10-21-2015

State v. Rozajewski Appellant's Brief 2 Dckt. 42447

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. STEPHEN PHILLIP ROZAJEWSKI, Defendant-Appellant.	NO. 42447 CANYON COUNTY NO. CR 2014-2299 APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW

STATEMENT OF THE CASE

Nature of the Case

Stephen Rozajewski asks the Idaho Supreme Court to review the opinion of the Idaho Court of Appeals, 2015 Opinion No. 55 (Ct. App. Sept. 3, 2015) (*hereinafter*, Opinion). He submits that the Opinion, which affirms the denial of his motion to suppress, is in conflict with previous decisions of the Idaho Supreme Court, as it misinterprets, and so, misapplies the rules from those prior decisions.

On review, Mr. Rozajewski contends that, upon finding one of the officers mispresented facts to the magistrate while applying for a warrant to search Mr. Rozajewski's room, the district court failed to properly apply the two-prong test for dealing with those false statements. As a result, the district court erroneously denied

Mr. Rozajewski's motion to suppress the evidence found in his room, as proper application of the two-prong test reveals the search warrant for that search was irreparably tainted by the officer's misrepresentations of fact. Therefore, this Court should vacate the judgment of conviction, reverse the order denying Mr. Rozajewski's motion to suppress, and remand this case for further proceedings.

Statement of the Facts & Course of Proceedings

Mr. Rozajewski was attending classes at Treasure Valley Community College and had just found a new place to live. (*See* Tr., p.79, Ls.9-11 (defense counsel noting that Mr. Rozajewski had been doing well in his classes); Tr., p.11, Ls.15-24 (Officer Larry Hemmert acknowledging that Mr. Rozajewski had moved into his new place two days before Officer Hemmert's visit to the house).) However, his new landlord, Shon Delisle, was having problems, which resulted in a visit from Mr. Delisle's probation officers to arrest Mr. Delisle for violating his probation. (*See* 1/28/14 Hemmert Report attached to Presentence Investigation Report (*hereinafter*, PSI), p.168.)[1] Although Mr. Rozajewski was not on probation himself (*see, e.g.,* Preliminary Hearing Tr., p.25, Ls.13-18), Mr. Delisle's probation violation would also impact Mr. Rozajewski because, in following up on that probation violation, one of the officers lied to get a warrant to search Mr. Rozajewski's room. (R., pp.80-81 (finding that, while applying for a warrant, the testifying officer made two false representations of fact with reckless disregard of the truth).)

[1] The police reports attached to the PSI appear to have been copied from other documents which had been paginated in the lower right corner. Those page numbers are included in references to those reports.

The probation officers requested the assistance of patrol officers to arrest Mr. Delisle. As a result, Officer Hemmert and another officer were sent to help the probation officers. (1/28/14 Hemmert Report attached to PSI, p.168.) Shortly after arriving on scene, Officer Hemmert placed Mr. Delisle under arrest, and the other officer took Mr. Delisle to the Canyon County Jail. (1/28/14 Hemmert Report attached to PSI, p.168.) There were three other people inside the house when Mr. Delisle was arrested: Mr. Delisle's girlfriend Karen Lechner (also appears in the record as "Leischner"), Mr. Rozajewski, and Mr. Rozajewski's friend, Lisa Lee. (1/28/14 Hemmert Report attached to PSI, p.168.)

After Mr. Delisle had been taken away, the probation officers and Officer Hemmert searched the house. (1/28/14 Hemmert Report attached to PSI, p.168.) However, they did not search Mr. Rozajewski's room because he was not on probation and he refused to consent to a search of his room. (Tr., p.13, Ls.12-16.) Officer Hemmert found drugs and drug paraphernalia in the living room, the kitchen, and the room Mr. Delisle shared with Ms. Lechner. (Tr., p.13, L.24 - p.14, L.4.)

After completing that search, Officer Hemmert interviewed the three people still being detained at the house and, ultimately, issued summonses to all of them. (1/28/14 Hemmert Report attached to PSI, pp.168-69.) During his interview, Mr. Rozajewski said none of the items Officer Hemmert had found in the common area were his. (Tr., p.14, Ls.12-16.) It was at that point that Officer Hemmert asked Mr. Rozajewski for his permission to search his room. (1/28/14 Hemmert Report attached to PSI, p.169.) When Mr. Rozajewski did not give consent, Officer Hemmert called for additional

assistance so that he could request a search warrant for Mr. Rozajewski's room. (1/28/14 Hemmert Report attached to PSI, p.169.)

Thus, an hour after Officer Hemmert arrived on scene, Officer Steve Fisher received the request for additional assistance. (1/28/14 Fisher Report attached to PSI, p.201.) When he got to the house, he found four other officers on scene. (1/28/14 Fisher Report attached to PSI, p.201.) Officer Fisher was briefed on the situation and informed that Mr. Rozajewski's room had not been searched. (Tr., p.20, L.19 - p.21, L.6.) There was no indication that the other officers were concerned for their safety at that time. (*See generally* Tr.; Reports attached to PSI.) Nevertheless, Officer Fisher decided to perform a protective sweep of Mr. Rozajewski's room. (Tr., p.21, Ls.7-14.) There is no indication in Officer Fisher's report as to what he saw or did not see while conducting that search.[2] (*See generally* 1/28/14 Fisher Report attached to PSI, pp.201-03.)

After sweeping Mr. Rozajewski's room, Officer Fisher went to apply for a search warrant. (1/28/14 Fisher Report attached to PSI, p.202.) Officer Hemmert stayed at the house, where Ms. Lee subsequently told him that she had left a pipe with methamphetamine in it in Mr. Rozajewski's room. (Tr., p.14, L.24 - p.15, L.2.) Officer Hemmert relayed that statement to Officer Fisher. (Tr., p.16, L.19 - p.17, L.13.)

Officer Fisher subsequently gave testimony in support of his application for a warrant. (*See* Audio of Warrant Application Hearing.)[3] He testified that, "Upon entering

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[2] As will be discussed *infra*, Officer Fisher gave more detailed information about his protective sweep at an evidentiary hearing on Mr. Rozajewski's subsequent motion to suppress.

[3] Mr. Rozajewski filed a motion for the district court to take judicial notice of the warrant application proceedings. (R., p.71.) Although the district court did not enter a formal

[the house], they [the other officers] found drug paraphernalia in plain view. Drug paraphernalia consisted of a marijuana pipe, tin can, a snort tube, a methamphetamine pipe." (Audio of Warrant Application Hearing, 1:45-2:00.) He continued, "And Shon Diesel [sic] ultimately ended up going to jail. During the course of that search, they came in contact with a Steven Rozowski [sic, phonetic]. I have trouble pronouncing his last name. He just recently moved into the 2021 Washington residence, has a room in the southwest corner." (Audio of Warrant Application Hearing, 2:00-2:22.) When asked if he had seen the drug paraphernalia the other officers found, Officer Fisher replied that he had and that "[i]t was in the front living area as soon as you walked in the front door." (Audio of Warrant Application Hearing, 2:32-2:46.)

He also told the magistrate that he had conducted a protective sweep of Mr. Rozajewski's room: "When I got there, I asked immediately if a protective sweep had been done to the residence. They told me the only room that they didn't do a sweep on was Steven's room and I opened the door and did a protective sweep and just made for sure nobody was in there." (Audio of Warrant Application Hearing, 2:46-3:05.) He did not tell the magistrate what, if anything, he had seen during that protective sweep. (*See generally* Audio of Warrant Application Hearing.) He would

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order granting that motion (*see generally* R.), it did state that it had listened to the audio recording of the warrant application proceedings at the hearing on Mr. Rozajewski's motion to suppress. (Tr., p.5, Ls.11-13.) A CD with the audio of that hearing was included in the appellate record as an exhibit. (R., p.127.)

Since the testimony at that hearing is the focus of Mr. Rozajewski's motion to suppress, references to that testimony will include the specific time (minutes:seconds) in the recording the statements were made. Where quotations from that hearing are necessary, they are reproduced to the best of appellate counsel's ability.

later testify the reason for not doing so was to not "muddy up the warrant." (Tr., p.22, Ls.13-14.)

Officer Fisher admitted that the room had not been searched before he arrived because "Steven is not on probation and he would not consent to a search of his bedroom." (Audio of Warrant Application Hearing, 3:10-3:19.) When asked to explain why he suspected there would be evidence of drug use in that room, Officer Fisher testified:

> A. Upon interviewing Lisa Lee, Shon Diesel's [sic] significant other, she says that there's meth inside the room with a methamphetamine pipe.
>
> Q. Did she say she'd seen that?
>
> A. Yes.

(Audio of Warrant Application Hearing, 3:21-3:44.)

Officer Fisher then proceeded to describe where the bedroom was located in the house. There was some confusion as to whether Mr. Rozajewski's room was in the southeast or southwest corner of the house. (Audio of Warrant Application Hearing, 3:47-4:15.) The warrant was ultimately amended by interlineation to indicate it was in the southwest corner. (*See* Audio of Warrant Application Hearing, 3:47-6:18.) Officer Fisher was also asked to describe how to get to Mr. Rozajewski's room from the front door, and he responded: "You enter the residence, you go to the right into a little hallway and the bedroom door is right there on the right side." (Audio of Warrant Application Hearing, 6:17-6:34.)

Officer Fisher's testimony concluded when he was asked to reiterate the reasons he believed that there was evidence to be found in Mr. Rozajewski's room. He responded: "Due to all the drugs found inside the residence in the common area and

also Lisa Lee's statements stating that there was drugs inside the bedroom." (Audio of Warrant Application Hearing, 6:36-6:54.) The magistrate followed up with a few questions about who lived in the house:

Q. Does Lisa Lee live there?

A. Yes.

Q. With Mr. Diesel [sic]?

A. Yes.

Q. And Mr. Rojowski [sic, phonetic] or –

A. Yes.

Q. -- whatever his name is.

(Audio of Warrant Application Hearing, 6:58-7:05.)

Based on Officer Fisher's oral affidavit, the magistrate issued a warrant to search Mr. Rozajewski's room. (Audio of Warrant Application hearing 7:05-8:38.) Upon executing that search warrant, officers found methamphetamine, drug paraphernalia, and a marijuana cigarette. (Preliminary Hearing Tr., p.13, L.23 - p.14, L.9, p.16, Ls.16-19.) They also found a gun under the bed. (Preliminary Hearing Tr., p.16, Ls.19-22.) As a result, Mr. Rozajewski was charged with possession of a controlled substance and unlawful possession of a firearm, along with a persistent violator enhancement.[4] (R., pp.19-22.)

Mr. Rozajewski filed a motion to suppress all the evidence found in his room because he asserted that Officer Fisher had made four material, false representations

[4] There were two other misdemeanor cases arising from this same incident that were addressed at the same time this case was addressed. (*See, e.g.*, Tr., p.45, Ls.4-6; PSI, pp.19-20.)

(three statements and one omission) to the magistrate in his application for the search warrant. (R., pp.65-67.) Specifically, those false representations were: (1) that Ms. Lee was Mr. Delisle's girlfriend; (2) that Ms. Lee lived at the residence; (3) that Ms. Lee had seen methamphetamine in Mr. Rozajewski's room (rather than that she had left her methamphetamine in that room); and (4) that Officer Fisher had not testified that he did not see anything concerning during his protective sweep of Mr. Rozajewski's room. (Tr., p.7, Ls.15-21; *see* R., p.67.)

Defense counsel questioned Officer Fisher on these various false representations. Officer Fisher testified that he had simply misspoken when he said Ms. Lee was in a relationship with Mr. Delisle.[5] (Tr., p.28, Ls.8-9.) He explained that, based on what he saw at the house, he believed that Ms. Lee was in a relationship with Mr. Rozajewski, not Mr. Delisle, and concluded that, because Mr. Rozajewski and Ms. Lee were in a relationship, they were living together. (Tr., p.30, Ls.6-16.) However, he did not question anyone to verify or dispel those assumptions. (*See* Tr., p.24, L.24 - p.25, L.6.) Officer Fisher also testified that he did not recall Officer Hemmert telling him that Ms. Lee had said she left her methamphetamine in the room, although Officer Hemmert testified that he did remember relaying that statement to Officer Fisher. (Tr., p.25, L.18 - p.26, L.10 (Officer Fisher's testimony on this point); Tr., p.16, L.19 - p.17, L.13 (Officer Hemmert's testimony on this point).) Finally, Officer Fisher testified that he had seen what he thought was a butane torch and a pipe when he conducted the protective sweep. (Tr., p.23, Ls.4-6.) He explained that he did not tell

[5] This was the same explanation Officer Fisher gave for getting both Mr. Delisle's and Mr. Rozajewski's names wrong during the warrant application hearing. (Tr., p.24, Ls.10-16; Tr., p.28, Ls.10-15.)

the magistrate about that because he thought it would "muddy up the warrant." (Tr., p.22, Ls.13-14.)

The district court considered each of the false representations in turn. In regard to the first representation, the district court found that Officer Fisher did not act recklessly when he testified that Ms. Lee was in a relationship with Mr. Delisle; he had just misspoken. (R., p.80.) In regard to the fourth representation (the material omission), the district court found that the omission was not prejudicial because, had Officer Fisher disclosed what he had seen during the protective sweep, that information, by itself, would have supplied probable cause for the warrant. (R., p.81.)

However, as to the second representation, the district court found that Officer Fisher had made a false representation with a reckless disregard of the truth. Specifically, it found that Officer Fisher's testimony that Ms. Lee lived at the house arose from Officer Fisher's unjustified assumption of that fact. (R., p.80.) The assumption was unjustified because it was based only on the fact that Ms. Lee and Mr. Rozajewski were sitting together when Officer Fisher arrived at the scene and he made no attempt to confirm or dispel that assumption. (R., p.80.) Furthermore, on the third representation, Officer Fisher's testimony – that Ms. Lee had seen the drugs and/or drug paraphernalia in the room – conveyed an erroneous impression that was different than the statement she actually gave to Officer Hemmert and which had been relayed to Officer Fisher. (R., p.81.) Therefore, the district court found that testimony was also a false representation made in reckless disregard of the truth. (R., p.81.)

The district court recognized that the next step of the relevant analysis was to set aside the false representations and determine if probable cause still existed without

them. (R., p.81.) However, the district court did not set aside the statement that Ms. Lee lived at the house because it determined that it was not material, in that the finding of probable cause would not have been altered if it were set aside. (R., p.83.) Ultimately, the district court found that the remaining information "known to the magistrate was that officers found a marijuana pipe in a backpack in the living room, a tin containing marijuana on the kitchen counter, drug paraphernalia in the bedroom of the [sic] Delisle and Lechner, and methamphetamine in a backpack in defendant's room." (R., p.83.) Based on that conclusion, the district court determined, "after deleting the false statements and including exculpatory information about the location of the methamphetamine, the magistrate could still have concluded that there was a fair probability that evidence of a crime could have been found in the defendant's room. (R., pp.82.) Therefore, it denied Mr. Rozajewski's motion to suppress. (R., p.83.)

Mr. Rozajewski subsequently entered a conditional plea reserving his right to challenge the denial of his motion to suppress. (R., p.97; Tr., p.48, L.23 - p.51, L.9.) He entered an *Alford* plea[6] to the unlawful possession of a firearm charge. (Tr., p.45, Ls.17-24.) The State agreed to dismiss all the remaining charges and enhancements related to this incident. (Tr., p.45, Ls.4-24; *see also* PSI, pp.19-20.) The district court imposed and executed a unified sentence of five years, with four years fixed, on Mr. Rozajewski. (R., p.101.) Mr. Rozajewski filed a timely notice of appeal. (R., pp.115-18.)

On appeal, Mr. Rozajewski argued that the district court had failed to properly set aside the false statements made by Officer Fisher. He also contended that, once those

[6] *See North Carolina v. Alford*, 400 U.S. 25 (1970).

false statements were properly set aside, the remaining information he actually and properly presented to the magistrate (namely, that drug paraphernalia had been found in the common area of the home) was insufficient to establish probable cause for the search warrant for Mr. Rozajewski's room. That was because the fact that there was paraphernalia in the common area did not create the requisite nexus to Mr. Rozajewski's room.

The Court of Appeals, however, affirmed the district court's order denying Mr. Rozajewski's suppression motion. It did not resolve the question regarding the district court's obligations in regard to setting aside the false statements, but instead, resolved the case based on its determination that the illicit items found in the common area, by themselves, justified a search warrant for Mr. Rozajewski's room. (Opinion, pp.5-7.) Mr. Rozajewski filed a timely petition for review.

ISSUES

1. Whether the Idaho Court of Appeals' Opinion affirming the order denying Mr. Rozajewski's motion to suppress is in conflict with previous decisions of the Idaho Supreme Court.

2. Whether the district court erred when it denied Mr. Rozajewski's motion to suppress.

ARGUMENT

I.

The Idaho Court Of Appeals' Opinion Affirming The Order Denying Mr. Rozajewski's Motion To Suppress Is In Conflict With Previous Decisions Of The Idaho Supreme Court

A. Standard For Evaluating Petitions For Review

The Idaho Appellate Rules provide that petitions for review may be granted only "when there are special and important reasons" for doing so but, ultimately, the decision of whether to grant a given petition lies within the sound discretion of the Supreme Court. I.A.R. 118(b). This exercise of discretion is not completely unfettered. Rule 118(b) provides some factors which must be considered in evaluating any petition for review, including whether the Court of Appeals' decision is inconsistent with precedent from the Idaho Supreme Court or the United States Supreme Court. I.A.R. 118(b)(2). Mr. Rozajewski contends that is the case here, and so, there are special and important reasons for review to be granted. Therefore, this Court should exercise its review authority in this case.

B. The Court Of Appeals' Opinion Fails To Appreciate The Underlying Nexus Requirement In Its Analysis Of Whether The Facts Remaining After The Officer's False Statements Are Removed Established Probable Cause To Support The Search Warrant In This Case

The Court of Appeals' decision turns on its understanding of this Court's decision in *State v. Hansen*, 151 Idaho 342, 347 (2011). (Opinion, pp.5-7.) In *Hansen*, this Court affirmed the denial of the homeowner's challenge to a search warrant for his home because it determined that drug paraphernalia found in the bathroom his house, which the homeowner allowed another person living in an RV on his property to also

use, was sufficient to create probable cause for a warrant to search the remainder of the homeowner's house. *Hansen*, 151 Idaho at 347. The facts in this case are different from *Hansen*, in that Mr. Hansen was the owner of the home the police wanted to search, whereas Mr. Rozajewski only rented a room within the home. (*See* Opinion, p.6.) However, the Court of Appeals determined there was "no functional difference" between the two cases. (Opinion, p.6.) It believed that, "[w]ere we to hold otherwise, the result would be that a person who rents a room from a probationer, as in this case, is afforded greater protection than a homeowner who rents a room to a probationer, as in the case of *Hansen*." (Opinion, p.6.) That belief is unfounded and misunderstands the underlying analysis necessary to determine whether probable cause has been established. With a proper understanding of the underlying analysis, the rationale behind the *Hansen* decision is revealed to be inapplicable to Mr. Rozajewski's case.

This Court discussed the underlying analysis for determining whether probable cause has been established in *State v. Yager*, 139 Idaho 680, 686 (2004). Specifically, it explained the question of whether probable cause exists turns on whether the State has presented specific evidence which shows a nexus between three items: (1) the alleged criminal conduct; (2) the items the police intend to seize; and (3) the place to be searched. *Id.* This nexus "must be established by specific facts; an officer's general conclusions are not enough." *Id.* This means "there must be some facts, in addition to the finding of probable cause that the person has committed a crime, which would support a finding that there is a fair probability that the items sought are in the location which the officers seek to search," though magistrates may draw reasonable inferences from the evidence in this regard. *State v. Molina*, 125 Idaho 637, 644 (Ct. App. 1993).

It was this analysis, though not expressly articulated, which dictated the outcome in *Hansen*.[7] *See Hansen*, 151 Idaho at 346-47. In *Hansen*, this Court determined that the fact that officers found drugs in the bathroom of the defendant's home was sufficient to give rise to probable cause for a search warrant for the rest of the defendant's home. *Id.* This was true even though the defendant allowed another person, who was living in a trailer in the back yard, to also use that bathroom. *Id.* at 346. Rather, the facts in that case showed, based on the paraphernalia found in the bathroom, officers were seeking to seize items related to drug use. *See id.* at 346-47. Thus, there was a nexus between the first two *Yager* factors (alleged criminal conduct and items to be seized).

The other part of the nexus analysis, between the items to be seized and the place to be searched, turns on a determination of access and control to the place to be searched – would the person having control over the items in the common area also have access to and/or control over the other places the officers want a warrant to search. *See, e.g., State v. Fancher*, 145 Idaho 832, 838 (Ct. App. 2008); 2 LaFave, SEARCH AND SEIZURE § 3.7(d), at 387; *see also Yager*, 139 Idaho at 686 (noting that the place to be searched in that case was the bedroom over which the defendant had sole control). If there is such a connection, then there is likely probable cause to search

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[7] There is no need for an opinion to recite every potentially-relevant legal principle; according to the doctrine of *stare decisis*, judges are presumed to act in accordance with prior decisions. *See, e.g., Webster v. Reproductive Health Services*, 492 U.S. 490, 559 (1989) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986)) ("The doctrine of *stare decisis* 'permits society to presume that bedrock principles are founded in the law rather than the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.'"); *see also Agrisource, Inc. v. Johnson*, 156 Idaho 903, 913 (2011) (noting the presumption of regularity in court judgments). Thus, absent a clear indication the *Hansen* Court was breaking from prior decisions on the nexus requirement, it is presumed that the nexus requirement was incorporated in the *Hansen* decision.

the other place for similar items. *See Yager*, 139 Idaho at 686; *cf. Hansen*, 151 Idaho at 347. However, if there is not such a connection, there is no probable cause to search the other place. *See Yager*, 139 Idaho at 686.

This is where the distinction between a homeowner and a renter makes a difference. The homeowner usually has control over the whole house. *See, e.g., Colbert v. Commonwealth*, 43 S.W.3d 777, 781 (Ky. 2001) ("Like any homeowner, in the absence of an understanding to the contrary, the mother retained the right of entry to all areas of her house including the room Appellant occupied."). Therefore, the nexus between the homeowner and items in a common space, and thus, the nexus between similar items and the rest of the house, is present. *See Hansen*, 151 Idaho at 347 (indicating that, based on the facts presented to the magistrate, the nexus is extended to the whole house). Thus, as a general rule, if there are items over which the homeowner has control in one part of his house, there is a factual nexus that he will have items in another area of the house. *Compare, e.g., United States v. Roberts*, 747 F.2d 537, 545 (9th Cir. 1984) ("If the defendant uses the whole building as a single unit or is in control of the entire premises, the entire premises are suspect. There was every indication here that Roberts was using the garage and the house as a single unit. Therefore, the search of both was not overbroad . . . .")

Of course, facts are critical to this analysis. *See, e.g., State v. Wulff*, 157 Idaho 416, 422 (2014) (quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991)) ("'[T]he touchstone of the Fourth Amendment is reasonableness,' and the United States Supreme Court has repeatedly emphasized a totality of the circumstances approach is necessary" to determine if there has been a violation of those protections). The point

being, as the facts in *Hansen* demonstrate, the illicit items in one part of Mr. Hansen's house combined with his ability to access and control other areas of his house can create the necessary nexus – that illicit items probably will be found in those other areas of his house under his control. *See id.* Under those facts, a search warrant for the rest of the house under the homeowner's control is appropriate. *See id.*

On the other hand, a person renting a room inside a house, such as Mr. Rozajewski was doing, will usually only have exclusive control over the room he is renting, and, as a result, usually has an independent expectation of privacy in that room. *See, e.g., Fancher*, 145 Idaho at 838; *United States v. Rith*, 164 F.3d 1323, 1330 (10th Cir. 1999); *United States v. Duran*, 957 F.2s 499, 505 (7th Cir. 1992). That interest supersedes that of the homeowner such that the homeowner cannot authorize an intrusion of the renter's privacy. *See, e.g., Fancher*, 145 Idaho at 838. As the *Fancher* Court pointed out, absent evidence that the home owner "had access to Fancher's room, customarily entered the room when Fancher wasn't present, or kept personal belongings in Fancher's room, the State failed to meet its burden of establishing common authority" over the room, and so, the home owner did not have actual or apparent authority to consent to a search of the room. *Id.* at 838-39; *cf. United States v. Matlock,* 415 U.S. 164, n.7 ("The authority which justifies the third-party consent does not rest upon the law of property . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes . . . .") (internal citations omitted).

As a result of this additional expectation of privacy, the situation with the renter is meaningfully different than the homeowner scenario considered in *Hansen*. (*Compare*

Opinion, p.6.) In the renter scenario, there simply is not the same extent of control and access which created the nexus in *Hansen*. Thus, additional analysis is necessary in the case of a renter that is less likely to be needed in the case of a homeowner.

That conclusion is borne out in the overall Fourth Amendment jurisprudence. As Professor LaFave explains, "the question was not whether there was probable cause to believe [the defendant] as an individual was involved in the previously observed use of marijuana, but rather, whether the room used by him was not a possible hiding place for the marijuana received by [the other occupant of the house]." 2 LaFave, SEARCH AND SEIZURE § 3.7(d), at 387. Thus, "'[a]s in cases where there is no link to any particular resident, there is still *the opportunity of access* by one tenant to each occupant's room and the appearance of collective arrangements. Concealment of evidence or frustration of purpose would result if a search warrant had to be artificially limited to *an access extent less than that of the particular suspect.*'" *Id.* (quoting *State v. Suits*, 243 N.W.2d 206 (Wisc. 1976)) (emphasis added). As such, the determination focuses on whether the subject known to have control over the items in question also has access to the other places the officers want to search. If he has access, there is likely probable cause to search those areas, but if he does not, there is likely not probable cause to search those areas. *See id.*

The South Dakota Supreme Court summarized this legal principle best, explaining:

> Accordingly, we cannot infer that the facts relating to the presence of cultivated [marijuana] plants in the common yard indicate the existence of probable cause to search defendant's apartment, or one of the three other occupied apartments sharing the yard. *Without any facts linking the defendant to the planters in the common yard or some showing of criminal activity within the apartment, there was no probable cause for the*

> *issuance of the warrant to search defendant's apartment. Suspicions do not amount to probable cause for the issuance of a search warrant.*

State v. Robinette, 270 N.W.2d 573, 578 (S.D. 1978) (emphasis added).

However, in this case, the State presented no evidence to the magistrate which would indicate that such a connection existed between the items found in the common area and Mr. Rozajewski's room. First, as in *Fancher*, there was no evidence that anyone else living at the house beside Mr. Rozajewski had access to his room, customarily entered it when he was gone, or kept personal belongings in the room. (*See generally* R., Tr.) In fact, the evidence presented to the magistrate demonstrates Mr. Rozajewski exercised his sole control over the room by prohibiting the officers from searching it while they searched the rest of the house pursuant to Mr. Delisle's probation waiver. (*See* Audio of Warrant Application Hearing, 2:46-3:19.) Therefore, the evidence indicates that, of the residents of the house, Mr. Rozajewski, and Mr. Rozajewski alone, had access and control over the bedroom the police wanted to search.

Rather, there had to be some specific facts showing a connection between the items in the common area and Mr. Rozajewski or his room in order to establish probable cause that other such items might be in his room. *See Yager*, 139 Idaho at 686; *compare Robinette*, 270 N.W. 2d at 578. However, there were no specific facts tending to connect Mr. Rozajewski or his room to the items in the common area. (*See generally* Audio of Warrant Application Hearing.) The officer's general conclusion – that, because of the drugs in the common room, there may be drugs in Mr. Rozajewski's room – does not satisfy that requirement. *Yager*, 139 Idaho at 686 (explaining that "an officer's general conclusions are not enough," to establish the nexus).

Thus, reading *Hansen* in light of *Yager*,[8] there were specific facts presented in the officer's testimony showing that Mr. Hansen had some connection to the times in the bathroom, thereby creating the nexus between the illicit items and Mr. Hansen, and thus, the other areas of the house under his control. Therefore, a warrant to search those areas was appropriate.

That does not mean Mr. Hansen had any less of an expectation of privacy than Mr. Rozajewski. (*See* Opinion, p.6.) They had the same expectation of privacy in the parts of the home they controlled. The difference is that the State presented specific evidence justifying an intrusion into Mr. Hansen's privacy by showing the nexus between the places in which Mr. Hansen had that expectation and the illicit evidence found in the common area, whereas, in Mr. Rozajewski's case, the officers did not truthfully present any such facts to the magistrate. That simply means that, unlike in *Hansen*, the State failed to carry its burden of proof in this case, once the officer's lies are properly removed from the calculus.

Therefore, the Court of Appeals misperceived and misapplied the relevant legal rules, which resulted in an opinion which is inconsistent with this Court's established precedent. As such, this Court should exercise its review authority in this case.

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[8] The nexus requirement was already well-established in Idaho law when the *Hansen* Opinion was delivered. *See, e.g., State v. Yager*, 139 Idaho 680, 686 (2003); *State v. Sorbel*, 124 Idaho 275, 278 (Ct. App. 1993) (citing 2 LaFave, SEARCH AND SEIZURE § 3.7(d)).

II.

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

On review, this Court should reverse the order denying Mr. Rozajewski's motion to suppress. While the district court properly found that Officer Fisher lied to the magistrate, misrepresenting the facts with reckless disregard for the truth, it did not properly analyze the case under the second part of the *Franks* test. *See Franks v. Delaware*, 438 U.S. 154, 164-65 (1978).

To establish probable cause for a warrant under the Fourth Amendment, the State must present evidence showing a fair probability that evidence of a crime will be found in a particular place. *State v. Josephson*, 123 Idaho 790, 792-93 (1993); *State v. Harper*, 152 Idaho 93, 98 (Ct. App. 2011). An inherent part of that rule is that the facts being relied on must be truthfully presented to the magistrate. *Id.*; *see also Franks*, 438 U.S. at 164-165; *State v. Lindner*, 100 Idaho 37, 41 (1979). "To have a warrant set aside on the ground that its issuance was based on a false representation of material fact, the defendant must establish that the false representation: (1) was made knowingly and intentionally, or with reckless disregard for truth; and (2) that the facts included or omitted were material to the magistrate's finding of probable cause." *State v. Sorbel*, 124 Idaho 275, 279 (Ct. App. 1993); *see Franks*, 438 U.S. at 156. The inclusion of false representations in the affidavit or testimony of the officer is material if, without those representations, probable cause would not have been found. *Id.* An omission is material if there is a "substantial probability" that, had the omitted information been presented, it would have altered the finding of probable cause. *Id.*

Thus, when the *Franks* test is properly applied, the officer's false statements should be removed entirely from the probable cause calculus and the warrant reviewed only in light of the remaining facts which were properly presented to the magistrate. Since those remaining facts fail to establish probable cause to search Mr. Rozajewski's room, the district court erred by denying the motion to suppress.

Whether the misrepresentation of fact is material (*i.e.*, whether there would still be probable cause if the false representations were set aside) is a question of law that this Court reviews *de novo*. *State v. Peterson*, 133 Idaho 44, 47 (Ct. App. 1999). However, the determination of whether the erroneous statements were made intentionally or recklessly, as opposed to negligently or mistakenly, will not be disturbed absent a showing that such a determination is clearly erroneous. *Id.*

The district court made several different errors in applying that rule to this case: (1) it failed to properly set aside all the false representations; (2) it improperly considered facts that were not presented to the magistrate in its evaluation of whether there was still probable cause after the false statements were set aside; and (3) it relied on a clearly erroneous factual finding about the evidence that had been presented to the magistrate in its evaluation of whether there was still probable cause after the false statements were set aside. For all those reasons, this Court should reverse the district court's order denying the motion to suppress the evidence found during the search based on the warrant which was obtained by making false representations to the magistrate.

A. The District Court Failed To Set Aside All Of Officer Fisher's False Representations From Its Consideration Of Whether There Was Probable Cause

The district court found that two of Officer Fisher's representations were false and made with reckless disregard of the truth: (1) that Ms. Lee lived at the house; and (2) that Ms. Lee had seen methamphetamine in Mr. Rozajewski's room. (R., pp.80-81.) When the false representations in the warrant application process speak to the basis for the affiant's knowledge of the link between the suspect and the items being sought under the warrant, the affiant "'can manipulate the inference a magistrate will draw. To allow a magistrate to be misled in such a manner could denude the probable cause ho at 530" ⊥ (quoting Stanert, 762 F*State v. Chapple*, 124 Idaho 525, 530 (Ct. App. (quoting *United States v. Stanert*, 762 F.2d 775, 781 (9th Cir. 1985), *amended by* 769 F.2d 1410 (9th Cir. 1985)).

Therefore, when such a false representation is made, "we must exclude from our consideration the false or intentionally misleading statements to [the magistrate], and review the finding of probable cause upon the remaining evidence." *Id.* Since both of Officer Fisher's recklessly false representations speak to the link between Mr. Rozajewski and the items the officers wanted to seize from his room (Ms. Lee's methamphetamine), those false representations needed to be set aside in their entirety. However, the district court did not set aside the first false representation at all, and it did not fully set aside the second. (*See* R., p.83.) Therefore, its evaluation of whether there was still probable cause absent those false representations was erroneous.

1. The District Court Erred By Not Setting Aside Officer Fisher's False Representation That Ms. Lee Lived At The House

Despite finding that Officer Fisher had falsely testified that Ms. Lee lived in the house with reckless regard for the truth (R., p.80), the district court decided that false representation "need not be omitted" based on the district court's determination that the false representation was not material. (R., p.83.) That is a clear misapplication of the rule set forth in *Franks*.

Franks established a two-step test for determining whether an officer's false statements in procuring a warrant should be the basis for suppressing the evidence found as a result of that warrant. *Franks*, 438 U.S. 156; *see, e.g., United States v. Ozar*, 50 F.3d 1440, 1445-46 (8th Cir. 1995). The first step is for the district court to determine whether an intentional or reckless false representation was made. *Id.* If so, then the district court is to set that false representation aside. *Id.* Only once that false representation is removed from consideration can the district court properly engage in the second step of the analysis and determine whether there was probable cause based only on the information properly presented to the magistrate. *See Ozar*, 50 F.3d at 1445-46. As the Eighth Circuit aptly explained, if the district court skips the first step and does not set the false representations aside, but instead, jumps straight to the second step, it "frustrates appellate review" of the issue because the district court fails to engage in a meaningful or effective analysis of whether the error was harmless. *Id.*

Basically, the district court that does not set the false representation aside fails to remove the error from the equation, and so, the answer it reaches is still tainted by erroneous information. *See id.* Such an answer is as unreliable as the magistrate's

original conclusion. However, that is exactly what the district court did in this case, and thus, its conclusion regarding whether probable cause existed without the false representations is unreliable and should be disregarded.

The whole point of the *Franks* analysis is to make sure that officers do not obtain warrants based on false information because if they do, they violate the protections afforded by the Fourth Amendment. *Franks*, 438 U.S. at 164-165; *Lindner*, 100 Idaho at 41. As defense counsel pointed out, the false representation that Ms. Lee lived at the house was material because it enhanced the impact of her statement – it raised the inference that she knew *Mr. Rozajewski* had drugs and/or drug paraphernalia in his room because she lived there, and thus, had the opportunity to see what was in Mr. Rozajewski's room. (*See* Tr., p.34, Ls.12-21.) This is precisely the type of manipulation of inferences that had the Court of Appeals concerned in *Chapple*. *Chapple*, 124 Idaho at 530. As such, this false representation, which established the link between Mr. Rozajewski and the items being sought, needed to be set aside before a proper evaluation of the evidence could occur. *Id.* As a result, the district court erred by not setting aside Officer Fisher's false representation that Ms. Lee lived at the house before evaluating whether probable cause could be found on the information properly presented at the warrant application hearing.

2. The District Court Erred By Not Fully Setting Aside Officer Fisher's False Representation About Ms. Lee's Statements Regarding The Evidence Purportedly In The Bedroom

Based on the testimony given at the warrant application hearing, the warrant in this case was only issued based on two factual representations: "Due to all the drugs found inside the residence in the common area and also Lisa Lee's statements

stating that there was drugs inside the bedroom." (Audio of Warrant Application Hearing, 6:36-6:54.) The district court found, as a matter of fact, that one of those representations – that Ms. Lee had told officers that she had seen drugs in Mr. Rozajewski's room – was false and was made in reckless disregard of the truth. (R., p.80.)

However, the district court did not set aside that false representation in its entirety; it still considered the fact that there was "methamphetamine in a backpack in [Mr. Rozajewski's] room." (R., p.83.) That decision was wrong for two reasons: (1) when the false representation in the warrant application goes to the officer's knowledge of how the suspect is connected to the criminal activity and/or the evidence being sought, the entire false representation needs to be set aside, *see, e.g., Chapple*, 124 Idaho at 530; and (2) it is not proper for the district court to consider information that the officer could have, but did not actually, present to the magistrate judge, *see, e.g., State v. Ledbetter*, 118 Idaho 8, 11 (Ct. App. 1990).

For either of those reasons, the fact that Ms. Lee had said there were drugs and/or drug paraphernalia in a backpack Mr. Rozajewski's room was erroneously considered by the district court.

a. The Officer's False Representation About Ms. Lee's Statement Needed To Be Set Aside In Its Entirety

In his testimony to the magistrate judge, Officer Fisher made two statements about what Ms. Lee had told him about the drugs and/or drug paraphernalia purportedly in Mr. Rozajewski's room: (1) "Upon interviewing Lisa Lee, Shon Diesel's [sic] significant other, she says there is meth inside the room with a methamphetamine pipe,"

because "she'd seen that," (Audio of Warrant Application Hearing, 3:21-3:44); and, (2) "Due to . . . Lisa Lee's statements stating that there was drugs inside the bedroom," (Audio of Warrant Application Hearing, 6:36-6:54). The district court found, as a matter of fact, those were not true representations about the fact at issue. (R., p.81.)

The reason those representations were false is that they asserted, or at least implied, that it was Mr. Rozajewski who owned the drugs and/or drug paraphernalia in his room even though Ms. Lee actually told Officer Hemmert the drugs were hers. (Tr., p.14, L.24 - p.15, L.2.) This implicates yet another of the *Chapple* Court's concerns regarding untruthful applications for warrants: when the officer does not accurately recount the basis for his knowledge of the link between the suspect and the items to be seized, he "'can manipulate the inference a magistrate will draw. To allow a magistrate to be misled in such a manner could denude the probable cause requirement of all real meaning.'" *Chapple*, 124 Idaho at 530 (quoting *Stanert*, 762 F.2d at 781).

Similar to the representations Officer Fisher made in this case, the officer applying for the search warrant in *Chapple* attested that "Val Chapple is known to your affiant as an associate of Jill Olsen. In fact, your affiant has talked with Val Chapple about his associates and he confirmed his association with Jill Olsen." *Id.* at 530. As the Court of Appeals pointed out, this statement "suggests that Chapple confirmed directly to [the officer] that he was an associate of Olsen." *Id.* However, in response to Mr. Chapple's motion to suppress, the officer provided more detail about his representation in the warrant application: he clarified that Mr. Chapple had recognized Ms. Olsen in a photograph the officer had shown him and had "identif[ied] Jill Olsen by name and indicated he knew her face and/or had seen her around." *Id.* Based on that

clarification, the Court of Appeals found that the officer lied in his warrant application: "Far from verifying that Olsen was his associate in criminal conduct, Chapple's statements to Officer Morgan indicates that Olsen was, at most, a passing acquaintance." *Id.*

That false representation – that Mr. Chapple was associated with Ms. Olsen – established the connection between Mr. Chapple and Ms. Olsen's drug trafficking operation. Therefore, the whole representation was tainted and had to be set aside. As a result, the Court of Appeals "remove[d the officer's] statement *about Chapple's connection* to Olsen from the evidence submitted to obtain the search warrant." *Id.* (emphasis added). Without those statements, "the evidence of probable cause [falls] like a house of cards. . . . [T]here is nothing to tie Chapple to Olsen's drug-related activities."[9] *Id.*

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[9] In other cases, where the officer's misstatement only spoke to a specific fact about, for example, the place to be searched or the items being sought, the Court of Appeals has set aside only the specific portion of the statement which was erroneous. Thus, when an officer testified that the truck he sought to search was "maroon," even though the victim had told him it was "brown," the Court of Appeals removed the term "maroon" from the affidavit, but considered the remainder of the officer's testimony about the truck in its probable cause determination. *State v. Kay*, 129 Idaho 507, 512-13 (Ct. App. 1996). Similarly, when the officer included various items being sought in his affidavit even though those items had already been recovered, the warrant was still appropriate. *State v. Thompson*, 121 Idaho 638, 641 (Ct. App. 1992). The *Thompson* Court implied that, even if the improperly-listed items were removed from the application, there would still be probable cause for the warrant to issue because there were other items listed in the warrant which were still missing. *Id.*

However, unlike in *Chapple*, the misstatements in *Kay* and *Thompson* did not mislead the magistrate as to how the officer was aware of the fact or mislead the magistrate in such a way as would manipulate the inferences the magistrate would draw about the connection between the suspect and the place to be searched and/or the items sought. *See Chapple*, 124 Idaho at 530; *cf. State v. Yager*, 139 Idaho 680, 686 (2004) (indicating that those sort of connections are what establish probable cause). Therefore, the more narrow strikes were appropriate in those cases. However, in *Chapple*, the Court of Appeals did not just strike the representation that Mr. Chapple

In this case, as in *Chapple*, Officer Fisher's false representations established the connection between Mr. Rozajewski and the items sought in his room, manipulating the inferences the magistrate would draw about those items – notably, whose they were, and thus, who knew that they were in the room. In fact, this was the district court's expressed concern with the officer's lie. (R., pp.81-82.) As a result, all Officer Fisher's erroneous representations regarding Ms. Lee's statements should have been set aside. Thus, the district court's reliance on part of Officer Fisher's false representation – that there was methamphetamine in Mr. Rozajewski's room (R., p.83) [because Ms. Lee had seen it there] – was erroneous.

b. The District Court Improperly Considered The Evidence The Officer Might Have, But Did Not Actually, Provide To The Magistrate

The other reason the district court erroneously considered the fact that Ms. Lee told officers there was methamphetamine in a backpack in Mr. Rozajewski's room was that it was "including exculpatory information about the location of the methamphetamine" in its consideration of whether there was still sufficient evidence to establish probable cause for the warrant. (R., p.82.) However, Officer Fisher did not testify as to where in the room Ms. Lee said the drugs and/or drug paraphernalia supposedly were. (*See generally* Audio of Warrant Application Hearing.) He certainly did not say anything about a backpack.[10] (*See generally* Audio of Warrant Application

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was an associate of Ms. Olsen's and still consider the fact that he actually did know her because the taint of the false representation would still be impacting the analysis. *See Chapple*, 124 Idaho at 530. Thus, it struck more broadly and removed the entire statement "about Chapple's connection to Olsen." *Id.*

[10] As will be discussed in depth in Section II(B), *infra*, the absence of testimony about the backpack during the warrant application hearing also means the district court's

Hearing.) Considering facts that the officer might have, but did not, present to the magistrate exceeds the scope of review permitted once a defendant has met his initial burden under *Franks*.

The proper procedure under *Franks* provides: "If the defendant established perjury or reckless disregard by a preponderance of the evidence, and 'with the affidavit's false material set to one side, the affidavit's *remaining content* is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.'" *Ledbetter*, 118 Idaho at 11 (quoting *Franks*, 438 U.S. at 156) (emphasis added). As the Court of Appeals has explained, this means that "the false testimony simply must be set aside and a determination then made as to whether there remains sufficient content *in the sworn testimony before the magistrate* to support a finding of probable cause." *State v. Schaffer*, 107 Idaho 812, 822 (Ct. App. 1984), *abrogated on other grounds by State v. Guzman*, 122 Idaho 981 (1991) (emphasis added). Thus, the district court cannot properly consider facts which were not included in the remainder of the officer's sworn testimony to the magistrate when evaluating whether probable cause remained after it has set aside the officer's affirmative misstatements.[11]

As a result, the district court in this case improperly included the "information about the location of the methamphetamine" – specifically, that it was in a backpack in

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conclusion that this information was, in fact, known to the magistrate is clearly erroneous and should be set aside.

[11] The rule is different if the misstatement is an omission of fact. In that scenario, the district court adds the omitted fact in to the calculus to see if the probable cause determination would change had that fact been presented. *See Franks*, 438 U.S. at 156; *Sorbel*, 124 Idaho at 279. However, since the district court only found affirmative misrepresentations (*see* R., pp.80-81), the omission rule is inapplicable to this issue.

Mr. Rozajewski's room – in its probable cause analysis because those facts were not part of the remaining sworn testimony once the false testimony about Ms. Lee's statement was set aside.

This is problematic in this case because what Ms. Lee actually told Officer Hemmert was "*she* had a loaded methamphetamine pipe in *her* backpack in the Defendant's room." (R., p.81 (emphasis added).) Thus, the scope of the warrant was drastically affected by Officer Fisher's misrepresentation of fact because it allowed the officers to search not just for Ms. Lee's backpack, which contained the proper target of the search, but the whole of Mr. Rozajewski's room for methamphetamine. (*See* Audio of Warrant Application Hearing, 7:19-7:41 (articulating the scope of the warrant).) This allowed the officers to search far more of the room to try and locate methamphetamine in numerous other places than just Ms. Lee's backpack. *Cf. State v. Teal*, 145 Idaho 985, 989 (Ct. App. 2008) (discussing the particularity requirement of the warrant requirement). However, given the statement Ms. Lee actually gave, the scope of the warrant would have properly been limited to Ms. Lee's backpack, and so, limited the intrusiveness of the intrusion into Mr. Rozajewski's privacy.

B. The District Court Made Clearly Erroneous Factual Findings About What Facts Had Been Presented To The Magistrate

The district court's evaluation of whether probable cause existed after Officer Fisher's false representations had been set aside is also wrong because it is based on the clearly erroneous finding that "[t]he information known to the magistrate was that the officers had found a marijuana pipe in a backpack in the living room, a tin containing marijuana on the kitchen counter, drug paraphernalia in the bedroom of the [sic] Delisle

and Lechner, and methamphetamine in a backpack in defendant's room." (R., pp.82-83.) As that factual finding is not supported by substantial and competent evidence, this Court should set that clearly erroneous finding aside. *See, e.g., State v. Henage*, 143 Idaho 655, 659 (2007).

The problem with this factual finding is not that the individual facts are inconsistent with the record on appeal, but rather, that the evidence does not support the district court's overarching conclusion that *the magistrate was aware of those particular facts.* Those specific facts, detailing the nature of the drug paraphernalia and where those items were found, came out only during the officers' testimony at the hearing on the motion to suppress held in the district court. (*See, e.g.,* Tr., p.13, L.24 - p.14, L.4.) Those facts were not presented to the magistrate during the warrant application hearing. (*See generally* Audio of Warrant Application Hearing.) The recording of the warrant application hearing is dispositive as to what information was before the magistrate, and it directly contradicts the district court's factual finding in this regard.

The first clearly erroneous aspect of the district court's description of what the magistrate knew dealt with the nature of the items found prior to the application for a warrant. For example, the district court concluded that the magistrate was aware that there was "a tin *containing marijuana.*" (R., p.83 (emphasis added).) That is a clearly erroneous determination because Officer Fisher made no representation about the contents of the tin at the warrant application hearing; all he said was that "[d]rug paraphernalia consisted of a marijuana pipe, *tin can*, a snort tube, a methamphetamine pipe. . . ." (Audio of Warrant Application Hearing, 1:45-2:00 (emphasis added).) In fact,

Officer Fisher described all those items as "paraphernalia." (*See* Audio of Warrant Application Hearing, 1:45-2:00.) Therefore, the district court's conclusion that the magistrate knew about the contents of the tin was clearly erroneous and should be set aside.

The second clearly erroneous aspect of the district court's finding addresses the location those items were found. The district court found that, "[t]he information known to the magistrate was that the officers had found a marijuana pipe in a backpack *in the living room*, a tin containing marijuana *on the kitchen counter*, drug paraphernalia *in the bedroom of the* [sic] *Delisle and Lechner* . . . ." (R., pp.82-83 (emphasis added).) However, at no time during that hearing did Officer Fisher testify that this drug paraphernalia had been found in any particular room. (*See generally* Audio of Warrant Application Hearing.) He only testified that, "[u]pon entering [the house], they [the other officers] found drug paraphernalia in plain view. Drug paraphernalia consisted of a marijuana pipe, tin can, a snort tube, a methamphetamine pipe. . . . [I believed there were drugs in Mr. Rozajewski's room d]ue to all the drugs *found in the residence in the common area* . . . ." (Audio of Warrant Application Hearing, 1:45-2:00, 6:36-6:54 (emphasis added).) The closest Officer Fisher got to specifically stating where those items had been found was his testimony that he had seen these items "in the front living area as soon as you walked in the front door."[12] (Audio of Warrant Application Hearing,

[12] The testimony at the motion to suppress hearing indicates that the other officers had gathered that evidence together before Officer Fisher arrived. (Tr., p.13, L.24 - p.14, L.4 (Officer Hemmert's testimony about finding the items in the common room); Tr., p.20, Ls.19-21 (Officer Fisher testifying that, when he arrived on scene, Officer Hemmert briefed him on what he had found while searching the house).) However, no such representation was made to the magistrate judge. (*See generally* Audio of the

2:32-2:46 (emphasis added).) Therefore, the district court's findings that the magistrate was aware of where the drug paraphernalia had been found by the other officers were not supported by substantial and competent evidence. As a result, this Court should set those clearly erroneous findings aside as well.

In that same regard, the district court's conclusion that the magistrate knew the drug paraphernalia had been found in backpacks was clearly erroneous. Specifically, the district court found that, "[t]he information known to the magistrate was that the officers had found a marijuana pipe *in a backpack* in the living room, a tin containing marijuana on the kitchen counter, drug paraphernalia in the bedroom of the [sic] Delisle and Lechner, and methamphetamine *in a backpack* in defendant's room." (R., pp.82-83 (emphasis added).) Officer Fisher never mentioned any backpacks in his testimony to the magistrate at the warrant application hearing. (*See generally* Audio of Warrant Application Hearing.) In fact, Officer Fisher testified to the magistrate that the drug paraphernalia was found in the common area was in "plain view." (Audio of Warrant Application Hearing, 1:45-2:00.) It is hard to reconcile how this drug paraphernalia could be in a backpack, and yet also be in plain view. Therefore, the district court's

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Warrant Application Hearing.) Officer Fisher just said *he* had seen those items in the front living area:

Q. *Did you see* the -- you said meth paraphernalia?

A. Yes.

Q. Okay. And where was that?

A. It was in the front living area as soon as you walked in the front door.

(Audio of Warrant Application Hearing, 2:32-2:46 (emphasis added).)

conclusion that the magistrate was aware that the drug paraphernalia was *in backpacks* is clearly erroneous in light of the audio recording of the warrant application hearing. It, along with all the other clearly erroneous findings the district court made in this regard, should be set aside.

Allowing these clearly erroneous factual determinations to remain in the record is particularly problematic in this case because the district court had to determine whether, *based on the information actually presented to the magistrate*, probable cause was still established. *See, e.g., Franks*, 438 U.S. 156; *Chapple*, 124 Idaho at 530. However, those clearly erroneous descriptions of the location and nature of the drug paraphernalia found in the common area of the house were an integral part of the district court's analysis on that issue. (R., pp.82-83.) Therefore, the presence of those clearly erroneous factual findings actually further demonstrates why this Court should reverse the order denying the motion to suppress based on the district court's failure to properly apply the *Franks* standard.

C. Considering Only The Evidence That Was Truthfully Presented To The Magistrate, There Was Insufficient Evidence To Establish Probable Cause To Search Mr. Rozajewski's Room

Once Officer Fisher's false representations are properly set aside, as are all the clearly erroneous factual findings about what facts were before the magistrate, the only evidence remaining in Officer Fisher's sworn testimony at the warrant application hearing upon which probable cause might be based was that drug paraphernalia had been "found in the common area of the house." (Audio of Warrant Application Hearing, 6:36-6:54; *see generally* Audio of Warrant Application Hearing.) That evidence is not sufficient to establish probable cause to search Mr. Rozajewski's room.

In order to establish probable cause, the State must show "a nexus between criminal activity and the item to be seized, and a nexus between the item to be seized and the place to be searched." *State v. Yager*, 139 Idaho 680, 686 (2003). That nexus must be "established by specific facts; an officer's general conclusions are not enough." *Id.* To establish that nexus, "there must be some facts, in addition to the finding of probable cause that the person has committed a crime, which would support a finding that there is a fair probability that the items sought are in the location which the officers seek to search," though magistrates may draw reasonable inferences from the evidence in this regard. *State v. Molina*, 125 Idaho 637, 644 (Ct. App. 1993).

As discussed in depth in Section I(B), *supra*, once the false representations in this case are set aside, there are no specific facts actually presented to the magistrate that created a nexus between Mr. Rozajewski's room and the items in the common room. Rather, the only thing presented at the warrant application hearing speaking to any sort of connection between the items to be seized and Mr. Rozajewski or his room was Officer Fisher's general conclusion that, because there were drugs in the common area, there must also be drugs in Mr. Rozajewski's room. (*See* Audio of Warrant Application Hearing, 6:36-6:54.) However, "an officer's general conclusions are not enough" to establish probable cause. *Yager*, 139 Idaho at 686. Therefore, the State failed to meet its burden to prove the nexus to establish probable cause to invade Mr. Rozajewski's privacy by searching the room over which only he had control. *Compare State v. Hansen*, 151 Idaho 342, 347 (2011).

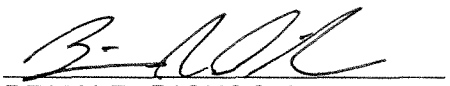
Since there was not probable cause, "the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the

face of the affidavit." *Franks*, 438 U.S. at 156. This means that all the evidence found in Mr. Rozajewski's room during the search under the warrant needed to be suppressed.

CONCLUSION

Mr. Rozajewski respectfully requests this Court grant review in this case. On review, he respectfully requests this Court vacate his judgment of conviction, reverse the order denying his motion to suppress, and remand this case for further proceedings.

DATED this 21st day of October, 2015.



BRIAN R. DICKSON
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 21st day of October, 2015, 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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