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State v. Pedersen Appellant's Brief 2 Dckt. 41431

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. JUSTIN LEE PEDERSEN, Defendant-Appellant.	NO. 41431 ADA COUNTY NO. CR 2013-3510 APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW

STATEMENT OF THE CASE

Nature of the Case

Justin Lee Pedersen asks the Idaho Supreme Court to review the opinion of the Idaho Court of Appeals, 2014 Opinion No. 84 (Ct. App. Oct. 8, 2014) (*hereinafter*, Opinion). After the district court denied Mr. Pedersen's motion to suppress evidence found after a search of his jacket incident to his arrest, Mr. Pedersen entered a conditional guilty plea and appealed from the district court's judgment of conviction. The issue presented on appeal was whether Mr. Pedersen's 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 conducted a search of Mr. Pedersen's jacket[1] without a warrant and in the absence of any valid exceptions to the warrant requirement.

Where, prior to the search, Mr. Pedersen was handcuffed and secured away from the jacket, it was unreasonable to believe that he had access to the jacket or its contents. Accordingly, Mr. Pedersen asserted that the State failed to meet its burden of proving that the search of his jacket fell within an exception to the warrant requirement and the district court erred when it denied his motion to suppress. However, the Court of Appeals determined that the police conducted a valid search incident to arrest when they searched Mr. Pedersen's jacket.

In the Opinion, the Court of Appeals ultimately concluded that the police conducted a valid search incident to Mr. Pedersen's arrest. In this case, Mr. Pedersen arrived at his house and spoke to Officer Jagosh. While Officer Jagosh stepped away to run his information, Mr. Pedersen emptied his pockets of valuable such as his wallet and cell phone and took off his jacket. He gave all of the items to a roommate who was seated on a chair by the front door, approximately fifteen feet away from where Mr. Pedersen was sitting. Officer Jagosh then placed Mr. Pedersen under arrest by putting him in handcuffs, after which asked another officer to retrieve the jacket and other items from the roommate. The jacket was retrieved and searched after Mr. Pedersen was handcuffed. Methamphetamine was found in the jacket.

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[1] The item of clothing was described as a grey, hooded, zip-up sweatshirt. (Tr., p.17, L.24 – p.18, L.1.) The district court and counsel consistently referred to the sweatshirt as a "jacket," thus all references contained herein will be to Mr. Pedersen's jacket. (*See* Tr., p.17, L.20, p.79, L.14.)

The State did not show that at the time of Mr. Pedersen's arrest the jacket was within Mr. Pedersen's area of immediate control from which he could have drawn a weapon or attempted to conceal or destroy evidence. The Court of Appeals agreed with the district court that it could not be said that the officers were entirely safe or that Mr. Pedersen's access to the jacket was foreclosed.

Mr. Pedersen submits that the Opinion, which affirmed his judgment of conviction, is in conflict with the United States and Idaho Constitutions, and previous decisions of the United States Supreme Court, Idaho Supreme Court, and the Idaho Court of Appeals, because the Court of Appeals erroneously found that the police conducted a valid search incident to Mr. Pedersen's arrest. As such, he asks that this Court grant review of his case.

Statement of the Facts & Course of Proceedings

On March 14, 2013, at around 5 o'clock in the afternoon, Justin Pedersen arrived home. (Tr.,[2] p.7, Ls.8-25, p.8, Ls.22-25.) Mr. Pedersen was riding his motorcycle when he arrived at his home, and he was wearing gloves because it was a little chilly that day. (Tr., p.9, Ls.1-3, p.17, Ls.6-9.) As he pulled up to his home, he saw several cars parked alongside both sides of the road by his home, and he realized that they were police vehicles and there were police officers all about his property—in his driveway and in his yard.[3] (Tr., p.9, Ls.7-21.) Immediately after he pulled up to the house, an officer asked

[2] All references to "Tr." are to the transcript of the suppression hearing held on June 24, 2013.

[3] Mr. Pedersen later learned that the officers and detectives were there to investigate a report of a stolen generator being advertised for sale on Craigslist. (Tr., p.41, Ls.3-17.)

Mr. Pedersen for his identification.[4] (Tr., p.15, Ls.15-23.) After Mr. Pedersen told the officer his name, the officer walked away to contact dispatch. (Tr., p.15, L.19 – p.16, L.4, p.28, Ls.15-22, p.44, Ls.18-24.) Mr. Pedersen knew there was a warrant for his arrest so he took off his gloves and handed the gloves, his jacket, his iPod, a Buck knife,[5] his cell phone, and his wallet to one of his roommates, Colleen Nucho, who was sitting in a lawn chair by the front door of his home. (Tr., p.8, Ls.1-3, p.11, Ls.15-20, p.17, Ls.1-14, p.24, Ls.1-4; p.29, Ls.14-22.) Thereafter Mr. Pedersen took a seat on a railroad tie, smoked a cigarette, and waited for the officer to finish running his information through dispatch. (Tr., p.18, Ls.5-9.)

Mr. Pedersen was seated approximately ten to fifteen feet from Ms. Nucho. (Tr., p.18, Ls.15-18.) When the officer returned to where Mr. Pedersen was sitting, he told Mr. Pedersen he was under arrest for an outstanding warrant and handcuffed him.[6] (Tr., p.18, L.21 – p.19, L.17.) After handcuffing Mr. Pedersen, the officer asked another

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[4] As Mr. Pedersen pulled up to the home, a female had identified him as the person who gave her the generator to sell. (Tr., p.42, Ls.11-20.)

[5] At the suppression hearing, Mr. Pedersen testified that, amongst his belongings, there was a "buck knife." (Tr., p.17, L.10.) No additional testimony was adduced regarding the "buck knife" and none of the officers testified that they feared for their safety due to the presence of a "buck knife." Further, the State conceded during argument at the suppression hearing that "there wasn't a weapon . . . he could have used." (Tr., p.74, Ls.8-10.) This fact can be likened to the presence of the pizza-cutting knife in the hotel room in *LaMay*. *See LaMay*, 140 Idaho at 452 (finding that the knife which was used to cut pizza, and which was placed in a drawer by the officers, was an irrelevancy in the Court's analysis as the officers had no fear of it as a weapon); *see also State v. Henage*, 143 Idaho 655 (2007) (holding that, even though the suspect admitted to having a knife on his person, the officer did not identify any fact that demonstrated the suspect presented a potential threat, and therefore, the search was not justified under Terry).

[6] Although the State failed to offer any evidence of Mr. Pedersen's arrest warrant, apparently Mr. Pedersen had an outstanding warrant for a misdemeanor probation violation in Ada County Case No. 2013-2076. (Idaho Supreme Court Data Repository.)

officer to get Mr. Pedersen's jacket and the other items from Ms. Nucho.[7] (Tr., p.51, Ls.11-20.) Officer Jagosh testified that he didn't know what was in the pockets of the jacket and there could have been a weapon or evidence, although he did not elaborate on what type of "evidence" he thought could be contained in Mr. Pedersen's jacket.[8] (Tr., p.53, L.22 – p.54, L.2.) Detective Scally testified that Ms. Nucho was sitting on the jacket when he went to retrieve it. (Tr., p.66, Ls.16-19.) Detective Scally searched the jacket and discovered a crystal substance, later identified as methamphetamine, in a pocket of the jacket. (Tr., p.67, Ls.10-17.)

On April 19, 2013, an Information was filed charging Mr. Pedersen with possession of a controlled substance, methamphetamine. (R., pp.42-43.) Shortly thereafter, Mr. Pedersen filed a Motion to Suppress and Memorandum in Support requesting that the district court suppress "all evidence obtained as a result of an illegal search" in violation of Mr. Pedersen's rights under Article I, Sections 13 and 17 of the Idaho Constitution, and under the Fourth and Fourteenth Amendments of the United States Constitution. (R., pp.53-54, 57-61.) Mr. Pedersen asserted that the search was not a valid search incident to arrest because the search was not justified by officer safety and the jacket and its contents were not in danger of being destroyed. (R., pp.57-60.)

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[7] Officer Jagosh testified that he asked Detective Scully to get the jacket and items from Ms. Nucho after Officer Jagosh had handcuffed Mr. Pedersen and while he was searching Mr. Pedersen. (Tr., p.51, Ls.11-20.) Mr. Pedersen testified that Officer Jagosh asked Detective Scully to get the items from Ms. Nucho after he was handcuffed and while he was being led to the patrol car. (Tr., p.19, L.18 – p.20, L.2.)

[8] Officer Jagosh testified, "So, you know, it's a sweatshirt. I didn't know what was in the pockets. While I'm handcuffing him, I don't know – I didn't know what it was. There could have been a weapon. There could have been evidence." (Tr., p.53, L.23 – p.54, L.2.)

At the hearing on Mr. Pedersen's motion to suppress, the State stipulated that Mr. Pedersen was handcuffed or restrained at the time the jacket was searched. (Tr., p.72, Ls.13-14.) The district court made the following factual findings:

1. At around 5:00 p.m. on March 14, 2013, officers went to a home in Garden City because they were investigating a report of a stolen generator;

2. In front of the home were: Colleen, Lisa, Donna, the defendant, and an unknown male. There was an unidentified female inside the home;

3. There were six officers at the scene. Two of the officers were in the backyard with the unidentified male;

4. The defendant arrived at the home on his motorcycle and pulled in next to a Subaru car;

5. One detective approached the defendant and questioned him;

6. The defendant asked to use the bathroom, which he was not permitted to do;

7. Detective Jagosh ran the defendant's information in search of warrants while the defendant waited in front of the house;

8. While the defendant was waiting, he handed his gloves, his iPod, his knife, his wallet, and his cell phone to Colleen who was sitting on the steps next to the front of the house;

9. The defendant knew that he had an outstanding warrant;

10. Before the defendant handed the items to Colleen, Detective Jagosh instructed him to remain seated where he was, and the defendant specifically disregarded or disobeyed that instruction in getting up and moving over to where Colleen was;

11. Defendant testified that it was chilly that evening in March. Colleen was located ten to 15 feet away from the defendant, and there was no one in between Colleen and the defendant;

12. The defendant was arrested for an outstanding warrant and placed in handcuffs;

13. The unidentified male in the back yard was "bigger and kind of intimidating;"

14. The police searched Mr. Pedersen's jacket and claimed that methamphetamine was found in the jacket;

15. There was a female inside the house who refused to come out;

16. One of the officers was talking to one of the civilians to the left side of the home.

(Tr., p.75, L.10 – p.81, L.18.)[9] The district court noted that the only question before it, as the defendant did not contest the stop, is whether the search of the defendant's jacket was a valid search incident to arrest. (Tr., p.79, Ls.10-15.) The district court concluded that, although there was a one-to-one ratio of officers to civilians,[10] there was risk to the officers and risk that evidence could be concealed or destroyed such that the search of Mr. Pedersen's jacket was appropriate as a search incident to arrest, and denied the motion to suppress. (Tr., p.81, L.24 – p.82, L.7.) The district court then issued an Order Denying Motion to Suppress Evidence. (R., pp.74-75.)

Following the denial of his suppression motion, Mr. Pedersen entered a conditional guilty plea to possession of a controlled substance, reserving the right to appeal the suppression issue. (R., pp.86-89.) As part of the plea agreement, the State agreed not to file a persistent violator enhancement in another case. (R., pp.86, 89.) On September 13, 2013, Mr. Pedersen was sentenced to a unified sentence of seven years, with two years fixed, and the district court retained jurisdiction. (R., pp.90-94.) On September 18, 2013, Mr. Pedersen filed a Notice of Appeal from the judgment of conviction. (R., pp.96-99.)

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[9] The district court provided these findings of fact in several paragraphs. These findings have been presented as individually numbered findings herein for ease of reading.

[10] Officer Jagosh testified that the purchase of something off of craigslist is "quite a big operation" and it called for "quite a few [officers]." (Tr., p.55, L.24 – p.56, L.4.) He testified that the ratio of officers versus non-officers was "roughly the same." (Tr., p.52, Ls.17 – p.53, L.7.)

On October 8, 2014, the Idaho Court of Appeals concluded that the district court correctly denied Mr. Pedersen's motion to suppress. (Opinion pp.1-8.) The order denying Mr. Pedersen's motion to suppress was affirmed. (Opinion p.8.) Mr. Pedersen filed a timely Petition for Review.

ISSUE

Should this Court grant review to address the question of whether the district court erred when it denied Mr. Pedersen's motion to suppress?

ARGUMENT

This Court Should Grant Review To Address The Question Of Whether The District Court Erred When It Denied Mr. Pedersen's Motion To Suppress

A. Introduction

The district court erred when it denied Mr. Pedersen's motion to suppress because the State failed to meet its burden of proving that the jacket fell within an exception to the warrant requirement as it was not within the area of Mr. Pedersen's immediate control. Thus Mr. Pedersen's rights to be free from unreasonable searches and seizures, protected by the Fourth Amendment to the United States Constitution and Article I § 17 of the Idaho Constitution, were violated when the jacket was searched without a warrant. The Idaho Court of Appeals' analysis is in conflict with precedent from both the Idaho Supreme Court and its own precedent, as well as the United States Supreme Court, because the Court of Appeals incorrectly found that the police conducted a valid search incident to Mr. Pedersen's arrest.

B. Standard For Granting Petitions For Review

Idaho Appellate Rule 118(b) provides that, "[g]ranting a petition for review from a final decision of the Court of Appeals is discretionary on the part of the Supreme Court, and will be granted only when there are special and important reasons . . . ." Factors to be considered include whether the Opinion is in conflict with a previous decision of either the Idaho Supreme Court, the Idaho Court of Appeals, or the United States Supreme Court. I.A.R. 118(b)(2) and (3).

Mr. Pedersen submits that the Opinion, which affirmed his judgment of conviction, is in conflict with the United States and Idaho Constitutions, and previous

decisions of the United States Supreme Court, Idaho Supreme Court, and the Idaho Court of Appeals, because the Court of Appeals erroneously found that the police conducted a valid search incident to Mr. Pedersen's arrest. This Court should exercise its review authority because the Court of Appeals' erroneous decision is directly contrary to precedent, and it should afford Mr. Pedersen the appropriate relief for the district court's violation of his rights.

C. This Court Should Grant Review To Address The Question Of Whether The District Court Erred When It Denied Mr. Pedersen's Motion To Suppress

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. *See* Idaho Const. Art. I, § 17. The purpose of these constitutional rights is to "impose a standard of reasonableness upon the exercise of discretion by governmental agents and thereby safeguard an individual's privacy and security against arbitrary invasions." *State v. Maddox*, 137 Idaho 821, 824 (Ct. App. 2002) (citing *Delaware v. Prouse*, 440 U.S. 648, 653-654 (1979)). The Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures, and warrantless searches are presumptively unreasonable. *See, e.g., State v. LaMay*, 140 Idaho 835, 837-838 (2004). The State may overcome the presumption of unreasonableness by demonstrating that the warrantless search fell within a well-recognized exception to the warrant requirement. *LaMay*, 140 Idaho at 838. If the State 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. *Illinois v. Krull*, 480 U.S. 340, 347 (1987); *State v. Brauch*, 133 Idaho 215, 219 (1999); *Segura v. United States,* 468 U.S. 796, 804 (1984).

The search incident to arrest exception to the warrant requirement permits police to search an arrestee following a lawful custodial arrest and is premised upon the dual purposes of: (1) protecting the officer and other persons in the vicinity from any dangerous objects or weapons in the possession of the person arrested; and (2) preventing concealment or destruction of evidence within the reach of the arrestee. *LaMay,* 140 Idaho at 838 (citing *Chimel v. California,* 395 U.S. 752, 763 (1969)). *Chimel* limited the scope of the search to "the arrestee's person and the area 'within his immediate control,'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Chimel*, 395 U.S. at 763. The *Chimel* Court further elaborated on the justifications underlying the rule allowing contemporaneous searches through a discussion of the decision in *Sibron v. New York*, 392 U.S. 40 (1968):

> Peters involved a search that we upheld as incident to a proper arrest. We sustained the search, however, only because its scope had been "reasonably limited" by the "need to seize weapons" and "to prevent the destruction of evidence," to which Preston had referred. We emphasized that the arresting officer "did not engage in an unrestrained and thorough going examination of Peters and his personal effects. He seized him to cut short his flight, and he searched him primarily for weapons."

Chimel, 395 U.S at 764 (1969) (quoting *Sibron*, 392 U.S. at 67) (holding that the incident search was justified "by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime").

The Idaho Supreme Court has applied the *Chimel* standard and recognized the following factors in determining what is reasonably within an arrestee's area of

immediate control: (1) the distance between the arrestee and the place searched; (2) whether the arrestee was handcuffed or otherwise restrained; (3) whether police were positioned so as to block the arrestee from the area searched; (4) the ease of access to the area itself; and (5) the number of officers. *LaMay,* 140 Idaho at 838. What constitutes the "area of immediate control" is determined based on the objective facts of each case. *Id.* However, "a warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation.'" *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (quoting *Terry v. Ohio*, 392 U.S. 1, 25-26 (1968)).

In this case, officers searched Mr. Pedersen's jacket without a valid exception to the warrant requirement, where the jacket was not within the area of "immediate control" of Mr. Pedersen under *Chimel v. California*, 395 U.S. 752, 763 (1969). As such, the district court erred when it denied his motion to suppress.

1. Mr. Pedersen's Jacket Was Not Within The Area Of "Immediate Control" At The Time The Jacket Was Searched, And Thus The Search Of The Jacket Does Not Fall Within The "Search Incident To Arrest" Exception To The Warrant Requirement

The jacket was not within the area of "immediate control" of Mr. Pedersen as he was ten to fifteen feet away, the jacket was being sat on by Ms. Nucho, and Mr. Pedersen was handcuffed and in the presence and control of Officer Jagosh.

After the suppression hearing, the district court made the following oral conclusions of law:

> The only question before this court – reiterating that the defendant is not contesting the stop in this case, the only question before the Court is whether this search of the defendant's jacket was a valid search incident to arrest. And I – both parties have cited at length the State v. Bowman case, where our Court of Appeals discussed the two rationales for the exception to the warrant requirement, first to protect an officer and other

persons from dangerous objects or weapons, and second is to prevent the concealment or destruction of evidence within the reach of the arrestee.

So I must determine whether the jacket that was searched in this case was within the immediate control of the arrestee. In making that determination, the facts the Court of Appeals tells me I must look at includes: The distance between the arrestee and the place searched. That distance, as I said, was ten to 15 feet; second, whether the arrestee is handcuffed and otherwise detained. He was handcuffed at the time that the search took place; third, whether police were positioned so as to block the arrestee from the area search. The police were not positioned so as to stop or block the arrestee from the area search; fourth, ease of access to the area itself.

I've looked at State's Exhibit Nos. 1 through 4. And it's clear from looking at the photographs that the distance between where Colleen was seated and the defendant was seated on those railroad ties was quite short. It could have been covered in a matter of steps. So on that fourth factor there was a great ease of access to the area itself.

And, finally, the number of officers versus the number of companions of the arrestee. I think this is the factor that the parties have argued the most. And I don't know that this – on the facts of this case, that there's a magic number that controls the outcome.

And I think, frankly, I can go through the officers that were there, versus the – we have called them civilians that were there: One, two, three, four, five, six, seven civilians; one, two, three, four, five, six officers. So we are at about a one-to-one ratio.

But that's not really controlling in this case, from my perspective, because this is not a controlled situation. This is a moving-parts situation. It's not a situation where everybody is in one place. You have people that are in the backyard.....

...

There was also testimony that a Garden City officer – and I'll make this as a factual finding – pulled one of the civilians to the left side of the home. So we have a number of locations that are uncontrolled by these officers. And, frankly, even if there were eight officers to five civilians, even if they had outnumbered them, I can't say, given the moving parts and, frankly, the volatility of the situation, that the officers could be safe.
I think that there was risk to the officers. And I think that the second prong, as far as the concealment or destruction of the evidence, also supports a finding that it was an appropriate search incident to arrest.

> So, on all of that, I conclude that it was a valid search incident to arrest, appropriate exception to the warrant requirement. And I deny the defendant's motion to suppress.

(Tr., p.79, L.10 – p.82, L.7.)

Thus, the State did not show that at the time of Mr. Pedersen's arrest the jacket was within Mr. Pedersen's area of immediate control from which he could have drawn a weapon or attempted to conceal or destroy evidence. In order to access the contents of the jacket, Mr. Pedersen would have had to, while handcuffed, escape the guard of the armed officer, run fifteen feet over to where his roommate was sitting, move her off the jacket, and rifle through the pockets of the jacket to obtain the item. The State claims that the district court correctly concluded that "there was a risk to the officers" and a potential for the "concealment or destruction of evidence;" however, risk to the officers from the handcuffed and guarded Mr. Pedersen was essentially nonexistent:

> To determine whether a warrantless search incident to an arrest exceeded constitutional bounds, a court must ask: was the area in question, at the time it was searched, conceivably accessible to the arrestee-assuming that he was neither "an acrobat [nor] a Houdini"?

United States v. Lyons, 706 F.2d 321, 330 (D.C. Cir. 1983) (internal citations omitted).

Mr. Pedersen would have had to be either "an acrobat" or "a Houdini" in order to escape the handcuffs and the officer guarding him, and dash 15 feet over to his roommate and then remove the jacket from under her and attempt to grab some sort of weapon or contraband. Additionally, where the *Shakir* Court held that the applicable standard required a "reasonable possibility" or "something more than the mere theoretical possibility that a suspect might access a weapon or evidence," the district

court's conclusion regarding fact number four, that there existed a great ease of access to the area itself, was clearly erroneous. *See Shakir*, 616 F.3d at 321.

Thus the jacket was not conceivably accessible to Mr. Pedersen, either to obtain a weapon or to conceal or destroy evidence. Accordingly, its search was not permissible under the "search incident to arrest" exception to the warrant requirement. *See, e.g., State v. LaMay,* 140 Idaho 835, 839 (2004) (where defendant had been arrested, handcuffed, and placed in a hallway under guard, the search of a backpack located fifteen feet away in another room was not justified as a search incident to his arrest merely because the backpack had been in his immediate control prior to his arrest).

Further, as Mr. Pedersen was being arrested on an outstanding warrant, there was no reason to believe evidence of the crime of arrest would be found either on his person or in his personal effects. In addition, the district court also failed to take into consideration the fact that the officers at the residence were armed, while the civilians presumably were not. Nor was there any evidence that the civilians outside the house were uncooperative, threatening, or violent. Thus, where the basis for the warrant exception for a search incident to arrest is officer safety and to prevent destruction of evidence, neither of these excuses were applicable in this case. As a result, officers searched Mr. Pedersen's jacket without a valid exception to the warrant requirement, where the jacket was not within the area of "immediate control" of Mr. Pedersen under *Chimel v. California*, 395 U.S. 752, 763 (1969).

The Court of Appeals held that *State v. Bowman*, 134 Idaho 176 (Ct. App. 2000) (holding that a woman holding the arrestee's jacket was approximately fifteen feet away and was thereby "within the zone of activity in which it could have been used by the

woman or made available to the defendant"), dictated affirmance of the district court's decision, but also relied upon a Third Circuit Court of Appeals decision, *United States v. Shakir*, 616 F.3d 315 (3rd Cir. 2010). (Opinion, p.6.) In *Shakir*, the suspect was standing in line in a hotel lobby, holding a gym bag. *Id.* 616 F.3d at 316. As law enforcement moved in closer to the suspect, a man nearby yelled an expletive, after which the suspect turned as if to respond, but instead simply made eye contact with the shouter. *Id.* The shouter, a confederate of the suspect, was detained by two unarmed hotel security guards, and when law enforcement made physical contact with the suspect, he dropped the gym bag he had been holding at his feet. *Id.* The Court upheld the search of the bag as one incident to arrest, finding that, although handcuffed, there was still a sufficient possibility that the arrestee could access a weapon where the bag was at the feet of the arrestee, and also in light of the facts that the arrestee was subject to an arrest warrant for armed bank robbery, and he was in an area with at least one suspected confederate who was guarded only by unarmed hotel security guards. *Shakir*, 616 F.3d at 321. However, in *Shakir*, unlike the facts of *Bowman* or Mr. Pedersen's case, there was at least one verified confederate in the room with the arrestee who was not in police custody and could have possibly assisted the handcuffed arrestee. *Id.* at 319. *Shakir* is further distinguishable in that the bag searched in that case was on the floor at the feet of the arrestee, unlike the facts of *Bowman* or this case where the item seized was 15 feet away from the arrestee.

2. The District Court Misapplied The Test Articulated In *LaMay* And *Bowman* In That It Failed To Acknowledge The Import Of The Fact That Mr. Pedersen Was Handcuffed At The Time The Jacket Was Seized

In attempting to carefully apply the test set forth in *Bowman* to the facts of this case, the district court neglected to appreciate the original reason behind the pertinent warrant exception—to protect officer safety and to prevent removal or destruction of the evidence of the crime. In doing so, the district court sabotaged the test by ignoring the importance of "whether the arrestee was handcuffed or otherwise restrained." Here, the fact that Mr. Pedersen was handcuffed and in the control of an officer, when his jacket was seized and searched, is determinative of whether he had immediate control of the jacket.

In *Bowman,* the Court of Appeals upheld the search of Mr. Bowman's jacket incident to his arrest after he handed the jacket to a woman a few feet away immediately prior to his arrest. *Id.* In determining the area of immediate control, the *Bowman* Court used five factors identified by a legal treatise as facts that had historically been relied on by other courts. 134 Idaho at 179-80. The Court found the following facts determinative: that there was one officer and three civilians, the arrestee had "hastily" removed his jacket and was left standing in a T-shirt at 4:30 a.m. in January, the distance from the arrestee to the woman holding the jacket was less than fifteen feet, and the arrestee had not yet been handcuffed. *Bowman*, 134 Idaho at 180. The Court found that, had there been a weapon in the coat, all of the people involved were "within the zone of activity in which it could have been used by the woman or made available to the defendant." *Id.* at 180. The Court of Appeals then reasoned that:

> The potential for risk of harm to the officer on these facts was high. To allow a defendant to hand over an article of clothing just before his arrest

> and thereby avoid the search of said item would seriously undercut the purposes and policy behind the search incident to that arrest - ensuring the safety of officers and bystanders through the recovery of weapons within the defendant's area of immediate control and preventing the loss or destruction of evidence of criminal activity. Faced with the possibility that the jacket might contain a weapon or evidence of a crime which could be lost or destroyed, we conclude that Wittmuss acted reasonably in requesting the jacket in order to search it incident to Bowman's arrest. We hold that such search did not violate Bowman's constitutional rights

Id. (internal citation omitted).

The Idaho Court of Appeals found the facts of Mr. Pedersen's case closely on point with the facts of *Bowman* rather than the facts of *State v. LaMay*, 104 Idaho 839 (2004). However, "a warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation.'" *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (quoting *Terry v. Ohio*, 392 U.S. 1, 25-26 (1968)). In denying Mr. Pedersen's motion to suppress, the district court attempted to apply the test set forth in *Bowman* to the facts of this case, but it neglected to appreciate the original reason behind the pertinent warrant exception—to protect officer safety and to prevent removal or destruction of the evidence of the crime. Thus, the district court neglected to consider *LaMay*, an Idaho Supreme Court decision that also utilized the factors set forth in *Bowman*, but addressed a situation where the arrestee was handcuffed and under the control of an officer like Mr. Pedersen was in this case. In failing to recognize *LaMay*, the district court ignored the importance of "whether the arrestee was handcuffed or otherwise restrained." *LaMay*, 140 Idaho at 839. Further, nothing about the test used by the Idaho Court of Appeals in *Bowman* and the Idaho Supreme Court in *LaMay* notes that it is necessary or even recommended, that the district courts give equal weight to each factor. In fact, it makes no sense to do so, particularly where the test adopted by the

Bowman Court was merely a list of factors that the courts have historically used in trying to answer the question of where it would be possible for the arrestee to reach. 3 WAYNE R. LAFAVE, SEARCH & SEIZURE S 6.3(c), at 306 (3d ed. 1996). As noted by the LaFave treatise—whether the arrestee was handcuffed "substantially narrows the area of control." *Id.*

In *LaMay*, the Idaho Supreme Court held that the search of the arrestee's backpack was not a reasonable search incident to arrest. 104 Idaho at 840. In *LaMay*, three officers encountered seven people in a hotel room. *Id.* at 837. LaMay was brought out into a hallway, placed under arrest for an outstanding warrant, handcuffed, and required to remain seated in the hallway under the guard of one of the officers. *Id.* An officer then searched a backpack that had been located approximately 10 inches from LaMay's hand when the officers entered the room. *Id.* LaMay was approximately 15 feet away from the backpack when it was searched. *LaMay.* at 837-40. The backpack contained cocaine. *Id.* The Court found that under these facts the backpack presented "no immediate danger to the officers or others surrounding the arrest." *Id.* at 839. Nor was the backpack and its contents in danger of being destroyed. *Id.* Because LaMay's backpack was not seized during the period of time it was within his control, once the officers had secured their own safety and restrained LaMay, any justifications underlying the search incident to arrest exception ceased to exist. *Id.* at 840 (emphasis added). The Court held that the trial court properly applied the *Chimel* test to the facts in determining that the backpack was not within LaMay's "immediate control" at the time of his arrest. *Id.* at 839.

Similarly, here, the jacket was not seized while it was within Mr. Pedersen's control. One of the purposes behind the warrant exception is officer safety—officers are safe when the item has been seized, not when it is searched. After the officers secured their own safety and restrained Mr. Pedersen, the justifications underlying the search incident to arrest warrant exception ceased to exist. In this case, the district court's conclusion regarding fact number four, that there existed a "great ease of access to the area itself" was clearly erroneous. (Tr., p.79, L.25 – p.80, L.21.)

Mr. Pedersen was not an immediate threat to the officers as he was handcuffed, removed from the immediate location, and under the control of an officer. As such, the State failed to show that the jacket was within Mr. Pedersen's immediate control as required under *Chimel* in order to justify the search under the search incident to arrest exception of the warrant requirement.

3. Ms. Nucho Was Not A Confederate Of Mr. Pedersen's

In its Opinion, the Court of Appeals correctly noted that Mr. Pedersen did not argue on appeal the possibility that Ms. Nucho, the roommate with whom Mr. Pedersen deposited his jacket and gloves, would come to his aid or assistance by helping Mr. Pedersen acquire a weapon from the jacket. (Opinion, p.6.) However, this was a new argument by the State on appeal which was not advanced in the lower court and not part of the district court's analysis in its order denying the motion to suppress. (Tr., p.71, L.5 – p.82, L.7.) Further, there is no evidence whatsoever that Ms. Nucho was involved in the alleged generator theft and thus she clearly was not a confederate

whom officers could expect may assist Mr. Pedersen.[11] By definition, a "confederate" is "[a]n ally; esp., a coconspirator or accomplice." Black's Law Dictionary (9th ed. 2009). Ms. Nucho was merely a roommate who had not been implicated in the generator sale in any way. By contrast, the confederate in *Shakir* was a person who, upon sighting the law enforcement officers, had yelled a warning to which the arrestee had responded. *Shakir*, 616 F.3d at 316, 319.

D. The District Court Erred In Denying Mr. Pedersen's Motion To Suppress

For the reasons stated above, Mr. Pedersen asserts that the search of his jacket incident to his arrest was unreasonable and, thus, violated his Fourth Amendment and Article I § 17 right to be free from unreasonable searches and seizures. Mr. Pedersen asserts that the discovery of the evidence used against him was the product of his illegal detention and should have been suppressed as "fruit of the poisonous tree." *See Wong Sun v. United States*, 371 U.S. 471, 478-488 (1963). Therefore, Mr. Pedersen asserts that the district court abused its discretion by denying his motion to suppress.

[11] Apparently the person who listed the generator for sale on Craigslist was outside the residence speaking to a detective, but that person was not Ms. Nucho. (Tr., p.24, Ls.10-21, p.42, Ls.11-20, p.47, L.25 – p.48, L.10.)

CONCLUSION

Mr. Pedersen respectfully requests that this Court grant his Petition for Review. If granted, he respectfully requests that this Court vacate the district court's judgment of conviction, and reverse the order which denied his motion to suppress, and remand his case for further proceedings.

DATED this 10th day of December, 2014.

SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 10th day of December, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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INMATE #65288
ISCC
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MELISSA MOODY
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