10-5-2012

State v. Ellis Appellant's Brief Dckt. 39226

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 39226
	)	
v.	)	
	)	
MARK LEE ELLIS,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
	)	

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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District Judge

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STATEMENT OF THE CASE

Nature of the Case

Mark Lee Ellis, timely appeals from the district court's judgment of conviction and argues that the district court erred in denying his motion to suppress evidence. Mr. Ellis asserts that his right to be free from unreasonable searches and seizures, protected by the Fourth and Fourteenth Amendments to the United States Constitution, and Article I § 17 of the Idaho Constitution, was violated when law enforcement officers entered his apartment and conducted a search without a warrant and without any valid exceptions to the warrant requirement.[1] Specifically, he asserts that he has standing to challenge the State's warrantless entry into his apartment based on trespass theory, as recently clarified in *United States v. Jones*, 132 S. Ct. 945 (2012), as opposed to a reasonable expectation of privacy theory. Mr. Ellis also argues that the State failed to prove the existence of a parole agreement which it relied on to circumvent the warrant requirement.

In the event it is determined that the State met its burden by establishing that Mr. Ellis waived his right to be free from warrantless searches, he argues that under I.C. § 20-228 the parole agreement and the waiver contained therein were suspended at the time the State entered his residence. Mr. Ellis also argues that neither the third party consent, nor exigency, exceptions to the warrant requirement are applicable under the facts of this case.

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[1] For the remainder of this brief, Mr. Ellis will address his State and Federal rights as his Fourth Amendment rights, but he is not abandoning his State constitutional challenge to the search of his apartment.

Statement of the Facts and Course of Proceedings

Mr. Ellis was on parole in an unrelated matter, and on March 17, 2010, he was arrested by his parole officer, Officer Kiehl, pursuant to an agent's warrant.[2] (R., pp.53-56, 58, 68-69, 193.) On March 19, 2010, while still incarcerated, Mr. Ellis contacted a neighbor and asked her to go into his apartment and remove a methamphetamine pipe, some drugs, some DVDs, and some cells phones. (R., pp.67, 74-75, 193.) Mr. Ellis also told the neighbor that the items were located in a secret compartment or room, which could only be accessed with either a knife or a screwdriver. (R., pp.75, 193.)

Instead of removing the items, the neighbor called Officer Kiehl and left a message. (R., p.67.) Officer Kiehl, contacted the neighbor on Monday March 29, 2010, at 4 pm, and she told officer Kiehl about Mr. Ellis' items and the secret room where they were stored. (R., p.67.) That same day, Officer Kiehl contacted Mr. Ellis' landlord Joe Guerricabeitia, and left a message. (R., p.67.) Officer Kiehl eventually contacted Mr. Guerricabeitia that same day, and they agreed to meet the following Tuesday, March 30, 2010, to "search [Mr.] Ellis' apartment.[3] (R., p.67.) The following day Officer Kiehl contacted Mr. Guerricabeitia at 11:34 am to confirm their meeting. (R., p.67.) Officer Kiehl then contacted Ada County Dispatch, at 11:48 am and requested a police officer to assist him in the search of Mr. Ellis' apartment. (R., p.67.)

Officer Kiehl met Mr. Guerricabeitia at 12:10 pm, in the parking lot of Mr. Ellis' apartment. (R., p.67.) Officer Kiehl explained to Mr. Guerricabeitia the secret room described by Mr. Ellis' neighbor. (R., p.67.) Mr. Guerricabeitia "explained that the

[2] The degree of specificity used in the Statement of Facts is relevant to the analysis of the issues contained in Section I(C)(5), *infra*.

[3] Neither March 29, 2010 nor March 30, 2010, correlated with the date of a major holiday.

'secret room' was a maintenance area on the porch outside the defendant's apartment which only the landlord and his maintenance worker were supposed to use and access." (R., p.194.) Mr. Guerricabeitia also noted that the room had an exterior entrance from the porch and an interior entrance in Mr. Ellis' apartment. (R., p.67.)

Mr. Guerricabeitia then opened the exterior door on the porch. (R., pp.67, 194.) However, "[t]he area was closed." (R., p.194.) Mr. Guerricabeitia "then closed and locked the door and" they "went back to their vehicles." (R., p.67.)

Mr. Guerricabeitia then "retrieved several screwdrivers from his vehicle . . . ." (R., p.67.) At 12:35 pm, a police officer, Officer Nickerson, arrived. (R., p.68.) Officer Kiehl, Officer Nickerson, and Mr. Guerricabeitia entered Mr. Ellis' apartment. (R., p.68.) Officer Kiehl noted that the "contents of the apartment appeared to be exactly the same as when [he] arrested [Mr. Ellis] on . . . March 17, 2010." (R., p.68.)

Mr. Guerricabeitia "then used a screwdriver to open a door without a door handle on the south side of [Mr. Ellis'] residence that matched the description provided by [Mr. Ellis'] neighbor. (R., p.68.) After the door was opened, Officer Kiehl noted that it was the entrance to the same room which was previously accessed from the porch. (R., p.68.) Officer Kiehl then discovered, among other things, drug paraphernalia, controlled substances, cell phones, and some DVDs. (R., p.194.)

On April 5, 2010, Officer Kiehl "searched one (1) DVD and noticed several file names consistent with child pornography." (R., p.68.) A detective then reviewed two videos on the DVD and found child pornography. (R., pp.75-76.) Officer Kiehl obtained a search warrant to conduct a subsequent search of the DVDs. (R., pp.71-81.)

Mr. Ellis was charged, by Information, with ten counts of possession of sexually explicit material and a sentencing enhancement for a prior conviction for a registerable

sex offense. (R., pp.152-155, 165-166.) Mr. Ellis filed a suppression motion requesting that all of the evidence which was obtained during the search of his residence be suppressed.[4] (R., pp.31-35.) In support of his motion, Mr. Ellis also provided exhibits including, a report of probation violation, the parole violation findings, an IDOC parole supplemental report, a Boise police department supplemental report, and the affidavit in support of the search warrant.[5] (R., pp.50-77.) The State also filed an objection and a supplemental objection to the motion to suppress both with supporting memoranda. (R., pp.85-90, 146-150.) Thereafter, the district court denied Mr. Ellis' suppression motion, and noted that both the State and Mr. Ellis only relied on Mr. Ellis' exhibits. (R., p.193 n.1.)

Pursuant to a conditional plea agreement, Mr. Ellis pleaded guilty to two counts of possession of sexually exploitive material and preserved his ability to challenge the denial of his suppression motion on appeal. (R., p.204; Tr., p.12, L.24 – p.13, L.9.) In return, the State dismissed the remaining counts and the sentence enhancement. (R., p.204; Tr., p.11, Ls.10-17.) Thereafter, the district court imposed a unified sentence of ten years, with five years fixed for count one and a consecutive sentence of five years fixed for count two. (R., pp.218-220.) Mr. Ellis timely appealed. (R., pp.225-229.)

Mr. Ellis then filed an Idaho Criminal Rule 35 (*hereinafter,* Rule 35) motion requesting leniency, which was denied by the district court.[6] (R., pp.245-248, 253-254.)

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[4] Mr. Ellis filed two amended motions to suppress. (R., pp.41-45, 104-108.)
[5] Mr. Ellis also provided a notice of filing supplemental authority, which included *State v. Fuller*, 138 Idaho 60 (2002). (R., pp.111-113.)
[6] Mr. Ellis is not challenging the denial of his Rule 35 motion on appeal.

ISSUE

Did the district court err when it denied Mr. Ellis' motion to suppress?

ARGUMENT

The District Court Erred When It Denied Mr. Ellis' Motion To Suppress

A. Introduction

Mr. Ellis argues that the State violated his Fourth Amendment right to be free from unreasonable searches and seizures when it entered his apartment without a search warrant. In support of this position, Mr. Ellis argues that he has standing to challenge the search of his apartment in reliance on *United States v. Jones*, which clarified that *Katz v. United States*, 389 U.S. 347 (1967), did not abandon prior United States Supreme Court precedents holding that the Fourth Amendment protects against governmental intrusions on private property when that intrusion is for the purpose of obtaining information. Even though Mr. Ellis did not establish an objective privacy interest in the storage area, he argues that he has standing to challenge the State's entrance into his apartment and its subsequent discovery of contraband based on a trespass theory.

Mr. Ellis also argues that the State failed to establish the extent to which he waived his Fourth Amendment rights in his parole agreement because the State failed to enter the parole agreement into the trial court's record. In the event that this Court finds that Mr. Ellis waived his Fourth Amendment rights in the parole agreement, he argues that the waiver was not applicable at the time of the search because I.C. § 20-228 states that the issuance of his arrest warrant for his parole violation suspended his parole and his parole agreement because the warrant changed his legal status from a parolee to a fugitive from justice.

Mr. Ellis also argues that neither the third party consent nor exigency exceptions to the warrant requirement are applicable under the facts of this matter.

B. Standard Of Review

In *State v. Cutler*, 143 Idaho 297 (Ct. App. 2006), the Court of Appeals articulated the following standard of review for an appeal from a motion to suppress:

> The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, we accept the trial court's findings of fact which are supported by substantial evidence, but we freely review the application of constitutional principles to the facts as found. At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court.

Id. at 302 (citations omitted).

C. The District Court Erred When It Denied Mr. Ellis' Motion To Suppress

1. In Light Of The Holding In *United States v. Jones*, 132 S.Ct. 945 (2012), Mr. Ellis Has Standing To Challenge The Search Of The Storage Area

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV; Idaho Const. Art. I § 17. *The "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed . . . ." State v. Johnson,* 110 Idaho 516, 523 (1986) (quoting *United States v. United States District Court,* 407 U.S. 297, 313 (1972)) (emphasis in original). Mr. Ellis has a similar liberty interest under Article I § 17 of the Idaho Constitution. *See State v. Christensen*, 131 Idaho 143, 146 (1998) ("Like the Fourth Amendment, the purpose of Art. I, § 17 is to protect Idaho citizens' reasonable expectation of privacy against arbitrary governmental intrusion."). "Whether a search is reasonable 'is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'"

Samson v. California 547 U.S. 843, 848 (2006) (quoting *United States v. Knights,* 534 U.S. 112, 118 (2001)).

Warrantless searches are presumptively unreasonable. *State v. Martinez*, 129 Idaho 426, 431 (Ct. App. 1996). "The Fourth Amendment's protection is a personal right which may be enforced by the exclusion of illegally acquired evidence only at the behest of one whose rights were infringed by an improper government intrusion." *State v. Vasquez*, 129 Idaho 129, 131 (Ct. App. 1996).

In this case, the district court employed the following analysis to determine that Mr. Ellis did not have standing[7] to challenge the search:

> [T]he motion to suppress concerns an area which was actually a maintenance storage area which was only supposed to be available to the landlord and the maintenance staff. Even if the defendant had a subjective expectation of privacy in the storage area, it is hardly reasonable for a defendant to have a reasonable expectation of privacy in an area which he is not authorized to use and which is for the use of the landlord and the maintenance staff.

(R., p.195.) The district court's conclusion was based on *Katz v. United States*, 389 U.S. 347, 351(1967), where the United States Supreme Court held that "the Fourth Amendment protects people, not places." (R., p.195.)

Mr. Ellis argues that standing can be established even though he had no privacy expectation in the area searched. For this argument, Mr. Ellis relies on *United States v. Jones*, 132 S. Ct. 945 (2012), which clarified the holding in *Katz*. In *Jones*, law

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[7] The term "standing" is no longer a technically accurate way to describe the relevant inquiry in this case as the United States Supreme Court has rejected the concept of "standing" insofar as that concept implicates only procedural rules: "[I]n determining whether a defendant is able to show the violation of his . . . Fourth Amendment rights, the 'definition of those rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing.'" *Minnesota v. Carter*, 525 U.S. 83, 88 (1998) (quoting *Rakas v. Illinois*, 439 U.S. 128, 139-40 (1978)). Nevertheless, since the courts continue to use the term "standing" imprecisely, that term is also used imprecisely by Mr. Ellis to describe the relevant inquiry in this case.

enforcement suspected Antoine Jones was involved in drug trafficking. *Id.* at 948. The government gathered information about Mr. Jones' activities and applied for a search warrant authorizing "the use of an electronic trafficking device" on a vehicle registered to Mr. Jones' wife. *Id.* The warrant was issued but required that the trafficking device be attached in the District of Columbia and within ten days. *Id.* Eleven days later, the government attached a Global-Positioning-System (*hereinafter,* GPS) tracking device to the undercarriage of Ms. Jones' vehicle while it was parked in a public parking lot in the State of Maryland. *Id.* For the next four weeks a significant amount of data was obtained from the GPS device, and Mr. Jones was ultimately indicted on federal charges related to drug trafficking. *Id.*

Mr. Jones filed a suppression motion; the government conceded its noncompliance with the warrant, but argued that a warrant was not required. *Id.* at 948 n.1. The district court partially granted the motion precluding the government from introducing any evidence obtained by the use of the GPS device during periods of time while Ms. Jones' vehicle was parked in a garage adjoining the Jones' residence. *Id.* at 948. However, the district court held that "the remaining data was admissible, because '[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id.* (quoting *United States v. Jones*, 451 F.Supp.2d 71, 88 (D.D.C. 2006).

The United States Supreme Court eventually granted *certiorari.* The central issue before the Court question was "whether the attachment of a [GPS] tracking device to an individual's vehicle, and the subsequent use of that device to monitor the vehicle's movements on public streets, constitutes a search or seizure within the meaning of the Fourth Amendment." *Id.* The *Jones* opinion began its discussion by further clarifying

that the issue at hand involved the government's physical occupation of "private property for the purpose of obtaining information." *Id.* at 949. The Court went on to state that this "physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted because at that time and for the first half of the 20th century the Court's "Fourth Amendment jurisprudence was tied to common-law trespass." *Id.* However, the *Katz* Court "deviated from that exclusive property-based approach" when it said that "the Fourth Amendment protects people not places . . . ." *Id.* at 950 (quoting *Katz*, 389 U.S. at 351.

After setting forth the foregoing framework, the Court then addressed the Government's argument. Specifically, the government argued that Mr. Jones "had no 'reasonable expectation of privacy' in the area of [Ms. Jones' vehicle] accessed by Government agents (its underbody) and in the locations of the [vehicle] on the public roads, which were visible to all." *Id.* The Court then employed the following analysis in rejecting this argument:

> [W]e need not address the Government's contentions, because Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation. At bottom, we must "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted."[8] As explained, for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ("persons, houses, papers, and effects") it enumerates. *Katz* did not repudiate that understanding. Less than two years later the Court upheld defendants' contention that the Government could not introduce against them conversations between *other* people obtained by warrantless placement of electronic surveillance devices in their homes. The opinion rejected the dissent's contention that there was no Fourth Amendment violation "unless the conversational privacy of the homeowner himself is invaded."[9] "[W]e [do not] believe that *Katz,* by holding that the Fourth Amendment protects persons and their private conversations, was intended to withdraw any of the protection which the Amendment extends to the home...." *Id.,* at 180, 89 S. Ct. 961.

[8] *Quoting Kyllo v. United States,* 533 U.S. 27, 34 (2001).
[9] *Quoting Alderman v. United States,* 394 U.S. 165, 176 (1969).

Id. at 950-951 (footnotes omitted) (original emphasis). The Court went on to state that "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespass test." *Id.* at 952 (emphasis in original). In other words, a reasonable expectation of privacy need not be established in instances where the State trespasses on a constitutionally protected area, *i.e.*, a person's house, papers, or effects as a means to obtain information. The Court held that "[b]y attaching the device to the [vehicle], officers encroached on a protected area." *Id.*

There is a significant similarity between the search in this matter and the search in *Jones*. In *Jones* it was not argued that Mr. Jones had a privacy interest in the underbody of his vehicle, "which was visible to all." *Id.* at 950. Similarly, Mr. Ellis is not asserting that he has a privacy interest in the storage area, which was where the contraband was discovered. That similarity is important because the Supreme Court implicitly noted in *Jones* that the government had other legal means to obtain the evidence it ultimately suppressed, and that the Fourth Amendment violation occurred when the government made the decision to encroach on the underbody of Ms. Jones' vehicle, which is a constitutionally protected area. *Id.* at 951-953. This case is very similar in that Officer Kiehl made the decision to access the storage area through Mr. Ellis' apartment, which is also a constitutionally protected area. (R., pp.67-68.)

In light of the foregoing, the district court's conclusion that Mr. Ellis did not have a reasonable expectation of privacy in the storage area is irrelevant because Mr. Ellis has standing to challenge the search of his apartment based on the trespass theory clarified in *Jones*.[10] The district court's analysis would be correct had the State accessed the

[10] Mr. Ellis recognizes that the *Jones* opinion was published after the district court denied his suppression motion. However, the United State's Supreme Court stated that

items solely through the porch entrance. However, for some reason not entirely clear on the record, Officer Kiehl decided to access the storage area from a door inside Mr. Ellis' residence, which constitutes a search within the meaning of the Fourth Amendment. (R., pp.67-68, 193-194.)

In sum, Mr. Ellis need not prove he had a reasonable expectation of privacy in the storage area in order to establish standing because Officer Kiehl's decision to trespass into Mr. Ellis' apartment created the standing necessary for Mr. Ellis to challenge the legality of the search of his apartment on the basis of the Fourth Amendment.

2. The State Failed To Meet Its Burden Of Proving The Existence Of The Parole Agreement It Relied On As An Exception To The Warrant Requirement

Warrantless searches are presumptively unreasonable. *State v. Martinez*, 129 Idaho 426, 431 (Ct. App. 1996). However, warrants are not required if a search falls under "a few specifically established and well-delineated exceptions." *Coolidge v. New Hampshire,* 403 U.S. 443, 455 (1971) (quoting *Katz* U.S. at 357); *see also State v. Brauch*, 133 Idaho 215, 218 (1999). The State "bears the burden to demonstrate that a warrantless search either fell within a well-recognized exception to the warrant requirement or was otherwise reasonable under the circumstances." *Martinez,* 129 Idaho at 431 (citation omitted). If the government fails to meet this burden, the evidence acquired as a result of the illegal search, including later-discovered evidence derived from the original illegal search, is inadmissible in court. *Brauch*, 133 Idaho at 219; *See*

Katz never abandoned the prior trespass theory and, therefore, *Jones* is applicable to all cases pending on direct appellate review. *Jones*, 132 S.Ct. at 952.

also Segura v. United States, 468 U.S. 796, 804 (1984); *Wong Sun v. United States*, 371 U.S. 471 (1963).

In this case, the State argued, and the district court found, that Mr. Ellis was on parole at the time of the search and that he had "given a waiver of his Fourth Amendment right to be free from [searches] as a condition of being granted parole." (R., pp.149, 196-200.) Mr. Ellis recognizes that all parties were operating under the assumption that he had waived his Fourth Amendment rights as part of his parole agreement; however, the State failed to put the parole agreement in the record.[11]

The only evidence the State relied on were the documents provided by Mr. Ellis in support of his suppression motion. In support of Mr. Ellis' motion, trial counsel submitted exhibits including, a report of probation violation, the parole violation findings, an IDOC parole supplemental report, a Boise Police Department supplemental report, and the affidavit in support of the search warrant. (R., pp.50-77.) The district court noted in its memorandum decision denying Mr. Ellis' motion to suppress that "[b]oth sides have relied on the defendant's Exhibits in Support of Amended Motion to Suppress Evidence . . . ." (R., p.193 n.1.) A hearing was held on the suppression motion, but no testimony was elicited by either party. (Tr., p.6 L.1 – p.9, L.13.) Thus, the foregoing documents are the only evidence in the record from which factual findings regarding the suppression motion can be based.

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[11] While defense counsel operated under the assumption that the waiver existed, at no point did either counsel or Mr. Ellis stipulate to the waiver's existence. Therefore, Mr. Ellis should be able to challenge its existence on appeal. *See State v. Hanson*, 142 Idaho 711, 717-718 (Ct. App. 2006) (holding that the State can challenge a defendant's standing for the first time on appeal even though all parties assumed the defendant had standing before the trial court.) In the event this position is rejected it will create a unique due process violation. *See Wardius v. Oregon*, 412 U.S. 470 (1973) (holding that in criminal prosecutions, one-sided *procedural* laws that benefit the government violate the Fourteenth Amendment's Due Process Clause).

The State had various opportunities to place the parole agreement into the record but failed to do so. For example, the State filed two objections supported by memoranda, but did not submit the parole agreement in a supporting affidavit. (R., pp.85-90, 146-150.) As stated above, the district court held a hearing on the motion to suppress, but the State rested on its briefing instead of eliciting testimony about the contents of the parole agreement. (Tr., p.6, L.4 – p.9, L.11.) Since the parole agreement is not in the record, the State failed to meet its burden of proving an exception to the warrant requirement was applicable to the search of Mr. Ellis' apartment.

Additionally, since the parole agreement is not in the record, the district court's factual finding that Mr. Ellis waived his Fourth Amendment rights as part of the parole agreement is not supported by substantial and competent evidence and is, therefore, clearly erroneous. *See State v. Munoz*, 149 Idaho 121, 128 (2010) ("When we review an order granting or denying a motion to suppress, we accept the trial court's factual findings, unless they are clearly erroneous. Findings of fact are not clearly erroneous if they are supported by substantial and competent evidence.") (citations omitted). There are two parts of the record which provide some factual support for the existence of the waiver. For example, when Officer Kiehl met Mr. Guerricabeitia, Officer Kiehl stated that he was there to "perform a Fourth Amendment Waiver search on [Mr. Ellis'] apartment." (R., p.67.) Detective Brady wrote in his affidavit that "Officer Kiehl explained that [Mr. Ellis] was currently on parole, and has a [Fourth] Amendment waiver on his residence." (R., p.139.) However, Mr. Ellis submits that this is not substantial evidence to support the district court's factual findings. Neither of the statements refer to the Fourth Amendment waiver being part of the parole agreement and neither Officer

Kiehl nor Detective Brady actually stated that they had personal knowledge of the existence of the parole agreement. *See Weller v. State*, 146 Idaho 652, 655 (Ct. App. 2008) ("[A]n appellate court is not the place for factual assertions; factual assertions must be made and supported with admissible evidence before the trial court.")

Another serious evidentiary problem is that the statements do not define the scope of the waiver. For example, the waiver could be limited to a time of day. It could limit areas of the residence which can be searched. It could limit which personnel are allowed to conduct the search. It could also control the events which trigger the termination of the agreement, such as an arrest for based on a parole violation. Without the parole agreement, there is no way of knowing whether Officer Kiehl's actions comported with the terms of the parole agreement.

In sum, the State failed to meet its burden of proving an exception to the warrant requirement because it failed to establish the parameters of Mr. Ellis' parole agreement. And for that reason, the district court's factual finding that Mr. Ellis waived his Fourth Amendment rights was not supported by substantial and competent evidence.

3. The Fourth Amendment Waiver In Mr. Ellis' Parole Agreement Was Not Enforceable When The State Entered His Apartment

In the event this Court determines that the State met its burden of proving the existence of the waiver, Mr. Ellis argues that the waiver was not applicable because his parole agreement was suspended due to the fact that he had been previously arrested for a parole violation and was in custody at the time of the search. In support of this argument, Mr. Ellis relies on I.C. § 20-228, which follows:

> The commission for pardons and parole, in releasing a person on parole, shall specify in writing the conditions of parole, and a copy of such conditions shall be given to the person paroled. Whenever the commission finds that a parolee may have violated the conditions of parole, the written

> order of the commission, signed by a member or members of the commission or the executive director, shall be sufficient warrant for any law enforcement officer to take into custody such person, and it is hereby made the duty of all sheriffs, police, constables, parole and probation officers, prison officials and other peace officers, to execute such order. Such warrant shall serve to suspend the person's parole until a determination on the merits of the allegations of the violation has been made pursuant to a revocation hearing. From and after the issuance of the warrant and suspension of the parole of any convicted person and until arrest, the parolee shall be considered a fugitive from justice. Such person so recommitted must serve out the sentence, and the time during which such prisoner was out on parole shall not be deemed a part thereof; unless the commission, in its discretion, shall determine otherwise, but nothing herein contained shall prevent the commission from again paroling such prisoners at its discretion.

(emphasis added). When interpreting a statute, courts are to adhere to the literal language of the statute unless there is an ambiguity. *City of Sandpoint v. Highway Dist.*, 139 Idaho 65, 69 (2003). In order to be deemed ambiguous, a statute must be deemed to have more than one reasonable construction. *Id.* No ambiguity exists even if the plain language of a statute creates a palpably absurd result. *Verska v. Saint Alphonsus Regional Medical Center*, 151 Idaho 889, 894-896 (2011). When dealing with an unambiguous statute, Idaho courts cannot engage in statutory construction, or in, other words, modify or void a statute, because the power to do so is legislative not judicial. *Id.*

Idaho Code Section 20-228 is not ambiguous and there is only one reasonable interpretation of I.C. § 20-228 which is consistent with the plain language of the statute. That interpretation is also consistent with Mr. Ellis' position. Specially, the third sentence of the statute states that a "warrant shall serve to suspend the person's parole until a determination on the merits of the allegations of the violation has been made pursuant to a revocation hearing." I.C. § 20-228 (emphasis added). That sentence indicates that parole is suspended when the arrest warrant is issued and until the parole

revocation hearing is held. The fourth sentence states "[f]rom and after the issuance of the warrant and suspension of the parole of any convicted person and until arrest, the parolee shall be considered a fugitive from justice." I.C. § 20-228 (emphasis added). That sentence reaffirms the third sentence by stating that issuance of the arrest warrant suspends parole and the parolee loses the status as a parolee and becomes a "fugitive from justice" until s/he is arrested. I.C. § 20-228. In other words, once the warrant is issued, the parolee's legal status changes and s/he becomes a fugitive from justice. The fifth sentence states that "[s]uch person so recommitted must serve out the sentence. . . but nothing herein contained shall prevent the commission from again paroling such prisoners at its discretion." I.C. § 20-228 (emphasis added). This sentence states that the fugitive from justice is recommitted and must serve out the reminder of the sentence unless the commission decides to place the person back on parole. In other words, that sentence states that after the issuance of the warrant the parolee is no longer on parole and is no longer a parolee and it is at the actual revocation hearing the commission decides whether to reinstate parole. Since parole is technically revoked it logically follows that the parole agreement is either suspended or terminated and, therefore, unenforceable. Another way to think about it is through contract law. Once Mr. Ellis lost the benefit of the parole agreement, release from custody, the State can no longer enforce the agreement.

Further support for Mr. Ellis' position can be found in *State v. Fuller*, 138 Idaho 60 (2002). In that case, Mr. Fuller was convicted for a felony and released on parole.[12] *Id.* at 61. Mr. Fuller's parole agreement included a waiver of his Fourth Amendment rights. *Id.* Mr. Fuller's parole officer submitted a report alleging the Mr. Fuller had

violated the terms of his parole and an order was issued which stated that "[t]he Board of Parole and Post-Prison Supervision hereby suspends the supervision of the above named person . . . . You are hereby authorized and directed to take custody and have this person detained . . . ." *Id.*

Mr. Fuller then went to his parole officer's office for a regularly scheduled appointment. *Id.* During that appointment, Mr. Fuller provided a urine sample which tested positive for methamphetamine. *Id.* Mr. Fuller was handcuffed and subsequently told his parole officer that he had methamphetamine in his car. *Id.* at 62. Mr. Fuller's car was searched and methamphetamine was discovered. *Id.* New charges were then brought against Mr. Fuller. *Id.*

Mr. Fuller filed a suppression motion and argued that his oral statements to his parole officer should be suppressed. *Id.* The district court granted the motion and, in doing so, reasoned that under I.C. § 20-228 the "issuance of the arrest warrant suspended [Mr. Fuller's] parole . . . and that the Idaho probation and parole officers therefore no longer had authority to ask him to submit to urinalysis." *Id.* The State appealed and the Idaho Court of Appeals affirmed the district court. *Id.* at 62-63. However, the Idaho Supreme Court reversed the district court based on the following analysis:

> The provisions of the parole supervision agreement continued in force as long as Fuller was under the Department's supervision. The Department's duty to supervise [Mr. Fuller] was governed by Idaho Code § 20-219,[13]

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[12] Mr. Fuller was convicted in Oregon and moved to Idaho. *Id.* at 61. However, that factual nuance does not alter the relevant legal analysis.

[13] The relevant language of I.C. § 20-219 follows:

> The state board of correction shall be charged with the duty of supervising all persons convicted of a felony placed on probation or released from the state penitentiary on parole, and all persons convicted of a felony released on parole or probation from other states and residing in the state of Idaho;

> which provides, "The state board of correction shall be charged with the duty of supervising . . . all persons convicted of a felony released on parole or probation from other states and residing in the state of Idaho." A parolee is "released" when he is allowed to be out of confinement. As long as Fuller was released, the Department had the duty of supervising him, and the parole supervision agreement he signed was still in effect. Even though on February 22, 1999, the Oregon authorities suspended Fuller's parole and he was legally a fugitive from justice, he was still released. He was not yet in custody. The order suspending Fuller's parole only authorized the authorities to take him into custody pursuant to the authority of the Oregon order. He remained released, however, until he was actually taken into custody under the authority of that order. Thus, when Fuller arrived at the probation and parole office on February 24, 1999, he was still under the Department's supervision, and, pursuant to the parole supervision agreement, the Idaho probation and parole officers had authority to demand that Fuller produce a urine sample for analysis and to search his vehicle.

Id. at 63 (emphasis added) (citations omitted). In other words, the question of whether a parolee's parole agreement is in force turns on whether the parolee is in custody. If an arrest warrant has been issued for a parole violation that alone does not suspend the terms of parole agreement. However, after a parolee has been arrested and taken into custody the parole agreement is no longer enforceable. Unlike Mr. Fuller, Mr. Ellis had been arrested and was in custody for a parole violation at the time Officer Kiehl searched his apartment and, therefore, his parole agreement was not enforceable during that time. (R., pp.58, 193, 200.)

Despite the holding in *Fuller*, the district court concluded that *Fuller* was not controlling and it relied on federal case law because *Fuller* "did not reach the question of whether the parolee's prior consent to search was a condition of his parole is revoked

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> of making such investigations as may be necessary; of reporting alleged violations of parole or probation in specific cases to the commission or the courts to aid in determining whether the parole or probation should be continued or revoked and of preparing a case history record of the prisoners to assist the commission or the courts in determining if they should be paroled or should be released on probation.

by I.C. 20-228." (R., p.199.) The district court further reasoned a parolee's parole agreement was enforceable until parole is revoked after a formal parole revocation hearing. (R., pp.196-200.) Contrary to the district court's conclusion, the Idaho Supreme Court's reasoning in *Fuller* controls because it holds that the parole agreement was enforceable until Mr. Fuller was taken into custody. *Id.* at 63. The logical extension of that rationale is that the parole agreement was no longer enforceable after Mr. Fuller was taken into custody because he was no longer under the supervision of the parole board and, therefore, his parole agreement was suspended pursuant to I.C. § 20-228. Had the *Fuller* Court intended to determine that parole was not suspended until parole is formally revoked, it would have so stated in its opinion. However, out of apparent deference to I.C. § 20-228 and the Idaho Legislature, the Court concluded differently, as such a conclusion would be contrary to the unambiguous language of I.C. § 20-228.

Additionally, the district court's decision to reject *Fuller* and rely on federal case law was in error because the federal cases relied upon are readily distinguishable due to the fact there appears to be no federal analog to I.C. § 20-288. The main opinion utilized by the district court is *United States v. Trujillo*, 404 F.3d 1238 (10th Cir. 2005). The district court's analysis of that case follows:

> Federal appellate authority is unanimous in holding that suspension of parole does not immediately suspend the Fourth Amendment waiver in the parole agreement. *United States v. Trujillo*, 404 F.3d 1238 (10th Cir. 2005). As the court in *Trujillo* points out, the parole agreement remains in effect, in some sense, even while suspended: it is only on the basis of the parole agreement that a warrant based on a parole violation could be issued. Id. at 1244. Only after the parolee's parole has elapsed or been revoked do the former parolee's Fourth Amendment rights change.

(R., p.199 (emphasis added).)

The district court's analysis of *Trujillo* is flawed for several reasons. The first and most important is the fact that the *Trujillo* opinion does not analyze a statute analogous to I.C. § 20-288. Due to that distinction, the district court's analysis is misleading because it assumes that there is such a federal statute or other federal rule analyzed in *Trujillo*. For example, the district court stated that "[f]ederal appellate authority is unanimous in holding that suspension of parole does not immediately suspend the Fourth Amendment Waiver in the agreement." (R., p.199 (emphasis added).) The district court went on to state that "*Trujillo* points out, the parole agreement remains in effect, in some sense, even while suspended . . . ." (R., p.199 (emphasis added).)

The *Trujillo* opinion never held that parole is suspended in the federal system upon the arrest of a federal parolee for a parole violation. In *Trujillo*, Mr. Trujillo provided two reasons why his arrest suspended the parole agreement. The first reason was "that the purposes of the parole agreement were no longer relevant once he was taken into custody." *Trujillo*, 404 F.3d at 1243. While rejecting that argument, the Tenth Circuit analyzed that policies behind parole and the parole agreement, but it never stated that parole is suspended when the parolee is arrested in the federal system. And it never discussed how a suspension of parole would affect the question of whether a parole agreement is enforceable in the event a federal parolee is arrested.

Mr. Trujillo's second argument was "that the parole agreement was intended to place conditions on his liberty only so long as he remained free on parole. Once police took him into custody, the argument continues he lost the liberty of parole and the agreement ceased to operate." *Id.* at 1244. Again, Mr. Trujillo never argued that there was a federal statute which caused his parole to be suspended upon his arrest. Mr. Trujillo argued, based on a contract theory, that his parole agreement terminated

upon his arrest. The Tenth Circuit employed the following analysis in rejecting this argument:

> While this may be Mr. Trujillo's understanding of the agreement, there is nothing in the text of agreement[14] to suggest that it terminates at the moment a law enforcement officer takes Mr. Trujillo into custody. At trial, Agent Hudspeth testified that Mr. Trujillo technically remained on parole after his arrest because the adjudication of his parole violations was deferred until the resolution of his federal case. Mr. Trujillo complains that if this is the case, authorities could search his residence many months after his incarceration. This assertion may or may not be correct, but it has no bearing on our analysis. To resolve this appeal we need determine only whether the parole agreement remained in effect minutes after Mr. Trujillo's arrest. There is nothing in the parole agreement to suggest that it did not, and, accordingly, we hold that Mr. Trujillo's arrest did not affect the validity of the parole agreement.

Id. Again, the Tenth Circuit did not analyze or discuss the effect of a federal statute which suspends parole upon the arrest of a federal parolee. As such, the district court's reliance on *Trujillo* is misplaced because it does not address the questions before this Court and the Idaho Supreme Court in *Fuller*; to wit, whether I.C. § 20-288 and its suspension language affects the enforceability of a parole agreement after a parolee is arrested. Since that was not the issue in *Trujillo*, the district court's assumption that an arrest in the federal system suspends a parolee's parole is misleading.

Another point can be drawn from the foregoing block quote. In this case, the district court stated, in its paragraph discussing *Trujillo*, that "[o]nly after the parolee's parole has elapsed or been revoked do the former parolee's Fourth Amendment rights change." (R., p.199.) Since there was no citation after that sentence it is unclear if that

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[14] As noted in Section I(C)(2), *supra*, the State failed to meet its burden to prove the existence of a Fourth Amendment waiver regarding Mr. Ellis' parole agreement because it failed to put that agreement into the record. Due to that failure, this Court has no way of knowing if the question at issue, whether Mr. Ellis' arrest terminated his parole agreement, is controlled by the text of the agreement. Based on that failure alone, the district court's order denying Mr. Ellis' suppression motion should be reversed.

is the district court's own conclusion or if the district court was asserting that the *Trujillo* opinion stands for that proposition. Regardless of that question, the *Trujillo* opinion expressly stated that it would not decide that question because the only issue before the Court was "whether the parole agreement remained in effect minutes after Mr. Trujillo's arrest." *Id.* (emphasis added). Therefore, *Trujillo* does not stand for the proposition that the terms of a parole agreement are enforceable until probation is ultimately revoked. And it is worth noting further that the Tenth Circuit determined a search pursuant to a Fourth amendment waiver a few minutes after an arrest and one occurring months later was a material distinction because it declined to answer the latter question under the facts of *Trujillo*.[15]

In sum, Mr. Ellis' parole agreement was suspended when Mr. Ellis was arrested and taken into custody for his parole violation. At the moment his arrest warrant was issued, Mr. Ellis' legal status changed from a parolee to a fugitive from justice. I.C. § 20-228. However, he was still under the supervision of the department, and it was not until he was arrested and taken into custody that his parole agreement was no longer in affect. *Fuller* 138 Idaho at 63; I.C. § 20-219. Moreover, the district court's decision to disregard the applicable Idaho authority and rely on inapposite federal authority, which deals with a different statutory scheme, was misplaced. Therefore, the district court erred when it determined that Mr. Ellis' parole agreement, and the Fourth Amendment waiver contained therein, was applicable at the time Officer Kiehl searched his apartment.

[15] The district court also relied on *Latta v. Fitzharris*, 521 F.2d 246 (9th Cir. 1975). (R., pp.199-200.) However, that case is inapposite for the same reasons as the *Trujillo* opinion.

4. The State Failed To Establish Sufficient Facts To Support The Conclusion That Mr. Guerricabeitia Had The Authority To Consent To The Search Of Mr. Ellis' Apartment

"Voluntary consent to search from a person who has actual authority to so consent obviates the need for a warrant." *State v. Fee*, 135 Idaho 857, 862 (Ct. App. 2001) (citing *United States v. Matlock*, 415 U.S. 164, 170 (1974)); *Johnson*, 110 Idaho at 522; *State v. Ham*, 113 Idaho 405, 406 (Ct. App. 1987). "Permission to search may come from someone other than the defendant who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *Lint v. State*, 145 Idaho 472 (Ct. App. 2008). The state bears the burden of proving that consent has been given and that the person giving consent had authority to do so. *Johnson*, 110 Idaho at 521; *Matlock*, 415 U.S. at 171. In the specific context of a landlord's ability to consent to the search of a lessee's residence, the ability to consent does not turn on the existence of the landlord's property interest in the area at issue. *Johnson*, 110 Idaho at 521 n.7. Instead, a landlord's ability to consent to a search of her/his tenant's residence turns on the existence evidence which indicates that the landlord enjoyed mutual use of the area searched. *State v. Benson*, 133 Idaho 152, 156 (Ct. App. 1999) ("Absent the state's ability to demonstrate that the landlord had mutual use of the property such that the tenant assumed the risk his landlord might permit the apartment to be searched, the landlord lacked authority to consent to a search of his tenant's residence.").

In this case, the district court found that Mr. Guerricabeitia had the authority to consent to the search of the storage area because Mr. Guerricabeitia, due to his status as Mr. Ellis' landlord, possessed common authority over the area . . . ." Mr. Ellis does not contest that Mr. Guerricabeitia had the authority to access the storage area from the

exterior entrance. However, Mr. Ellis argues that Mr. Guerricabeitia had no ability to consent to the search of his apartment because there are no facts in the record which support the conclusion that Mr. Guerricabeitia had either the mutual use of Mr. Ellis' apartment or any other basis for the authority to enter Mr. Ellis' apartment. The only facts in the record indicate that Officer Kiehl told Mr. Guerricabeitia that he was at Mr. Ellis' apartment to "perform a Fourth Amendment search." (R., p.67.) The only reasonable inference which can be drawn from those facts is that Mr. Guerricabeitia opened Mr. Ellis' apartment based on Officer Keihls' representation that he had authorization to search Mr. Ellis' apartment.

Since the State failed to meet its burden of submitting facts which indicate that Mr. Guerricabeitia had mutual use of Mr. Ellis' apartment or any other basis of authority to consent to the search of Mr. Ellis' apartment, the third party consent exception is not applicable in this matter.

5. The Exigency Exception To The Warrant Requirement Was Not Applicable To Officer Kiehl's Search Of Mr. Ellis' Apartment

"[I]f officers have probable cause to search the residence and exigent circumstances are present, a warrantless entry, for limited purposes, is permissible." *State v. Yeates*, 112 Idaho 377, 380-81 (Ct. App. 1987). "[E]xigent circumstances can justify a warrantless entry where there is probable cause and the officers have a reasonable belief that evidence will [imminently] be destroyed unless they act." *Id.* at 381. "[By] 'reason to believe' we mean just that: *reason to believe*. Mere guesswork or whim will not do." *Id.* (quoting *United States v. Cuaron*, 700 F.2d 582 (10th Cir. 1983)) (original emphasis). "The state has the burden to show the existence of the exigent circumstances justifying a warrantless entry." *Id.*

In the context of a warrantless search of a residence, the Idaho Court of Appeals held that various factors had to be shown in order for the state to rely on the exigency exception. *Id.* The first factor is specific information that contraband was located in the residence. *Id.* The second factor is knowledge that people are located in the residence. *Id.* The third is the officer's ability to state facts known to her/him at the time of the warrantless action which create a reasonable belief that the contraband would be destroyed unless immediate action is taken. *Id.* The Idaho Court of Appeals also held that "[t]he exigent circumstances exception does not apply where there is time to secure a warrant." *State v. Robinson*, 144 Idaho 496, 501 (Ct. App. 2007).

In this case, the district court found the existence of an exigency which justified Officer Kiehl's entrance into Mr. Ellis' apartment. (R., pp.195-196.) This conclusion was based on the fact that Mr. Ellis had contacted his neighbor and asked her to remove contraband from his apartment. (R., pp.195-196.) Contrary to this conclusion, the record does not reflect the existence of three out of the four necessary factors required to justify reliance of the exigency exception to the warrant requirement. Mr. Ellis does not contest that Officer Kiehl had specific information that contraband was located in the residence. However, the record contains no evidence indicating that Officer Kiehl had reason to believe that someone was in Mr. Ellis' apartment at the time of the search. Numerous facts support this contention. First, Mr. Ellis was in custody at the time of this search, so he was not in the apartment. (R., pp.58, 193, 200.) Mr. Ellis contacted his neighbor, not a roommate, to dispose of the contraband. (R., pp.67, 193.) Had someone been in the apartment, Officer Kiehl could have knocked on the door and requested entry. However, Officer Kiehl contacted the landlord, Mr. Guerricabeitia, and he provided Officer Kiehl with access to Mr. Ellis' apartment after they opened the

storage area from the porch. (R., p.67.) Officer Kiehl also noticed the Mr. Ellis had mail in his mailbox before they entered his apartment, which suggests that no one was checking Mr. Ellis' mail. (R., p.68.) Most importantly, Officer Kiehl never said or otherwise indicated that he thought that someone was in Mr. Ellis' residence. (*See generally* R., pp.67-69.)

Additionally, there is no evidence in the record indicating that Officer Kiehl thought that the contraband would be destroyed unless immediate action was taken. Officer Kiehl spoke with Mr. Ellis' neighbor on Monday March 29 at 4 p.m. about the contraband in Mr. Ellis' apartment. (R., p.67.) Officer Kiehl then waited until noon the following day to enter Mr. Ellis' apartment. (R., p.67.) If Officer Kiehl had a reasonable belief that the contraband was going to be immediately destroyed, he would have immediately gone over to Mr. Ellis' apartment after his 4 p.m. conversation with Mr. Ellis' neighbor. Absent that fact, the record does not support the conclusion that the contraband was subject to the risk if immediate disposal.

Furthermore, nothing occurred on March 30, 2010, which would have given rise to an exigency. It was 12:10 p.m. when Officer Kiehl and Mr. Guerricabeitia opened the storage area. (R., p.67.) For some reason not clear in the record, they locked the storage area and went back to their cars. (R., p.67.) Almost a half hour later, at approximately 12:35 p.m., they decided to enter Mr. Ellis' apartment. (R., p.68.) Since the storage area was on the front porch of Mr. Ellis' apartment, their presence would have probably been noticed by someone in the home, which could have created an exigency to enter.[16] However, Officer Kiehl waited almost a half hour before he entered

[16] If this theory was argued as an alternate reason for the existence of an exigency it would be contrary to the rule which prevents the State from creating the exigency. (*See State v. Kelly*, 131 Idaho 774, 776-777 (Ct. App. 1998) (holding that a police officer

the apartment. This again, supports the conclusion that Officer Kiehl did not have any reason to believe that the contraband was going to be immediately destroyed.

Despite these foregoing facts, the district court concluded that an exigency existed because Mr. Ellis' had called his neighbor to remove the evidence, which provided Officer Kiehl reason to believe "that haste was essential." (R., pp.195-196.) As argued above, this conclusion is not tenable because Officer Kiehl spoke with the neighbor, then waited until the next day to enter Mr. Ellis' apartment. (R., p.67.) Furthermore, there are no facts in the record indicating that Mr. Ellis had told a person, other than the neighbor, to enter his apartment and retrieve the contraband. The record does reflect that the only person Mr. Ellis told about the contraband went to Mr. Ellis' parole officer instead adhering to Mr. Ellis' instructions. Since there are no facts indicating that Mr. Ellis asked someone other than the neighbor to retrieve the contraband, the district court's legal conclusion is in error because it relied on mere guesswork to find an exigency.

Turning to the final factor, there is no evidence in the record indicating that Officer Kiehl was not able to obtain a warrant. As stated above, Officer Kiehl found out about the possible existence of the contraband at 4:00 p.m. on Monday March 29, 2010, which is not a major holiday. (R., p.67.) Thus, Officer Kiehl could have obtained a search warrant that Monday evening. However, Officer Kiehl waited until noon on Tuesday March 30, 2010, to meet with Mr. Guerricabeitia to investigate the storage area. (R., p.67.) Again, Officer Kiehl had hours that morning to obtain a search warrant. After opening the storage area from the exterior entrance on the porch, Officer

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cannot create an exigency by knocking on a door where retreat was possible and knocking on the door alerted the residence's occupants of the officer's presence.)

Kiehl waited almost a half hour to enter Mr. Ellis apartment. (R., pp.67-68.) Officer Kiehl could have obtained a search warrant during that wait since a Boise City Police Officer arrived before they entered the apartment. (R., p.68.) Mr. Ellis' apartment is located at 312 North 15th Street, Boise Idaho, which is only a short drive to the Ada County Court House. (R., p.67.) While there are no facts in the record which evince an inability for Officer Kiehl to obtain a warrant, there are numerous facts which indicate that he had ample time to obtain one.

In sum, the record is replete with facts that support the conclusion that no one was in Mr. Ellis' apartment at the time of the search, no exigency existed, and Officer Kiehl had over half of a non-holiday weekday to obtain a search warrant. Moreover, the record reflects that only one person was contacted by Mr. Ellis to remove the contraband, and that person went to the police instead of attempting to either remove or destroy the contraband. Thus, the district court erred when it concluded that an exigency existed to enter Mr. Ellis' apartment because that conclusion is not supported by the record and, therefore, was based on the district court's own guesswork.

CONCLUSION

Mr. Ellis respectfully requests that this Court reverse the district court's order denying his motion to suppress and remand this case to the district court for further proceedings.

DATED this 5th day of October, 2012.

SHAWN F. WILKERSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 5th day of October, 2012, 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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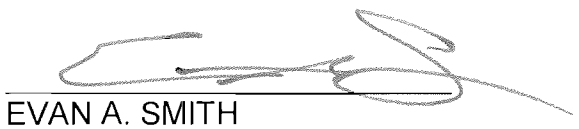

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