9-20-2012

State v. Ruck Appellant's Brief Dckt. 39830

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff – Respondent,	)	Docket No. 39830
	)	
vs.	)	
	)	
MATT EUGENE RUCK,	)	
	)	
Defendant – Appellant.	)	APPELLANT'S BRIEF
	)	

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

Honorable Carl B. Kerrick, District Judge, presiding.

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A. Summary of the Case.

The instant case before the Court involves whether or not a third party loses its protections outlined by the 4th Amendment of the United States Constitution as well as Article I, § 17 of the Constitution of the State of Idaho to be free from unreasonable search and seizure when they allow an employee under a probation agreement to use sensitive corporate property for professional purposes.

The Respondent claims they can search and seize a laptop found in a probationer's residence, arguing that it falls within the scope of a 4th Amendment "search" waiver signed by the probationer. The Respondent claims the search and seizure falls within the scope of the waiver because the seized laptop was found in a backpack owned by MLDC among evidence of suspected probation violations. Additionally, Respondent asserts their right to search the laptop claiming that the probationer consented to the search by providing the password when demanded of him by Probation and Parole Officers, refusal of which would have constituted a probation violation.

Appellant asserts the laptop cannot be searched because it does not belong to the probationer, and a third party does not lose their fundamental right to be free from unreasonable search and seizure under the 4th Amendment of the Bill of Rights as well as Article I, § 17 of the Idaho State Constitution simply by allowing an employee the ability to access the tools of his

trade. The Appellant also claims that the probationer lacked authority to consent to a search of its laptop. Regardless, the Appellant asserts that even any accidental consent by the Probationer found by the court has since been revoked by the employer. Moreover, the property has been illegally seized beyond the scope of the probation agreement, because there has been a seizure, not a search, and that the Respondent now seeks to search the laptop off-site. The laptop must be returned and a search forbidden.

The Appellant additionally claims that they have been forced by the District Courts to bring this motion forth in the wrong forum due to the lack of any pending criminal action against the probationer, whose case the Appellant has wrongfully been compelled to intervene in, and have been placed by the District Court in the position of trying to prosecute its case and defend the probationer, denying both parties their right to due process under the 14th Amendment of the United States Constitution as well as Article I, § 13 of the Idaho State Constitution.

B. Course of the Proceedings.

On June 22, 2011, The Department of Probation and Parole seized a laptop belonging to the corporation MLDC Government Services Corp. (hereafter MLDC), but in the possession of one of its employees who happened to be on probation. On June 23, 2011, the day following the seizure of the laptop, the Appellant's attorney, Gregory R. Rauch contacted Latah County Prosecutor William Thompson, informing him that it was the property of the Appellant and requesting the return of the laptop. R. Vol. II, p. 133. The request was denied. On June 27,

2011, the Appellant filed suit for a return of the property as well as a request for an immediate temporary injunction and an ex-parte restraining order on the contents of the laptop, assigned Latah County Case No. CV-2011-00645. R. Vol. II, p. 136. MLDC asserted that the civil forum was appropriate because no criminal action was facing the probationer (hereafter Matt Ruck). An order was issued by stipulation in the case by the District Court Judge, the Honorable John R. Stegner, on June 28, 2011 sealing the laptop while awaiting a hearing.

On July 15, 2011, William Thompson, attorney for Latah County, and William M. Loomis counsel for the Idaho Department of Correction as well as for Probation and Parole Officers Jackye Squire-Leonard and Andrew Nelson (hereafter referred together as the State), filed a response to MLDC's petition for the return of the laptop, consisting of a blanket denial of MLDC's motion based on an attached affidavit of the Probation Officer conducting the search as well as the probation agreement signed by Mr. Ruck. R. Vol. II, p.151. On July 21, 2011, MLDC filed a reply to the State's response arguing that the probation agreement clearly does not allow a search of third party property, nor did Mr. Ruck have authority to consent to a search of MLDC property at his residence, and especially following its removal from his residence. R. Vol. II, p. 171.

The case proceeded to a hearing on July 23, 2011 before Judge Stegner, who ordered a stay to the civil case pending consideration of the Rule 41(e) motion in the criminal court. R. Vol. II, p. 130. Judge Stegner ruled that the case should be transferred to Judge Kerrick to decide if his criminal court was the appropriate forum.

Oral argument was heard in front of the Honorable Carl B. Kerrick, District Court Judge, on January 6, 2012. R. Vol. II, p. 236. Argument was later followed by MLDC filing a second supplemental brief in support of their motion for the return of MLDC's property on January 11, 2012. R. Vol. II, p. 237.

On February 27, 2012, Judge Kerrick issued an order on the motion for return of property in the criminal case, denying MLDC's motion, and ruling that the Rule 41(e) motion was before the proper forum as well as that Mr. Ruck had common authority over the laptop, giving probation officers reasonable suspicion sufficient to search and seize the laptop. R. Vol. II, p. 245.

On March 21, 2012, MLDC properly filed a notice of appeal on the denied motion for the return of property. R. Vol. II, p. 254. On April 5, 2012 MLDC filed a motion to seal the laptop pending this appeal. R. Vol. II, p. 259. The motion was granted in part and denied in part by Judge Kerrick who issued an order allowing the State to proceed with the search of the laptop, but only after placing a filter to prevent the viewing of any information protected by attorney/client privilege on June 1, 2012. R. Vol. II, p. 265.

To protect the laptop to preserve the appeal, MLDC filed a motion to stay execution of the order with the Idaho Supreme Court. Def.'s Mot. Writ of Prohibition (June 8, 2012). That appeal was denied. Or. Denying Def.'s Mot. (June 21, 2012). With no alternative to preserve its rights, MLDC filed a suit in Federal Court for violation of USC 21 §1983 violation of civil rights and conversion. Pl.'s Compl. (June 12, 2012). MLDC filed for a temporary ex parte injunction

in federal court, which was denied in part and granted in part, limiting the search. Or. Denying Pl.'s Mot. (June 14, 2012)

C. Statement of Facts.

On September 27, 2006, Mr. Ruck was sentenced to a seven-year term of probation following a conviction for forgery. R. Vol. II, p. 159. As part of his probation, Mr. Ruck was not allowed to travel outside of the state without the permission of his probation officer. R. Vol. II, p. 160, 161. He was made subject to the standard terms and conditions of probation. R. Vol. II, p. 160-163. Mr. Ruck was also made subject to special conditions of probation disallowing him to be self employed, limiting his banking and credit agreements, and subjecting him to polygraphs on request. R. Vol. II, p. 163, 164. Mr. Ruck also was required to sign an "Agreement of Supervision – Revised," within which has a provision stating in full:

> **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.

R. Vol. II, p. 166. On June 22, 2011, Mr. Ruck was visited by Probation and Parole Officers Jackye Squire-Leonard and Andrew Nelson, who arrived to conduct a home visit and search of Mr. Ruck's premises. R. Vol. II, p. 157. During the search, Ms. Squire-Leonard proceeded to look through a work backpack belonging to MLDC. In it she found receipts for travel to American Samoa. R. Vol. II, p. 157. Ms. Squire-Leonard claims he did so without permission in

violation of his probation agreement. R. Vol. II, p. 157. During questioning, the State could not announce a clear reason for the "home visit," citing at one time that it was conducted to acquaint a new Probation and Parole Officer, Andrew Nelson, with Mr. Ruck R. Vol. II, p. 203, L. 22-25. Later it was simply called a random home visit (R. Vol. II, p. 198, L. 25), at another time claiming that it was due to concerns that Mr. Ruck had been shopping for a firearm. (R. Vol. II, p. 199, L. 2, 3) and yet another time stating that the State was seeking evidence of financial transactions in violation of Mr. Ruck's probation agreement. R. Vol. II, p. 207, L. 16-23.

In the same backpack with the travel vouchers was the laptop in question. R. Vol. II, p. 157. Mr. Ruck informed the searching officers that the laptop belonged to his employer, MLDC. R. Vol. II, p. 157. The laptop was subsequently seized and the State claims they intend to search it for possible evidence of potential probation violations. R. Vol. II, p. 157, 158. There were several other computers in Mr. Ruck's residence that were neither searched nor seized. R. Vol. II, p. 208, L. 4-7. Following the seizure, the property has remained with the State away from Mr. Ruck's premises and out of his control. After over a year, Mr. Ruck has not been subject to any disciplinary action for any allegations of possible probation violations that were then professed by the State.

II. STANDARD OF REVIEW

The court should adopt a *de novo* standard of review in deciding matters implicating the 4th Amendment of the United States Constitution as well as Article I, § 17 of the Idaho State

Constitution, "[I]t cannot be that the Fourth Amendment's incidence turns on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause." *Brinegar v. U.S.*, 338 U.S. 160, 171 (1949). The Court cannot give high deference to trial courts for determinations of violations of fundamental rights or there will be no true standard as to what those standards are. In all matters of law the Court exercises free review. *Rhoades v. State*, 233 P.3d 61, 63 (Idaho 2010).

In order to find a violation of due process, "the state action that deprives a person of life, liberty, or property must be arbitrary, capricious, or without a rational basis." *Williams v. State*, 283 P.3d 127, 138 (Idaho App. 2012).

In matters involving Idaho Criminal Rule 41(e), there is no Idaho case law on point, therefore the Court shall "consider federal cases interpreting a similar provision of the federal rule." *Idaho v. Meier,* 233 P.3d 160, 162 (Idaho App. 2010). The Ninth Circuit has held that they review Federal Rule of Criminal Procedure 41(e) motions *de novo*. *U.S. v. Mills*, 991 F.2d 609, 612 (9th Cir. 1993). Federal Rule of Criminal Procedure 41(e) has since become Federal Rule of Criminal Procedure 41(g).

III. ISSUES PRESENTED ON APPEAL

A. Does a defendant's probationary status in a closed criminal case qualify as a "pending action" for purposes of establishing forum in an Idaho Criminal Rule 41(e) motion?

B. Whether the Respondent's failure to adhere to Idaho Criminal Rule 49(a) resulted in an interference of MLDC's right to procedural due process.

C. Was MLDC's right to be free from unreasonable search and seizure under the 4th Amendment of the United States Constitution and Article I, § 17 of the Idaho State Constitution violated by the seizure and pending search of the corporate laptop?

D. Did the District Court err in denying MLDC's motion for the return of unlawfully seized property under Idaho Criminal Rule 41(e)?

IV. SUMMARY OF ARGUMENT

The State of Idaho, through the Idaho Department of Corrections, has attempted to free itself of the limitations on government power enshrined in the 4th Amendment of the United States Constitution as well as Article I, § 17 of the Idaho State Constitution, by engaging in an unreasonable seizure and pending attempt to search the property of a noncriminal third party. The State engaged in this unlawful action by imposing authority to consent to a search on a probationer employee, with reduced 4th Amendment protections to be free from unreasonable searches originating from a waiver signed as a part of his probation agreement. The State has also taken the weakened 4th Amendment protections afforded to Mr. Ruck as a person on probation, and pressed those onto his employer for giving him access to the necessary tools of his employment. The State has additionally violated the rights of a noncriminal third party by

expanding the scope of Mr. Ruck's probation agreement beyond the plain meaning of the language in the agreement and contrary to established law (both federal and state) and the Constitution (both federal and state).

In order to unlawfully seize property belonging to a noncriminal third party, Parole and Probation Officers from the Idaho Department of Corrections disregarded the fact that the probationer informed the officers that he was not the owner of the laptop and was not authorized to divulge the password to access it. R. Vol. II, p. 203, L. 2. The officers disregarded Mr. Ruck denying ownership and used his compelled conveyance of the password as consent to search and seize property owned by MLDC, an innocent third party.

Officers seized the laptop with an intent to later search it off-site, despite the fact that Mr. Ruck lacked authority to give consent to the search. Mr. Ruck lacked actual authority in that his employment handbook expressly stated that he was not authorized to provide the password to anyone, specifically naming government agents. Mr. Ruck lacks actual authority in that his employer, MLDC, the owner of the laptop, has expressly denied permission to search the laptop and demanded it be returned. R. Vol. II, p. 190, L. 6-9. Mr. Ruck lacked apparent authority when officers became aware that he lacked express authority.

Officers continued their violation of MLDC's right to be free from unreasonable search and seizure by expanding the scope of the probation agreement consented to by Mr. Ruck to include MLDC's corporate property. Because this is a warrantless search, there must be consent. The consent alleged here is the fourth amendment "search" waiver (Probation Agreement) of the

employee. The officers exceeded the scope of that probation agreement by seizing the laptop, which in itself is not contraband, although the agreement only expressly allows only for a search of property rather than a seizure. R. Vol. II, p. 166. The State now desires to go outside the scope of the probation agreement again by searching the laptop after it has left any semblance of possession or control by Mr. Ruck or MLDC. The State is attempting to engage in this unlawful behavior even after it has been determined beyond question that it is not Mr. Ruck's laptop, and even any accidental consent to search has been revoked by MLDC on the record by its CEO. R. Vol. II, p. 190, L. 6-9.

The State has continued to resist MLDC's motions to return the laptop rather than to comply with the Idaho and United States Constitutions and simply request a warrant to search the laptop. The State most likely has not attempted to secure a search warrant because they lacked even reasonable suspicion for an on-site search, nor do they now have probable cause sufficient to convince a judge to sign a search warrant.

MLDC has been required to bring this action before a court that may not be the proper forum. The District Court has erroneously stated that Mr. Ruck was represented by MLDC's counsel, a clear factual error, placing counsel in a conflicted position, and limiting argument so as not to prejudice Mr. Ruck, thus denying due process to both MLDC and Mr. Ruck. R. Vol. II, p. 245.

V. ARGUMENT

A. MLDC CANNOT INTERVENE IN MR. RUCK'S CRIMINAL CASE AS AN INTERESTED PARTY UNDER IDAHO CRIMINAL RULE 41(e) BECAUSE THERE IS NO ACTION PENDING AGAINST HIM.

Idaho Criminal Rule 41(e) allows for a person aggrieved by an unlawful search or seizure to file a motion for the return of the illegally seized property. Under a plain reading of the text of the rule, MLDC cannot intervene in the criminal action and must instead file the motion under I.C.R. 41(e) in the District Court as a civil action. The District Court erred when it accepted the transfer from the civil court and decided to hear the case, because there was no criminal action pending either against MLDC or against Mr. Ruck.

The forum for an Idaho Criminal Rule 41(e) motion is in the criminal court when an action is pending, but when no action is pending, a civil proceeding may be filed. I.C.R. 41(e). The rule then relies on what exactly qualifies as a "pending" action. Black's Law Dictionary defines "pending" as "remaining undecided; awaiting decision <a pending case>." *Black's Law Dictionary* 953 (Bryan A. Garner ed., 8th ed., West 2005). Alternatively, as a preposition, Black's Law Dictionary defines "pending" as, "throughout the continuance of; during. 2. While awaiting; until." *Id.* Under none of these definitions does Mr. Ruck's issued order of probation qualify as a "pending" action for the purposes of I.C.R. 41(e).

Despite the fact that Mr. Ruck was on probation, there was no pending criminal action against him, as he had already entered a guilty plea and was given a sentence. The State refers to

concerns that Mr. Ruck had violated his probation by seeking to procure a firearm – no charges have been filed against him. The State refers to evidence of travel and financial activities potentially in violation of Mr. Ruck's probation agreement – over a year later, not a single action has been filed against him for a probation violation, despite the fact that Mr. Ruck admitted to undocumented travel. R. Vol. II, p. 157. Mr. Ruck has been charged with no crime or probation violation nor are there currently charges awaiting him. As to his criminal trial, that too is closed. Mr. Ruck has already pled guilty in his criminal case, therefore there is no criminal action left undecided. Despite the evidence that the State claims necessitated the seizure of the laptop, there is no action pending for violating his probation agreement.

In the initial civil Rule 41(e) motion, Judge Stegner held that the action should be properly raised as part of the criminal case, and transferred the case to Judge Kerrick to decide if he should hear it in the criminal court. This left the decision to Judge Kerrick to decide which court was the appropriate forum to hear MLDC's Rule 41(e) motion. Judge Stegner's reasoning was that because Mr. Ruck was still on probation, there existed a criminal action pending against him. The District Court erred in this belief for two reasons: 1) To be on probation is not a pending criminal action, but rather a separate action to be treated as such, and 2) in the event a violation of Mr. Ruck's probation agreement were to be prosecuted, it would be said that such criminal action would be "pending". To have an action pending in an action pending would be nonsensical. The criminal case was closed. The defendant was charged, pled guilty, sentenced, placed on probation, and the time for any available post-conviction relief has expired.

Most of all, there was no pending action against MLDC. MLDC was not a defendant to Mr. Ruck's criminal case. MLDC is a third party to the action and is affiliated with Mr. Ruck only as his employer. MLDC's grievance lies only with the illegal seizure by the State. It has no interest in Mr. Ruck's matter whatsoever, thus involving the probationer's case seems inappropriate.

Due to the lack of any action pending against either MLDC or Mr. Ruck, there is no appropriate forum in the criminal court for MLDC to file an I.C.R. 41(e) motion and it must be filed as a civil action. Therefore, this Court should remand the case to the criminal court with an order to transfer it back as a civil case in the court where it was originally filed.

B. MLDC'S RIGHTS WERE NEGATIVELY IMPACTED WHEN MR. RUCK WAS DENIED HIS RIGHT TO PROCEDURAL DUE PROCESS BY THE RESPONDENT'S FAILURE TO FOLLOW IDAHO CRIMINAL RULE 49(a).

Because this motion has been forced into a criminal, rather than civil case, the defendant, Mr. Ruck, must be given notice of any action by the State of Idaho. By denying Mr. Ruck or his attorney of record, James E. Siebe, notice of the motions and filings in this matter, he was denied his due process rights, because he was not given an opportunity to object to the action. Additionally, the fact that the State did not feel compelled to serve notice upon Mr. Ruck or his attorney is indicative that this I.C.R. 41(e) motion has not been filed in the appropriate forum.

Idaho Criminal Rule 49(a) states that, "Written motions, other than those which may be

properly heard ex parte, written notices, and similar papers shall be served upon each party and filed within the time and in the manner provided by the civil rules." Idaho Crim. R. 49(a). To deny a party to an action notice to that action deprives him of his due process rights under the 14th Amendment of the United States Constitution and Article I, § 13 of the Idaho Constitution. Article I, § 13 states in part that a defendant shall "have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend in person and with counsel." Idaho Const. Art. I, § 13. By not providing Mr. Ruck notice, he lacked the opportunity to appear with counsel. This placed him in a position unable to defend himself in a matter of record that has unknown potential to result in future disciplinary action or incarceration. Judge Kerrick in his order stated in footnote #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...

R. Vol. II, p. 245. The determination that now somehow MLDC's counsel was at some point the counsel for Mr. Ruck in the criminal matter was completely erroneous. Mr. Ruck's initial counsel James Siebe is still the attorney of record and no notice of appearance was made by MLDC's attorney at any time for Mr. Ruck. The result is that Judge Kerrick effectively forced representation for Mr. Ruck on MLDC's counsel, to the detriment of both parties. Not only does MLDC have no interest in defending Mr. Ruck; their interests are divergent. For example, since MLDC is the owner of the laptop, Mr. Ruck may not have standing to challenge a search. There

may be a determination in Mr. Ruck's own closed criminal case, in which his attorney was not provided notice or the chance to defend, argue, or even advise his client.

The Idaho Supreme Court has held that "the due process guarantees derived from the two constitutions are substantially the same." *Bell v. Idaho Transp. Dept.*, 262 P.3d 1030, 1035 (Idaho 2011). When the Court is facing a procedural due process argument, they must consider three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). The failure to give notice per I.C.R. 49(a) and the District Court's imputation of representation negatively impacts both Mr. Ruck and MLDC because it could hamper MLDC's ability to prove its case through representation without putting Mr. Ruck in a more precarious position.

As to the second factor, neither Mr. Ruck nor MLDC required any additional safeguards, but rather simply those that are already in place – in place to protect the procedural due process rights of the accused or aggrieved.

Finally, the government is hardly burdened by following rules currently in place. All that is required is that they simply send notice and a copy of filings and motions relevant to the liberty interest of Mr. Ruck, which is potentially put in jeopardy by the search of the laptop.

Even if the laptop is searched and no evidence of a probation violation is found, MLDC's, Mr. Ruck's, and the whole of the citizenry of Idaho's liberty interest is compromised simply by the fact that the limits on a government that is already unlawfully searching and seizing property are truly unknown.

C. MLDC'S RIGHT TO BE FREE FROM UNREASONABLE SEARCH AND SEIZURE UNDER BOTH THE 4TH AMENDMENT OF THE UNITED STATES CONSTITUTION AS WELL AS ARTICLE I, § 17 OF THE IDAHO STATE CONSTITUTION WAS VIOLATED BY THE SEIZURE AND PENDING SEARCH OF THE CORPORATE LAPTOP.

1. MLDC did not surrender either its 4th Amendment rights or its rights under Article I, § 17 of the Idaho State Constitution by allowing Mr. Ruck access to the tools required for his employment.

The fact that a third party employs a probationer, and allows him to use their equipment, does not automatically subject the third party to the same limitations on its fundamental rights as those placed on the probationer himself. To do so would not only be disastrous to those on probation attempting to get on their feet and improve their lives, but also endanger the liberties of all Idahoans and Idaho entities. The Idaho Court of Appeals has expressed concern over this very issue:

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.

State v. Turek, 250 P.3d 796, 801 (Idaho App. 2011), (citing *Roman v. State,* 570 P.2d 1235, 1243 (Alaska 1977), 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)). The laptop is the property of MLDC. MLDC did not sign the employee's probation agreement. MLDC never waived its constitutional rights.

The fact that MLDC allowed Mr. Ruck to use the corporate laptop does not diminish the protections MLDC receives in its own property. The Fourth Amendment protects "people, not places." *Katz v. U.S.,* 389 U.S. 347, 351 (1967). In *Katz*, the Court established that a 4th Amendment protection is applied in any action where there is an actual invasion of privacy, and that expectation of privacy would be considered reasonable by society. *Id.* Corporations also are able to claim 4th Amendment protections. *G.M. Leasing Corp. v. U.S.*, 429 U.S. 338, 353 (1977).

The Supreme Court of Idaho made clear the expectations of an innocent third party to be free from government interference in his affairs, "Perhaps the most important attribute of our way of life in Idaho is individual liberty. A citizen is free to stroll the streets, hike the mountains, and float the rivers of this state without interference from the government. That is, police treat you as a criminal only if your actions correspond." *Idaho v. Henderson*, 756 P.2d. 1057, 1062

(Idaho 1988). MLDC has not engaged in criminal behavior and has not forfeited its rights by allowing an employee probationer to use a work computer for lawful, professional purposes.

An actual invasion of privacy is a subjective standard. It can more readily be seen when a person engages in attempts to protect something or limit its view from the public eye. Whether or not the expectation is reasonable is an objective standard. In other words, "the individual's expectation, viewed objectively, [must be] 'justifiable' under the circumstances." *Smith v. Md.*, 442 U.S. 735, 740 (1979). The Ninth Circuit has held that there is "a reasonable expectation of privacy in password-protected computer files." *U.S. v. Heckenkamp*, 482 F.3d 1142, 1146 (9th Cir. 2007) citing *Trulock v. Freeh*, 275 F.3d 391, 403 (4th Cir. 2001). The Ninth Circuit also held that "the act of attaching his computer to the network did not extinguish his legitimate, objectively reasonable privacy expectations." *Heckenkamp,* 482 F. 3d at 1146. It also does not waive a person's constitutional protections to allow another person physical access to a computer, "[T]he mere act of accessing a network does not in itself extinguish privacy expectations, nor does the fact that others may have occasional access to the computer." *Id.* at 1146-1147, citing *Leventhal v. Knapek*, 266 F.3d 64, 74 (2d Cir. 2001).

MLDC has a protected 4th Amendment and Article I, § 17 right in the seized laptop. MLDC has shown an invasion of their privacy under a subjective standard by placing a password on the laptop, specifically outlining privacy protection measures in their employee handbook, and immediately requesting the return of the laptop. R. Vol. II, p. 182. The Ninth Circuit in *Heckenkamp* expressly stated that a password protected computer has a reasonable expectation of

privacy, meeting the objective test in *Katz*. Therefore, the protections placed on the laptop by MLDC has met both the subjective and objective standards necessary under *Katz* to establish a reasonable expectation of privacy and 4th amendment protection to MLDC.

Therefore, because MLDC, not Mr. Ruck, is the uncontested, uncontroverted owner of the computer, MLDC is given constitutional protections in its property. The end result is that although the laptop was seized from Mr. Ruck's home, it is MLDC that is protected, not the place where the laptop was seized.

2. The District Court erred in finding that the Parole and Probation Officers had reasonable suspicion sufficient to place a search and seizure of the laptop within the probation agreement.

A person subject to a probation agreement is under a relaxed standard when it comes to the strength of his 4th Amendment rights. However, that relaxed standard is not a complete waiver, "The permissible bounds of a probation search are governed by a reasonable suspicion standard." *U.S. v. Davis*, 932 F.2d 752, 758 (9th Cir. 1991). In order to fall under the probation agreement, officers must have had reasonable suspicion that Mr. Ruck owned, possessed, or controlled the laptop. They have not made such a showing.

Mr. Ruck is not the owner of the laptop. He stated so at the time of its seizure. However, the fact that Mr. Ruck told officers that he was not the owner of the laptop does not instantly close the inquiry, "[s]uch a rigid rule would unnecessarily bind the officer to the answer given,

regardless of its veracity." *Id.* at 760, (quoting *People v. Britton*, 156 Cal.App.3d 689, 701 (1984)).

"[Q]uestions of ownership, possession, or control may rise to a level requiring law enforcement officers to inquire into ownership, possession, or control in order to develop the reasonable suspicion necessary to justify the search of the item..." *Davis,* 432 F.2d at 760. In other words, under the totality of the circumstances, officers must take any assertion of ownership of the property into consideration amongst the other factors in establishing whether or not there is reasonable suspicion for a search.

The State cannot claim that it had reasonable suspicion that Mr. Ruck was the owner of the laptop. Mr. Ruck informed them that MLDC was the rightful owner of the laptop. While that alone isn't enough to protect it from search, the fact that the laptop was found in a backpack belonging to MLDC that also contained work related travel vouchers, government contracts, discount and business cards in MLDC's name, a camera owned by the corporation as well as a "Thrifty Corporate Rate Plan" specifically labelled as belonging to MLDC in the property receipt taken during the seizure is enough to demonstrate that the property did in fact belong to MLDC. R. Vol. II, p. 168-170. Mr. Fitt-Chappell, the president of MLDC, stated that he was under the belief that Mr. Ruck was allowed to travel for work. R. Vol. II, p. 193, L. 19, 20. Were it simply evidence of travel or other email evidence officers were seeking, such evidence, if it exists, might potentially be found in any number of other computers in the residence which remain to this day untouched. R. Vol. II, p. 170.

Mr. Ruck may well have had physical possession of the laptop, but lacking an ownership interest, he is not the sole possessor. As the legal owner, MLDC also has constructive possession of the laptop. Likewise, now lacking both physical possession and ownership over the laptop, Mr. Ruck has no control over it whatsoever, and cannot be governed by Mr. Ruck's 4th amendment waiver.

It would be a dangerous holding indeed to say that a person's mere physical possession of property would automatically make it subject to that probationer's 4th Amendment waiver. Such a holding would endanger the rights of every person who allowed a probationer with compromised 4th Amendment rights to borrow property, or in some cases even step foot in an office. Corporations can only ever physically hold property through its agents. If a corporation surrendered property rights by having an agent hold its property, then corporations would never have fourth amendment rights. This clearly isn't the case because courts have uniformly ruled that corporations do have fourth amendment rights. *G.M. Leasing Corp. v. U.S.*, 429 U.S. 338, 353 (1977).

However, even assuming arguendo that a Court could find that officers had reasonable suspicion of the laptop, and that Mr. Ruck did in fact have both possession and control of the laptop, there has yet to be a search; rather there has been only a seizure, something not contemplated in the 4th Amendment "search" waiver portion of the probation agreement. Regardless, Mr. Ruck no longer has possession or control of the laptop. This alone takes the potential for a search of the laptop out of the exception to the warrant requirement given by the

probation agreement. Given that the State has had over a year to secure a search warrant, they should be compelled to do so, rather than to be incentivized and rewarded to conduct illegal searches and seizures in the future.

3. <u>The District Court erred in finding that Mr. Ruck had the authority to consent to the search and seizure of the laptop.</u>

a. Mr. Ruck had neither actual, nor apparent authority to consent to a search or seizure of the laptop.

Unless there is a noted exception, warrantless searches are *per se* unreasonable and thus unconstitutional. *State v. Bottelson*, 625 P.2d 1093, 1095 (Idaho 1981). An accepted exception to the warrant requirement is when consent is given. *State v. Harwood*, 495 P.2d 160, 163 (Idaho 1972). Consent need not be given by the defendant himself but may be acquired from a third party with sufficient authority over the premises or item searched. *U.S. v. Matlock,* 415 U.S. 164, 171 (1974). The standard for measuring the scope of a consent to search is that of objective reasonableness. *Florida v. Jimeno,* 500 U.S. 248 (1991). Therefore, the 4th Amendment waiver is not an open door to search anything that happens to be within the four walls of his residence; any search must fit within the reasonable scope of the consent given.

There are two forms of authority a person may have: apparent and actual. Apparent authority exists when an officer reasonably, even if erroneously, believes, based on the totality of the circumstances known at the time, that the third party possessed authority to consent. *Georgia v. Randolph,* 547 U.S. 103, 109 (2006). "Actual authority exists if the third party shares

with the defendant 'common authority over or other sufficient relationship to the premises or effects sought to be inspected.'" *State v. Brauch*, 984 P.2d 703, 707 (Idaho 1999). Common authority isn't a simple property right but is based 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..." *Matlock*, 415 U.S. at 171.

Simple authority to use property does not bring with it actual authority to consent to a search of that property. "Even a spouse may not have actual authority to consent to a search of property owned by the other if the spouse has no right or ability to control or access the item." *State v. Reynolds,* 197 P.3d 327, 334 (Idaho App. 2008). The Court has applied this to computers in *State v. Aschinger*, 232 P.3d 831, 835 (Idaho App. 2010). Although the Court in *Aschinger* specifically refers to the ability of a person to access only certain files and not others on a single computer, it can be applied to express limits on an authorized user's ability to use a computer that he does not own.

The mere location of the property within the control of Mr. Ruck does not bring with it automatic apparent authority for a consent of its search, nor does the location of the property in his residence or the corporate backpack. "The shared control of 'host' property does not serve to forfeit the expectation of privacy in containers within that property." *Reynolds,* 197 P.3d at 334, (citing *U.S. v. Welch*, 4 F.3d 761, 764 (9th Cir. 1993)). In other words, allowing access to the backpack doesn't give consent to the search of the laptop inside. "Courts have uniformly agreed

that computers should be treated as if they were closed containers." *U.S. v. Al-Marri*, 230 F. Supp. 2d 535, 541 (S.D.N.Y. 2002). The question of the existence of apparent authority must be taken on the whole, and lack of ownership would certainly be a major factor is deciding whether the probationer had authority to consent to the search.

The fact that the laptop was discovered in MLDC's backpack, as well as in his residence, does not in itself confer upon Mr. Ruck authority to consent to its search and seizure. Because Mr. Ruck cannot, "permit inspection in his own right," he lacks common authority. The Probation Department testified that Mr. Ruck informed the Probation Officers the laptop did not belong to him, but rather his employer. R. Vol. II, p. 202, L. 25, p. 203, L 1, 2. This removes from the State the ability to claim that an erroneous belief that Mr. Ruck had authority. Because they cannot now make that claim in good faith, they cannot claim he has apparent authority. MLDC's employee handbook expressly disallowed Mr. Ruck the authority to provide the password to anyone, naming government agents especially. R. Vol. II, p. 182. Therefore Mr. Ruck had neither apparent nor actual authority to consent to the search or seizure of the laptop.

Arguably, one could understand how, in making an immediate decision, the State made a reasonable mistake, and officers could possibly conduct a search of the computer on-site. However, because there was no search, only an unlawful seizure, the court has the benefit of hindsight and the ability to give deference to both the United States Constitution and the Idaho Constitution, and protect the constitutional rights of Mr. Ruck's employer to be safe from an unlawful search.

b. Once the laptop had been removed from Mr. Ruck's residence, it became outside the scope of consent in his 4th Amendment waiver.

In addition to the fact that Mr. Ruck could not consent to the search or seizure of the laptop while at his residence, he certainly does not have the authority, apparent or actual, to consent to any search at the present time. Thus, even if the court finds that mere possession can trigger a search of the laptop, Mr. Ruck no longer has possession, meaning that the ability of the State to claim that mere possession gives a right to search the laptop has ended. The laptop has been illegally seized. Mr. Ruck now lacks any access or control over the laptop. Mr. Ruck's probation agreement only states that the probationer shall consent to a search of his:

(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.

R. Vol. II, p. 166. [numbers and spacing added]. Because, the laptop clearly does not fall within these five categories, it is not subject to seizure or search, especially after it is no longer present with his person, residence, or vehicle.

Since MLDC expressly disallowed any actual authority to Mr. Ruck through the

employee handbook, the State can only argue that Mr. Ruck retains apparent authority to allow for the search, or that the search is still allowable under the probation agreement. However, since the laptop has yet to be searched, and the State has had over a year to provide a factual scenario to allow for a constitutional search, they cannot now argue that Mr. Ruck still could have any authority to consent to a search. It would be a travesty of justice for this Court to allow past mistakes of fact to justify the completion of an otherwise unlawful act that has not yet begun with the search of the laptop.

In order to have apparent authority an officer must reasonably, even if erroneously, believe based on the totality of the circumstances known at the time, that the third party possessed authority to consent. *Georgia v. Randolph,* 547 U.S. 103 at 109. That authority can come from a probation agreement waiving certain rights. *State v. Barker*, 40 P.3d 86 (Idaho 2002). In *Barker*, a 4th Amendment waiver was used to grant officers access to the area where the third party probationer resided. Due to a multitude of factors, the Court found that officers were able to show a reasonable belief under the totality of the circumstances that the probationer had common authority over a fanny pack belonging to the defendant. *Id.*

The District Court based its ruling denying MLDC's motion for return of the laptop largely upon finding the present case analogous to *Barker.* R. Vol. II, p. 250. However, the factual scenario in *Barker* is quite different from the one before this Court. In *Barker*, the probation department used a probationer's 4th Amendment waiver to conduct a search that involved a drug dog while the probationer was not present. The drug dog alerted officers to a

fanny pack holding methamphetamine, belonging to the probationer's girlfriend. The fanny pack was in the probationer's bedroom without any means of identifying it as belonging to the girlfriend. The fanny pack did contain methamphetamine. The Court held that it was reasonable to believe at the time that the fanny pack belonged to the probationer, making the search legal.

The facts before the Court in the present case are different because the drug dog in *Barker* alerted officers to the drugs in the fanny pack, whereas there is no convincing evidence of illegal activity that could be found in the computer. The computer had a password protecting it, unlike the fanny pack, which had been left in the open on the probationer's bed. In *Barker*, the probationer's girlfriend, the true owner of the fanny pack, stated that it belonged to her, but only after independent probable cause for its search had been created by the alert from the drug dog. In other words, officers knew there were narcotics in the fanny pack before they even opened it. Here, the State cannot claim knowledge that there is evidence of a probation violation or criminal actions within the computer.

Finally, the search of the fanny pack was conducted on-site, where the probation agreement 4th amendment waiver still applied, as opposed to the present matter where there was a seizure instead of a search, with intent to search off-site. The parallels between these cases are thin at best. The distinctions, however, are clear.

The record in the District Court is clear. MLDC immediately came forth to claim ownership of the laptop, as well as to revoke any apparent consent to a search or seizure of their property. The State cannot claim a reasonable belief exists to conduct a search, now that the

State has had the opportunity to view the employee handbook, which states that Mr. Ruck cannot give access to the computer. The State may be able to claim a good faith error during the initial seizure of the laptop. However, the laptop has not yet been searched. Even if there is found to be a lawful seizure, authority must be shown at the present time in order to conduct a search that falls into the exceptions to the warrant requirement. If an officer is unaware as to whether the third party has actual authority for the search and seizure, he may find apparent authority if the circumstances are right. However, knowing that the third party lacks actual authority, with the luxury of hindsight, the State cannot now claim that Mr. Ruck has apparent authority because it is impossible to reasonably believe that he has any authority at all.

The probation agreement signed by Mr. Ruck includes language limiting his 4th Amendment right in regard to searches. However, 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." *U.S. v. Carey*, 172 F.3d 1268, 1274 (10th Cir. 1999).

The situation before the Court is analogous to that in *Carey.* In that case the defendant consented to a seizure of his property "if said property shall be essential in the proof of the commission of any crime." *Id.* The 10th Circuit held that the consent to seize the defendant's computer did not shield the government from the need to secure a warrant to search the computer

when it was taken off-site. The probation agreement itself states that the probationer consents to the search of "his" personal property. The only property which Mr. Ruck is not the legal owner of that he has consented to a search of under his probation agreement is "real property" for which he is, "the controlling authority". R. Vol. II, p. 166. Mr. Ruck is not the legal owner of the laptop. Additionally, even if the court were to construe property that he is not the legal owner of as being within the 4th Amendment waiver, the words, "the controlling authority" would not give him that power to consent to a search. The term, "***the*** controlling authority" implies that there can be only one controlling authority whereas, "***a*** controlling authority" would allow for there to be more than one [emphasis added]. Mr. Ruck is neither the legal owner, nor the controlling authority of the laptop – MLDC is. This fact was uncontested by the State at the hearing. With the laptop out of his possession, use, and without any authority whatsoever, any authority Mr. Ruck may have had to consent to a search or seizure must subjugate itself to MLDC's superior authority.

Therefore, because the laptop is out of the probationers home and out of Mr. Ruck's physical possession, the 4th amendment waiver from which the State derives its consent does not apply to the laptop. The laptop and it's contents must be returned to MLDC.

c. Any authority to consent to search or seizure given by MLDC to Mr. Ruck has been revoked, forbidding a search of the laptop.

Even if Mr. Ruck did have the authority to consent to the search and seizure of the laptop,

that authority has been expressly revoked by MLDC. When a warrantless search is conducted using consent as the exception, the scope of the consent remains a limiting factor: 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*, 186, P.3d 696, 705 (Idaho App. 2008). The consent begins and ends with the grantor, allowing him to revoke that consent at his leisure. This principle extends to the person granting authority to another. If officers were to begin a search after receiving consent from person X, the person who granted authority to person X can remove that authority, ending the search.

Several courts have upheld this principle in practice, allowing for actual authority to be revoked after a search has begun. "A consent to search is not irrevocable, and thus if a person effectively revokes ... consent prior to the time the search is completed, then the police may not thereafter search in reliance upon the earlier consent." *U.S. 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))

The laptop has been seized illegally. However, even if the Court holds that the seizure of the property has not been done unlawfully, no search of the laptop has been conducted. Any consent to the search of its laptop has been revoked by MLDC. If Mr. Ruck were found to have authority to consent at the time of seizure, that authority has since been clearly revoked prior to the search, since no search has even been conducted yet. Any consent Mr. Ruck has given, may offer, or protection he may be deemed to have waived is invalid and irrelevant; therefore the laptop must be returned to MLDC.

4. **The search and seizure of the laptop are unlawful due to pretextual "stalking horse" practices designed to gain access to information in the corporate laptop rather than evidence of parole violations by Mr. Ruck.**

Officers cannot violate the fundamental rights of a third party by going through the compromised protections of another. If it is the third party whom the officers wish to engage in a search or seizure of, they must first seek out a warrant. Here, the State has sought out evidence against MLDC through subterfuge by using Mr. Ruck as a smoke screen, or as the Appellate Court has referred to it, a "stalking horse". *State v. Misner*, 16 P.3d 953, 957 (Idaho App. 2000). That Court provides an example of a "stalking horse" as when, "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." *Id.* That scenario is almost exactly what has happened here.

At any point that a government agent can get a warrant to execute a search or seizure, one should be applied for, "We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure." *Terry v. Ohio*, 392 U.S. 1, 20 (1968). Idaho courts have restated this position, "Warrantless searches are presumptively unreasonable." *State v. Woolery*, 775 P.2d 1210, 1212 (Idaho 1989). Being presumptively unreasonable, "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." *State v. Anderson*, 95 P.3d 635, 637 (Idaho 2004). In *Anderson*, the Court found a warrantless search reasonable, however, that search was against the probationer. In our case, the seizure and pending search are against a noncriminal third party (MLDC).

Through the probation agreement, officers have attempted to use Mr. Ruck's waiver of his 4th Amendment right "concerning searches," to seize third party property with the intent to unlawfully search the property off-site. Mr. Ruck is the "stalking horse" used by the State in order to bypass the warrant requirement to search MLDC's property. There were multiple computers in Mr. Ruck's home, yet it was MLDC's laptop that was seized. The illegally seized laptop was to be used specifically as a work laptop, not for his personal use. The State claims that the laptop was seized because it was found in MLDC's backpack along with the other evidence of travel. However, this is unpersuasive, as it is certainly not unusual that a work laptop would be taken to and from work in a backpack. If gaining access to email and financial records was the goal of the State's investigation, then there would be other constitutional avenues available to them.

If the State was genuine in its concern, it would have searched the other computers in Mr. Ruck's residence as well, something the State can even do now under his probation agreement. Instead, the State continues to resist the return of the solitary computer that Mr. Ruck does not have control, nor authority to use for personal purposes and continues to go after MLDC's work computer that contains privileged documents, sensitive but not classified documents (SBUs), and

other information general to the federal contracting business. The State maintains its resistance without making an effort to simply secure a search warrant or use any other routine investigative techniques to discern whether or not Mr. Ruck travelled outside of the state. The State failed to take five minutes on-site with Mr. Ruck to check his email and the contents of the computer to look for evidence of probation violations.

Ultimately, there are other methods which the State could have used to search MLDC's laptop without violating the Bill of Rights or the Idaho State Constitution. To allow the State to use a probationer as a "stalking horse" endangers and dilutes the constitutional rights of all Idahoans who associate with probationers on a personal or professional level by offering them work, friendship, or help.

5. The probation agreement gives only the authority to search property; it does not give authority to seize property.

The probation agreement signed by Mr. Ruck allows for searches of particular property. The probation agreement does not allow for seizures, especially seizures of password-protected laptops, without direct evidence of criminal violations contained within. Without reasonable suspicion, any search or seizure of the laptop is beyond the scope of Mr. Ruck's probation agreement.

The Supreme Court of the United States has repeatedly held that the 4th Amendment protection to be free from unreasonable search and seizure applies to two different legal

concepts. These holdings do nothing more than reinforce the plain meaning of the two words. "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *U.S. v. Jacobsen*, 466 U.S. 109, 113 (1984).

There is some overlap between the concepts of search and seizure, however, a search does not necessarily require a seizure, and a seizure does not necessarily involve a search. For example, during a *Terry* stop, an officer might seize a backpack temporarily for purposes of officer safety by moving it out of the immediate area of control of the person subject to that search, thereby denying that individual dominion over his backpack. However, such a seizure does not require a search of the backpack. Similarly, an officer might search that same backpack without denying the individual dominion over the backpack. An individual retains dominion and control over the backpack by having the power to revoke consent to the search.

When the terms of a contract are ambiguous and each interpretation is reasonable, a court should interpret the contract against the drafter. *USA Fertilizer, Inc. v. Idaho First Nat. Bank,* 815 P.2d 469, 472 (Idaho App. 1991). By interpreting any ambiguous term against the drafter, the weaker party is protected from a stronger party benefitting from their own mistakes. It is especially important that such a position is upheld regarding the waiver of fundamental constitutional rights.

The revised agreement of supervision signed by Mr. Ruck expressly stipulated consent to a **search** of, "his/her person, residence, vehicle, personal property, and other real property...".

R. Vol. II, p. 166. This is followed again by the statement that, "[t]he defendant waives his/her Fourth Amendment Rights concerning **searches**." [Emphasis added] R. Vol. II, p. 166. At no point in the agreement is the word seizure used. This is likely intentional, as the burden on a probationer of having his property arbitrarily seized would be especially onerous to a probationer attempting to thrive in society, especially when it is the tools of his trade being seized. In this case, the State has taken liberties to seize property and expand its power regardless of the cost to society and effect on public policy.

While perhaps not legally, Probation Officers could have physically searched the laptop on-site after receiving the password. If the State asserts that they were given consent to search the laptop, then they should have searched it on-site, as a consensual search would not require a seizure of the property. Instead the State went outside the clear scope of the probation agreement by completely removing the laptop with no idea what was stored on the computer's hard drive.

The contract was drafted by the State and did not include language allowing for the seizure of the property. The contract must be interpreted against the drafter and always with an intent to err on the side of protecting the rights of Idahoans. Because there is no power to arbitrarily seize property within the scope of the agreement, the property must be returned to MLDC.

D. THE DISTRICT COURT ERRED BY DENYING MLDC'S MOTION FOR THE RETURN OF THE LAPTOP UNDER IDAHO CRIMINAL RULE 41(e) BECAUSE RESPONDENT CANNOT MEET THE BURDEN OF PROOF TO JUSTIFY RETAINING THIRD PARTY PROPERTY.

1. The burden of proof is on the State to prove that Mr. Ruck could consent to the search and seizure of the laptop.

Idaho Criminal Rule 41(e) allows an aggrieved party to move for a return of unlawfully seized property. Since there is no Idaho case law involving Rule 41(e), "we consider federal cases interpreting a similar provision of the federal rule." *Idaho v. Meier,* 233 P.3d 160, 162 (Idaho App. 2010). Idaho Criminal Rule 41(e) has an analog in Federal Rule of Criminal Procedure 41(g) which also allows for an aggrieved party to move for illegally seized property. Fed. R. Crim. P. 41(g).

In *Meier*, the Court outlined precisely when the burden of proof for returning property shifts to the State for keeping the property for evidentiary purposes. "The burden of proof in a 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. If a movant has not been charged with a crime, then the time for filing an application for post-conviction relief never existed and is expired *ab initio.*

MLDC has not been charged with any crime. The State therefore cannot assert that the burden for the return of the property has not shifted to the State. The time for post-conviction

relief expired at the onset, as there was never an investigation, trial, or conviction of MLDC. Additionally, Mr. Ruck's possibility of post-conviction relief had long since expired well before the seizure. The State must meet the burden of proof to hold the laptop or return it under Rule 41(e).

2. MLDC has met any burden of proof to show that Mr. Ruck could not consent to the search and seizure of the laptop.

Even if the Court found that the burden of proof for the return of the laptop under Rule 41(e) were upon MLDC, MLDC has met that burden. Idaho Criminal Rule 41(e) requires only that there be a showing of an unlawful seizure and that the movant is entitled to lawful possession of the property.

The first portion of Rule 41(e) has been met several times over. The property has been seized illegally. The property was taken without a warrant. There are no warrant exceptions available to the State. The seizure goes beyond the power available to the State of Idaho in Mr. Ruck's 4th Amendment waiver. The seizure goes beyond the scope of the consent in the probation agreement. Mr. Ruck lacked the authority to give consent to the search or seizure of the laptop. Furthermore, any possible consent was revoked by the true owner, MLDC, after the seizure.

The second portion of Rule 41(e) has also been met. Mr. Fitt-Chappell, the president of MLDC, testified that the laptop was the property of MLDC. R. Vol. II, p. 188, L. 11, 12. The

Probation Officer even admitted that Mr. Ruck informed them the laptop belonged to his employer. At no point has the State challenged the assertion that legal title to the property rests with MLDC. Because both of these requirements have been met, the State is required by law to return the property to MLDC.

3. The good faith warrant requirement exception does not apply to Idaho Criminal Rule 41(e) proceedings.

The State illegally seized third party property. It has done so despite the fact that Mr. Ruck had no right to consent to the search or seizure of the laptop. Even in the event that the State has taken the property in good faith reliance on its error, no such exception applies to prevent the return of the property under Idaho Criminal Rule 41(e).

Generally, evidence gathered through violations of the 4th Amendment has been made subject to the exclusionary rule, barring its admission. *Weeks v. U.S.*, 232 U.S. 383 (1914) The rule was later extended to the states. *Mapp v. Ohio*, 367 U.S. 643 (1961). Later, the Supreme Court applied the good faith exception to the exclusionary rule. *U.S. v. Leon*, 468 U.S. 897 (1984). The good faith exception was later applied to Federal Rule of Criminal Procedure 41(e) by the Ninth Circuit. *Center Art Galleries–Hawaii, Inc. v. U.S.*, 875 F.2d 747 (9th Cir. 1989). Federal Rule of Criminal Procedure 41(e) has since become Rule 41(g).

The Ninth Circuit has overturned that ruling and more recently held that the good faith exception does not apply to the exclusionary rule in Federal Rule of Criminal Procedure 41(e)

proceedings. *J.B. Manning Corp. v. U.S.*, 86 F.3d 926 (9th Cir. 1996). The reasoning behind their holding is that the federal rule allowed for, "'reasonable conditions' on the return of property 'to protect access and use of the property in subsequent proceedings.'" *Id.* at 928. The idea was that the court could issue orders to protect or copy evidence and return the property without allowing incriminating evidence gathered in good faith to be lost, preserving the entire purpose of the good faith exception as held in *U.S. v. Leon.*

Idaho Criminal Rule 41(e) does not have the same protections as Federal Rule 41(g) to place those "reasonable conditions" on the return of property. However, even if this Court were to use that reasoning to not follow federal precedent disallowing the exclusionary rule in Rule 41(g) proceedings, Idaho case law has stated that there is no good faith exception to the exclusionary rule involving searches and seizures made in violation of Article I, § 17 of the Idaho State Constitution. In fact, the Idaho Supreme Court expressly rejects the good faith exception as applied in *Leon* by stating that, "evidence illegally seized must be suppressed because to admit it would constitute an independent constitutional violation by the court..." *State v. Guzman*, 842 P.2d 660, 671 (Idaho 1992). The rejection of the good faith exception to the exclusionary rule has been more recently upheld in *State v. Koivu*, 272 P.3d 483 (Idaho 2012).

The laptop was not taken in good faith. However, even if this Court finds that the laptop was taken in good faith, it has since been revealed to the State that they have taken third party property, making a search that may have been reasonable on-site during the visit to be unlawful now. The rightful owner of the illegally seized property has not given his consent to its search or

seizure and in fact has requested its return. The State cannot claim to still be operating in good faith. Yet even if they were, both federal interpretation of the Federal Rule of Criminal Procedure most analogous to Idaho Criminal Rule 41(e), as well as Idaho case law expressly discarding the good faith exception to the exclusionary rule, dictate that the laptop must be returned to its rightful owner.

VI. CONCLUSION

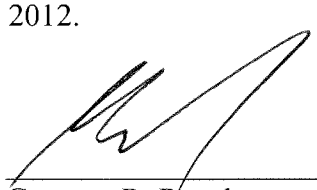
The laptop belongs to MLDC. MLDC did not agree to sign away its most basic right to be free from unreasonable search and seizure simply by hiring an employee who happened to be on probation and providing him the tools necessary to carry out his trade. For this Court to press an innocent third party into such compromised territory as to rob them of their basic rights would be injurious to those attempting to correct their lives after being placed on probation, as it would drastically limit the number of people that would render aid, shelter, or property to them.

More importantly, it would leave the whole of the citizenry of Idaho in a position where their liberty interests would be constantly in a state of flux depending on who they associated with at any given time, since we deal with people with varying backgrounds on a daily basis, oftentimes not knowing that background.

The appellant humbly requests that this Court continue to serve as the aegis of Idahoans' rights under the Fourth Amendment of the Bill of Rights and Article I, § 17 of the Idaho Constitution and reverse the District Court's order refusing to compel the return of the illegally

seized laptop gathered by the violation of MLDC's right to be free from illegal search and seizure.

Respectfully submitted this 18th day of September, 2012.



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