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State v. Ashbey Appellant's Reply Brief Dckt. 47251

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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NOS. 47251-2019, 47252-2019,**
Plaintiff-Respondent,	)	**& 47253-2019**
	)	
v.	)	**KOOTENAI COUNTY**
	)	**NOS. CR28-19-2202, CR28-19-2258,**
ROBERT SCOTT ASHBEY,	)	**& CR28-19-3208**
	)	
Defendant-Appellant.	)	**REPLY BRIEF**
	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE SCOTT WAYMAN
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Robert Scott Ashbey appeals the district court's orders denying his motions to suppress in his three separate cases. He argues the evidence in each of his three cases was obtained as the result of an officer's unlawful prolonging of traffic stop to facilitate a dog sniff, in violation of his Fourth Amendment rights. As correctly found by the district court, the officer requested the dog handler to conduct an exterior sniff of the vehicle, and chose to act as safety backup for the dog handler instead of returning to his patrol car and running the license checks. However, the district court erroneously concluded that detaining Mr. Ashby and the driver for the dog sniff was constitutionally reasonable because the officers had "information" that Mr. Ashbey might be transacting in narcotics. The district court ruled in the alternative, also erroneously, that there was no unlawful prolonging because the normal traffic-related tasks could have been completed within the same timeframe as the dog sniff.

In his Appellant's Brief, Mr. Ashbey argued that district court erred in concluding the officers' "information" justified the brief detention to conduct the dog sniff, because the State failed to present a sufficient factual basis to support a reasonable suspicion of drug activity or other criminal activity. The officers' "information," which the officer attributed to unspecified "street sources," was bare-bones, and according to the holdings in *Alabama v. White*, 496 U.S. 325, 330 (1990), and *State v. Bishop*, 146 Idaho 804, 811 (2009), lacked the requisite indicia of reliability to meet the Fourth Amendment's reasonable suspicion standard. (*See* Appellant's Br., pp.14-18.)

As to the district court's alternative ruling – that the traffic related tasks "could have" been completed within the same timeframe as dog sniff and therefore the officer's conduct did

not unlawfully prolong the stop – Mr. Ashbey argued that the court's rationale was expressly rejected in *Rodriguez v. United States*, 575 U.S. 348 (2015), and *State v. Linze*, 161 Idaho 605 (2016), and that the court's factual findings are also unsupported by the record. (Appellant's Br., p.12.) Mr. Ashbey asked this Court to reverse the district court's orders denying suppression, and to remand all three of his cases to the district court.

The State responds by arguing that, notwithstanding the district court's finding that the officer had decided to act as safety back up "instead of" running the license checks, the officer was "dutifully engaged in the traffic investigation up until the time the drug dog alerted on the car." (Resp. Br., p.10.) Next, the State argues that, even if the officer extended the stop beyond its traffic mission, the officer had information that supported a reasonable suspicion that justified a drug dog sniff. (Resp.Br., pp.14-15.) Finally, and relevant only to the evidence in Mr. Ashbey's third case – the drugs found at the jail – State argues that the denial of suppression as to the contraband can be affirmed based on the attenuation doctrine. (Resp.Br. pp.19-20).

This Reply Brief is necessary to respond to the State's arguments.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Ashbey's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Did the district court err in denying Mr. Ashbey's motions to suppress?

ARGUMENT

The District Court Erred When It Denied Mr. Ashbey's Motions To Suppress

A. Introduction

The district court erred as a matter of law when it concluded that Officer Nordman did not violate Mr. Ashbey's Fourth Amendment rights. As argued in the Appellant's Brief, the officer prolonged the traffic stop beyond his traffic mission, and the officer's bare-bones "information" purportedly obtained from "street sources" was inadequate to justify the extension of the detention. (Appellant's Br., pp.9-19.) Specifically, Mr. Ashbey argued that Officer Nordman had unlawfully prolonged the stop for approximately fifty seconds when, as expressly found by the district court, "instead of" running the license checks, Officer Nordman "chose to stand and act as cover for Officer Bangs [the canine handler] while he had the canine do the search." (Tr., p.102, Ls.2-12.) (Appellant's Br., pp.11, 12.) The district court's finding is supported by the officer's testimony that:

> "*I chose* not to retreat back to my vehicle, access my computer. *Instead, I allowed* Officer Bangs to conduct his exterior sniff of the vehicle *while I essentially was safety and stood* with both the defendant and the driver."

(Tr., 69, L.20 – p.70. L.5 (emphasis added).) (Appellant's Br., p.11.)

Despite the district court's factual finding and the officer's sworn testimony that Officer Nordman was acting as safety to allow the dog sniff "instead of" performing the license checks, and despite the absence of any evidence that he was investigating the turn signal violation or writing a citation, the State has asserted that, during this same time, Officer Nordman was in fact "dutifully engaged in the stop's traffic investigation" by "attending to related safety concerns." (Resp. Br., pp.7, 10-15.) As set forth below, the State's arguments are unavailing and should be rejected.

B. The Rationale Of *State v. McGraw* And *State v. Renteria* Do Not Apply Here Because Officer Nordman Was Not Continuously Investigating The Traffic Violation Or Conducting The Ordinary Inquiries

In support of its position that acting as safety back up for the dog sniff did not extend the traffic stop, the State cites the Court of Appeals' decisions in *State v. McGraw*, 163 Idaho 736, 741 (Ct. App. 2018), and *State v. Renteria*, 163 Idaho 545, 459 (Ct. App. 2018). (Resp.Br., pp.9-13.) However, both of these cases are easily distinguishable.

In *McGraw*, a traffic stop case, the Court of Appeals held that an officer providing safety cover for a dog sniff while at the same time continuously *writing a traffic citation* did not extend the duration of the traffic stop. *Id.* at 741. In *Renteria*, also a traffic stop case, the Court of Appeals held that an officer's unrelated inquiries and tasks did not extend the duration of a traffic stop, because at the same time, the officer was *conducting the ordinary inquiries incident to the traffic stop*: gathering the driver's proof of insurance; walking back to his patrol car to run the license checks; and waiting for a return of information from dispatch. *Id.* at 459. In both *McGraw* and *Renteria*, the officer was performing the tasks of his traffic mission: writing the citation, and conducting the ordinary inquiries.

By contrast, while Officer Nordman was acting as backup for the dog sniff in this case, he was performing *no* tasks that were included within his traffic mission. Rather, as testified to by the officer and expressly found by the district court, Officer Nordman chose to act as safety backup for the dog sniff "instead of" returning to his patrol car to conduct the ordinary inquiries of running the relevant license checks, and thus *instead of* concluding the traffic stop. (Tr., p.69, L.20 – p.70. L.5.) Unlike the officers in *McGraw* and *Renteria*, Officer Nordman was not performing duties related to the traffic mission while facilitating the dog sniff. Consequently, even if during the time he was facilitating the dog sniff, Officer Nordman made inquiries that had some relation to officer safety, such inquiries did not relate to the investigation or citation for

the turn signal violation, but instead were safety measures related to facilitating the dog sniff. As recognized by the Court of Appeals, the Idaho Supreme Court, and the U.S. Supreme Court, "safety precautions taken in order to facilitate investigation of other crimes, outside of the traffic mission, are not justified as part of a routine traffic stop." *State v. Jacobsen*, 166 Idaho 832, _, 464 P.3d 318, 321 (Ct. App. 2020) (quoting *Rodriguez,* 575 U.S. at 365); *see also Linze*, 161 Idaho at 609 (same). Thus, Officer Nordman's inquiries during the time he was acting as back up fell outside of his original traffic mission.

Moreover, and as demonstrated in the following section, Officer Nordman's specific roadside questioning of Mr. Ashbey and the driver during the fifty seconds at issue do not constitute the type of "safety concerns," "officer safety measures," or "precautions" needed in order for an officer to safely perform his traffic mission, and therefore were not authorized as part of the mission's related safety concerns.

C. The Record Fails To Support The State's Claim That While Officer Nordman Was Acting As Safety Backup For The Dog Sniff, The Officer Was Also Diligently Pursuing The Turn-Signal Violation

According to the State, *while* Officer Nordman was standing at the roadside and acting as a safety backup for the dog sniff, he was *also* advancing the stop's original traffic mission – *i.e.*, investigating the turn signal violation – by attending to the mission's "related safety concerns." (Resp.Br., p.10.) Specifically, the State asserts that during the first forty seconds of that fifty-second period, before the dog alerted, Officer Nordman was attending to the mission's related safety concerns by: (1) asking the occupants, "Nothing illegal inside of the vehicle?"; (2) asking the driver to confirm that she was "unsure of the blue pill" taken from her pocket during the previous search of her person; and (3) instructing Mr. Ashbey not to use his phone and telling him it was "an officer safety issue." (Resp.Br., pp.3, 12.) The State argues that the last ten

seconds of the fifty second period "does not count" because the driver had asked what was going on, and the officer took that ten seconds to explain to Mr. Ashbey and the driver that they were being detained pending the outcome of the dog sniff. (Resp. Br., pp.7, 10-15.)

As shown below, the State's assertions are not supported by the record, by the district courts findings, or by the controlling Fourth Amendment precedent and should therefore be rejected.

1. The Officer's Question, "Nothing Illegal Inside Of The Vehicle?" Was Not A Safety Concern Related To The Mission Of The Original Traffic Stop

Contrary to the State's assertion (Resp. Br., p.11), Officer Nordman's question, "Nothing *illegal* inside of the vehicle?" does not fall within the scope of a safety concern related to the traffic stop, because the question fails to address any *safety* issue that stemmed from the traffic infraction. Nor has the State shown, by officer testimony or other evidence, that the question was a necessary "precaution" taken by the officer "in order to complete the mission safely." *Rodriguez*, 575 U.S. at 365. (*See generally* Tr.) First, and most obvious, Officer Nordman did not ask if there was anything "dangerous" in the car, or if there were "weapons," or potentially hazardous or harmful items. (*See* Ex.A.) Rather, the officer asked *only* if there was anything "illegal." (*See* Ex.A.) It is not illegal for persons to carry weapons, and in Idaho, it is not illegal to carry firearms, either openly or under concealment. *See* IDAHO CONST. art. I, § 1; I.C. § 18-3301 *et seq.*[1]

As its sole authority in support of its claim, the State cites to a federal trial court's decision from West Virginia, wherein the trial judge reasoned that asking if there was anything illegal in the car was related to officer safety because "the question could expose dangerous

[1] There is nothing in the record to indicate that the officer had any knowledge that either Mr. Ashbey or the driver was disqualified from legally possessing firearms. (*See generally* Tr.)

weapons or narcotics." *United States v. Buzzard*, 395 F.Supp.3d 750, 745 (S.D.W.Virginia 2019). That ruling is incorrect. While the decision purports to rely on a federal appeals court decision, *United States v. Everett*, 601 F.3d 484, 495 (6th Cir. 2010), *see Buzzard*, 395 F.Supp.3d at 745, the appeals court case only permits questioning about "dangerous weapons" and whether a driver "has a gun." *Everett*, 601 F.3d at 495.

Rather, and contrary to the West Virginia trial court decision, and contrary to the position taken by the State on appeal, an investigation into whether a persons are in possession of "anything illegal" is precisely the type of questioning the United States Supreme Court has held to be *outside* of the officer's traffic mission. *Rodriguez*, 575 U.S. 348, 356-57 (holding that "on-scene investigations in to other crimes" detours from the traffic mission); *see also United States v. Campbell*, 912 F.3d 1340, 1353 (11th Cir. 2019)[2] (stating that "diligence does not provide an officer with cover to slip in a few unrelated questions," and holding that an officer who asked questions about contraband and drugs violated the defendant's Fourth Amendment rights); *compare State v. Floyd*, 898 N.W.2d 560, 569 (Wis. 2017) (holding that an officer's question about whether the driver "had any weapons or anything that could harm him" was related to officer safety, and therefore related to the mission of the stop.)

The State also cites to *Floyd* in support for its position, but, unlike the officer in *Floyd*, Officer Nordman did not ask about "weapons" or items that could "harm him." *See* 898 N.W.2d at 569. Officer Nordman asked instead if there was anything *illegal* in the car, which has nothing to do with guns or weapons, but is a question aimed at the detection of criminal activity. *See Campbell*, 912 F.3d at 1353. As emphasized by the United States Supreme Court in

[2] The Idaho Court of Appeals has quoted from *Campbell* with approval, albeit from a different sentence in *Campbell*. *See State v. Still*, 166 Idaho 351, 458 P.3d 220, 225 (Ct. App. 2019).

Rodriquez, "officer safety interests are interests different in kind from the Government's endeavor to detect crime in general or drug trafficking in particular." 575 U.S. 348, 356-57. Officer Nordman's inquiry had nothing to do with weapons, guns, or potentially dangerous items but was specifically directed to "illegal" items, and thus, the detection of crime. The inquiry is thus not justified as related to the safety of the mission. *Id.*

Also significant is the timing of Officer Nordman's question. When he asked, "Nothing illegal inside of the vehicle," Officer Nordman had already removed both occupants away from their vehicle. (Ex.A, at 4:58 – 5:10). Officer Nordman had already instructed the dog handler, Officer Bangs, to "go ahead" and run the dog, and already decided he would stand by and act as a safety backup. (Ex.A, 4:58 – 5:57.) At that point, to the extent that the question, "nothing illegal inside the vehicle" was in some way, somehow, a necessary officer safety precaution, it was a precaution taken for the safety of the officers conducting and facilitating the dog sniff, and not a precaution taken in relation to suspended turn-signal investigation. Under the holdings of *Rodriguez*, 575 U.S. at 355, and *Linze*, 161 Idaho at 609, safety precautions taken in order to facilitate a dog sniff fall *outside* of the mission of the original stop.

2. The Officer's Question, "You're Unsure About The Blue Pill?" Was Not A Safety Measure Related To The Turn-Signal Violation And Exceeded The Mission Of The Traffic Stop

The State next asserts that Officer Nordman's question to the driver, "you're unsure about the blue pill found that was found inside your coin pocket?" was a safety measure taken in pursuit of the original traffic violation. (Resp. Br. pp.10, 11.) According to the State, the observation of the pill presented a "related safety concern" that warranted additional questioning, for "safety reasons." This assertion is incorrect for multiple reasons. First, the assertion that a single blue pill presents any type of safety concern is pure speculation by the State. Officer

Nordman provided no testimony articulating *any* safety concern connected to his apparent discovery of a blue pill. (*See generally* Tr.) Additionally, although Officer Nordman had asked the driver if *she* was unsure what the pill was (*see* Ex.A), there is no testimony from Officer Nordman that *he* was unsure of the identity of the pill, or that he otherwise had any factual basis, be it in his training or experience, from which to draw an inference that the presence of the pill presented a safety concern to the officer or to others. (*See generally* Tr.) Nor is there any testimony or other evidence that the appearance of the pills was consistent with substances that, if ingested, can impair driving; in fact, there was no mention whatsoever of blue pills during the suppression hearing or in any of the officer's reports. (*See generally* Tr.; Conf.Exhibits, pp.2-18; Tr.) The State's suggestion that the pill presented a safety concern that justified the officer's question is not supported by the record. Thus, notwithstanding the State's speculation on appeal, the record in the district court provides no factual basis that connects the officer's inquiry about the pill to the safety of the officer or others. For this reason, the State's assertion fails. *Accord State v. Burgess*, 165 Idaho 109, 114 (Ct. App. 2018) (where record failed to demonstrate that the officer's inquiry was necessary for officer safety in continuing to carry out the purpose of the stop).

The State also cites *State v. Hays*, 159 Idaho 476, 481 (Ct. App. 2015), as support for its argument. However, *Hays* bears no resemblance to this case. There, the Court of Appeals concluded that an officer's extensive inquiries regarding a defendant's obvious excessive nervousness was "safety related" and justified questioning. *Id.* The Court's "safety concern" regarding the driver derived from the officer-observed *behavior* of the driver, and the officer *testified* at the suppression hearing regarding his observations and concerns with the driver's "nervousness." *Id.* In the present case, there is no evidence that the driver exhibited concerning

behavior, and no testimony that Officer Nordman had any concern about the driver, either based on his observation of the driver, or his observation of a blue pill. (*See generally* Tr.)

Moreover, contrary to the State's assertion (Resp.Br., p.11), a concern for the safety of the traveling public does *not* fall within the scope of a safety concern related to the mission of the traffic stop. The "related safety concerns" that may be addressed as part of the officer's traffic mission are, as explained by the U.S. Supreme Court, refer to the "officer safety interest" that "stem[] from the mission of the stop itself." *Rodriguez*, 575 U.S. at 355. "A seizure for a traffic violation justifies a police investigation *of that violation*." *Linze*, 161 Idaho 605, 608 (2016) (quoting *Rodriguez*, at 355) (emphasis added.) The stop remains a reasonable seizure only so long "as the officer diligently pursues the purpose of the stop *to which the reasonable suspicion is related*." *Linze*, at 609 (emphasis added). Thus, *Linze* and *Rodriguez* make clear that, beyond the investigation of the traffic violation for which the stop was made – here, a turn signal infraction – and the "ordinary inquiries incident" there to, an officer may *not* expand his investigation into *other* possible traffic safety code violations or more serious crimes, absent independent reasonable suspicion.

3. The State Has Not Shown That Officer Nordman's Instruction That Mr. Ashbey Stay Off His Phone Was An Officer Safety Precaution

The State next argues that Officer Nordman was acting out of a concern for officer safety "related to the traffic stop" when he instructed Mr. Ashbey not to make calls or send texts. (Resp.Br.,p.12.) This argument should also be rejected. First, because Officer Nordman had suspended his investigation of the turn signal violation while he was acting as safety back up for the dog sniff, whatever safety measures he might have taken were not related to the turn signal violation but necessarily aimed at allowing him to carry his backup function safely.

Second, although Officer Nordman can be heard on his bodycam recording telling Mr. Ashbey that not using the phone was an "officer safety issue" (Ex.A), the State provided no officer testimony showing in fact that was true, or showing how, when, or why directing vehicle occupants to stay off their phones during routine traffic stops is needed for officer safety. (*See generally* Tr.) Nor has the State cited any authority showing that forbidding occupants the use of their mobile phones during a routine traffic stop is a typical or constitutionally reasonable officer safety measure. The State's has cited to *Milledge v. State*, 811 S.E.2d 796 (S.C. 2018), a South Carolina case involving reasonable suspicion to conduct a weapons frisk, which has little relevance to the issue here. In *Milledge*, the officers testified that based on their training and experience, the defendant's attempt to make a phone call was relevant to whether he posed a threat to officer safety. *Id.* The South Carolina Court held that the officer testimony was one of a "mosaic" of factors (including that the defendant was extremely nervous, with hands shaking so much he could not dial the number), to be considered by a reviewing court to determine whether the officers had reasonable suspicion to justify a *Terry* frisk. *Id.* at 803. The discussion in *Milledge* is irrelevant to this case, however, because not only are the cases factually dissimilar, the State presented no officer testimony connecting the use of a phone with any officer safety issue. (*See generally*, Tr.)

On the other hand, citizens generally have a First Amendment right to film officers engaging in their duties, and citizens do this using their cell phones. *See e.g.*, *Glik v. Cunniffle*, 655 F.3d 78 (1st Cir. 2011). Thus, in the absence of officer testimony establishing a basis for linking an officer's instruction not to use a cell phone with officer safety interest, the State cannot establish that Officer Nordman's instruction to Mr. Ashbey was an officer safety precaution. The State's argument should be rejected.

4. The Officer's Explanation To The Occupants That The Stop Was Being Extended Pending The Results Of The Dog Sniff Did Not Justify Extending Their Detention For The Dog Sniff

The State does not attempt to claim that Officer Nordman was advancing the mission of the traffic stop during the last ten seconds of Mr. Ashbey's extended roadside detention. During most of those ten seconds, Officer Nordman was explaining to Mr. Ashbey and the driver that they were being detained pending the results of the dog sniff. (Ex.A.) Rather, the State argues that last ten seconds should not count because prior to the officer's explanation, the driver had asked "what's going on?" (Ex.A.) (Resp.Br., pp.3, 12.) The State's argument should be rejected.

It has already been established that, for the full fifty seconds that he detained Mr. Ashbey and the driver at the roadside before the dog alerted, Officer Nordman had been acting as backup in order to facilitate a dog sniff. (Tr., 69, L.20 – p.70. L.5; p.102, Ls.2-12.) Thus, to come within the holdings and rationale of *McGraw* and *Renteria*, the State must show that *while* facilitating the dog sniff, Officer Nordman was *also* diligently pursuing the mission of the traffic stop. *McGraw*, 163 Idaho at 741; *Renteria*, 163 Idaho at 459. However, the officer's telling Mr. Ashbey and the driver that they are being detained so that the dog can sniff the car, and will remain detained pending the result of the sniff, in no way shows that the officer was pursuing the investigation of the turn signal violation. The State's argument should be rejected.

The State cites the Court of Appeals' unpublished decision in *State v. Dewitt*, N. 46524, 2020 WL 374362 (Ct. App. January 23, 2020), as authority that supports its position. (Resp.Br., p.12.) The State's reliance on *Dewitt* in misplaced. First, *Dewitt* is an unpublished decision, and not properly cited to any court as precedent or as authority, as stated on the face of that opinion. *Id.* Moreover, the reasoning in *Dewitt* has no application here. In *Dewitt*, the

Court of Appeals ruled that lengthening of the stop attributable to defendant's search for prescription bottles was not attributable to the officer, and thus did not unlawfully prolong the stop. *Id.* In *Dewitt*, the stop was extended because the officer was waiting on the defendant. *Id.* In the present case, by contrast, it is undisputed that Mr. Ashbey was being detained for the last ten of that fifty seconds, because Officer Nordman was waiting on the results of the dog sniff. (Tr., p.69, L.20 – p.70. L.5; p.102, Ls.2-12.) Thus, Mr. Ashbey's detention was unlawfully prolonged during this ten-second period also.

D. The State Failed To Carry Its Burden Of Showing That Extending The Stop To Conduct A Dog Sniff Was Justified By Reasonable Suspicion

As argued in his Appellant's Brief, the officers' "information" that Mr. Ashbey and his roommate were selling narcotics from their apartment, was "bare-bones" and insufficient to provide reasonable suspicion. (Appellant's Br., pp.14-18.) In its response, the State argues that there are additional facts the provided the officer with a reasonable suspicion of crime, specifically, an "unidentifiable blue pill" and a "makeshift weapon." (Resp.Br., p.14-15.) With respect to these "additional facts," the State's argument is fatally flawed, as the officer never articulated any criminal suspicion based on those facts.

As made clear by the Idaho Supreme Court in *State v. Gonzalez*, 165 Idaho 667, 772 (2019), and by the Court of Appeals in *State v. Bly*, 159 Idaho 708, 710 (Ct. App. 2016), an officer is required to *articulate what criminal suspicion* he had, based on his observations. Thus, while "[a]n officer *can* utilize law enforcement training to draw reasonable inferences based upon objective facts to justify his or her suspicion that criminal activity is afoot," the officer *must*, at the very least, articulate how and why his training and experience has lead him draw such inferences. *Bly*, 159 Idaho at 710 (declining to find reasonable suspicion based on defendant's conduct, where "the officer articulated no basis justifying *why* the defendant's

conduct" "was consistent with criminal activity"); *see also Gonzales* (holding "[t]he fatal flaws in the State's case are that [the officer] never *articulated* what *criminal* suspicion he had of Gonzales' behavior.").

Here, though the comments captured by Officer Nordman's bodycam suggest that he saw a blue pill when he searched the driver, and that the driver said she did not know what it was, there is no indication in the record that Officer Nordman had attached *any* significance to either of those facts; there is no testimony as to why any reasonable officer could. (*See generally* Tr.) Officer Nordman never mentioned those facts, in either his police report or at the suppression hearing. (*See generally* Conf.Exhibits, pp.2-18; Tr.) There is a complete lack of any officer testimony that the pill the officer found, or the driver's statement that she did not know what it was, were in anyway indicative of or consistent with criminal activity. (*See generally* Tr.)

Likewise, there is no officer testimony or any other evidence that Officer Nordman's observation of a potential weapon on the front seat console in the vehicle, was indicative of or consistent with criminal activity. Officer Nordman testified to his concern that the item was within reach of both the driver and Mr. Ashbey, and as such presented an officer safety concern. (Tr., p.29, Ls.1-6.) However, the officer provided no testimony articulating any connection between the presence of the weapon and any particularized criminal activity. (*See generally* Tr.) The sole factual basis articulated by the officer, and on which he based his belief of criminal activity, was the information provided by the unidentified "street sources." (Tr., p.5, Ls.16-21; Conf.Exhibits, p.10.) As demonstrated in the Appellant's Brief, at pages 14-19, that information was insufficient to support a reasonable suspicion to justify the extended detention of Mr. Ashbey. Therefore, because reasonable suspicion was absent, Officer Nordman's extension of the traffic stop to conduct a drug investigation violated Mr. Ashbey's Fourth Amendment

rights. *Linze*, 161 Idaho at 608-09. The district court's contrary conclusion was error as a matter of law.

E. Suppression Should Have Been Granted In All Three Of Mr. Ashbey's Cases; The State's Attenuation Argument, Which Is Preserved Only As To The Third Case, Should Be Rejected

With respect to the evidence discovered in the jail, and relevant to the suppression of the evidence in Mr. Asbhey's third case only,[3] the State has argued that the district court's denial of suppression may be affirmed based on this Court's application of the attenuation doctrine. (Resp. Br., p.15.) As noted in the parties' respective briefing, in the district court, the prosecutor argued the application of the doctrine to the evidence discovered at the jail, but because the district court ultimately found no Fourth Amendment violation, and because that ruling was dispositive in all three of Mr. Ashbey's motions, the district court did not reach the attenuation issue.

Mr. Ashbey asserts that, based on the flagrancy and purposefulness of Officer Nordman's misconduct, this Court should conclude, as a matter of law, that the subsequent discovery of the evidence at the jail was not sufficiently attenuated, and that the evidence should have been suppressed. Alternatively, Mr. Ashbey argues that his third case, Appeal No. 47253, should be remanded to the district court with instructions that the district court determine the application of the doctrine.

[3] The attenuation doctrine is an exception to the exclusionary rule and must be argued and established by the State in the district court or else it is waived. *State v. Gonzalez*, 165 Idaho 667, 673 n.3 (2019). As noted in the Appellant's Brief, page 5, and as acknowledged by the State (Resp.Br., p.15 note 6), the State argued in the district court the attenuation exception applied *only* as to the drug evidence found at the jail (*see* Appeal No. 47253, R., pp.70-72). Accordingly, the State has waived any argument that the doctrine applies as an exception to the exclusion of any other evidence in either of the two cases. *Gonzalez*, 165 Idaho at 673.

1. This Court Should Conclude That The Officer's Conduct Is Sufficiently Attenuated

"[T]he indirect fruits of an illegal search or arrest should be suppressed when they bear a sufficiently close relationship to the underlying illegality." *New York v. Harris*, 495 U.S. 14, 19 (1990). The Idaho Supreme Court has held there are three factors for a court to consider when determining whether unlawful conduct has been adequately attenuated to remove the illegal taint: "(1) the elapsed time between the misconduct and the acquisition of the evidence, (2) the occurrence of intervening circumstances, and (3) the flagrancy and purpose of the improper law enforcement action." *State v. Cohagan*, 162 Idaho 717, 722 (2017). Id. (citation omitted.) However, in conducting this weighing, no single factor is dispositive of attenuation. *Brown v. Illinois*, 422 U.S. 590, 603 (1975).

Mr. Ashbey acknowledges that the first and second factors – elapsed time and occurrence of intervening circumstances – weigh in favor of attenuation, but not so heavily as claimed by the State. Regarding the elapsed time, the testimony indicates that the officer intentionally delayed the arrest of Mr. Ashbey, resulting in the delay of his jailing. Thus, while "the period of time to consider is the elapsed time between the misconduct and the acquisition of the evidence," *Cohagan*, 162 Idaho at 722, the elapse of fifty days does not tell the whole story here. The record shows, as Mr. Ashbey argued below, that the officer had extended his original misconduct into the application for the arrest warrant, directly using the illegally obtained evidence to procure that warrant and arrest and jail Mr. Ashbey. (Tr., p.33, L.15 – p.37, L.10.) Under these circumstances, the period of time between Mr. Ashbey's arrest on the constitutionally invalid warrant, and the discovery of the contraband at the jail, while arguably favoring attenuation, does not do so heavily.

Critically, however, and contrary the State's assertion, the third factor strongly favors exclusion because the officer's misconduct was both flagrant and purposeful. Mr. Ashbey asserts that, based on the flagrantly unlawful misconduct of the officer in his case, this Court should conclude, as it did in *Cohagan*, that "the discovery of the evidence was not sufficiently attenuated from the illegal stop as to break the causal chain between the unconstitutional stop and the discovery of the evidence." 162 Idaho at 726.

The purpose of the exclusionary rule, as it relates to the Fourth Amendment, is to deter police misconduct. *Id.* at 722-23. Accordingly, the third factor favors exclusion only "when the police misconduct is most in need of deterrence—that is, when it is *purposeful* or *flagrant*." Id. (quoting *Utah v. Strieff*, _ U.S. _, 136 S.Ct. 2056, 2061 (2016).

The State argues that Officer Nordman's conduct, like the officer's in *Strieff*, was only "negligent," not purposeful or flagrant. (Resp.Br., p.19.) However, *Strieff* differs factually from Mr. Ashbey's case, and those differences are sufficient to warrant suppression. Mr. Nordman submits that the facts of his case more closely resemble those in *Cohagan*, where due largely to the flagrancy and purposefulness of the officer's violation, the Court found there was not sufficient attenuation to remove the taint, and the exclusionary rule applied. 162 Idaho at 726.

Like the officer in *Cohagan*, Officer Nordman's misconduct was flagrant and purposeful. The with no more than a bare-bones allegation not amounting to reasonable suspicion, Officer Nordman set out to follow and seize citizens to investigate them for possible evidence of drug trafficking activity at the location they were watching. The officer did so with the express intent to generate evidence of probable cause to obtain a search warrant for the residence, and to make future multiple arrests. (Tr., p.77, Ls.13-25.) Then, rather than arrest Mr. Ashbey at the scene, Officer Nordman sought a warrant using that unlawfully obtained evidence, providing law

enforcement with another opportunity to seize and search Mr. Ashbey. As he argued to the district court, the series of events starting on December 21, and overseen by Officer Nordman, resulted in this series of criminal cases against Mr. Ashbey. (*See* Appeal No. 47253 R., pp.64-65.) Given the way in which these criminal were built upon each other, compounding the compound the ongoing law enforcement actions, the exclusionary rule would simply be given lip service if it did not apply to the seriously aggravated set of circumstances. (*See* Appeal No. 47253 R., p.65.) As it did in *Cohagan*, this Court should find that in Mr. Asbhey's case, "such purposeful conduct is simply untenable and is exactly the type of flagrantly unlawful conduct the Fourth Amendment is designed to protect against." 162 Idaho at 724. Accordingly, the district court's denial of Mr. Ashbey's motion to suppress the evidence found at the jail should be reversed, as the evidence obtained was the indirect fruit of the officer's constitutionally unlawful conduct.

2. Alternatively, This Court Should Remand Mr. Ashbey's Third Case With Instructions

Alternatively, if this Court is unable to conclude there is insufficient attenuation as to evidence found at the jail, Mr. Ashbey requests that this Court remand his third case, Appeal No. 47253, with the instruction that the district court consider and rule on the attenuation issue.

CONCLUSION

The district court erred in failing to conclude that the stop was unlawfully prolonged, in violation of Mr. Ashbey's Fourth Amendment rights. For the reasons argued in his Appellant's Brief, and those set forth herein, Mr. Ashbey asks this Court to reverse the district court's order denying his motions to suppress in his three cases, vacate his judgments of conviction, and remand his cases to the district court for further proceedings, consistent with the terms of his plea agreements.

DATED this 18th day of September, 2020.

/s/ Kimberly A. Coster
KIMBERLY A. COSTER
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of September, 2020, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served as follows:

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KAC/eas