2-26-2013

State v. Bradshaw Appellant's Brief Dckt. 39943

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. JAMES CLAYTON BRADSHAW, Defendant-Appellant.	)	NO. 39943 ADA COUNTY NO. CR 2011-17363 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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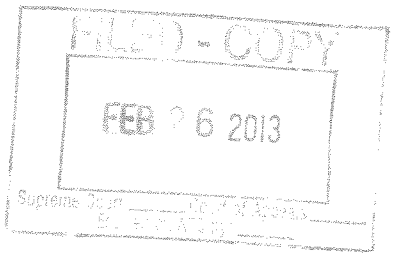

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STATEMENT OF THE CASE

Nature of the Case

James Clayton Bradshaw appeals from his conviction for felony destruction of evidence following a jury trial. On appeal, he asserts that the evidence was insufficient to support the jury's verdict for felony destruction of evidence. In so arguing, he asserts that the Idaho Court of Appeals' decision in *State v. Peteja*, 139 Idaho 607 (2003), in which it interpreted the felony destruction of evidence statute, Idaho Code § 18-2603, was wrongly decided because it relied on public policy considerations and legislative history, rather than the rule of lenity, in expanding the scope of an ambiguous criminal statute. When the statute is properly interpreted, the evidence presented at trial was insufficient to establish Mr. Bradshaw's guilt on the charge of felony destruction of evidence.

Statement of the Facts and Course of Proceedings

James Clayton Bradshaw was charged by Amended Information with, *inter alia*, felony destruction of evidence,[1] alleged to have been committed as follows:

> That the Defendant, JAMES CLAYTON BRADSHAW, on or about the 28th day of October, 2011, in the County of Ada, State of Idaho, did willfully destroy and/or conceal a baggie of white powdery substance knowing that the baggie of white powdery substance was about to be produced, used or discovered as evidence in a felony investigation authorized by law and with the intent to prevent it from being so produced, used or discovered.

(R., p.56.) The matter proceeded to a jury trial.

[1] Mr. Bradshaw was also charged with resisting or obstructing officers, driving without privileges, and a persistent violator enhancement. (R., pp.40-41, 55-56.) Neither the misdemeanor charges nor the enhancement are relevant to this appeal.

The first witness called was Isaiah Wear, a police officer with the Meridian Police Department, who works as "a narcotics canine handler." (Tr., p.199, L.23 – p.201, L.4.) His drug dog, Blitz, "is trained to alert to the odor of marijuana, methamphetamine, cocaine, and heroin." (Tr., p.202, Ls.13-14.) Officer Wear approached Mr. Bradshaw, whom he knew to have a suspended driver's license, after observing him driving a vehicle. (Tr., p.206, L.7 – p.208, L.2.) Mr. Bradshaw was already out of the car at the time of the contact, and Officer Wear informed him that he was being arrested for driving without privileges. (Tr., p.208, L.13 – p.209, L.7.) Officer Wear ordered Mr. Bradshaw "to set the items he had in his left hand down on – on the vehicle, set them down." Mr. Bradshaw eventually complied, placing paperwork and a cell phone on the trunk of his car. (Tr., p.209, L.14 – p.210, L.25.) Mr. Bradshaw maintained "that he was being harassed" and "demand[ed] a supervisor [be called] to the scene." (Tr., p.210, Ls.24-25.) Officer Wear, assisted by Sergeant Harper, who had arrived as back-up, eventually handcuffed Mr. Bradshaw. (Tr., p.211, Ls.6-18.)

After handcuffing Mr. Bradshaw, Officer Wear and Sergeant Harper lifted him to his feet, at which point Officer Wear began a search of Mr. Bradshaw's person, removing the contents of his pockets and placing them on the trunk of his car, near the papers and cell phone. Officer Wear didn't pay particular attention to the items as he removed them from Mr. Bradshaw's pockets, as he planned to examine them later. (Tr., p.212, L.12 – p.215, L.6.)

After emptying Mr. Bradshaw's pockets, Officer Wear and Sergeant Harper "began to lead him toward that [police] car," at which point Mr. Bradshaw "lunge[d] toward the Cadillac." Officer Wear "wasn't sure what he was doing" and "thought he was trying to harm himself" by "headbutting the trunk." (Tr., p.215, Ls.7-22.) Officer

Wear then heard Sergeant Harper "yell out, spit it out" and saw him "grab Mr. Bradshaw by the face and bring him back up." At that point, Officer Wear "could see a bindle, a clear, plastic wrapped item with a white, powdery substance in it, and it was resting at the tip of his lips. And he, then, tilted his head back and ingested the item."[2] (Tr., p.216, Ls.4-20.) The bindle was approximately "a half inch by half inch or so." Officer Wear described it as being consistent with bindles that are commonly used "to package cocaine, methamphetamine, or heroin." (Tr., p.219, L.25 – p.221, L.3.) Describing his thoughts upon seeing the bindle in Mr. Bradshaw's mouth, Officer Wear testified, "My – my number one concern was, if he ingests this material . . . my concern was he could die from it if it bursts open in his stomach."[3] (Tr., p.222, Ls.14-17.)

After placing Mr. Bradshaw in a patrol car, Officer Wear deployed Blitz, "[t]o try to determine what the substance was . . . ." (Tr., p.224, Ls.1-14.) Officer Wear described Blitz as "a trained, certified, drug detecting canine." (Tr., p.225, Ls.19-23.) Blitz is a "dual purpose dog" because he is used for both drug detection and apprehending suspects. (Tr., p.226, Ls.9-16.) The dog receives regular training, and every fifteen months, he must pass an Idaho State Police administered certification program that requires one hundred percent accuracy. (Tr., p.227, L.3 – p.230, L.2.) Blitz is a "passive alert dog," meaning that when he alerts on an odor of one of the four drugs for which he is certified "he sits next to it." (Tr., p.230, L.22 – p.231, L.8.) When asked whether his sitting could be confused with "a regular sit," Officer Wear described his ability to "read" his particular dog "and recognize some of the pre-alerts." Specifically,

> When he gets that odor as he walks by, his head will snap back, his mouth will generally close, unless – unless he's tired or it's hot out, his mouth will

[2] Neither the bindle nor its contents was ever recovered. (Tr., p.223, Ls.5-18.)
[3] The officer who transported Mr. Bradshaw to jail testified that he declined treatment at the hospital and exhibited no medical problems. (Tr., p.252, L.8 – p.256, L.24.)

> close and he'll focus. His ears will be – my dog – I'm describing my dog specifically – his ears will be forward, a lot of times his tail's wagging, and his head moves rapidly toward that source. And, I mean, he shuffles back and forth, his muscle tone will quiver with excitement.
>
> When he sits next to that odor, the way I know he has alerted is he will sit rapidly, sit quick, his head will be low, his ears are forward, his eyes will be wide, they won't blink. He's very intense, he'll have an arch in his back, and he looks like he's getting ready to pounce [on] something. And that will be his reward for finding the narcotics, *the odor of narcotics*, and he's wanting his ball to be rewarded.
>
> Those are the behaviors I look for to confirm that *he has alerted on a narcotic odor.*

(Tr., p.231, L.9 – p.232, L.19 (emphasis added).)

According to Officer Wear, "the canine doesn't necessarily alert on the drug itself, he alerts on the odor." Even when no narcotics are present in a location, the dog will still alert if the odor from narcotics that were present earlier has been absorbed by some item that was once near the narcotics. Such items include paper and cotton balls. "[O]ftentimes, when we get a vehicle where my – my dog has alerted, whether it's on a glove box, a center console, whatever, the odor can still be present even though a narcotic is not." (Tr., p.232, L.20 – p.233, L.20.)

Upon deploying Blitz, Officer Wear "worked in a clockwise rotation, working from the front of the vehicle, around the doors, around the trunks, and back up the driver's side." When Blitz got to the trunk, where the paperwork and objects from Mr. Bradshaw's pockets were located, he "displayed a positive alert to the odor of an illegal narcotic." (Tr., p.235, Ls.4-24.) Blitz is not able to indicate which of the four types of drugs he has been trained on was the source of the odor. (Tr., p.236, Ls.7-16.) Considering Blitz's alert that the odor of one of the four controlled substances for which he was trained was present, Officer Wear "believed it was either methamphetamine or cocaine" because, based on its appearance, it could not have been marijuana or heroin.

(Tr., p.236, L.17 – p.239, L.12.) On cross-examination, Officer Wear acknowledged that sometimes drug dealers sell fake controlled substances to users. (Tr., p.240, Ls.11-23.)

The State then called Shawn Harper, a patrol sergeant with the Meridian Police Department. (Tr., p.276, Ls.11-20.) He testified that possession of either methamphetamine or cocaine is a felony in Idaho. (Tr., p.284, Ls.2-4.) Sergeant Harper's testimony was consistent with Officer Wear's, with the exception of the fact that he believed the substance in the bindle to be methamphetamine, rather than cocaine, because of its granular appearance. (Tr., p.284, L.9 – p.311, L.25.)

Following a jury question concerning the definition of reasonable doubt (Tr., p.397, Ls.10-14), the jury found Mr. Bradshaw guilty of all three charges. (Tr., p.401, L.16 – p.402, L.15.) Following a court trial on the enhancement, Mr. Bradshaw was found to be a persistent violator (Tr., p.422, Ls.15-17), and received a unified sentence of ten years, with two years fixed, on the felony destruction of evidence conviction, with the district court retaining jurisdiction "for evaluative purposes." (Tr., p.446, L.20 – p.447, L.4.) Mr. Bradshaw filed a Notice of Appeal timely from the judgment of conviction. (R., p.106.)

ISSUE

Was the evidence sufficient to support Mr. Bradshaw's conviction for felony destruction of evidence when the statute is interpreted using the rule of lenity?

ARGUMENT

The Evidence Was Insufficient To Support Mr. Bradshaw's Conviction For Felony Destruction Of Evidence When The Statute Is Interpreted Using The Rule Of Lenity

A. Introduction

Mr. Bradshaw asserts that the evidence presented at trial was insufficient to support his conviction for felony destruction of evidence when the ambiguous language of the statute is interpreted using the rule of lenity. He urges a reversal of the Idaho Court of Appeals' opinion in *State v. Peteja*, 139 Idaho 607 (Ct. App. 2003), because, in *Peteja*, the Court of Appeals failed to consider the rule of lenity adopted by the Idaho Supreme Court, instead incorrectly resorting to consideration of public policy and legislative history to broaden the scope of the ambiguous language in the criminal statute.

B. Standards Of Review

1. Statutory Interpretation

Interpreting the meaning of a statute is a question of law over which an Idaho appellate court exercises free review. *Gooding County v. Wybenga*, 137 Idaho 201, 204 (2002) (citation omitted).

2. Sufficiency Of The Evidence

The standard of review for an appellate court regarding the sufficiency of the evidence to sustain a conviction was set forth by the Idaho Court of Appeals in *State v. Peite*, 122 Idaho 809 (Ct. App. 1992), in which it noted,

> A conviction will not be set aside where there is substantial evidence upon which any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. On appeal, we construe all facts,

> and inferences to be drawn from those facts, in favor of upholding the jury's verdict. Where there is competent although conflicting evidence to sustain the verdict, we will not reweigh the evidence or disturb the verdict.

Peite, 122 Idaho at 823 (citations omitted). "For evidence to be substantial, it must be of sufficient quality that reasonable minds could reach the same conclusion." *State v. Johnson*, 131 Idaho 808, 809 (Ct. App. 1998) (citing *Bott v. Idaho State Bldg. Auth.*, 128 Idaho 580, 586 (1996)).

A verdict cannot be the result of speculation or conjecture. *See Ryan v. Beisner*, 123 Idaho 42, 46 (Ct. App. 1992) ("[A] verdict cannot rest on speculation or conjecture.") (citing *Petersen v. Parry*, 92 Idaho 647, 652 (1968)); *Pennsylvania R. Co. v. Chamberlain*, 288 U.S. 333, 344 (1933) (Jury's verdict cannot rest "upon mere speculation and conjecture"); *United States v. Pinckney*, 85 F.3d 4, 7 (2 Cir. 1996) ("[A] conviction cannot rest on mere speculation or conjecture."); *United States v. Pettigrew*, 77 F.3d 1500, 1521 (5th Cir. 1996) ("[A] verdict may not rest on mere suspicion, speculation, or conjecture...."); *United States v. Jones*, 49 F.3d 628, 632 (10th Cir. 1995) ("We cannot permit speculation to substitute for proof beyond a reasonable doubt. Even though rational jurors may believe in the likelihood of the defendant's guilt, as they probably did in this case, they may not convict on that belief alone."); *United States v. Diggs*, 527 F.2d 509, 513 (8th Cir. 1975) ("[A] jury is not justified in convicting a defendant on the basis of mere suspicion, speculation or conjecture."); *United States v. Bethea*, 442 F.2d 790, 792 (D.C. Cir. 1971) ("[T]he trial judge should not allow the case to go to the jury if the evidence is such as to permit the jury to merely conjecture or speculate as to defendant's guilt."); *Karchmer v. United States*, 61 F.2d 623 (7th Cir. 1932) ("A verdict which finds its only support in conjecture and speculation cannot stand.").

C. The Evidence Was Insufficient To Support Mr. Bradshaw's Conviction For Felony Destruction Of Evidence When The Statute Is Interpreted Using The Rule Of Lenity

Idaho Code § 18-2603, in relevant part, provides:

> Every person who, knowing that any book, paper, record, instrument in writing, or other object, matter or thing, is about to be produced, used or discovered as evidence upon any trial, proceeding, inquiry, or investigation whatever, authorized by law, wilfully [sic] destroys, alters or conceals the same, with intent thereby to prevent it from being produced, used or discovered, is guilty of a misdemeanor, *unless the trial, proceeding, inquiry or investigation is criminal in nature and involves a felony offense, in which case said person is guilty of a felony . . . .*

I.C. § 18-2603 (emphasis added).

The language elevating the offense to a felony when the investigation is "criminal in nature and involves a felony offense" was added to the statute in 1983. *Peteja*, 139 Idaho at 611. After examining the legislative history and public policy considerations behind the amendment, the Idaho Court of Appeals has concluded, "[W]e give proper effect to the legislature's intent by interpreting the statute to mean that whether the investigation 'involves a felony offense' depends on whether the evidence that was destroyed, altered, or concealed would have tended to demonstrate the commission of a felony." *Id.* at 612. Nowhere in *Peteja* did the Court of Appeals address the rule of lenity. Mr. Bradshaw maintains that the Idaho Court of Appeals engaged in incorrect statutory interpretation when it considered public policy and legislative history in adopting an expansive reading of the criminal statute, rather than utilizing the rule of lenity.

The Idaho Supreme Court has explained, "It is [a] well settled principal [sic] of law that criminal statutes must be strictly construed." *State v. Thompson*, 101 Idaho

430, 436 (1980) (citations omitted). It has described this principle, sometimes referred to as the rule of lenity,[4] as follows:

> A statute defining a crime must be sufficiently explicit so that all persons subject thereto may know what conduct on their part will subject them to its penalties. A criminal statute must give a clear and unmistakable warning as to the acts which will subject one to criminal punishment, and *courts are without power to supply what the legislature has left vague.* An act cannot be held as criminal under a statute unless it clearly appears *from the language used* that the legislature so intended.

State v. Hahn, 92 Idaho 265, 267 (1968) (citations omitted).

Interpreting a statute concerning victim impact statements, the Idaho Supreme Court described an appellate court's role in statutory construction as follows: "[T]his Court will not deal in any subtle refinements of the legislation, but will ascertain and give effect to the purpose and intent of the legislature, *based on the whole act and every word therein*, lending substance and meaning to the provisions." *State v. Payne*, 146 Idaho 548, 575 (2008) (emphasis added) (brackets in original) (internal quotation marks omitted) (quoting *Ada County Assessor v. Roman Catholic Diocese of Boise*, 123 Idaho 425, 428 (1993)). In rejecting a public policy argument advanced by the State when interpreting the statute providing for time limitations for prosecuting felonies, the Idaho Supreme Court explained, "[S]uch policy arguments should be made to the legislature which has the power to change the statute, and not to this Court." *State v. Barnes*, 124

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[4] The rule of lenity adopted by the United States Supreme Court for use in interpreting federal criminal statutes appears to be less protective of individuals and less concerned with government overreach than the rule adopted by the Idaho Supreme Court. *See Muscarello v. United States*, 524 U.S. 125, 138 (1998) ("The rule of lenity applies only if, after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended.") (citations omitted) (internal quotation marks and ellipsis omitted). Any difference between the federal and Idaho rules of lenity is not surprising in light of the First Circuit's conclusion that "[f]ederal courts have no power to . . . mandate adoption of the rule of lenity." *Butler v. O'Brien*, 663 F.3d 514, 519 (1st Cir. 2011). The United States Supreme Court's version of the rule of lenity is, therefore, not binding on Idaho courts.

Idaho 379, 380-81 (1993), *overruled on other grounds by State v. Maidwell*, 137 Idaho 424 (2002).

Thus, the Idaho Supreme Court has indicated on a number of occasions that the only method by which the legislature's intent in enacting an ambiguous criminal statute may be divined is through an examination of the statutory language, with any ambiguities resolved in favor of the defendant. Resort to legislative history and public policy considerations in order to broaden the scope of an ambiguous criminal statute is, therefore, inappropriate under Idaho Supreme Court precedent.

Over the years, this Court's clear holding as to the appropriate method by which to interpret ambiguous criminal statutes has been weakened by Idaho Court of Appeals decisions in which legislative intent is determined by resorting to the consideration of legislative history and / or public policy.[5] *See State v. Shanks*, 139 Idaho 152, 154 (Ct. App. 2003) (explaining that, in determining legislative intent, "we look to . . . the public policy behind the statute") (emphasis added) (citation omitted); *State v. Escobar*, 134 Idaho 387, 389 (Ct. App. 2000) ("If the [statutory] language is clear and unambiguous, it must be applied according to its plain terms, and there is no need for the court to resort to legislative history or rules of statutory interpretation.") (citations omitted).

Additionally, the Idaho Supreme Court, in a number of appeals involving the interpretation of criminal statutes has mentioned, in *dicta*, that public policy

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[5] In doing so, the Court of Appeals may have been conflating the statutory interpretation of non-criminal statutes engaged in by the Idaho Supreme Court with that for criminal statutes. *See State v. Yzaguirre*, 144 Idaho 471, 475 (2007) (interpreting Idaho's open meetings law, a non-criminal statute, and explaining that "[t]o ascertain legislative intent, the Court examines not only the literal words of the statute, but the reasonableness of the proposed interpretations, the policy behind the statute, and its legislative history") (citing *Carrier v. Lake Pend Oreille Sch. Dist. No. 84*, 142 Idaho 804, 807 (2006)).

considerations and legislative history are appropriate means of ascertaining legislative intent. *See State v. Rhode*, 133 Idaho 459, 462 (1999)[6]; *State v. Burnight*, 132 Idaho 654, 659 (1999); *State v. Schwartz*, 139 Idaho 360, 362 (2003); *State v. Jeppesen*, 138 Idaho 71, 74 (2002); *State v. Yager*, 139 Idaho 680, 690 (2004); *State v. Urrabazo*, 150 Idaho 158, 161 (2010); *State v. Doe*, 47 Idaho 326, 328 (2009). The *dicta*, in all but three of the cases,[7] involved citation to cases interpreting non-criminal statutes. *Rhode*, 133 Idaho at 462 (citing *Messenger v. Burns*, 86 Idaho 26, 29 (1963)); *Burnight*, 132 Idaho at 659 (citing *Corporation of Presiding Bishop v. Ada County*, 123 Idaho 410, 416 (1993)); *Schwartz*, 139 Idaho at 362 (citing *Lopez v. State, Indus. Special Indem. Fund*, 136 Idaho 174 (2001); *Adamson v. Blanchard*, 133 Idaho 602 (1999)); *Doe*, 147 Idaho at 328 (citing *Hayden Lake Fire Protection Dist. v. Alcorn*, 141 Idaho 388, 398-99 (2005)). The situation appears to mirror one concerning another issue of statutory construction that existed in *dicta* in a number of Idaho Supreme Court cases until it was recently clarified when the Court disavowed the *dicta*. *See Verska v. St. Alphonsus Reg. Med. Ctr.*, 151 Idaho 889 (2011) (disavowing *dicta* in dozens of Idaho Supreme Court opinions spanning twenty years implying that it may be appropriate to alter the plain language of an unambiguous statute by considering whether giving effect to the statute as written would lead to palpably absurd results).

One case in which the Court of Appeals has resorted to an examination of legislative history and public policy considerations without even considering the rule of

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[6] Interestingly, in *Rhode*, two sentences before the *dicta* concerning consideration of public policy and legislative history, the Court cited *Thompson*, and explained that, when resolving ambiguities involving "elements or potential sanctions of a crime, this Court will strictly construe the criminal statute in favor of the defendant." *Rhode*, 133 Idaho at 462 (citing *Thompson*, 101 Idaho at 437).

lenity in interpreting an ambiguous criminal statute concerns the destruction of evidence statute. In that case, *Peteja*, the defendant argued that the offense of destruction of evidence should be elevated to a felony only when the investigation at issue began as a felony investigation, thereby rendering the "misdemeanor or felony nature of an investigation . . . fixed at the time that the officer begins the investigation." *Peteja*, 139 Idaho at 611. In rejecting Peteja's proffered interpretation of the ambiguity, the Court of Appeals considered the legislative history and the "public policy underlying statutes criminalizing the destruction of evidence." *Id.* at 611-12. Ultimately, the Court of Appeals explained, "[W]e give proper effect to the legislature's intent by interpreting the statute to mean that whether the investigation 'involves a felony offense' depends on whether the evidence that was destroyed, altered, or concealed would have tended to demonstrate the commission of a felony." *Id.* at 612. Consideration of lenity is completely absent from the *Peteja* decision.

Mr. Bradshaw asserts that *Peteja* was incorrectly decided insofar as the Court of Appeals failed to consider the rule of lenity adopted by the Idaho Supreme Court and improperly resorted to consideration of public policy concerns and legislative history in interpreting the criminal statute's ambiguous language. As such, he respectfully requests that this Court apply the rule of lenity, and conclude that the behavior prohibited by the statute is only elevated to a felony if it occurs while a felony investigation is being conducted.[8] To hold otherwise would violate the rule of lenity and this Court's longstanding jurisprudence.

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[7] Those three cases are *Jeppesen*, *Yager*, and *Urrabazo*. *Jeppesen* cited *Rhode*, *Yager* cited *Burnight*, and *Urrabazo* cited *Doe*. *Jeppesen*, 138 Idaho at 74; *Yager*, 139 Idaho at 690; *Urrabazo*, 150 Idaho at 161.

[8] If this case is assigned to the Idaho Court of Appeals, per Idaho Appellate Rule 108(b), he maintains that, to the extent that the Court of Appeals feels bound by *Peteja*,

Under a proper interpretation of the statute, the facts presented at trial were not sufficient to support his conviction for felony destruction of evidence because the investigation being conducted concerned a misdemeanor charge of driving without privileges. If this Court accepts his invitation to overrule *Peteja* and interprets the statute using the rule of lenity, he asserts that the appropriate remedy is to vacate the judgment of conviction for felony destruction of evidence, and remand this matter for resentencing on a charge of misdemeanor destruction of evidence.

CONCLUSION

For the reasons set forth herein, Mr. Bradshaw respectfully requests that this Court overrule *Peteja*, apply the rule of lenity to interpret Idaho Code § 18-2603, find that the evidence presented at trial was insufficient to support a conviction for felony destruction of evidence, and remand this matter to the district court for sentencing on a misdemeanor charge of destruction of evidence.

DATED this 26th day of February, 2013.

SPENCER J. HAHN
Deputy State Appellate Public Defender

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he submits that its decision was "manifestly wrong" and that adopting the interpretation advanced by Mr. Bradshaw is "necessary to vindicate plain, obvious principles of law and remedy continued injustice." *State v. Sivak*, 119 Idaho 320, 322-23 (1990) (citations and internal quotation marks omitted).

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 26th day of February, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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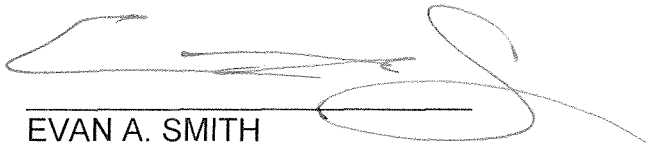

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SJH/eas