Name (printed)

Page 1 (57) Community Corrections Division
PROPERTY REPORT/RECEIPT

PROPERTY OBTAINED FROM Ruck, Matt	DATE 06-22-11	TIME 2:10	PREPARING OFFICER AND NUMBER Andrew Nelson 4900
TYPE OF INCIDENT Search	DOC NUMBER	ADDRESS 823 E. 5th St. Moscow ID	
<input type="checkbox"/> EVIDENCE		<input type="checkbox"/> OTHER	

ITEM NO.	AMOUNT	ITEMIZATION AND DESCRIPTION OF PROPERTY	STORED IN
1	1	Etrade C.C. 7840 (wallet)	
2	1	Visa Debit 9083 (wallet)	
3	1	Bank ATM 1400 (wallet)	
4	1	Regions C.C. 7128 (wallet)	
5	1	Regions C.C. 7094 (wallet)	
6	3	Blue Sky \$20 ⁰⁰ Blue Card (B.P.)	
7	2	Ace America Sam's Cards (B.P.)	
8	1	SIM #41109092744 (B.P.)	
9	1	SIM #41109092745 (B.P.)	
10	1	SIM Card Case SIM#41109092672 (B.P.)	
11	1	Hertz rental receipt SEA/TAC 6-20/21 (B.P.)	
12	1	Parking receipt Spokane 6-20-11 (in mail)	
13	1	Tradewinds Hotel receipt 5-6-11 (B.P.)	
14	6	Various Business Cards (B.P.)	
15	2	Hampton Louisiana room keys (B.P.)	
16	1	Hertz rental receipt 5/29-5/30 (B.P.)	
17	1	Boarding Pass Sea-ATL 5-28 (B.P.)	
18	1	Boarding Pass ATL-NewO. 5-29 (B.P.)	

OWNER'S NAME (if different from above)	ADDRESS	PHONE NUMBER
--	---------	--------------

OWNER'S SIGNATURE RECEIVING PROPERTY

EVIDENCE OUT	EVIDENCE IN	FINAL DISPOSITION <input type="checkbox"/> Returned to owner <input type="checkbox"/> Destroyed
EVIDENCE OUT	EVIDENCE IN	<input type="checkbox"/> Turned over to _____ Date of Disposition _____
EVIDENCE OUT	EVIDENCE IN	SIGNATURE OF RELEASING OFFICER
EVIDENCE OUT	EVIDENCE IN	SUPERVISOR AUTHORIZING DISPOSITION

PROPERTY OFFICER PROCESSING AND STORING	LOCATION OF STORAGE Probation & Parole	0168
SIGNATURE OF PREPARING OFFICER AND NUMBER 4900	SUPERVISOR AND NUMBER	

EXHIBIT C

Page 2. (ASU)

Community Corrections Division PROPERTY REPORT/RECEIPT

PROPERTY OBTAINED FROM	DATE	TIME	PREPARING OFFICER AND NUMBER
TYPE OF INCIDENT	DOC NUMBER	ADDRESS	
<input type="checkbox"/> EVIDENCE		<input type="checkbox"/> OTHER	

ITEM NO.	AMOUNT	ITEMIZATION AND DESCRIPTION OF PROPERTY	STORED IN
19	1	Parking receipt Spokane 5-28/5-30 (B.P.)	
20	1	Boardy Pass, New O. - Salt L. 5-30 (B.P.)	
21	2	receipts (B.P.)	
22	1	Embassy Hotel receipt 5-29/5-30 (B.P.)	
23	1	MIDC - Thrifty (Corporate reek plan (B.P.)	
24	1	Cover sheet - Thrifty (B.P.)	
25	1	Invoice (receipt - Rejuvenation (residence)	
26	1	Bushmaster Firearms handout (residence)	
27	1	receipt, Spangle WA 5-30 (B.P.)	
28	1	receipt, Kennecock WA 6-4 (B.P.)	
29	1	Dice of paper w/ # 6 --- 8387	
30	1	Black Paper card (B.P.)	
31	1	White Paper card (B.P.)	
32	1	USB Black charger/power (B.P.)	
33	1	Stereo earphone jack	
34	1	4G white Kingston Thumbdrive (B.P.)	
35	1	SD Card reader (B.P.)	
36	1	SD 8GB Card	

OWNER'S NAME (if different from above)	ADDRESS	PHONE NUMBER
--	---------	--------------

OWNER'S SIGNATURE RECEIVING PROPERTY _____

EVIDENCE OUT	EVIDENCE IN	FINAL DISPOSITION <input type="checkbox"/> Returned to owner <input type="checkbox"/> Destroyed
EVIDENCE OUT	EVIDENCE IN	<input type="checkbox"/> Turned over to _____ Date of Disposition _____
EVIDENCE OUT	EVIDENCE IN	SIGNATURE OF RELEASING OFFICER _____
EVIDENCE OUT	EVIDENCE IN	SUPERVISOR AUTHORIZING DISPOSITION _____

PROPERTY OFFICER PROCESSING AND STORING	LOCATION OF STORAGE Prudhon 1 Pond
SIGNATURE OF PREPARING OFFICER AND NUMBER 4900	SUPERVISOR AND NUMBER 0169

Page 3 (A51)

Community Corrections Division PROPERTY REPORT/RECEIPT

PROPERTY OBTAINED FROM	DATE	TIME	PREPARING OFFICER AND NUMBER
TYPE OF INCIDENT	DOC NUMBER	ADDRESS	
<input type="checkbox"/> EVIDENCE		<input type="checkbox"/> OTHER	

ITEM NO.	AMOUNT	ITEMIZATION AND DESCRIPTION OF PROPERTY	STORED IN
37	1	Nikon Coolpix Camera (B.P.)	
38	1	Panasonic Computer # 8HKPROB735 (B.P.)	
39	1	IPAD 32GB # v5042YKETU (B.P.)	
40	1	IPAD Zipper case (B.P.)	
41	3	myrcenary Beers (residence)	
42	1	Black Targus Back Pack	
43	1	Alaska Airline Baggage tag (B.P.)	
44	1	Black Stereo Headphone jack (B.P.)	
45	1	Silver Cigar Cutter (B.P.)	
46	1	Blue lighter (B.P.)	
47	1	calculator (B.P.)	
48	1	Plastic Baggie w/ paper in it. (B.P.)	
49	1	Black plastic piece (B.P.)	
50	2	Cough drops (B.P.)	

OWNER'S NAME (if different from above)	ADDRESS	PHONE NUMBER
--	---------	--------------

OWNER'S SIGNATURE RECEIVING PROPERTY _____

EVIDENCE OUT	EVIDENCE IN	FINAL DISPOSITION <input type="checkbox"/> Returned to owner <input type="checkbox"/> Destroyed
EVIDENCE OUT	EVIDENCE IN	<input type="checkbox"/> Turned over to _____
EVIDENCE OUT	EVIDENCE IN	Date of Disposition _____
EVIDENCE OUT	EVIDENCE IN	SIGNATURE OF RELEASING OFFICER _____
EVIDENCE OUT	EVIDENCE IN	SUPERVISOR AUTHORIZING DISPOSITION _____

PROPERTY OFFICER PROCESSING AND STORING	LOCATION OF STORAGE <i>Protestant Parole</i>
SIGNATURE OF PREPARING OFFICER AND NUMBER <i>[Signature]</i> 41906	SUPERVISOR AND NUMBER 0170

Magyar, Rauch & Thie, PLLC
Gregory R. Rauch, ISB# 7389
326 E. 6th
Moscow, Idaho 83843
Tel: (208) 882-1906
Attorney for Plaintiff

CASE NO _____
2011 JUL 21 PM 1:31
CLERK OF DISTRICT COURT
LATAH COUNTY
BY: _____ DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

MLDC GOVERNMENT SERVICES, CORP

Plaintiff.

vs.

COUNTY OF LATAH, DEPARTMENT OF
PROBATION AND PAROLE, JACKYE
SQUIRE LEANORD, ANDREW NELSON,
STATE OF IDAHO, LATAH COUNTY
SHERIFF'S DEPARTMENT,
DEPARTMENT OF CORRECTIONS

Defendants.

Case No. CV 2011-00645

REPLY TO RESPONSE TO
PETITION FOR RETURN OF
PROPERTY AND REQUEST FOR
IMMEDIATE TEMPORARY
INJUNCTION AND EX-PARTE
RESTRAINING ORDER ON THE
CONTENTS OF THE PROPERTY
SIEZED AND MEMORANDUM IN
SUPPORT THEROF

The plaintiff, MLDC Government Services, Corp, through its attorney, hereby submits this reply to Defendant's response to the underlying petition.

It is important to note from the outset that Defendants shoulder the burden of proof in warrantless searches. "Warrantless searches are presumptively unreasonable. *State v. Woolery*, 116 Idaho 368, 370, 775 P.2d 1210, 1212 (1989), *cert. denied* 511 U.S. 1057, 114 S.Ct. 1623, 128 L.Ed.2d 348 (1994). The burden of proof rests with the State to demonstrate that the search either fell within a well-recognized exception to the warrant requirement or was otherwise reasonable under the circumstances. *Id.*" *State v. Anderson* 140 Idaho 484, 486,(2004). In this

case the Defendant's shoulder the burden to prove that their search was legal. They have not met that burden.

Defendant's response contains no legal case authority for their position. They merely attach an affidavit of the Probation Department employee Jackye Squire Leonard (hereinafter Leonard) which describes the "circumstances of the search, the basis for the search and an explanation of the items seized." *Response* 2:7-8. The Defendants state that based upon the above-referenced affidavit and its attachments, and applicable law, the property was legally seized. Other than referencing rule 41(e) cited in the petition, they cite NO applicable law or NO applicable references to the meaning of 41(e). Further, not only is their argument without legal authority (just a blanket reference to "applicable law") their argument is without merit. Just an inexplicable reference to an affidavit with no indication on how the affidavit even relates to the "applicable law". Finally, the Defendants don't even ask for oral argument as mandated under Rule 7 (b)(3)(C).

Although Defendants have given nothing to reply to, what we do know is that they have not contended that the search was conducted with a warrant and no exception to the warrant requirement was given. Therefore the only way to circumvent the warrant requirement was with proper consent and authority. None is present.

Defendants admit that probation officer Leonard was informed that the property in question was corporate property before the seizure. *Affidavit of Leonard* 3:18. Thus, to seize the property, Leonard would have to have proper consent or authority. Leonard had no proper consent or authority for the seizure of this corporate property. Thus the search was in violation of MLDC's Fourth Amendment rights under the United States Constitution which prohibits unreasonable searches and seizures.

In support of Leonard's affidavit she attached an *Amended Order Suspending Execution of Sentence and Order of Probation* as Exhibit A and the *Idaho Department of Correction Agreement of Supervision – Revised* as Exhibit B. Notwithstanding the fact that a probationer has no power to waive another entities' constitutional right to privacy, neither document confers the power on the probation department to seize and take possession of property that is owned by another.

- I. The original Amended Order does not confer the right to search property held for another.

The amended order signed by the Honorable Judge Carl B. Kerrick states "the defendant shall submit to a search of defendant's (1) person, (2) vehicle, (3) residence, (4) and/or property" [numbering added] *Amended Order* 4:16-17.

Here the contents of the laptop were not on his person, not his vehicle, not his residence, and not his property. The only argument could be that because the Corporation's laptop was in the Probationer's house, the right to search was given. This argument ultimately fails. A laptop has been held analogous to a closed container such as a suitcase, footlocker, or briefcase. *See United States v. Heckenkamp*, 482 F. 3d 1142, 1146 (9th Cir. 2007) finding a reasonable expectation of privacy in a computer. Because there is a reasonable expectation of privacy in a computer, there has to be appropriate consent by the appropriate party and here the appropriate property is MLDC Government Services, Inc., its Officers, or Directors.

In third party searches there must be actual or apparent authority to allow consent to a search. Here, no knowledge was alleged by defendants as to any actual authority given by the corporation to allow a search. Moreover any actual authority conferred on an employee to consent to a search may be revoked prior to the time the search is completed. *United States v.*

Lattimore, 87 F.3d 647, 651 (4th Cir. 1996) (quoting 3 Wayne R. LaFave, *Search and Seizure* §8.2(f), at 674 (3d ed. 1996)).

Here, no apparent authority existed. Leonard was told that the laptop was corporate property. Additionally, the probationer told the probation department several times that he did not have authority to consent to the search and had no authority to give out the password. Further, Plaintiff's corporate policy clearly indicates that dissemination of corporate information is forbidden. Please See Exhibit 1, Mobile Computer Use and Policy.

Because there was no actual or apparent authority, there could be no seizure of the corporate property without a warrant. Judge Kerrick's order could have indicated that the probationer would have to submit to the search of all property within the probationers immediate control. It seems that this Draconian condition has been present in probation orders in other jurisdictions. See *United States v. Tucker*, 305 F. 3d 1193, 1202 (10th Cir. 2002) where a computer search was allowed pursuant to a parole agreement allowing search of "Any other Property Under [defendant's] Control." However, this condition of probation is not present in the probationers order and agreement. Therefore, the automatic consent that Defendant's rely upon to effectuate the search and seizure is inadequate and not expressly permitted, therefore it is not allowed.

Further, even if a condition like the one in *Tucker* was imposed, courts have held that once the computer was seized under that provision, it would no longer be permissible to conduct the search under that authority. See *United States v. Carey*, 172 F.3d 1268, 1274 (10th Cir. 1999) where the court interpreted probationers written consent, so that consent to seizure of "any property" under the defendant's control and to "a complete search of the premises and property" at the defendants address merely permitted the agents to seize the defendant's computer from his

apartment, not to search the computer off-site because it was no longer located at the defendant's address.

The harsh result of a condition like the one imposed in *Tucker* is recognized in *State of Idaho v. Turek*, where a probation search was held illegal, the court recognized the danger of not allowing employers, friends, and other bystanders to employ or shelter a probationer. "As the supreme court recognized in *Roman v. State*, 570 P.2d 1235 (Alaska 1977), there is a price to be paid for adopting a rule that probationers and parolees give up all of their Fourth Amendment rights simply because they are on probation or parole: Fourth amendment protection will be diminished not only for parolees, but also for the family and friends with whom the parolee might be living. Those bystanders may find themselves subject to warrantless searches only because they are good enough to shelter the parolee, and they may therefore be less willing to help him—a sadly ironic result in a system designed to encourage reintegration into society. *Roman*, 570 P.2d at 1243 (quoting Note, *Striking the Balance Between Privacy and Supervision: The Fourth Amendment and Parole and Probation Officer Searches of Parolees and Probationers*, 51 N.Y.U. L. REV 800, 816 (1976)). *State v. Turek* 250 P.3d 796, 801 (Idaho App.,2011).

Thus, because there was no condition in Judge Kerrick's order specifically allowing the probation department to search an employers' property, any third party property, or for property merely in probationers possession without more, this court cannot rule that the property was obtained legally. Because of the Detrimental effects discussed in *Turek*, no Judge should place that condition on a probationer, ultimately restricting his employment, without some articulated cause or danger. The question truly is, should a corporation or business lose its constitutional rights in its property because an employee views or handles its property? The answer ultimately

depends on how would that affect overall hiring practices across our country. Would a corporation purposefully disavow itself of its Fourth Amendment protections?

II. The Agreement of Supervision Does Not Give Authority to seize a Probationers' Employers' Property Through Third Party Consent.

The *Agreement of Supervision* signed by the probationer states "the defendant shall consent to he search of his/her

- (1) person,
- (2) residence,
- (3) vehicle,
- (4) personal property,
- (5) and other real property or structures owned or leased by the defendant or for which the defendant is the controlling authority" [numbers added] *Agreement of Supervision* 1:40-42

Here, nothing in this agreement confers on the Probation and Parole Department the authority to search corporate property of an employer in an employees' possession.

The search in question was conducted while probationer was not present in the room and was showing the other probation officer around the rest of his home. While out of his presence, Leonard started going through the probationers belongings. Leonard pulled a laptop out of a backpack. When asked, the probationer indicated that the laptop wasn't his informing Leonard that it was corporate property. Leonard searched and seized the laptop anyway. Just like in the *Amended Order* discussed above, the phrase in *Tucker* "Any other Property Under [defendant's] Control" was also absent in this document.

It is Plaintiff's contention that it does not matter whether the state believes consent was or was not given to search other peoples property in the agreement. Whether or not Probationer consented to searches in past agreements and orders, he still doesn't possess the authority to surrender the corporations' constitutional rights and made it known to the probation officer that he had no such authority. Further there is nothing in the contract that would indicate there was a meeting of the minds about the scope and specificity of searching third party property held for another. There is still no allowance in the *Agreement* that any consent was ever given. There is nothing allowing a search of corporate property merely within probationers control or possession. There is without a doubt an agreement allowing the probation department to search for "His person, property, residence, vehicle, personal property, and other real property..." [emphasis added]. However, without a specifically articulated provision giving away the employer's constitutional protections of the right to privacy, or any other third party, none is surrendered. Because there is no authority to allow for seizure of property held for another or property merely in the possession of the probationer, this seizure cannot be held to be constitutional. Thus the seizure was unconstitutional, the property must be returned to the corporation and can only be searched and seized with a warrant with the correct finding of cause.

It must be noted that if the Probation Department was truly interested in the computer property of the probationer, there were several other computers in the home. The computer of interest was the only one identified as the Corporations' computer. We cannot allow the Defendants to circumvent the warrant requirement and investigate the Corporation while under the guise of a random "home visit".

Privilege and Sensitive Information

As a further aside, much of the laptop is privileged. There are literally hundreds of communications and documents from several attorneys. Even beyond the attorney client privilege, the computer has Sensitive But Unclassified Documents or (SBU) contained in its memory. SBU documents are documents intended for use by authorized users only. If a reader is not the intended recipient of the document, any reading, copying, use or distribution of the document is strictly prohibited and ILLEGAL. "Some agency guidance documents have started to use interchangeably the terms "for official use only," "limited use," "sensitive," "sensitive but unclassified," and related terms, and have defined SBU by referring to such statutes as *Privacy Act of 1974* (5 USC 552a),³⁷ the *Freedom of Information Act (FOIA) of 1966* (5 USC 552), the *Computer Security Act of 1987* (relevant portions codified at 15 USC 278 g-3), and other language. Agencies have discretion to define SBU in ways that serve their particular needs to safeguard information. Genevieve J. Knezo, "*Sensitive But Unclassified*" and other Federal Security Controls on Scientific and Technical Information: History and Current Controversy, CRS Report for Congress, Congressional Research Service/ Library of Congress, February 20, 2004.

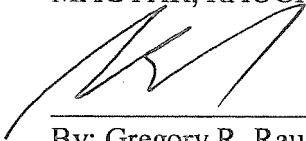
Relevant SBU documents have been defined to Plaintiff in contract as: "Sensitive But Unclassified (SBU) building information. SBU documents provided under this solicitation are intended for use by authorized users only. In support of this requirement, GSA requires planholders to exercise reasonable care when handling documents relating to SBU building information per the solicitation. If you are not the intended recipient, you are hereby notified that any reading, copying, use or distribution (whether materially, verbally or electronically) of this document is strictly prohibited and illegal." Exhibit 2- Special Contract Requirements.

Anyone who intentionally reads the SBU documents without permission is breaking federal law. Therefore, in addition to not having federal consent to search and read the documents, there is obviously no consent to search and read the attorney client privileged emails. This computer must be returned because its seizure was unlawful and potentially subjects anyone who reads the material to federal penalties and would break attorney client privilege.

In conclusion, there was no authority given, apparent or actual, to search and seize a field computer from a business, regardless of where it was located.

DATED this 21 day of July, 2010.

MAGYAR, RAUCH & THIE, PLLC



By: Gregory R. Rauch
Attorney for Plaintiff

CERTIFICATE OF SERVICE

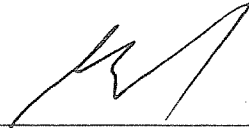
I hereby certify that on this 21 day of July, 2011, I caused a true and correct copy of the foregoing document to be served on the following in the manner indicated below:

Bill Thompson
Latah County Prosecutor's Office
*Attorney for Defendants Latah County, and
Latah County Sheriff's Department*
P. O. Box 8068
Moscow, ID 83843

- U.S. Mail
- Overnight Mail
- Facsimile (208) 883-2290
- Hand Delivery

William Loomis
Office of the Attorney General
*Attorney for Defendants Department of
Probation and Parole, Jackye Squire
Leanord, Andrew Nelson, State of Idaho, and
Department of Corrections*
1299 W. Orchard Street Ste. 110
Boise, ID 83706-2266

- U.S. Mail
- Overnight Mail
- Facsimile (208) 327-7485
- Hand Delivery



Gregory R. Rauch

EXHIBIT

1

MLDC Government Services Corp Employee Manual; Policies and Procedures

Field Deployment Mobile Computer Use and Policy

The laptop computer issued to you is done so for work purposes. It remains the property of the company and will be treated as such.

The following procedures will be followed prior to departing for job sites and or visits.

- Synchronize the laptop with the company server to ensure contract files and documents are current.
- Ensure battery is fully charged and operational.
- Ensure the laptop is equipped with cellular modem or request one.
- Ensure all software updates are installed and current including anti-virus.
- Ensure your password is functional on the laptop

As with company desktop computers, laptops contain a great deal of information regarding contracts. Many of these contracts are Department of Defense or Defense related and carry special requirements for information handling. There are no exceptions to the following rules and regulations.

- Never leave the laptop unattended or unsecure.
- Never leave the laptop unprotected via password.
- Never disable the password protection.
- Do not alter the time sequence for auto lockdown or shutoff.
- Do not allow anyone outside the company access to the laptop, this includes Government personnel. They will often ask as a probe or test.
- Do not give your password to anyone, including coworkers.

Contracts and contract files containing PCII, SSI or SBU documents require a nondisclosure agreement not only for the company but for anyone accessing them. Violation of the above rules and regulations may render the user in violation of this agreement and in violation of Federal law. If you are not sure if the contract you are working on has these provisions ASK!

If your laptop is lost, stolen or otherwise compromised immediate notification is required. There are specific procedures that must be followed and any delay could further compound the issue.

The laptop computers are expensive. Please treat them with respect.

EXHIBIT

2

SECTION H - SPECIAL CONTRACT REQUIREMENTS

Drawings: Sensitive But Unclassified (SBU) building information. SBU documents provided under this solicitation are intended for use by authorized users only. In support of this requirement, GSA requires plan-holders to exercise reasonable care when handling documents relating to SBU building information per the solicitation. If you are not the intended recipient, you are hereby notified that any reading, copying, use or distribution (whether materially, verbally or electronically) of this document is strictly prohibited and illegal. Solicitation documents no longer needed by the plan-holder shall be destroyed or returned to the following address:

GSA - Project Manager
300 Ala Moana Blvd., Ste 1-336
Honolulu, HI 96850

H2

0184

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IN THE SECOND JUDICIAL DISTRICT,
SITTING WITHIN AND FOR LATAH COUNTY,
STATE OF IDAHO

MLDC GOVERNMENT SERVICES CORP,)
Plaintiff,)

vs.) NO. CV-2011-645

COUNTY OF LATAH, DEPARTMENT OF)
PROBATION AND PAROLE, JACKYE)
SQUIRE LEONARD, ANDREW NELSON,)
STATE OF IDAHO, LATAH COUNTY)
SHERIFF'S DEPARTMENT,)
DEPARTMENT OF CORRECTIONS,)
Defendants.)

TRANSCRIPT OF A PETITION FOR RETURN OF PROPERTY
HAD ON THE 25TH DAY OF JULY, 2011, AT 9:29 AM

BEFORE: The Honorable John R. Stegner,
District Judge

REPORTED BY: KEITH M. EVANS, RPR, CSR NO. 655

K & K REPORTING (208) 926-4789
kkreport@wildblue.net

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APPEARANCES

For the Plaintiff: MR. GREGORY R. RAUCH
Attorney at Law
326 E. 6th Street
Moscow, ID 83843

For the Defendants: MR. WILLIAM W. THOMPSON, JR.
Latah County Prosecutor
P.O. Box 8068
Moscow, ID 83843

1 BE IT REMEMBERED that the above-entitled matter
2 came on for hearing before the Honorable John R. Stegner,
3 District Judge, at the hour of 9:29 a.m., July 25th, 2011,
4 in the District Courtroom of the Latah County Courthouse,
5 City of Moscow, County of Latah, State of Idaho.

6 (Thereupon the following oral proceedings
7 were had as follows, to-wit:)

8 THE COURT: We are on the record in Latah County
9 Case CV-11-645. It's MLDC Government Services, Corp
10 vs. Latah County. Present are Mr. Rauch, who
11 represents MLDC Government Services. Mr. Thompson is
12 present on behalf of Latah County. There's been a
13 motion for return of property. Mr. Magyar -- or, Mr.
14 Rauch, I believe it's your motion.

15 MR. RAUCH: Thank you, Your Honor. I call Riley
16 Fitt-Chappell to the stand.

17 THE COURT: Are you prepared for witnesses, Mr.
18 Thompson?

19 MR. THOMPSON: I reckon, Judge. I don't know
20 what Mr. Fitt-Chappell has to say.

21 THE COURT: All right. Please come forward.
22 Face the clerk and raise your right hand to be sworn.

23 RILEY FITT-CHAPPELL

24 after having been first duly sworn,
25 was examined and testified as follows:

K & K REPORTING (208) 926-4789
kkreport@wildblue.net

1 MR. FITT-CHAPPELL: I do.

2 THE CLERK: Please be seated.

3 THE COURT: You may inquire.

4 MR. RAUCH: Thank you, Your Honor.

5 DIRECT EXAMINATION

6 BY MR. RAUCH:

7 Q. Mr. Fitt-Chappell, this petition was brought
8 for a return of a laptop computer. The laptop computer
9 was taken from one of your employee's homes. Whose
10 laptop is that computer that was taken?

11 A. It belongs to the corporation, MLDC
12 Government Services Corp.

13 Q. And do you have -- how do you know it's your
14 computer?

15 A. It was purchased by the business used for
16 business use.

17 Q. What kind of uses do you use the computer
18 for?

19 A. Fieldwork, preparing documents, corresponding
20 through email.

21 Q. Do you have a corporate policy on security of
22 sensitive information on a laptop?

23 A. Yes, I do.

24 Q. Are your laptops password protected?

25 A. Yes, they are.

K & K REPORTING (208) 926-4789
kkreport@wildblue.net

1 Q. Explain to me what sensitive business
2 documents are.

3 A. They are documents that are intended for the
4 sole use of those who the documents were sent to. For
5 them to be used by anyone else would be illegal.
6 Therefore, strictly or -- not strictly, but mostly used
7 for federal government contracts where information is
8 to remain between the governmental entity and those who
9 they were sent to.

10 Q. And you take precautions to secure those
11 sensitive documents?

12 A. Yes.

13 Q. And what would happen if those sensitive
14 documents were released?

15 A. Uhm, people releasing those documents could
16 be held accountable under federal law.

17 Q. Did you ever consent to searches of your
18 corporate property?

19 A. No.

20 Q. You hired a person that was on probation, did
21 you not?

22 A. Yes, I did.

23 Q. When you hired him did you have any
24 understanding that you would be waiving your Fourth
25 Amendment rights?

1 A. None.

2 Q. Why is that?

3 A. I read the probation order. Nothing in that
4 said that any corporate property or my property would
5 be subject to search.

6 Q. If any consent was deemed to have been given
7 did you revoke that consent?

8 A. I don't recall giving any consent. I guess,
9 yes. I'm not sure how to answer that.

10 MR. RAUCH: I have no further questions for
11 Mr. Fitt-Chappell.

12 THE COURT: Cross-examination?

13 CROSS-EXAMINATION

14 BY MR. THOMPSON:

15 Q. Mr. Fitt-Chappell, what is your position with
16 MLDC Government Services?

17 A. I'm the president.

18 Q. And who are the other officers?

19 A. There are none.

20 Q. And where is this business incorporated?

21 A. Delaware.

22 Q. And who's the registered agent in Delaware?

23 A. I would have to get out my corporate filings
24 and read that name off.

25 Q. And you're the president. Who's the

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1 secretary/treasurer of the corporation?

2 A. That would be me as well.

3 Q. Now, the employee that Mr. Rauch was talking
4 about is Matt Ruck; is that correct?

5 A. Yes, sir.

6 Q. And what does Matt Ruck do for MLDC
7 Government Services Corporation?

8 MR. RAUCH: Objection, scope of the testimony.

9 THE COURT: Overruled.

10 A. He's a contract administrator.

11 Q (By Mr. Thompson) And so he administers
12 contracts on behalf of MLDC?

13 A. Yes.

14 Q. And as part of that that's why he has the
15 computer to help him administer contracts and do his
16 job?

17 A. Correct.

18 Q. And he's allowed to take this computer home
19 with him?

20 A. Yes.

21 Q. And traveling with him?

22 A. Yes.

23 Q. And anywhere he wants to take it or feels a
24 need he can take the computer; is that correct?

25 A. Yes.

1 Q. Mr. Ruck travels on behalf of MLDC?
2 A. Yes, he does.
3 Q. Are you aware -- I guess, let's get this
4 straight. You weren't present when the probation
5 officers searched Mr. Ruck's residence and seized the
6 computer; is that correct?
7 A. No, I was not.
8 Q. So you don't know what happened there?
9 A. No.
10 Q. Okay. Now, the petition for turn over of
11 property in this case is signed by you; is that
12 correct?
13 A. Yes.
14 Q. And it's signed under oath?
15 A. Yes.
16 Q. And in the petition it names the Latah County
17 Sheriff's Office as being involved in this search; is
18 that correct?
19 A. I believe it does, yes.
20 Q. And isn't it true that the Latah County
21 Sheriff's Office was not involved in this search?
22 A. I can't be certain. I wasn't there.
23 Q. But, sir, you swore under oath that
24 allegation was true.
25 A. I was relying on information that was given

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1 to me by my lawyers.

2 Q. So you swore to a document that your lawyer
3 prepared for you and said to sign?

4 A. I assume they were part of the search and
5 seizure.

6 Q. Back to Mr. Ruck. He travels on behalf of
7 MLDC; is that correct?

8 A. Yes.

9 Q. And those travels take him outside the State
10 of Idaho; is that correct?

11 A. Yes.

12 Q. And, in fact, in his backpack where the
13 laptop was seized from is it your understanding that
14 there was also documentation that he had traveled to
15 American Samoa on behalf of MLDC?

16 A. I believe that's correct, yes.

17 Q. You're aware that he did that without
18 permission of his probation officer?

19 A. I was not aware that he did not have
20 permission from his probation officer.

21 Q. Are you now aware of that?

22 MR. RAUCH: Objection, scope of the direct
23 examination.

24 THE COURT: Overruled.

25 A. I was under the impression that he had

1 permission to travel for the company.

2 Q (By Mr. Thompson) And you say you read his --
3 you've read his conditions of probation. It's true,
4 is it not, that those conditions say he cannot leave
5 the State of Idaho without the permission of his
6 probation officer?

7 A. Yes.

8 Q. And it's also true that those conditions say
9 that he cannot --

10 MR. RAUCH: Objection, relevance and objection,
11 scope.

12 THE COURT: Overruled and overruled.

13 Q (By Mr. Thompson) That Mr. Ruck cannot be a
14 party to any credit agreement or arrangement; is
15 that correct?

16 A. I believe that's correct.

17 Q. And that he shall not be a signatory to nor
18 be named on or have an ownership interest in any bank
19 accounts without the prior written consent of his
20 probation officer; is that correct?

21 A. I believe that is correct.

22 Q. And are you aware that in the backpack at his
23 residence, in addition to this laptop computer, there
24 were credit cards and financial documents like that?

25 A. I was not aware of any credit cards.

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1 MR. THOMPSON: I don't have any other questions,
2 Your Honor.

3 THE COURT: Redirect?

4 MR. RAUCH: Thank you, Your Honor.

5 REDIRECT EXAMINATION

6 BY MR. RAUCH:

7 Q. Mr. Fitt-Chappell, is having a mobile laptop
8 essential to your business?

9 A. Yes, it is.

10 Q. And is your laptop -- does it connect into
11 your server?

12 A. Yes, it does.

13 MR. RAUCH: I have no further questions, Your
14 Honor.

15 THE COURT: Recross?

16 MR. THOMPSON: Nothing, Your Honor.

17 EXAMINATION

18 BY THE COURT:

19 Q. Mr. Fitt-Chappell, you said that Mr. Ruck is
20 an employee of MLDC?

21 A. Yes, sir.

22 Q. What's the employment relationship between
23 Mr. Ruck and MLDC?

24 A. He's an employee.

25 Q. Salary?

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1 A. Yes, he receives a monthly salary.
2 Q. And who are the shareholders of MLDC?
3 A. Me.
4 Q. You're the sole shareholder?
5 A. Yes, sir.
6 Q. So Mr. Ruck doesn't have an ownership
7 interest in MLDC Government Services?
8 A. No, sir.
9 Q. What does MLDC Government Services do?
10 A. They contract with the federal government.
11 Q. And which branch?
12 A. Any, all, I suppose.
13 Q. Which branches does it contract with?
14 A. Any, all.
15 Q. No, I'm asking you a question.
16 A. I'm sorry.
17 Q. Which branches has it contracted with?
18 A. Department of Defense, Department of
19 Agriculture specifically Fish and Game, Department of
20 BLM, the Navy, Corp of Engineers. I'm sure I'm leaving
21 several out.
22 Q. That's fine. I'm trying to understand what
23 it is you do for those branches of the federal
24 government.
25 A. We do commodity supply, small construction

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1 projects, remodels, salvage work.

2 Q. Are there other employees of MLDC Government
3 Services?

4 A. Yes, sir, there are.

5 Q. How many?

6 A. Three, four including Mr. Ruck.

7 Q. All right. Has the ownership -- has the
8 relationship between Mr. Ruck and MLDC been reduced to
9 writing?

10 A. Yes.

11 Q. There's a written document outlining an
12 employment contract?

13 A. Yes.

14 THE COURT: Any questions in light of my
15 questions?

16 MR. RAUCH: No, Your Honor.

17 THE COURT: Mr. Thompson?

18 MR. THOMPSON: No, sir. Thank you.

19 THE COURT: Thank you, Mr. Fitt-Chappell, you may
20 step down. Any other witnesses, Mr. Rauch?

21 MR. RAUCH: Yes, Your Honor. I call Ms. Squire
22 Leonard to the stand.

23 JACKYE SQUIRE LEONARD

24 after having been first duly sworn,

25 was examined and testified as follows:

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1 MS. SQUIRE LEONARD: Yes, I do.

2 THE CLERK: Please be seated.

3 THE COURT: You may inquire.

4 MR. RAUCH: Thank you, Your Honor.

5 DIRECT EXAMINATION

6 BY MR. RAUCH:

7 Q. Good morning, Ms. Leonard.

8 A. Good morning.

9 Q. I want to talk to you about the search that
10 took place at your probationer Mr. Ruck's home. On
11 what day was that?

12 A. June 22nd, 2011.

13 Q. About what time of day was it?

14 A. I think we arrived there around 8:00 p.m.

15 Q. Who was with you?

16 A. Probation Officer Andrew Nelson.

17 Q. Just the two of you?

18 A. Initially, yes.

19 Q. And where was Mr. Ruck when you arrived at
20 the home?

21 A. He was out working in his yard.

22 Q. What was he working on?

23 A. I'm not sure. I think he was pulling weeds.

24 Q. Why were you at his house?

25 A. Well, one reason was that it's standard home

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1 visit that we do periodically on people on probation.
2 Another reason was that we had had information that he
3 had sought to purchase a firearm, and that's pretty
4 much why.

5 Q. What information did you have that he had
6 sought to purchase a firearm?

7 A. We had an email exchange between he and a
8 person who had advertised a handgun online. That
9 information had been presented to us in writing, and we
10 called Mr. Ruck in to explain his actions, and we
11 weren't satisfied with his responses.

12 Q. What was his response?

13 A. That he was doing it for a friend.

14 Q. Did you call that friend?

15 A. Yes.

16 Q. What did the friend say?

17 A. He confirmed that Mr. Ruck was doing it on
18 his behalf.

19 Q. Did you call that friend while Mr. Ruck was
20 in your office?

21 A. Yes. And I should clarify that Andrew Nelson
22 actually placed the call, and I was party to the call.

23 Q. Why weren't you satisfied with that response?

24 A. Well, his response was -- I guess the only
25 word that comes to mind is ridiculous to have a felon

1 making a firearm exchange for somebody. It shouldn't
2 be something he even considers.

3 Q. But he wasn't making a firearm exchange.

4 A. He was -- he was arranging that.

5 Q. He was arranging it. A sale for his friend?

6 A. Yes, a purchase for his friend.

7 Q. So you called this friend from your office at
8 that time and he said it was for him?

9 A. Yes.

10 Q. And that was with no ability to prepare on
11 anybody's part, right?

12 A. Well, I don't know what was discussed prior
13 to Mr. Ruck coming to our office, but from the time
14 Mr. Ruck got to our office he did not have time to
15 prepare.

16 Q. Who is the friend that was called?

17 A. I believe it was Mr. Brown.

18 Q. Have you ever met Mr. Brown?

19 A. I have not.

20 Q. Would it surprise you that Mr. Brown was an
21 elderly gentleman?

22 A. No. He sounded a little older on the phone.

23 Q. So it would make sense that the probationer
24 maybe facilitated an internet transaction for his elder
25 friend?

1 A. Not for a firearm it doesn't make sense.

2 Q. Okay, so upon arriving to Mr. Ruck's house
3 and seeing him in the garden what did you do?

4 A. We asked him to go inside and so that we
5 could look around, particularly for Officer Nelson who
6 had never been to the home before, so that he could get
7 an idea of the lay of the land, so to speak.

8 Q. So both of you entered the house at the same
9 time?

10 A. Yes.

11 Q. And then did Mr. Ruck show Mr. Nelson around
12 the house?

13 A. Yes.

14 Q. What did you do during that time?

15 A. I was waiting downstairs in the kitchen area.

16 Q. Is that when you started going through his
17 things?

18 A. Yes. I asked him -- as he was leaving the
19 kitchen area I saw a backpack sitting on the kitchen
20 table, and I pointed to it and asked him if that was
21 his backpack, and he said, yes, and continued on his
22 way.

23 Q. Did you ask him if you could search it?

24 A. No.

25 Q. And then what happened?

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1 A. I looked through the bag and as I started
2 finding indicators that he had traveled out of state I
3 started taking those out so that I could ask him about
4 those things when he and Officer Nelson came back down.

5 Q. And how long was it before they came back
6 down?

7 A. Between 5 and 10 minutes, not long.

8 Q. Did -- I'll just ask you what happened when
9 they came back downstairs.

10 A. I asked Mr. Ruck about whether he had been
11 traveling out of the assigned district. And he
12 initially denied that he had been, said that the
13 boarding passes and the information regarding the --
14 there was information regarding traveling to New
15 Orleans to American Samoa and Seattle, and I asked him
16 if he had traveled to those areas. I believe he said
17 he did travel to Seattle initially to take his children
18 there. Andrew -- Officer Nelson was more of that part
19 of the conversation. But he said that he had that
20 information in his backpack because somebody else had
21 traveled to those areas. And I just continued
22 questioning him about that and ultimately he admitted
23 that he had gone to those places and -- without a
24 travel permit.

25 Q. You said in your affidavit that Mr. Ruck told

1 you that the laptop was not his?

2 A. He indicated it's a work computer.

3 Q. Did you force him to give you the password
4 for the computer?

5 A. I asked him for it.

6 Q. Did he initially refuse?

7 A. No, he gave it to me.

8 MR. RAUCH: I have no further questions, Your
9 Honor.

10 THE COURT: Cross-examination, Mr. Thompson?

11 CROSS-EXAMINATION

12 BY MR. THOMPSON:

13 Q. Ms. Squire Leonard, on the 22nd was this the
14 first time that you had been by to see Mr. Ruck that
15 day?

16 A. No.

17 Q. When prior to the 8:00 p.m. or so did you go
18 by?

19 A. I don't remember exactly what time. I'm
20 going to estimate sometime between 5:00 and 7:00 p.m.
21 that night.

22 Q. And you say that part of the reason was to
23 allow Mr. Nelson to get familiar with the residence; is
24 that correct?

25 A. Yes.

1 Q. How long has Mr. Nelson been working with
2 your office?

3 A. I think he started in, I want to say April,
4 but I'm not positive about that. It's only been a few
5 months.

6 Q. And prior to that time who was the primary
7 probation officer assigned to Mr. Ruck?

8 A. Warren Lamphere.

9 Q. And is he no longer in the area; is that
10 correct?

11 A. He is not in the area anymore.

12 Q. Do you recall signing an affidavit in
13 relation to this case that -- on July 14th that
14 outlines the circumstances of your visit and the search
15 and has attached to it a list of Mr. Ruck's probation
16 conditions and the items you seized from his residence?

17 A. Yes.

18 Q. Is that true and accurate and complete?

19 A. Yes.

20 MR. THOMPSON: I have no further questions, Your
21 Honor.

22 THE COURT: Redirect, Mr. Rauch?

23 REDIRECT EXAMINATION

24 BY MR. RAUCH:

25 Q. That affidavit that Mr. Thompson was

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1 referring to is there anywhere in there that says,
2 under the item search, all property in defendant's or
3 probationer's possession?

4 A. I'd have to look at the exact wording, but --
5 I don't know exactly what the words say for that rule.

6 Q. Would you like to see my copy?

7 A. Sure.

8 MR. RAUCH: May I approach, Your Honor?

9 THE COURT: Yes, you may.

10 Q (By Mr. Rauch) Do you see No. 11 there?

11 A. Yes.

12 Q. And is there anywhere in that paragraph that
13 says third-party property?

14 A. It does not say third-party property.

15 Q. Is there anywhere that says all property in
16 defendant's possession regardless of ownership?

17 A. It says, owned or leased by the defendant or
18 for which defendant is the controlling authority.

19 Q. Yeah, and that's item five under real
20 property. But is there any other paragraph in there
21 that says, personal property of another in defendant's
22 possession?

23 A. No.

24 MR. RAUCH: Thank you. Your Honor, no further
25 questions.

1 THE COURT: Recross, Mr. Thompson?

2 RECROSS-EXAMINATION

3 BY MR. THOMPSON:

4 Q. Probation condition you just read now that
5 was Exhibit B to your affidavit and is the Department
6 of Corrections supervision agreement; is that correct?

7 A. Yes.

8 Q. And there's also a court condition of
9 Mr. Ruck's probation as well; is that true?

10 A. Yes.

11 Q. And both those conditions say that he shall
12 submit to searches of his residence?

13 A. Yes.

14 Q. And when you search a residence do you search
15 what's found in the residence or do you just look at
16 the residence?

17 A. We search what's found in the residence.

18 Q. And this backpack was where?

19 A. In the residence.

20 Q. And prior to you beginning to search Mr. Ruck
21 had told you the backpack was his backpack?

22 A. Yes.

23 Q. The seizure of the laptop was not the only
24 data compilation seized; isn't that correct? Wasn't
25 there an iPad?

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1 A. Yes.

2 Q. Which is like a computer?

3 A. Yes.

4 Q. And then the other documentation that you

5 listed from the backpack was seized?

6 A. Yes.

7 Q. Is it fair to say that your intent was to

8 search those items to see if there was further evidence

9 of Mr. Ruck not complying with his probation?

10 A. Yes.

11 Q. And in that at least, in part, would be in

12 light of the fact that you had already found in the

13 backpack evidence that Mr. Ruck had been traveling

14 without permission; is that correct?

15 A. That's correct.

16 Q. Did you also find evidence that Mr. Ruck may

17 have been engaging in prohibited financial

18 transactions?

19 A. Yes.

20 Q. And was it your intent in seizing both the

21 laptop and the iPad that those would be searched to

22 further ascertain whether there was evidence of

23 violations on Mr. Ruck's part?

24 A. Exactly.

25 MR. THOMPSON: I don't have any other questions.

1 THE COURT: Redirect, Mr. Rauch?

2 REDIRECT EXAMINATION

3 BY MR. RAUCH:

4 Q. Were there other computers in the home?

5 A. I believe so, yes.

6 Q. Did you seize those?

7 A. No.

8 Q. Did Mr. Riley sign any of these agreements on
9 behalf of his corporation?

10 A. No.

11 Q. Where is the laptop now?

12 A. It's in evidence at the probation office.

13 Q. It's no longer in his home; is that correct?

14 A. No.

15 Q. So a search of that computer would no longer
16 be in his residence or his residence?

17 A. No, but it was taken from his residence.

18 Q. But it's no longer there?

19 A. No.

20 MR. RAUCH: I have no further questions, Your
21 Honor.

22 THE COURT: Anything else, Mr. Thompson?

23 MR. THOMPSON: No, sir.

24 THE COURT: Thank you, Ms. Squire Leonard, you
25 may step down. Any other witnesses, Mr. Rauch?

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1 MR. RAUCH: No, Your Honor.

2 THE COURT: Any witnesses, Mr. Thompson?

3 MR. THOMPSON: No, Your Honor.

4 THE COURT: Then, Mr. Rauch, this is your
5 opportunity to argue.

6 MR. RAUCH: Thank you, Your Honor. I'll keep it
7 brief because my briefing and memorandum covers most of
8 it. I'm not going to reiterate that. I'm just going
9 to make a simple point that in this world that we live
10 in of mobile technologies, and especially in the case
11 of mobile fieldwork, it's inherent that we're able to
12 transport technology to other places and through
13 employees. This is not that much different because
14 employees have always held knowledge in their head,
15 knowledge of personal files, confidential records,
16 things of that nature, and the employers despite having
17 employees that work for them do not waive Fourth
18 Amendment protections. They can't. And in this case,
19 especially because there's no provision in either the
20 order or the affidavit that was submitted by
21 Ms. Leonard giving them permission to do so, and that
22 wouldn't put the corporation even on notice that merely
23 hiring a probationer would give them access to their
24 files and eventually from their files onto a laptop to
25 their servers. And Mr. Riley has a duty --

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1 THE COURT: Mr. Fitt-Chappell.
2 MR. RAUCH: Mr. Fitt-Chappell, excuse me, has an
3 important duty to protect these documents because they
4 are sensitive but not classified documents, the SPUs
5 (sic). He has to do everything in his power to try to
6 seal those documents, and it can be a violation to view
7 them from a party that does not have permission from
8 the federal government. Also and most important --
9 it's not more important than in the sense of the
10 documents, but it's equally important, there's
11 attorney/client product between the corporation and
12 himself on his server, letters, many privileged items
13 that are also sensitive and in this world of linking
14 servers together with computers for business purposes,
15 there's a lot of danger there of relinquishing those
16 things. So, in summary, because the orders really
17 don't cover third-party property, and I've also shown
18 case law that shows once that material is out of the
19 house it can no longer be searched under a residence.
20 Also as again in my briefing it was -- it's clearly
21 been equated to a lockbox at somebody -- somebody
22 else's lockbox thus third-party consent would be
23 needed. It's imperative, I think, today that we find a
24 ruling that protects employers' Fourth Amendment
25 rights. I think if we give this up for

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1 Mr. Fitt-Chappell we're giving this up for Walmart.
2 We're giving this up for big corporations that have to
3 hire employees and lots of employees, court staff,
4 janitors, what they know, what they see, what they
5 hear, sealed hearings, bailiffs. If you start holding
6 employers -- to waive their Fourth Amendment rights
7 merely gives someone -- is on probation or being
8 searched or in a position where he has to tell
9 everything he knows on a whim if you don't protect that
10 I think we're in serious trouble here, and I think this
11 is the kind of case that needs to be decided in favor
12 of returning the protected property especially since
13 it's been relinquished and there's no power authority
14 to do so.

15 THE COURT: Well, I don't necessarily disagree
16 with what you just said about the employers' right to
17 privacy. My question to you is if you're bringing this
18 pursuant to Rule 41 of the criminal rules, which is
19 what your pleadings say, paragraph E under that rule
20 says the motion for the return of the property shall be
21 made only in the criminal action if one is pending.
22 But if no action is pending a civil proceeding may be
23 filed in the county where the property is seized or
24 located. You and Mr. Thompson sent me some
25 correspondence regarding that rule. You, I think, are

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1 of the position that Mr. Ruck's criminal case is
2 closed.

3 MR. RAUCH: Yes, Your Honor.

4 THE COURT: So I went and looked at Mr. Ruck's
5 criminal case, and it doesn't seem to be closed to me.
6 He seems to be on active probation and that case is
7 under the jurisdiction of Judge Kerrick so I'm trying
8 to figure out how I get into this fight.

9 MR. RAUCH: Well, I think that it's important for
10 the corporation to have a vehicle to protect its Fourth
11 Amendment rights.

12 THE COURT: I don't disagree.

13 MR. RAUCH: And immediately -- and I don't think
14 Mr. Riley -- Mr. Fitt-Chappell, excuse me again, and
15 his corporation have standing to go into a probation
16 hearing to protect its property once it's been seized.
17 I don't think he has standing to do that especially
18 when no action is pending. I guess it's open, but it
19 says on the repository that no action was pending, and
20 how does he even bring a motion to get that property
21 back. I mean, I guess we're looking at --

22 THE COURT: Why don't you bring it in front of
23 Judge Kerrick? If Rule 41 is the vehicle by which you
24 get that laptop back, it strikes me that the rule is
25 fairly clear that it must be brought in the criminal

1 proceeding if one is pending.

2 MR. RAUCH: Well, I don't think Mr. Riley (sic)
3 has standing to enter into a criminal suit in which
4 he's not a defendant. I think maybe -- I think this is
5 what the rule was intended for. 41{e} I think it
6 needed to be open, but I think it needed to be open for
7 that particular party that the information is to be
8 sought. I think if the property was illegally sought
9 for Mr. Ruck he would have a vehicle to go into his own
10 probation hearing or criminal proceeding and he would
11 be able to protest it there. But Mr. Fitt-Chappell
12 doesn't have an open proceeding against him, as he
13 can't enter in as a third party on a criminal
14 proceeding to get return of his property. So, I guess,
15 that we're looking -- then we have to look at a 1983
16 action having to file a tort claim and suing the State
17 of Idaho for return of property that's been seized
18 against the United States Constitution is the only
19 other remedy, which it's not going to protect the
20 property especially the client attorney/client
21 privilege property and --

22 THE COURT: But if he doesn't have standing in
23 the criminal case how does he have standing in a
24 separate and independent case?

25 MR. RAUCH: Because it's his property.

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1 THE COURT: Then why doesn't he have standing in
2 the criminal case?

3 MR. RAUCH: Because he's not the defendant. It's
4 a criminal case, and he's not a party to that criminal
5 case. There's no open proceeding concerning him is
6 what I'm saying. So even if you do define that as an
7 open proceeding even though that no action is pending,
8 and I don't believe the probation violation hearing is
9 active because there's nothing pending, there's no open
10 probation violation to contest anything.

11 THE COURT: Well, Mr. Ruck's case is open.

12 MR. RAUCH: I'll --

13 THE COURT: I don't think there's any doubt about
14 that. He's on active supervision by the Department of
15 Correction under the auspices of Judge Kerrick's order.
16 That's an open case as far as I'm concerned.

17 MR. RAUCH: And I would say that's not an open
18 case to Mr. Fitt-Chappell because he's not a defendant
19 in that proceeding.

20 THE COURT: Do you see how the rights of Mr. Ruck
21 and MLDC might be intertwined?

22 MR. RAUCH: Yes.

23 THE COURT: And why wouldn't MLDC be able to go
24 into court in front of Judge Kerrick and say, this
25 isn't Mr. Ruck's computer. Rule 41 says that this is

1 the venue for us to pursue the return of that computer,
2 and we'd like it back.

3 MR. RAUCH: Because he's not a defendant to that
4 suit. That's why I chose a different vehicle -- our
5 own Rule 41 action under the civil matter to bring this
6 forward, that's why I chose that. And I presumed after
7 reading the repository where it said the case was
8 closed and nothing is pending, I believe it said, to
9 assume that that meant that since nothing is pending
10 there was no action and that there was no action I
11 could take because there was no probation violation.
12 There was an underlying criminal case that I assumed
13 was closed. I assumed the probation violation --
14 probation was open on it, but I didn't think that meant
15 that -- well, I think you understand what my way of
16 thinking.

17 THE COURT: I understand. Well, I guess if Judge
18 Kerrick said that he didn't have jurisdiction and that
19 41, the rule under which you're pursuing this return,
20 did not apply in Mr. Ruck's case I might be more
21 inclined to intercede. But my concern is, as was
22 pointed out in Mr. Thompson's letter, is that it's not
23 necessarily good to have two different judges trying to
24 sort this out. I think there may be issues for
25 Mr. Ruck that are intertwined with MLDC that need to be

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1 sorted out by Judge Kerrick, but I think he's in a
2 better position to determine the relative merits of
3 each of those parties' positions.

4 MR. RAUCH: In light of that would you like me to
5 move to transfer that or you would like me to refile?

6 THE COURT: Well, as I was sorting this out I was
7 thinking that I would stay this pending Judge Kerrick's
8 consideration of the Rule 41 motion and that way you
9 would have the Judge who is presiding over Mr. Ruck's
10 case able to sort out whether there is an interest in
11 the State having that computer and what that interest
12 is and if not return it to MLDC.

13 MR. RAUCH: We would agree to that obviously.

14 THE COURT: Any problem with proceeding in that
15 fashion?

16 MR. THOMPSON: No, sir.

17 THE COURT: Then I'm going to stay this
18 proceeding and let Judge Kerrick sort this out, and I'm
19 only going to reopen it if Judge Kerrick concludes that
20 he doesn't have jurisdiction. Is there anything else
21 we need to take up?

22 MR. THOMPSON: No, sir.

23 MR. RAUCH: No, Your Honor. Thank you.

24 THE COURT: Thank you. Mr. Rauch, I was -- I
25 overruled your objections because Mr. Thompson was

1 engaging in questions that were outside the scope. I
2 think that's a perfectly valid objection, but I think
3 it exalts form over substance, because if he wanted to
4 he could then call the witness and engage in the
5 questioning that you were seeking to have concluded to
6 be outside the scope. So, that's why I overruled your
7 objection.

8 MR. RAUCH: Thank you.

9 THE COURT: Anything else we need to take up?

10 MR. THOMPSON: No, sir. Thank you.

11 THE COURT: Anything else, Mr. Rauch?

12 MR. RAUCH: No, Your Honor. Thank you.

13 THE COURT: Then we're in recess. Thank you
14 both.

15 (Hearing concluded at 10:07 a.m.)

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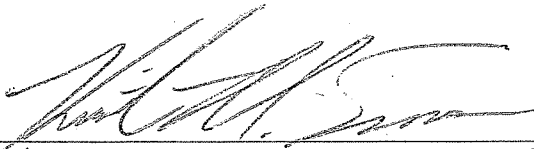
IN THE SECOND JUDICIAL DISTRICT,
SITTING WITHIN AND FOR LATAH COUNTY,
STATE OF IDAHO

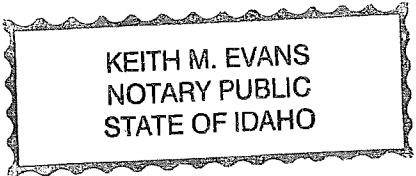
MLDC GOVERNMENT SERVICES CORP,))
Plaintiff,)
vs.) NO. CV-2011-645
COUNTY OF LATAH, DEPARTMENT OF)
PROBATION AND PAROLE, JACKYE)
SQUIRE LEONARD, ANDREW NELSON,)
STATE OF IDAHO, LATAH COUNTY.)
SHERIFF'S DEPARTMENT,)
DEPARTMENT OF CORRECTIONS,)
Defendants.)

CERTIFICATE OF TRANSCRIPTION

The undersigned does hereby certify that he
correctly and accurately transcribed and typed the foregoing
transcript from the stenographic notes of the hearing which
was reported on the 25th day of July, 2011, in the
above-entitled action or proceeding.

Dated this 26th day of July, 2011.


Keith M. Evans, RPR, CSR NO. 655
Court Reporter



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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

MLDC GOVERNMENT SERVICES, CORP,

Case No. CV 2005-2960

Plaintiff.

vs.

**BRIEF IN SUPPORT OF
PLAINTIFF'S MOTION TO RETURN
PROPERTY**

COUNTY OF LATAH, DEPARTMENT OF
PROBATION AND PAROLE, JACKYE
SQUIRE LEANORD, ANDREW NELSON,
STATE OF IDAHO, LATAH COUNTY
SHERIFF'S DEPARTMENT,
DEPARTMENT OF CORRECTIONS,

Defendants.

The plaintiff, MLDC Government Services, Corp, (Hereinafter MLDC) through its attorney, herby submits this brief in support of its petition for the return of its property.

Short Argument

1. **The burden of proof is clearly on the state. *State v. Meier* 149 Idaho 229 (Ct. App., 2010).**
2. **The burden of proof has been met by MLDC.**
3. **The good faith exception to the search warrant requirement doesn't apply to 41(e) proceedings. *J.B. Manning Corp. v. U.S.* 86 F.3d 926, 928 (C.A.9 (Cal.),1996) *Kitty's East*, 905 F.2d at 1372.**

4. Once the third party property has been removed from the residence, it is outside the scope of the probationers consent to 4th amendment waiver. *United States v. Carey* 172 F.3d 1268, 1274 (10th Cir. 1999).
5. Authority bestowed on an employee to consent to a search may be revoked by the employer after seizure of the property. *United States v. Lattimore* 87 F. 3d 647, 651.
6. Once consent is revoked, the property and any copies must be turned over to its rightful owner. *Mason v. Pulliam*, 557 F.2d 426, 429 (5th Cir. 1977) and *Vaughn v. Baldwin* 950 F. 2d 331, 334 (6th Cir. 1991).
7. Federal interpretation of Idaho Rule 41(e) controls. *State v. Burchard*, 123 Idaho 382, 385, 848 P.2d 440, 443 (Ct.App.1993).” *State v. Meier* 149 Idaho 229, 231 (Idaho App.,2010).
8. Stalking horse scenario is impermissible and unconstitutional. *State v. Misner* 135 Idaho 277, 281, 16 P.3d 953, 957 (Idaho App.,2000).

ARGUMENT

I. The burden of proof is clearly on the state.

The State cited *State v. Meier* 149 Idaho 229 for the proposition that “the burden of going forward remains on MLDC, pursuant to the language of I.C.R. 41(e) and *State v. Meier*, 149 Idaho 229 (Ct. App., 2010).” *State’s Request for Hearing* pg 4 Para 1.

Whereas this may a true statement, this burden has been met in that MLDC has asserted its claim of ownership and for return of the property. However, this oversimplification of *Meier* could bring about a miscarriage of justice. If we look to the actual holding of *Meier*, that Court expressly held that the burden of proof shifts to the state. What is important in this case is not the burden of going forward, but the burden of proof on the ultimate issue.

“In this case, the state argues that the burden does not shift under Idaho law because the language of the Idaho rule and the federal rule are substantially different. The state contends that the Idaho rule requires that the movant show that he or she is entitled to lawful possession of the property and that it was illegally seized, whereas, there is no such language in the federal

counterpart. Therefore, the state claims that the burden remains, at all times, with the movant.

However, the state's argument is unpersuasive." [emphasis added]. *State v. Meier* 149 Idaho 229, 231 (Idaho App.,2010). In our case, the burden shifts to the state, by the mechanism specifically outlined in *Meier*.

The state cannot hold property indefinitely, and the State has the burden to prove otherwise unless the movant is facing charges, a trial, or has filed for post conviction relief.

In *Meier*, the Court held that the burden of proof would shift once the time for appeal has expired. "The burden of proof in a Rule 41(e) proceeding seeking the return of property does not shift to the state until the time for filing an application for post-conviction relief expires." *Id* at 232,233. Here, the movant, MLDC has not been charged nor is MLDC under investigation. Therefore the burden is clearly the State's to prove that the property was not taken contrary to law and is not MLDC property.

Further, the facts in *Meier* are very different and completely distinguishable from our case, thus the facts in *Meier* do not trigger the burden shifting mechanism. In *Meier*, a case involving the receipt of stolen property held by the state to prosecute a stolen property charge on a probationer, the court found that the property in question didn't even belong to the Defendant who sought the return the property. The court held that the stolen property belonged to the store where the property was stolen from. The court specifically noted that *Meier* did not present any evidence that the property was his. Also *Meier* was pleading guilty to the charges on a plea agreement and the prosecution was holding the property until the agreement was finalized. Here, we have no such facts. In this case, the state is holding a third party computer with no charges filed against the owner of that property. We have the computer's true owner testifying that the

property belongs to the corporation, not the probationer. Thus the burden now correctly shifts to the state because of *Meier*, not in spite of it, as the State in this case would argue. Therefore, the burden of proof in this matter has to be placed on the state.

II. Even if the burden is not properly shifted to the state Plaintiff, MLDC, has met that burden; the bottom line is that MLDC is entitled to the property which was seized illegally without a warrant.

To meet the requirements of 41(e), there has to be a showing that there was an illegal seizure and that the movant is entitled to lawful possession of the property. ICR 41(e).

Here, property of MLDC, a mobile laptop, was seized. This seizure goes beyond the consent to warrantless searches provided for by the probation agreement; the seizure itself was impermissible under Idaho law. Any implied consent to the search was revoked on the record, the warrantless search of the probationer was likely illegal to begin with, and the good faith exception to the warrant requirement is null and void in 41(e) proceedings. Therefore the property must be returned.

Mr. Fitt-Chappell testified under oath that the laptop was corporate property. He also testified that he had read the probation agreement and nothing in that agreement notified him that he would be consenting to a search of MLDC's third party property while such property was in the hands of the probationer. Further Mr. Fitt-Chappell testified that any implied consent has been revoked. See *Transcript of Petition to Return Property* 4:7-24.

The seizure extends beyond the permissible scope of the probation agreement and order. The *Order of Probation* only extends to the submission to search of defendant's person, vehicle, residence, and/or property. The *Agreement of Supervision* allows search of his person, residence, vehicle, personal property, and other real property. The uncontroverted testimony is that the

laptop in question is not the defendant's person, not the defendant's vehicle, not the defendant's residence, and most importantly not his property.

Furthermore, a probationer does not automatically waive all of his 4th amendment rights. "We are unconvinced that *Gawron* and *Purdum* stand for the proposition that the type of probation condition at issue here constitutes a *complete* waiver of all Fourth Amendment rights, regardless of the actual language in the condition. The state's assertion that the acceptance of this probation condition constitutes an unfettered waiver of all Fourth Amendment rights against any warrantless search ignores a key component of the consent exception to the Fourth Amendment's proscription of warrantless searches—the *scope* of the consent. It is well settled that when the basis for a search is consent, the state must conform its search to the limitations placed upon the right granted by the consent. *State v. Ballou*, 145 Idaho 840, 849, 186 P.3d 696, 705 (Ct.App.2008); *State v. Thorpe*, 141 Idaho 151, 154, 106 P.3d 477, 480 (Ct.App.2004). The standard for measuring the scope of consent under the Fourth Amendment is that of objective reasonableness. *Florida v. Jimeno*, 500 U.S. 248, 251, 111 S.Ct. 1801, 1803–04, 114 L.Ed.2d 297, 302–03 (1991); *Ballou*, 145 Idaho at 849, 186 P.3d at 705." *State v. Turek* 250 P.3d 796, 800 (Idaho App.,2011) [emphasis added]

Even if one could somehow construe the *Probation Agreement* and *Order of Probation* to find that Ruck gave his consent to search third party property, one still has to rectify the fact that Mr. Ruck did not have the authority to consent to the search of MLDC's property. The computer is still third party property, for which no consent had been given by the owner.

The good faith exception to the warrant requirement does not apply to 41(e) proceedings. Please see *J.B. Manning Corp. v. U.S.* 86 F.3d 926, 928 (C.A.9 (Cal.),1996) where the Ninth

Circuit unequivocally held that the good faith exception does not apply to 41(e) proceedings. “We join the Tenth Circuit in holding that the good faith exception announced in *Leon* does not apply to Rule 41(e) as it was amended in 1989. See *Kitty's East*, 905 F.2d at 1372.” This is the correct policy. You can accidentally take wrong property and your good faith can carry the day, but when you find out that you were wrong, and that it wasn't the probationer's property, you cannot continue to rely on your previous innocent mistake, simply closing your eyes to the fact that property was taken illegally or in violation of the constitution.

Therefore, under the precedent of *J.B. Manning Corp.*, the intent of the seizing officer is irrelevant. Even if there was an erroneous belief that the probationer had the ability to consent to the search either through probation agreements or actual consent at the time of search, it still wouldn't matter because the good faith exception does not apply. Notwithstanding the fact that Mr. Ruck told Ms. Squire-Leonard before she unlawfully seized the computer that it was a work computer and not his. *Transcript* 19:2 also see *Affidavit of Squire-Leanord* p3 para 4. Even if the court believes she didn't know the character of ownership at the time of seizure, she cannot continue to rely on the crutch of good faith, when the time for good faith has passed.

Finally, courts hold that even consent to search agreements are to be read “narrowly, so that consent to seizure of “any property” under the defendant's control and to “a complete search of the premises and property” at the defendant's address merely permitted the agents to seize the defendant's computer from his apartment, not to search the computer off-site because it was no longer located at the defendant's address”. [emphasis added] *United States v. Carey*, 172 F.3d 1268, 1274 (10th Cir. 1999). Cited in *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* a publication put out by the Computer Crime and

Intellectual Property Section Criminal Division of the Department of Justice. H. Marshall Jarrett, Michael W. Bailie, Ed Hagen & Nathan Judish, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations*, 17 (3d ed, Off. of Leg. Educ. Exec. Off. for U.S. Atty. 2009).

Taking it one step farther, even if we do the mental gymnastics and construe Mr. Fitt-Chappell's actions as somehow consenting to a search by hiring Mr. Ruck while he was on probation and having him take his work home with him, Mr. Fitt-Chappell can revoke the consent at any time, **EVEN AFTER SEARCH**. Please See *United States v. Lattimore* 87 F. 3d 647, 651 (4th Cir. 1996) Moreover, any actual authority conferred on an employee to consent to a search may be revoked prior to the time the search is completed. (quoting 3 Wayne R. LaFave, *Search and Seizure* §8.2(f), at 674 (3d ed. 1996)). Mr. Fitt-Chappell revoked any authority or consent specifically on the record, therefore any implied consent to search the corporation's property is clearly **OVER**. In fact, several cases have dealt with this issue and courts have even forced the government to turn over images and copies of documents made after the consent was revoked in addition to the original documents See *Mason v. Pulliam*, 557 F.2d 426, 429 (5th Cir. 1977) and *Vaughn v. Baldwin* 950 F. 2d 331, 334 (6th Cir. 1991).

Thus, because the probation officer clearly took third party property, an uncontroverted fact, the State must return said property. Because no good faith exception can apply, because the consent to search has been revoked, and because the laptop is no longer in the probationer's residence, this court must order that the property and any contents and or copies **MUST** immediately be returned. Federal Law's interpretation of 41(e) controls in this instance, and federal law, as cited in the last several paragraphs mandates that due to the aforementioned cases,

the property be returned. As the States only cited case *Meier* points out: “There is no Idaho case law dealing with allocation of the burden of proof under Idaho Criminal Rule 41(e). Without the benefit of Idaho case law discussing an Idaho rule, we consider federal cases interpreting a similar provision of the federal rule. *State v. Burchard*, 123 Idaho 382, 385, 848 P.2d 440, 443 (Ct.App.1993).” [emphasis added] *State v. Meier* 149 Idaho 229, 231 (Idaho App.,2010).

Because no Idaho case is on point we look to the decisions in *Lattimore*, *Carey*, *Baldwin*, *Pulliam*, *J.B. Manning Corp*, and *Kitty's East*. The law is crystal clear, and that law dictates that the property must be returned.

III. STALKING HORSE SCENARIO

The situation of a targeted search here has been forewarned by the Idaho Court of Appeals: “We would be confronted with a significantly different issue, of course, if the probationer's presence as a cohabitant had been used merely as a pretext to conduct a search targeted at uncovering evidence against a third-party resident of the premises. *See, e.g., State v. Vega*, 110 Idaho 685, 718 P.2d 598 (Ct.App.1986); *United States v. Coleman*, 22 F.3d 126, 129 (7th Cir.1994); *Shea v. Smith*, 966 F.2d 127, 132-33 (3d Cir.1992); *United States v. Cardona*, 903 F.2d 60, 65 (1st Cir.1990); *United States v. Richardson*, 849 F.2d 439, 441 (9th Cir.1988). However, such a “stalking horse” scenario has not been alleged here and is not evidenced by the facts presented to the district court.” *State v. Misner* 135 Idaho 277, 281, 16 P.3d 953, 957 (Idaho App.,2000). Although the Movant in *Misner* did not fully allege the proper facts, the Plaintiff, MLDC, does assert those facts alluded to by the Court of Appeals.

Here, the facts are alleged as follows: The search of probationer's home was thorough but the only computer seized was the business computer. See *Transcript Testimony of Squire Leonard* 24:11:

"Q: Were there other computers in the home?

A: I believe so, yes.

Q: Did you seize those?

A: No"

Several computers were in the home and they were all left untouched. The only computer that was sought was the third party business computer belonging to MLDC. The probation department CANNOT run an end around on the United States and Idaho Constitutions, and search a business without a warrant merely because the probationer has agreed to consent to search his person, vehicle, etc. If the probation department was truly interested in searching Mr. Ruck's personal emails and effects, they would have seized his personal computers. They did not. It would be a slap in the face to the United States Constitution to allow this kind of search. If the probation department wanted corporate property, they should have asked a neutral judge to issue a warrant with a probable cause standard, instead of waiting until an employee brings home his work computer so they can create a reason to seize the corporate property.

If these reasons given for the search were more than a mere subterfuge, the probation department would have searched Mr. Ruck's personal computers, to check his email, his accounts, and his personal documents. They skipped over the personal computers and went straight to the business computer. I am sure that Mr. Ruck would be happy to help with any investigation and would immediately turn over his home computers so that his travel records, his

non-privileged emails, and his personal accounts could be viewed by the probation office. Those computers are still in Mr. Ruck's home and still subject to the probation department, all the Probation Department has to do is drive across town and take them, as the home computers would clearly be within the scope of the order of probation. But that is not what the probation department wants. They want the corporate property. They want a glimpse into third party business.

If the Court chooses to uphold this search, this Court will be sanctioning horrific conduct and what the Idaho Court of Appeals was writing about when they warned of a "Stalking Horse." If the Court opens this Pandora's Box, third party property searches will be allowed on a regular basis. Anyone on probation will subject their employer to search and seizure of the employer's business files, business records, and any other corporate property that the probationer would have had access to. This may prove to make a probationer unemployable. It is up to this Court to protect our civil liberties as employers from this behavior.

DATED this 10th day of November, 2011.

Law Offices of Magyar, Rauch, & Thie, PLLC,

By Brian D. Thie, for Gregory C. Rauch

By: Gregory R. Rauch
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of November, 2011, I caused a true and correct copy of the foregoing document to be served on the following in the manner indicated below:

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Legal Assistant to Gregory R. Rauch

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

COURT MINUTES

Presiding Judge
CARL B. KERRICK
Reporter
Nancy Towler
Date January 6, 2012
Time: 11:15 a.m.

STATE OF IDAHO,

Plaintiff,

vs.

MATT RUCK,

Defendant,

)
)
) Docket No. CR05-02960
)

) APPEARANCES:
)

) WILLIAM THOMSON
)

) For, State of Idaho
)

) GREGORY RAUCH
)

) For, MLDC Government Services
)

) Bill Loomis
)

) For, Department of Corrections
)

SUBJECT OF PROCEEDINGS: MLDC'S MOTION RETURN PROPERTY

BE IT KNOWN, THAT THE FOLLOWING PROCEEDINGS WERE HAD, TO-WIT

111529 Greg Rauch, Bill Thompson and Bill Loomis present on the telephone.
111600 Court addresses the parties.
111622 Mr. Rauch presents argument.
113209 Mr. Thompson presents argument.
114311 Mr. Loomis presents argument.
115325 Mr. Rauch presents rebuttal argument.
120419 Court takes matter under advisement and will issue written decision.
120436 Mr. Rauch addresses the Court re: holding telephonic hearing re: Court's
decision.
120503 Court will issue written decision.
120510 Court recess.

TERESA DAMMON

Deputy Clerk

1 Page of 1 Pages

APPROVED:


Presiding Judge

COURT MINUTES JANUARY 6, 2012

0236

CR 2005-2960

CASE NO _____

2012 JAN 11 PM 3:47

CLERK OF DISTRICT COURT
LATAH COUNTY
BY _____ DEPUTY

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

MLDC GOVERNMENT SERVICES, CORP

Case No. ^RCV 2005-2960

Plaintiff.

vs.

**SECOND SUPPLEMENTAL BRIEF IN
SUPPORT OF PLAINTIFF'S MOTION
TO RETURN PROPERTY**

COUNTY OF LATAH, DEPARTMENT OF
PROBATION AND PAROLE, JACKYE
SQUIRE LEANORD, ANDREW NELSON,
STATE OF IDAHO, LATAH COUNTY
SHERIFF'S DEPARTMENT,
DEPARTMENT OF CORRECTIONS

Defendants.

The Plaintiff, MLDC Government Services Corp, (Hereinafter MLDC) through its attorney, hereby submits this supplemental brief after oral argument. Plaintiff submits this brief because Defendants raised case law in oral argument that had not been previously raised or addressed in any of Defendant's briefing or previous argument. Defendants also raised two new issues in oral argument that had not been briefed. Plaintiff requests that the court accept and consider the submission of this brief allowing Plaintiff a fair chance to research and respond to the new points brought up in oral argument.

ORIGINAL 0237

- I. Defendant's counsel argued that to search and to seize are one in the same and without distinction. However the United States Supreme Court has decided otherwise.
- II. Defendants referred to *State v. Barker*, 136 Idaho 728 (2002) which is clearly distinguishable from our facts and not applicable.
- III. Defendant's counsel stated to the Court that they could simply apply for a warrant to view the contents of the laptop. The conditions for a Warrant mandate that there be probable cause to believe criminal conduct or contraband is present, for which a probation rule violation that is not also a criminal violation doesn't qualify.

I.

Defendants made the argument that the terms "search" and "seizure" were the same thing and that the terms were indistinguishable. However, the United States Supreme Court has already issued an opinion holding that the terms "search" and "seizure" are two separate actions and have two distinct meanings. "A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property." *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984). *Horton v. California* 496 U.S. 128, 133, 110 S.Ct. 2301, 2306 (U.S. Cal., 1990).

Here, the rule is that searches and seizures are separate actions that carry with them different suspension of constitutional rights. Under the rule of plain meaning, the probationer's order of probation and probation agreements regarding fourth amendment waiver have to be construed as narrowly as possible. The construction has to be strict; if it's not implied, it must be denied. Here, seizure is not part of the probationers amendment waiver, thus, the Probation

Department had no authority in which to conduct a warrantless seizure of property, especially not third party property.

II.

Defendant Counsel only referred to one case in oral argument, *Idaho v. Barker* 136 Idaho 728 (2002) and that case is clearly distinguishable. In *Barker*, there was no revocation of apparent authority or revocation of implied consent prior to the search. In *Barker*, the probation department, at the time of search, under the totality of the circumstances known to them made a proper legal determination that they could search under the Probationer's fourth amendment waiver. Conversely, in our case, the laptop is no longer located at the Probationer's residence, there is a clear exercise of ownership of the laptop by the corporation MLDC, a clear revocation of any apparent or implied common authority or consent prior to search. In fact, MLDC provided the written security policy on its laptops, the president testified that the laptop was in fact the corporation's, and the President revoked any common authority express or implied to search the laptop on the record. Under the totality of the circumstances, it would be unreasonable for the Probation Department at this point to now search the laptop after the fact without probable cause of crime and a warrant.

In *Barker* the probation department utilized a 4th amendment probation waiver home search and escorted a drug dog through probationer Tate's home. The drug dog pointed to a fanny pack that wasn't his; it was his girlfriend Barker's. The search yielded methamphetamine. The court held that due to the totality of the circumstances known prior to search, it was reasonable for the probation officer to believe that Tate had common authority over the fanny pack. The court listed five factors to demonstrate that belief. (1) that Tate had absconded from probation after giving a positive UA, (2) the fanny pack was pointed out by a drug dog, (4) the fanny pack was

in Tate's bedroom, (5) and there was nothing to indicate that it was Barker's. In that case it *would* be reasonable to believe that the fanny pack was Tate's at the time of search and to search the item at Tate's residence utilizing Tate's fourth amendment waiver and consent to search his residence.

Notwithstanding the obvious distinguishing factors from our current case in that we are dealing with a seizure not a search, we are dealing with and a prospective search, outside of the premises instead of in the residence of a probationer, and is therefore outside the scope of the probation order and agreement, the main holding and thrust of *Barker* is distinguishable as well.

If at the time of the search, Barker was present and stated to the officers "that is mine and you can't search it, I hereby revoke any common authority and consent" and if the fanny pack was locked, had its own password protections and security to get into it, as well as a written security policy, the officers would have had a completely different totality of the circumstances to evaluate, presumptively they would then have to apply to a neutral and detached magistrate and get a warrant. Admittedly, the probation officers in *Barker* would have likely had proper probable cause as the positive signal for drugs from the dog would have likely met the threshold for the issuance of a warrant in front of a neutral and detached magistrate.

Again all this is academic because Mr. Ruck's probation order doesn't even allow seizure -- just searches. However, assuming in arguendo, that the order does, the facts in evidence are still in favor of the Plaintiff: the probation department was informed by Mr. Ruck prior to seizure that the laptop was the corporation's, MLDC testified on the record to ownership, MLDC showed that the laptop was password protected, testified on the record that any authority of one of their employees whether implicitly or explicitly is revoked, and provided the written security policy of its laptops governing the dissemination of information and security of their laptops and server.

All of these factors are present now, before the prospective search and must be evaluated in the totality of the circumstances test. The only factor to the contrary that the probation department has been able to point to is that the laptop was carried in a backpack purported to be Mr. Ruck's. That argument is weak at best, the extent of things that you could possibly carry in a backpack is infinite and virtually none of those items would transfer ownership by merely being in someone's backpack. Further, if the Defendants are relying on Probationer's mere possession of the item, the item is no longer in the Probationer's possession. Here, given the totality of the circumstances at this point in the process of seizure and future search, it would not be reasonable to believe that Mr. Ruck still has either the ability to give consent to search or has any common authority what so ever over the laptop.

This is the rationale in previously cited cases showing that there can be no good faith exception to 41(e) proceedings. In a 41(e) proceeding, we have the benefit of uncontroverted testimony to prove ownership. The Defendants may have been able to immediately search the laptop at the time of seizure at the residence. They chose not to. Now the Defendants cannot possibly use a good faith mistaken belief regarding possession that would have only existed at the time of search (or in this case seizure). Because the true nature of the property is now known, because that nature dictates that the property is MLDC's property, not only is *Barker* distinguishable, it supports Plaintiff's position.

III.

The Idaho Rules of Criminal Procedure require that a warrant to search or seize only be given when "(1) evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) weapons or other things by means of which a crime has been committed or reasonably appears about to be committed..." I.C.R. 41(b).

The U.S. Constitution provides that a warrant must be based on probable cause. U.S. Amend IV. In this case, probation officers searched the home of Mr. Ruck and seized a computer that they know belonged to his employer and now know any grant of authority was revoked. The officers now want to search that computer because they claim it might contain evidence of probation violations, keeping in mind that no allegations of any crime have been made nor inferred. It is irrelevant that Mr. Ruck is on probation because "if a search warrant be constitutionally required, the requirement cannot be flexibly interpreted to dispense with the rigorous constitutional restrictions for its issue." Griffin v. Wisconsin, 483 U.S. 868, 878 (1987). In this case, the laptop was not searched at the home, but was seized and removed from the premises. The probation agreement as it applies to Mr. Ruck no longer governs.

The probation officer does not have sufficient evidence to meet the probable cause threshold to support any claim that Matt Ruck or MLDC committed a crime. Even if Mr. Ruck may have violated his probation (which is still in serious doubt), a crime has not been committed. On their face, probation violations are not crimes, they are merely a breach of an agreement.

MLDC owns the laptop and thus has a 4th amendment privacy interest in the laptop. Because MLDC has a reasonable expectation of privacy in their property a search of the laptop must adhere to the constitutional requirements of reasonableness. MLDC has not committed any crime, nor has any officer, director, owner, or employee. Nothing is inherently unlawful about the laptop, such as the contraband methamphetamine in *Baker*. Therefore it would be unreasonable for probation officers to search the laptop for evidence of a crime. It is not illegal for MLDC to enter into financial transactions, nor is it illegal for an MLDC employee to travel wherever they please. Therefore, any indicia of travel or financial transaction are not indicia that Matt Ruck violated his probation, let alone that a crime has been committed. Because the state

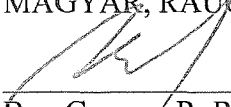
cannot possibly provide enough evidence to support a finding of probable cause that a crime has been committed and that the laptop constitutes evidence of that crime a warrant cannot be issued.

IV.

In conclusion, the United States Supreme Court has already decided that the terms Search and Seizure carry different bundles of rights. *State v. Baker* does not apply to our facts namely because the item to be searched is no longer at the Probationer's residence. A warrant cannot be issued without evidence of a crime.

DATED this 11 day of Jan, 2012.

MAGYAR, RAUCH & THIE, PLLC


By: Gregory R. Rauch

CERTIFICATE OF SERVICE

I hereby certify that on this 11 day of January, 2012, I caused a true and correct copy of the foregoing document to be served on the following in the manner indicated below:

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Sent via fax



Gregory R. Rauch

Filed February 27, 2012 AT
 3:36 P.M. LEWISTON, IDAHO
 BY Carl B. Kerrick
 CARL B. KERRICK *cc*

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO,)
)
 Plaintiff,)
)
 v.)
)
 MATT RUCK,)
)
 Defendant.)

CASE NO. CR 2005-2960
 OPINION AND ORDER ON
 MOTION FOR RETURN OF
 PROPERTY

This matter came before the Court on MLDC Government Services Corporation's Petition for Return of Property. Gregory Rauch¹, of the firm Magyar, Rauch & Thie, represented MLDC Government Services Corporation. The State of Idaho was represented by William Thompson, Latah County Prosecuting Attorney. William Loomis, Deputy Attorney General, was also present and participated in the hearing. The Court heard oral argument on this matter on January 6, 2012. The Court, having heard the argument of counsel and being fully advised in the matter, hereby renders its decision.

¹ As will be explained in more detail below, MLDC Government Services Corporation has intervened in the criminal case against Matt Ruck. MLDC is represented by Mr. Rauch, who has also represented Mr. Ruck on the criminal matter. For purposes of this motion, Mr. Rauch expressed no representation of Mr. Ruck. Furthermore, Mr. Ruck has taken no position with respect to the issue before the Court.

FACTS AND PROCEDURAL HISTORY

MLDC Government Services Corporation (hereinafter "MLDC") is seeking the return of a laptop computer that was seized from the home of Matt Ruck during a search of Mr. Ruck's residence. Ruck is currently serving a seven year term of probation as a result of pleading guilty to committing forgery, I.C. § 18-3601. As part of Ruck's order of probation, he is required to submit to searches of his person, vehicle, residence, and/or property in a reasonable manner and at reasonable times by any agent of the division of Probation and Parole of the Idaho State Board of Correction. *Amended Order Suspending Execution of Sentence and Order of Probation*, Latah County Case CR-2005-02960, at 4-5.

On June 22, 2011, Probation and Parole Officers Jackye Squire Leonard and Andrew Nelson visited Ruck's home. While visiting the house, pursuant to the authority of the Order of Probation, PPO Leonard searched a backpack after Ruck indicated that he owned it. Within the backpack, Leonard found receipts and boarding passes indicating Ruck had recently traveled out of the state without first obtaining permission from his probation officer, in direct violation of the Order of Probation. *Id.* at 2-3. Two computers, the laptop computer that is central to the issue before this Court and an iPad, and the other contents of the backpack were seized. These items were seized with the intention of searching them for further evidence that Ruck was in violation of the Order of Probation. *Affidavit of Jackye Squire Leonard*, at 3-4.²

Initially, MLDC filed a civil action in Latah County, Case CV-2011-0645, seeking return of the laptop computer. The civil action was stayed pending a determination by this Court.

² The Affidavit of Jackye Squire Leonard was filed in Latah County Case CV-2011-00645. The Court takes judicial notice of this case, which was filed by MLDC for purposes of effectuating the return of the laptop computer.

MLDC is currently before this Court seeking return of the laptop computer pursuant to I.C.R. 41(e).

ANALYSIS

1. **The matter is properly before this Court pursuant to I.C.R. 41(e)**

Matt Ruck is currently serving a period of probation in the foregoing criminal case as a result of pleading guilty to committing forgery. The sentence imposed by this Court was suspended and Ruck was placed on probation to the Idaho State Board of Correction for a period of seven years, commencing September 27, 2006. *Amended Order Suspending Execution of Sentence and Order of Probation*, at 2. Included within the probation order are fifteen terms and conditions which Ruck must comply with in order to remain on probation.

I.C. § 20-221 provides that the court may impose, and may modify at any time, conditions of probation. “[A]fter a judge has granted probation, he retains jurisdiction during the probationary period, and has continuing discretion to modify its conditions.” *State v. Oylar*, 92 Idaho 43, 47, 436 P.2d 709, 713 (1968). Further, revocation of probation is also within the discretion of the district court. *See* I.C. §20-222. Revocation of probation may occur during the probationary period upon a finding that the probationer violated the terms or conditions of the probation. *State v. Schumacher*, 131 Idaho 484, 486, 959 P.2d 465, 467 (Ct. App. 1998).

I.C.R. 41 permits a person aggrieved by a search and seizure to move the district court for the return of property.

Motion for Return of Property. A person aggrieved by a search and seizure may move the district court for the return of the property on the ground that the person is entitled to lawful possession of the property and that it was illegally seized. The motion for the return of the property shall be made only in the criminal action if one is pending, but if no action is pending a civil proceeding may be filed in the county where the property is seized or located. The court shall receive evidence on any issue of fact necessary to the decision on the motion. If the motion is granted

the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing after a complaint, indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

I.C.R. 41(e). In the case at hand, the laptop computer was seized directly as a result of the order of probation entered by this Court. Further, MLDC's argument that the criminal case is closed based upon the status of the case as listed in the Idaho Supreme Court Data Repository is disingenuous.³ Based upon I.C.R. 41(e), jurisdiction is proper before this Court pursuant to the foregoing criminal action.

2. Whether the laptop should be returned

MLDC, as the movant in this case, bears the burden of establishing whether the laptop was illegally seized. "In a Rule 41(e) proceeding, the burden of proof shifts from the movant to the state when the property is no longer needed for evidentiary purposes." *State v. Meier*, 149 Idaho 229, 233, 233 P.3d 160, 164 (Ct. App. 2010). Based upon the testimony of PPO Leonard, the backpack at Ruck's home contained both the laptop and an iPad. Further, the backpack contained evidence that Ruck was not complying with the terms and conditions of probation. The laptop was seized with the intent to search the contents of the device to determine whether there was evidence of probation violations.⁴

³ On July 25, 2011, a hearing was held on this issue in the civil case, Latah County Case CV-2011-00645. This Court has reviewed a transcript of that hearing. Counsel for MLDC took the position that the case was closed based upon the status of the case on the Idaho Supreme Court Data Repository, located at www.idcourts.us/repository/start.do. Counsel argued the following:

And I presumed after reading the repository where it said that the case was closed and nothing was pending, I believe it said, to assume that that meant that since nothing is pending there was no action and that there was no action I could take because there was no probation violation. There was an underlying criminal case that I assumed was closed.

Tr. at 31, L. 6-13. It appears commonplace for cases to have the status listed as "Closed Pending Clerk Action" for purposes of data entry within the repository. Regardless of this status, the parties are well aware that Mr. Ruck continues to be on probation for the underlying criminal case, thus, I.C.R. 41 is applicable.

⁴ Tr. at 23.

Thus, this Court must determine whether the laptop was illegally seized. MDLC contends that Ruck did not have the authority to consent to the search or seizure of the laptop computer, thus, the computer was illegally seized.

A similar issue was discussed in *State v. Barker*, 136 Idaho 728, 40 P.3d 86 (2002). In this case, parole agents searched Barker's apartment based upon parolee Tate's waiver of his Fourth Amendment rights. *Id.* at 730, 40 P.3d at 88. Barker explained to the officers that Tate did not live in the apartment, but the parole officers searched the apartment based upon sufficient information to believe that Tate lived at the apartment. *Id.* While searching the bedroom of the apartment, an officer found a fanny pack. The officer contacted Barker, who stated that she owned the fanny pack; nevertheless the officer proceeded to open and search the fanny pack and discovered methamphetamine and a vehicle title with both the parolee and Barker's name on it. *Id.* Barker challenged the search as illegal, arguing the officers did not have consent to search the apartment or the fanny pack.

The *Barker* Court discussed the consent exception to the warrant requirement.

Warrantless searches are *per se* unreasonable, and therefore unconstitutional, unless they are authorized by a recognized exception to the warrant requirement. *State v. Johnson*, 110 Idaho 516, 716 P.2d 1288 (1986). One such exception is properly given consent. *Id.* When the State seeks to justify a warrantless search based upon consent, it is not limited to proof that the consent was given by the defendant. *Id.* It may show that the consent came from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected. *United States v. Matlock*, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). The common authority of the third party does not rest upon the law of property. *Id.* The State need not show that the third party had a property interest in the premises or effects searched. Rather, the common authority rests upon the joint access or control of the property searched. As explained by the United States Supreme Court in *Matlock*:

The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that

any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Id. at 171, n. 7, 94 S. Ct. at 993, n. 7, 39 L.Ed.2d at 250, n. 7 (citations omitted).

The State has the burden of proving that consent has been given and that the person giving the consent had actual or apparent authority to do so. *Id.*; *State v. Brauch*, 133 Idaho 215, 984 P.2d 703 (1999).

Id. at 730-731, 40 P.3d 88-89.

The case at hand is analogous to *Barker*. The seized computer was located within a backpack, when questioned Ruck stated the backpack belonged to him. Also included within the backpack were other indicia that Ruck had violated his probation. Prior to the seizure of the computer, Ruck established that he had mutual use of the computer, and that he had joint access and control of the computer for most purposes. Further, when asked, Ruck provided PPO Leonard with the password to the computer.

Important to the case at hand is the factual determination that Ruck had common authority over the property to be searched. Riley Fitt-Chappell, president of MLDC, testified regarding Ruck's authority to use the computer. Fitt-Chappell testified Ruck was allowed to take the computer home, allowed to travel with the computer, essentially allowed to take the computer anywhere Ruck would choose to take it. Tr. at 7-8. Further, Fitt-Chappell testified he was aware that Ruck was on probation when he was hired to work for MLDC, and Fitt-Chappell had read the probation order that Ruck was required to follow. Tr. at 5-6. Ruck knew the password for the computer and provided this information to Leonard, indicating that Ruck had common authority over the computer and its contents.

The *Barker* Court explained that officers could search items if they had a reasonable suspicion that the parolee owned, possessed, or controlled the item.

Barker also argues that Tate's consent to search could not extend to the fanny pack because the officers knew before the search that it belonged to Barker. The authority to consent to a search is not derived from the law of property (e.g., ownership), but is based upon common authority over the property to be searched. *United States v. Matlock*, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). That common authority rests upon the mutual use of the property by persons generally having joint access or control over it for most purposes. *Id.*

Because both Tate and Barker occupied the master bedroom, Tate had common authority over the bedroom sufficient for him to consent to a search of that room. His consent to search could not extend to items in the bedroom over which he had no common authority, however. When searching that room pursuant to Tate's consent, the officers could search any item in the bedroom if they had reasonable suspicion that Tate owned, possessed, or controlled the item. *United States v. Davis*, 932 F.2d 752 (9th Cir.1991).

The circumstances need not indicate that the item was obviously and undeniably owned, possessed, or controlled by Tate. *Id.* When searching a residence pursuant to the consent of only one of the occupants, the officers are not required in all instances to inquire into the ownership, possession, or control of an item when ownership, possession, or control is not obviously and undeniably apparent. *Id.* If the officers do inquire, they are not necessarily bound by the answer given. *Id.* The test is whether, under the totality of the circumstances, the officers had a reasonable suspicion that the item was owned, possessed, or controlled by the occupant who consented to the search.

Id. at 731-732, 40 P.3d at 89-90.

In the case at hand, under the totality of the circumstances, the probation officers had a reasonable suspicion that the computer was owned, possessed, or controlled by Ruck. The computer was in a backpack, which Ruck stated he owned, located within Ruck's home. Other items in the backpack indicated that the backpack was owned, possessed or controlled by Ruck. Ruck's possession of the computer, and his knowledge of the password, supports this determination. Further, based upon the totality of the circumstances, it is reasonable to believe the computer may hold evidence that Ruck was in violation of the probation order, specifically with respect to whether Ruck was traveling without permission, or engaging in financial transactions which are prohibited by the order.

Thus, MLDC's motion for return of property is denied. However, this Court notes the parties entered into a stipulation for purposes of protecting the information contained on the computer. Further, the State acknowledged that there may be information that should be protected based upon attorney-client privilege and that the computer may contain sensitive government documents that contain information that should not be disseminated to the public. The State indicated a filter could be applied to filter documents which contained privileged information before the computer would be searched. The Court encourages the parties to modify the stipulated agreement for purposes of effectuating a search of the computer to determine whether a probation violation has occurred. If the parties cannot reach an agreement regarding the method of searching the computer, the Court will entertain a motion for a protective order which would allow the information on the computer to be submitted to the Court under seal.

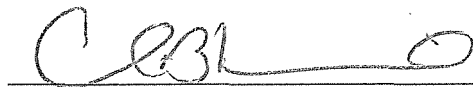
CONCLUSION

Based upon the foregoing analysis, MLDC's motion for return of property is denied, with direction to the parties on the proper basis to proceed.

ORDER

MLDC Government Services Corporation's Motion for Return of Property is DENIED.
IT IS HEREBY ORDERED.

Dated this 27th day of February 2012.



CARL B. KERRICK - District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing OPINION AND ORDER ON MOTION FOR RETURN OF PROPERTY was:

_____ hand delivered via court basket, or

mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 27th day of February, 2012, to:

William H. Thompson, Jr
P O Box 8068
Moscow ID 83843

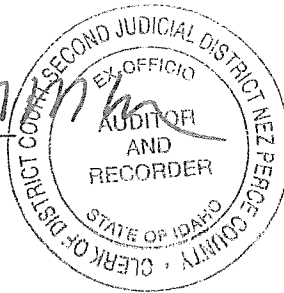
Gregory R. Rauch
326 e 6th Street
Moscow ID 83843

William M. Loomis
1299 North Orchard, No 100
Boise ID 83706

PATTY O. WEEKS, CLERK

By: _____

Deputy



CASE NO. CR-05-2960

2012 MAR 21 PM 2: 07

CLERK OF DISTRICT COURT
LATAH COUNTY

BY: *Re*

Gregory R. Rauch, ISB# 7389
Attorneys for Appellant
Law Offices of
Magyar, Rauch, & Thie, PLLC
326 E. 6th St.
Moscow, Idaho 83843
Tel: (208) 882-1906
grauch@mrt-law.com

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

MLDC GOVERNMENT SERVICES CORP,
Appellant.

Case No. CV-2011-00645
CR-2005-2960

vs.

NOTICE OF APPEAL
Fee Category: L4
Fee: \$101.00

COUNTY OF LATAH, DEPARTMENT OF
PROBATION AND PAROLE, JACKYE
SQUIRE LEANORD, ANDREW NELSON,
STATE OF IDAHO LATAH COUNTY
SHERIFF'S DEPARTMENT,
DEPARTMENT OF CORRECTIONS,
Respondents.

TO: THE ABOVE NAMES RESPONDENTS, COUNTY OF LATAH, DEPARTMENT OF
PROBATION AND PAROLE, JACKYE SQUIRE LEANORD, ANDREW NELSON, STATE
OF IDAHO LATAH COUNTY SHERIFF'S DEPARTMENT, DEPARTMENT OF
CORRECTIONS, AND THE PARTIES' ATTORNEYS BILL THOMPSON AND WILLIAM
LOOMIS, AND THE CLERK OF THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellant MLDC Government Services Corp. appeal against the above
named respondents to the Idaho Supreme Court from the order denying Appellants

Motion to Return Property, entered in the above entitled action on the day of February 27, 2012 Honorable Carl B. Kerrick presiding.

2. That the party has the right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(1) I.A.R. or 11(a)(8) I.A.R.

a. This is an expedited appeal.

3. The issues appellant intends to raise on appeal are:

a. The legal issue was not before the proper court. The original court hearing the issues was Judge John R. Stegner CV 2011-645 where it was determined to transfer the case to CR 2005-2960. The issue is whether a civil party has standing to enter another parties' criminal case as a party in interest under Idaho Criminal Rule 41(e).

b. The court erred in ruling that Probationer was represented by Counsel for the Corporation. Probationer has separate counsel who had previously appeared in the criminal matter. If these proceedings were in fact proper in the underlying criminal matter, said separate counsel should have been served or notified by the court or the state, thus failed to satisfy due process requirements of the probationer who has never had a chance to object. The court has created a conflict of interest between the Corporation and the Probationer where there was none, imputing representation to the Corporation's attorney where no such representation exists outside the corporate umbrella.

c. The Court erred in finding that the Parole and Probation Officers had reasonable suspicion that Probationer owned, possessed, or controlled the laptop.

d. The Court erred in finding that Probationer had the authority to consent to the search or seizure of the laptop.

e. The court erred in not addressing and applying Plaintiff's arguments that:

i. The burden of proof is clearly on the state.

ii. MLDC met their burden of proof.

iii. Once the third party property has been removed from the residence, it is outside the scope of the probationer's consent to 4th amendment waiver.

- iv. A warrant was required to search the laptop because it belonged to the Corporation whose fourth amendment rights were not surrendered.
 - v. Any authority that MLDC bestowed upon Probationer (if any) to consent to a search was revoked prior to any permissible search, thus the property must be returned.
 - vi. The laptop's seizure was impermissible and unconstitutional because the Probation Officers were engaging in stalking horse practices only seeking to gain access to the corporate laptop and corporate records, not several home computers or home email accounts personal to the probationer.
 - vii. The probation order and agreement does not give authority nor consent to arbitrary seizure of property. The plain meaning of the strictly construed probation agreement and order of probation specifies that the probationer gave up his rights to object to a search. The probation department may have had authority to search the laptop on the premises; however the order gave no right to seize the item that wasn't contraband or illegal in and of itself.
 - viii. The probation order even if construed to apply to seizure, still cannot apply because once the computer is no longer in the Probationer's possession or in his control, the agreement and order is now inapplicable.
 - ix. That the Federal interpretation of Idaho Rule 41(e) applies in this case.
 - x. The good faith warrant requirement exception does not apply in Idaho Rule 41(e) proceedings.
- f. This preliminary statement will not prevent the appellant from asserting other issues upon appeal.
- 4. An order has not been entered sealing all or any portion of the record.
 - 5. (A) Is a reporter's transcript requested? Yes.
(B) The appellant requests the preparation of the following portions of the reporter's transcript in hard copy: the standard record pursuant to rule 28(b), I.A.R. and the oral argument held on January 6, 2012. All supplemental briefing on the issues that were filed in both Latah County civil case CR 2011-645 and the criminal case CR-2005-2960.

6. The appellant requests the following documents, charts, or pictures offered or admitted as exhibits to be copied and sent to the Supreme Court.
 - a. Exhibits attached to the State of Idaho's Response to Petition for Return of Property. Specifically, the *order of probation*, the *agreement of probation*, and the *affidavit of Jackye Squire Leonard*.
7. The appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R.
 - a. *Petition for for Return of Property and Request for Immediate Temporary Injunction and Ex-Parte Restraining Order on the Contents of the Property Seized and Memorandum in Support Thereof* in CV- 2011- 645.
 - b. *Brief in Support of Plaintiff's Motion to Return Property* in CV- 2011-645.
 - c. *Reply to Response to Petition for Return of Property and Request for Immediate Temporary Injunction and Ex-Parte Restraining Order on the Contents of the Property Seized and Memorandum in Support Thereof* in CV- 2011- 645.
 - d. *Second Supplemental Brief in Support of Plaintiff's Motion to Return Property* in CR- 2005- 2960.
8. I certify that:
 - a. That a copy of this notice of appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:
Nancy Towler, P.O. Box 896 Lewiston, Idaho 83501.
 - b. That the clerk of the district court has been paid the estimated fee for preparation of the reporter's transcript.
 - c. That the appellate filing fee has been paid.
 - d. That service has been made upon all parties required to be served pursuant to Rule 20 and the attorney general of Idaho pursuant to Section 67-1401(1), Idaho Code.

DATED this 21 day of March, 2012.



Gregory R. Rauch
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 20 day of March, 2012, I caused a true and correct copy of the foregoing document to be served on the following in the manner indicated below:

Bill Thompson
Latah County Prosecutor's Office
*Attorney for Defendants Latah County, and
Latah County Sheriff's Department*
P.O. Box 8068
Moscow, ID 838343

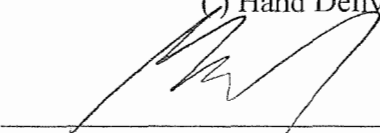
U.S. Mail
 Overnight Mail
 Facsimile (208) 883-2290
 Hand Delivery

Lawrence G. Wasden
William Loomis
Office of the Attorney General
*Attorney for Defendants Department of
Probation and Parole, Jackeye Squire
Leanord, Andrew Nelson, State of Idaho, and
Department of Corrections.*

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Nancy Toweler
Court Reporter
P.O. Box 896
Lewiston, Idaho 83501.

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 Facsimile (208) 327-7485
 Hand Delivery



Gregory R. Rauch
Attorney for Appellant

CR-2005-2960
CASE NO.

2012 APR -5 PM 4:40

CLERK OF DISTRICT COURT
LATAH COUNTY
BY: *SW*

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Tel: (208) 882-1906
grauch@mrt-law.com
Attorneys for Appellant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

MLDC GOVERNMENT SERVICES CORP,

Appellant,

Case No. CR- 2005-2960

**MOTION TO SEAL LAPTOP
PENDING APPEAL.**

vs.

COUNTY OF LATAH, DEPARTMENT OF
PROBATION AND PAROLE, JACKYE
SQUIRE LEANORD, ANDREW NELSON,
STATE OF IDAHO LATAH COUNTY
SHERIFF'S DEPARTMENT,
DEPARTMENT OF CORRECTIONS,

Respondents.

COMES NOW MLDC Government Services Inc. (hereinafter Appellant) BY AND
THROUGH ITS ATTORNEY OF RECORD Gregory R. Rauch respectfully moves this court to
enjoin any search of the laptop pending the results of the appeal. Pursuant to Idaho Appellant
Rules the District Court Judge in a criminal case has the authority to grant an order which affects
Motion for Writ.

Law Offices of Magyar, Rauch, & Thie, PLLC
326 E. 6th St., Moscow ID 83843
(208)882-1906

the substantive rights of the Defendant. Idaho App. R. 13(c)(10). While MLDC is not technically a defendant they have been forced into that role by the Respondents.

In this case the property that is the subject of the appeal is MLDC's laptop and the information stored on it. Contained in the laptop is confidential government information and privileged attorney/client information. MLDC has substantive proprietary and privacy rights regarding the information stored on the laptop; therefore, the court has jurisdiction to enter an order protecting the substantive rights of MLDC who has been pushed into the role of defendant. MLDC asks that this court grant an order enjoining the County of Latah, Department of Parole, Jackeye Squire Leonard, Andrew Nelson, State of Idaho Latah County Sheriff's Department, or the Department of Corrections (hereinafter Respondents) from searching the laptop while the appeal of the District Court's Order dated February 27, 2012 is being appealed.

MLDC will be irreparably harmed if the Respondents are allowed to search the laptop before the decision on appeal is rendered. Firstly, MLDC has stored confidential government information and privileged attorney/client communications on the laptop that will be compromised if the Respondents search it. While the Respondents claim that they would do their best to ensure no confidential files are accessed and the Court has suggested a protective order sealing the contents of the laptop, the only sure way to protect the privacy of the government documents and privileged communications that MLDC has stored on the laptop is a complete ban on searching it. Secondly, the issue on appeal is the propriety and privacy rights of the Appellant in protecting the information on its laptop. Hence, a search of the laptop before the appeal could heard will spoil the issue on appeal thus rendering the appeal moot.


Hence, the only way to completely protect MLDC's substantive proprietary and privacy rights and to preserve the issue for appeal is to enjoin the Respondents from searching the laptop.

Motion for Writ.

Law Offices of Magyar, Rauch, & Thie, PLLC
326 E. 6th St., Moscow ID 83843
(208)882-1906

While irreparable harm will come to MLDC if the laptop is searched before the decision on appeal is rendered, the Respondents will not be harmed by waiting. The Respondents allege that the laptop possesses evidence of probation violations by Matt Ruck. The laptop is currently in the Respondents' possession and will remain so until the decision on the appeal is rendered. Thus, there is no danger that the Respondents will lose any of the alleged evidence they hope to obtain from the laptop.

DATED this 5 day of April, 2012.



Gregory R. Rauch
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 5 day of April, 2012, I caused a true and correct copy of the foregoing document to be served on the following in the manner indicated below:

Bill Thompson
Latah County Prosecutor's Office
*Attorney for Respondents Latah County, and
Latah County Sheriff's Department*
P.O. Box 8068
Moscow, ID 838343

- U.S. Mail
- Overnight Mail
- Facsimile (208) 883-2290
- Hand Delivery

William Loomis
Office of the Attorney General
*Attorney for Respondents Department of
Probation and Parole, Jackeye Squire
Leanord, Andrew Nelson, State of Idaho, and
Department of Corrections.*
1299 W. Orchard Street Ste. 110
Boise, ID 83706-2266

- U.S. Mail
- Overnight Mail
- Facsimile (208) 327-7485
- Hand Delivery



Gregory R. Rauch
Attorney for Appellant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

COURT MINUTES

Presiding Judge
CARL B. KERRICK
Reporter
Nancy Towler
Date May 15, 2012
Time: 10:00 a.m.

STATE OF IDAHO,

Plaintiff,

vs.

MATT RUCK,

Defendant,

)
)
) Docket No. CR05-02960
)
) APPEARANCES:
)
) BILL LOOMIS
) For, Plaintiff
)
) GREG RAUCH
) For, Defendant

SUBJECT OF PROCEEDINGS: MOTION TO SEAL LAPTOP
BE IT KNOWN, THAT THE FOLLOWING PROCEEDINGS WERE HAD, TO-WIT

COURTROOM 1

100105 Mr. Rauch and Mr. Loomis present on the telephone. Court addresses
counsel.
100146 Mr. Rauch addresses the Court re: appeal and orders that the Supreme
Court deem final.
100300 Court received copies of those orders.
100330 Mr. Rauch presents argument on Motion to Seal Laptop.
100454 Mr. Loomis presents argument on Motion to Seal Laptop.
100754 Mr. Rauch presents rebuttal argument.
100855 Court takes matter under advisement and will issue written decision.
100935 Court recess.

TERESA DAMMON

Deputy Clerk

1 Page of 1 Pages

APPROVED:


Presiding Judge

COURT MINUTES MAY 15, 2012

0263

In the Supreme Court of the State of Idaho

CASE NO. CR-05-2960

MAY 17 AM 11:08

CLERK OF DISTRICT COURT
LATAH COUNTY
BY DC DEPUTY

STATE OF IDAHO,

Plaintiff-Respondent,

v.

MATT EUGENE RUCK,

Defendant-Appellant.

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ORDER DISMISSING APPEAL

Supreme Court Docket No. 39830-2012

Latah County Docket No. CR 2005-2960

An ORDER CONDITIONALLY DISMISSING APPEAL was entered April 18, 2012 for the reason the fees for preparation of the Clerk's Record and Reporter's Transcript were not paid. Thereafter, this Court received notice from the District Court Reporter that the fee for preparation of the Reporter's Transcript was paid March 22, 2012. However, the District Court Clerk advised that the fee for preparation of the Clerk's Record has not been paid. Therefore, good cause appearing,

IT HEREBY IS ORDERED that this appeal be, and hereby is, DISMISSED for Appellant's failure to fully comply with this Court's Order Conditionally Dismissing Appeal entered April 18, 2012.

DATED this 16th day of May 2012.

For the Supreme Court

Stephen W. Kenyon
Stephen W. Kenyon, Clerk

cc: Counsel of Record
District Court Clerk
District Court Reporter
District Court Judge

LODGED June 1, 2012 AT
2:34 PM LEWISTON, IDAHO
 BY Carl B. Kerrick
CARL B. KERRICK

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO,)
)
 Plaintiff,)
)
 v.)
)
 MATT RUCK,)
)
 Defendant.)
 _____)

CASE NO. CR 2005-2960

**OPINION AND ORDER ON
 MOTION TO SEAL LAPTOP**

This matter came before the Court on MLDC Government Services Corporation's Petition for Return of Property. Gregory Rauch, of the firm Magyar, Rauch & Thie, represented MLDC Government Services Corporation. The State of Idaho was represented by William Loomis, Deputy Attorney General. The Court heard oral argument on this matter on May 15, 2012. The Court, having heard the argument of counsel and being fully advised in the matter, hereby renders its decision.

FACTS AND PROCEDURAL HISTORY

MLDC Government Services Corporation (hereinafter "MLDC") intervened into this criminal matter, seeking the return of a laptop computer that was seized from the home of Matt

Ruck during a search of Mr. Ruck's residence.¹ On February 27, 2012, this Court issued an Opinion and Order on Motion for Return of Property. Within this order, MLDC's motion for return of the laptop computer was denied. MLDC seeks to appeal this order, and thus, requests the State be enjoined from searching the laptop pending the results of the appeal.

ANALYSIS

MLDC contends it will be irreparably harmed if the State is allowed to search the laptop before the decision on appeal is rendered. Specifically, MLDC refers to stored confidential government information and privileged attorney/client communications on the laptop that will be compromised if the laptop is searched. MLDC relies upon Idaho Appellate Rule 13(c) which allows the district court to rule upon certain motions during the pendency of an appeal. I.A.R. 13(c)(10) permits the Court to "Enter any other order after judgment affecting the substantial rights of the defendant as authorized by law." MLDC contends that it has been effectively placed into the position of a defendant, and that searching the laptop will affect the substantial rights of MLDC.

The laptop was seized during a search of a probationer's residence; it may contain information which will indicate Ruck was in violation of the terms and conditions of his probation agreement. A probationary period is limited in nature, and the search in question may provide information that Ruck violated probation. In this case, the dangers to MLDC of having the computer searched are outweighed by the State's responsibility to ensure that probationer's comply with the terms and conditions of probation. Further, timeliness is a concern in this

¹ Ruck is currently serving a seven year term of probation as a result of pleading guilty to committing forgery, I.C. § 18-3601. As part of Ruck's order of probation, he is required to submit to searches of his person, vehicle, residence, and/or property in a reasonable manner and at reasonable times by any agent of the division of Probation and Parole of the Idaho State Board of Correction. *Amended Order Suspending Execution of Sentence and Order of Probation*,
OPINION AND ORDER ON
MOTION TO SEAL LAPTOP

matter. Ruck was placed on probation for a period of seven years, commencing September 27, 2006. *Amended Order Suspending Execution of Sentence and Order of Probation*, at 2. It is reasonable for the State to pursue action on a probation violation, and simply sealing the laptop may improperly insulate Ruck from appropriate consequences if there is evidence which shows Ruck violated the terms and conditions of his probation agreement.

At argument, the State indicated there is current technology which can be applied to protect documents from being viewed if they are privileged communications. Throughout the course of these proceedings the parties have alluded to filters which can be set up prior to the search of the contents of the computer. Thus, the State is required to place a filter on the inspection of the laptop to prevent viewing of attorney/client privileged material. MLDC is ordered to provide to the State a list of the names of attorney's who may have sent privileged communications to users of the laptops. MLDC must provide this list within two weeks of the date this order is filed.

CONCLUSION

Based upon the foregoing analysis, MLDC's motion to seal the laptop is granted in part, and denied in part. The motion is denied insofar as the State is permitted to proceed with the search of information on the laptop, for purposes of determining whether Ruck violated the terms and conditions of his probation. The motion is granted in a limited manner, with respect to information on the computer which may be protected by the attorney/client privilege. The State is required to place a filter on the inspection of the laptop to prevent viewing of attorney/client privileged material. MLDC is ordered to provide to the State a list of the names of attorney's

who may have sent privileged communications to users of the laptop. MLDC must provide this list within two weeks of the date this order is filed.

ORDER

MLDC Government Services Corporation's Motion to Seal Laptop is GRANTED in part and DENIED in part, consistent with the foregoing analysis.

IT IS HEREBY ORDERED.

Dated this 1st day of June, 2012.

A handwritten signature in black ink, appearing to read 'C. B. Kerrick', written over a horizontal line.

CARL B. KERRICK - District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing OPINION AND ORDER ON MOTION FOR RETURN OF PROPERTY was:

_____ hand delivered via court basket, or

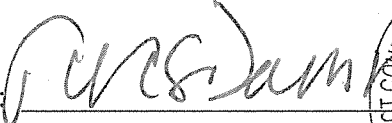
mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 18th day of June, 2012, to:

William H. Thompson, Jr
P O Box 8068
Moscow ID 83843

Gregory R. Rauch
326 e 6th Street
Moscow ID 83843

William M. Loomis
1299 North Orchard, No 100
Boise ID 83706

PATTY O. WEEKS, CLERK

By: 
Deputy



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO,)	
	)	Supreme Court No. 39830-2012
Plaintiff-Respondent,)	
	)	CLERK'S CERTIFICATE
vs.	)	RE: EXHIBITS
)	
MATT EUGENE RUCK,)	
)	
Defendant-Appellant.)	
_____)	

I, Ranae Converse, Deputy Court Clerk of the District Court of the Second Judicial District of the State of Idaho, in and for the County of Latah, do hereby certify that the following EXHIBITS:

PRELIMINARY HEARING (5/18/06)

STATE'S EXHIBITS:

- #1 - Check No. 16503, \$267.34 - Admitted
- #2 - Check History Report - Admitted
- #3 - ICM Shareholder Activity Detail - Admitted
- #4 - ICM Shareholder Activity Detail - Admitted
- #5 - ICM Shareholder Activity Detail - Admitted
- #6 - Affidavit of Shannon Neill - Rejected

REVIEW OF RETAINED JURISDICTION (4/23/07)

STATE'S EXHIBITS:

- #1 - Inmate Telephone System, Inmate Call Records from 4/5/06 to 4/5/07, 44 pages
- Admitted
- #2 - Inmate Telephone System, Inmate Call Records from 4/10/06 to 4/10/07, 18 pages
- Admitted
- #3 - List of Telephone Calls Under IDOC Custody - Admitted
- #4 - Photocopy of Letter Dated 8/15/06 from William D. Brown and Attached Photocopy
of Stock Transfer Agreement - Admitted
- #5 - CD and Case- Admitted
- #6 - Photocopy of letter dated February 13, 2007 to Judge Kerrick from Sheryl Pizzidill
- Admitted

CLERK'S CERTIFICATE RE: EXHIBITS - 1

DEFENDANT'S EXHIBITS:

- #A1 - Photograph of Three Children- Admitted
- #A2 - Photograph of Defendant's Son, Jack- Admitted
- #A3 - Photograph of Defendant's Daughter, Kathryn - Admitted
- #A4 - Photograph of Defendant's Son, J.P. - Admitted
- #B - Letter dated April 11, 2007 to Siebe Law Office from Jack Ruck and Photocopy of Letter Dated 2/15/07 to Tammy Majors from Jack Ruck - Admitted
- #C - Photocopy of E-Mail from Lynn Guyer and Responses Dated 1/16/06 to 11/27/06 - Admitted
- #D - Criminal and Addictive Thinking Book - Admitted

AND FURTHER that the transcript of the preliminary hearings held on May 18, 2006, and the Motion Hearing held on January 6, 2012, will be lodged as exhibits as provided by Rule 31(a)(3), IAR.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Moscow, Idaho this 12th day of July, 2012.

Susan R. Petersen, Clerk of the
District Court, Latah County, ID

By Ranae Converse
Deputy Clerk

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO,)	
	)	Supreme Court Case No. 39830-2012
Plaintiff-Respondent)	
	)	CLERK'S CERTIFICATE
vs.)	
)	
MATT EUGENE RUCK)	
)	
Defendant-Appellant)	
_____)	

I, Ranae Converse, Deputy Court Clerk of the District Court of the Second Judicial District of the State of Idaho, in and for the County of Latah, do hereby certify that the above and foregoing transcript in the above entitled cause was compiled and bound under my direction as, and is a true, full, complete and correct transcript of the pleadings and documents as are automatically required under Rule 28 of the Idaho Appellate Rules.

I do further certify that all exhibits, offered or admitted in the above entitled cause will be duly lodged with the Clerk of the Supreme Court along with the court reporter's transcript and the clerk's record, as required by Rule 31 of the Idaho Appellate Rules.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Moscow, Idaho this 12th day of July 2012.

Susan R. Petersen, Clerk of the
District Court, Latah County, ID

By Ranae Converse
Deputy Clerk

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO,

Plaintiff-Respondent,

vs.

MATT EUGENE RUCK,

Defendant-Appellant.

)
)
) Supreme Court Case No. 39830-2012
)
)
)

CERTIFICATE OF SERVICE

I, Ranae Converse, Deputy Court Clerk of the District Court of the Second Judicial District of the State of Idaho, in and for the County of Latah, do hereby certify that I have mailed, by United States mail, one copy of the Clerk's Record and the Reporter's Transcript to each of the attorneys of record in this cause as follows:

GREGORY R. RAUCH
ATTORNEY AT LAW
326 6TH STREET
MOSCOW, ID 83843

LAWRENCE WASDEN
ATTORNEY GENERAL
PO BOX 83720
BOISE, ID 83720-0010

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Moscow, Idaho this 12th day of July 2012.

Susan R. Petersen, Clerk of the
District Court, Latah County, ID

By Ranae Converse
Deputy Clerk