

3-19-2013

## State v. Rhall Appellant's Reply Brief Dckt. 39950

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, )  
 )  
 Respondent, )  
 )  
 VS )  
 )  
 ROBERT WAGNER RHALL, III, )  
 )  
 Appellant, )  
 \_\_\_\_\_ )

Case No. 39950-2012  
DISTRICT COURT NO. CR 11 2411

\_\_\_\_\_  
REPLY BRIEF OF APPELLANT  
\_\_\_\_\_

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF JEROME

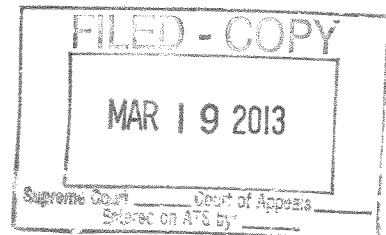
\_\_\_\_\_  
HONORABLE JOHN BUTLER  
District Judge  
\_\_\_\_\_

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### UNITED STATES SUPREME COURT CASES

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## STATEMENT OF THE FACTS

The Appellant did refer to the Appellants dogs being sprayed by a skunk just prior to The subject police stop/search.( Supp. Mot. Tr. Pg.181 ln11-12+22-25 Pg.182 Ln1) This Testimony from Appellant was not contradicted by any of the police officers present. The Lack of keen interest and cueing of Kenzo is clearly supported by Dr. Myers testimony( Suppmo trans pg126-174) and his report.( Exh E)

## COURSE OF THE PROCEEDINGS

The State of Idaho, through the Attorney Generals' Office in their response brief, correctly asserts That Appellants' Opening Brief did not contain a formal designation of the "Statement of Issues " required by Idaho Appellate Rule 35(a)(4). However, compliance with this rule is to be relaxed when the issues raised are supported by argument and authority in the briefs. *State v. Prestwich*, 116 Idaho 959, 961, 783 P.2d 298, 300 (1989), overruled on other grounds, *State v. Guzman*, 122 Idaho 981, 842 P.2d 660 (1992); *Joylene EVERHART, Plaintiff-Appellant v WASHINGTON COUNTY ROAD AND BRIDGE DEPARTMENT*, an independent political subdivision of the State of Idaho; Washington County; and John Does I through V, Defendants-Respondents. 130 Idaho 273, 939 P.2d 849 (Idaho 1997); *STATE of Idaho, Plaintiff-Respondent v Vance WATKINS, Defendant-Appellant*, 224 P.3d 485, 148 Idaho 418 (Idaho 2009) Appellant asserts that the argument and attendant briefing correctly Presented the issues asserted by appellant in this appeal. This Reply brief expressly presents the issues brought for this court's review and attempts to further particularize the factual and legal grounds of this appeal. The Primary policy concern expressed by the appellate

courts and endorsed by Appellant is that both parties have a complete opportunity to develop the factual background and legal arguments relating to Appellant's claim. STATE of Idaho, Plaintiff-Respondent, v Vance A. WATKINS, Defendant-Appellant. 148 Idaho 418 at 423, 224 P.3d 485 (Idaho 2009) If the State of Idaho through its representative Attorney General feels that it Requires additional briefing to respond to any issue raised in either Appellant's Opening or Reply briefs, Appellant has no objection either more time to prepare argument or additional briefing to provide additional authority.

#### ISSUES PRESENTED ON APPEAL

##### I.

ARE THE TRIAL COURTS FINDINGS OF FACT CLEARLY ERRONEOUS AS UNSUPPORTED BY SUBSTANTIAL AND COMPETANT EVIDENCE.

##### II

DID THE TRIAL COURT PROPERLY APPY THE CONSTITUTIONAL PRINCIPLES GOVERNING THE WARRANTLESS SEARCH OF THE BED OF APPELLANT'S TRUCK.

## ARGUMENT

### I.

#### THE CUED WELL TRAINED DRUG DOG IS THE FUNCTIONAL EQUIVALENT OF THE GENERAL WRIT OF ASSISTANCE.

The Trial Court fails to explicitly find the use of "cueing" by Officer Gonzalez as a Precursor to her later claim of an alert by her drug Kenzo. This clearly erroneous ignoring of a constitutionally Prohibited and scientifically invalidating behavior is an avoidance of a key circumstance which Demonstrates error by the trial court and bad faith on the part of police investigators. The fact that Kenzo had so little interest in appellant's truck probably rendered him more vulnerable to distraction, but the reality of the dog's reaction is that he was so little interested in the scent emanating from Appellant's truck as to require clear, aggressive and unreported manipulation ie "cueing". As argued in Appellant's Opening Brief, "cueing" of a well trained drug dog is analogous to the original "writs of assistance," The "writs of assistance" were the unreasonable "hunch writs." and were the definitive exercise of governmental power which motivated the founding fathers to include the Fourth Amendment in the guarantees of individual rights now referred to as the "Bill of Rights" (US Constitution; Amendments One through Ten). Dr. Myer's opinion that any alert by Kenzo was the product of repetitive cueing by Officer Gonzalez is a factual assertion so primary to the Trial Court's ultimate determination of the Totality of the circumstances, that to not include a careful determination of cueings existence and impact renders the factual finding of the impact of "clearly distracted" (Suppmo Memo Decision pg 19) and "not working well"(Suppmo trans pg

19) clearly erroneous. To the extent Kenzo was distracted or not working well his handler's response was to cue him and not report any of these deficiencies in the execution of the free air sniff. She reported an alert to Garcia and admitted neither that Kenzo was not working well nor that he was distracted to any degree. This failure to describe Kenzo's free air sniff as other than producing an immediate alert corroborating Garcias' claim that he smelled raw marijuana continued until cross-examination at preliminary hearing.(Prelim trans pg21 ln5-7) Even under oath the States witness Garcia asserted immediate corroboration.( Prelim trans pg20-21 ln13-7) , although the existence of a video recording of Kenzo's free air sniff soon became evident, it was at the hearing upon appellant's Suppression motion that the trial court was presented with the prosecutions first ever claims of distraction and failure to work.

The trial court's failure to include factual allegations of cueing and the lack of interest by Kenzo is not accompanied by any display of a rational weighing of this evidence that somehow requires its exclusion or mitigation. Rather, it is clear from the record that the only "expert" presented by the Prosecution to contradict Dr. Myers' lifetime of experience in the study of indicator dogs was Officer Janeece Gonzales with her one year as a dog handler. The portrayal of Ms Gonzalez handling of Kenzo by the video recording (Def Exh B) fully supports Dr. Myers' assertion of lack of interest in Appellant's truck by Kenzo and cueing by Officer Gonzalez. Officer Gonzalez failure to report any Defects in Kenzo's free air sniff either immediately to Officer Garcia or eventually through her written Report demonstrates a level of bad faith which brings her credibility into question and renders the Trial Court's Memorandum Decision the product of erroneous factual findings and misapplication of the "totality of the circumstances" constitutional standard.



## II.

### KENZO FAILED TO EXECUTE A SCIENTIFICALLY VALID SEARCH ON DEFENDANT'S TRUCK

The Trial Court's finding that Kenzo's search was "unreliable" is clearly erroneous. It avoids and ignores the central question of whether Kenzo was "cued" and the Why's and impact of that cueing. The trial court used the invalidity of Kenzo's free air sniff As a justification to delete it from the totality of circumstances and return to reliance on Officer Garcia's claim that his olfactory senses (clearly far inferior to those of the trained drug dog Garcia had called to the scene) alone provided legal justification for the continuation of the search. This finding ignores the extent that lack of interest in odors emanating from Appellant's truck was the factual predicate for both Kenzo's susceptibility to distraction And led to the frustration of his handler sufficient to cause her to engage in clear "cueing" Behavior. It is these underlying details of Kenzo's free air sniff that remain of central importance to the determination of the "totality of the circumstances". Their deletion from Careful consideration also renders any finding that the failure to work and distraction were The primary causes of the unreliableness of Kenzo's search clearly erroneous. Only after a Careful weighing of whether Kenzo was distracted because he was receiving no target scent From appellant's vehicle as opined by Dr. Myers or rather just not working as asserted by Officer Gonzalez, can the court determine if there is probable cause sufficient under the totality Of the circumstances to justify the eventual search of the bed of appellant's truck Whether There was target scent present or absent is the primary factual issue. Officer Garcia sought

Corroboration from Kenzo before seizing Appellant's truck. Officer Gonzalez was faced with a lack of interest by Kenzo which she responded to by obviously cueing Kenzo. The ignoring of the detailed circumstances of Kenzo's free air sniff renders the trial courts' factual finding that it can consider only Officer Garcia's claim that he smelled "raw marijuana" along with Garcias' speculation that there were marijuana ashes (no characteristics given) in the passenger cab and assertions of a large sum of money (\$1650.00) being present as the only factual underpinnings of probable cause clearly erroneous.

### III.

#### KENZO'S LACK OF INTEREST IN DEFENDANT'S TRUCK AND THE NEED TO CUE HIM TO ALERT DEMONSTRATES THE ABSENCE OF ANY TARGET ODOR OF CONTROLLED SUBSTANCES

The removal of the detail of Kenzo's free air sniff from consideration from the trial court's totality of the circumstances analysis in its Memorandum Decision constituted a misapplication of constitutional standards governing warrantless searches of vehicles by police officers. The Fourth Amendment to the United States Constitution and Article I, § 17 of the Idaho Constitution prohibit unreasonable searches and seizures. Warrantless searches are presumed to be unreasonable unless they fall within one of several narrowly drawn exceptions. *State v. Gallegos*, 120 Idaho 894, 897, 821 P.2d 949, 952 (1991). One of those exceptions, the "automobile exception," allows police to search a vehicle without a warrant when there is probable cause to believe the vehicle contains contraband or evidence of a crime. *State v. Buti*, 131 Idaho 793, 800, 964 P.2d 660, 667 (1998). Probable cause is established when the totality of

the circumstances known to the officer at the time of the search would give rise in the mind of a reasonable person to a fair probability that contraband or evidence of a crime will be found in a particular place. *State v. Josephson*, 123 Idaho 790, 792&ndash;93, 852 P.2d 1387, 1389;90 (1993). Probable cause is a flexible, common-sense standard, and a practical, nontechnical probability that incriminating evidence is present is all that is required. *Texas v Brown*, , 460 U.S. 730, 742 (1983). The Trial court should include all significant circumstances in making its determination of the existence of probable cause. *State v Anderson*, SupCt No.39187,Idaho Supreme Court 2012 opinion no.123,Ann. September 14,2012

#### IV.

#### THE STATE/PROSECUTION FAILED TO PROVE THE EXISTENCE OF PROBABLE CAUSE TO SEARCH DEFENDANT’S TRUCK THROUGH ANALYSIS OF THE TOTALITY OF THE CIRCUMSTANCES

The trial court’s finding that Kenzo’s alert is unreliable does not clearly include a finding as to why the alert was unreliable. This failure to clearly find that Kenzo was cued by his handler is the central error in the courts’ decision. It is the ignoring of the totality of the circumstances that allows the trial court to treat Garcia’s claim that he smelled” raw Marijuana” And the fruits of the cab search as providing probable cause justifying search of the truck bed. This ruling is the product of ignoring the totality of the circumstances. Elimination of the “why” allows the exclusion of clear evidence of handler manipulation of Kenzo and fraudulent

Reporting of the details of Kenzo's free air sniff. This elimination of key circumstances from the "totality" presented in evidence to the trial court is a misapplication of "Gates" totality of the circumstances analysis which has been referred to as divide and conquer analysis. *United States v. Arvizu*, 534 U.S. 266, 274, 122 S.Ct. 744, 751, 151 L.Ed.2d 740, 750 (2002), *State v. Munoz*, 149 Idaho 121 at 127, 233 P.3d 52 (Idaho 2010). By finding Kenzo's alert "unreliable" the trial court simply eliminates the goal directed (legitimizing searching the truck bed), fraudulent use of an olfactorily powerful well trained drug dog (Kenzo) and fraudulent reporting of the details of Kenzo's investigation. Dr. Myers' testimony is also excluded from consideration. Thus the decision below is the product of The careful exclusion of circumstances which if considered as a part of the totality would tend to reduce the weight of the claims of Officers Garcia and Gonzalez to less than is legally necessary to contradict the presumptive unreasonability of the warrantless search carried out in this case.

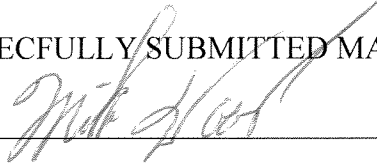
### CONCLUSION

This is a criminal prosecution which "turns" upon the details of a free air sniff carried out by a well trained and certified drug dog named Kenzo. Kenzo's lack of interest in and the assertive cueing of Kenzo to alert to Appellant's truck were captured by Officer Garcia's cruiser video camera (without sound) Def ex B. Without this video Officers Garcia and Gonzalez fraudulent misrepresentation of Kenzo's free air sniff would have been accepted by the Court and counsel. The analysis of the video and testimony by an expert recognized for his skill in critiquing detector dog teams was a second evidentiary occurrence unforeseen by the State of Idaho or its prosecutor. The trial court's refusal to confront this body of evidence was achieved through a combination of clearly erroneous factual findings and misapplication of constitutional standards as argued above.

For the legal justifications argued above, Appellant/Defendant moves this Honorable Appellate Court to reverse the trial court's ruling denying the Appellant/Defendant's Motion to

Suppress and order all fruits of the search of Appellant/Defendant's truck suppressed (excluded as evidence) in this criminal action upon withdrawal of Appellant/Defendant's conditional plea of guilty.

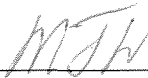
RESPECTFULLY SUBMITTED MARCH 19, 2013

A handwritten signature in cursive script, appearing to read "Mike Wood", is written over a horizontal line.

MICHAEL J. WOOD

CERTIFICATE OF DELIVERY

I, the undersigned, hereby certify that a true and correct copy of the forgoing OPENING BRIEF OF APPELLANT was HAND DELIVERED to the OFFICE of the CRIMINAL DIVISION OF THE IDAHO ATTORNEY GENERAL on the 19TH day of MARCH, 2013.

  
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