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State v. Maxim Appellant's Reply Brief Dckt. 45950

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

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 45950**
	)	
v.	)	**ADA COUNTY NO. CR01-17-41727**
	)	
ANDREW CHARLES MAXIM,	)	**REPLY BRIEF**
	)	
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE PETER BARTON
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Andrew Maxim contends the district court erred when it held the evidence would have been inevitably discovered under an analysis which the Idaho Supreme Court had held, mere weeks before, to be improper. The State offered only a brief response to that issue. Its argument in that regard makes the precise argument that both the Supreme Court and the Court of Appeals have expressly rejected. Therefore, this Court should reject those arguments, as they would render the exclusionary rule, and thus, the Fourth Amendment, meaningless.

The majority of the State's response tries to find contradictions in the controlling precedent, so as to find error in the district court's conclusion that Mr. Maxim had standing to procedurally challenge the search of his person in the first place. However, those contradictions are born from the State's misreading of the precedent; they do not actually exist. When the controlling precedent and legal principles are understood, the State's arguments are meritless. The Court of Appeals decision directly on point makes it clear that Mr. Maxim had standing to procedurally challenge the search of his person and property even though he had a Fourth Amendment waiver a as term of probation. The district court's implicit conclusion, that the officers' actions were not justified by the terms of Mr. Maxim's probation because they did not know he was on probation at the time of the search, was also in line with the applicable United States Supreme Court precedent. As such, this Court should reject the State's attempt to show error in those respects.

Statement of the Facts and Course of Proceedings

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

ISSUE

Whether the district court's speculative analysis under the inevitable discovery doctrine is directly contrary to clear Idaho Supreme Court precedent.

ARGUMENT

The District Court's Speculative Analysis Under The Inevitable Discovery Doctrine Is Directly Contrary To Clear Idaho Supreme Court Precedent

A. A Probation Waiver Of The Fourth Amendment Does Not Give The Officers *Carte Blanche* To Warrantlessly Search A Person, Especially When The Officers Do Not Actually Know About The Waiver At The Time Of The Search

The determination of whether a party has standing to challenge a search is a question which "involves only procedural rights." *State v. Hanson*, 142 Idaho 711, 716 n.2 (Ct. App. 2006) (citing *Minnesota v. Carter*, 5235 U.S. 83, 88 (1998)). However, that term is often misused to refer to the defendant's ability to show a violation of his, as opposed to another person's, Fourth Amendment rights even though that analysis "'is more properly placed within the purview of substantive Fourth Amendment law than within that of standing.'" *Carter*, 525 U.S. at 88 (quoting *Rakas v. Illinois*, 439 U.S. 128, 140 (1978)). "[T]his Court's long history of insistence that Fourth Amendment rights are personal in nature has already answered many of these traditional standing inquiries." *Rakas*, 439 U.S. at 140. In other words, the fact that Mr. Maxim sought to ask the district court to determine the constitutionality of a warrantless search of his person is sufficient to meet his minimal burden to show standing. *See State v. Holland*, 135 Idaho 159, 162 (2000) (noting the low threshold for the defendant to prove standing).

The State's arguments fail to appreciate this distinction between the procedural and substantive analyses in this context, and so, improperly attempts to apply precedents which are assessing the substantive constitutionality of a search under the Fourth Amendment to the determination of whether the defendant had the procedural ability to challenge that search in the first place. Properly understood, the precedent reveals that the district court correctly determined

Mr. Maxim had standing to challenge the search in this case, and that the warrantless search was not reasonable.

1. Probationers have standing to challenge warrantless searches of their persons and property despite Fourth Amendment waivers

As the United States Supreme Court has repeatedly recognized, society recognizes that probationers and parolees have objectively reasonable expectations of privacy under the Fourth Amendment; those rights simply are not coextensive with those of normal citizens. *Samson v. California*, 547 U.S. 843, 848-49 & 850 n.2 (2006) (specifically discussing parolees); *United States v. Knights*, 534 U.S. 112, 115 (2001) (specifically discussing probationers). Because they still enjoy some protections under the Fourth Amendment, probationers and parolees have the procedural ability to challenge warrantless searches even in light of a probation waiver. The waiver, in other words, functions as a reason why, substantively, the search was not unreasonable under the Fourth Amendment.

The *Samson* Court actually said as much when it explained that the "traditional Fourth Amendment analysis of the totality of the circumstances [is] *inapplicable* to the question whether a prisoner had a reasonable expectation of privacy in his prison cell." *Samson*, 547 U.S. at 850 n.2 (emphasis added). It also made it clear that its decision in that case was that "the search at issue here is reasonable under our general Fourth Amendment approach . . . ." *Id.* at 547 U.S. at 852 n.3 (emphasis added). Thus, it explained that the decision was not based on whether the defendant could procedurally challenge the search (*i.e.* had standing), because if it were actually doing so, and holding he had no rights under the Fourth Amendment, "there would have been no cause to resort to Fourth Amendment analysis." *Id.* at 850 n.2. In other words, while "a condition of release *can* so diminish or eliminate a released prisoner's reasonable expectation of

privacy," it will not *always* do so. *Samson*, 547 U.S. 847 (also acknowledging that probationers have more expectations of privacy than parolees) (emphasis added). Since the waiver is not a *per se* elimination of the reasonable expectation of privacy, parolees and probationers retain the ability *to challenge* searches into those areas.

The Supreme Court made a similar point in *Knights* when it noted: "We do not decide whether the probation condition so diminished, or completely eliminated Knights' reasonable expectation of privacy (or constituted consent . . .) that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment." *Knights*, 534 U.S. at 120 n.6. Thus, the *Knights* Court was also recognizing that the probationer had the procedural ability to challenge the constitutionality of the search, but substantively, the search was, in light of the waiver and the reasonable suspicion the officers had, was constitutional. *Id.*

The Ninth Circuit has actually recognized and succinctly summarized this point: "*Samson* is not itself a case about Fourth Amendment standing, and it does not purport to change the requisites for raising a challenge to a substantively invalid search." *United States v. Grandberry*, 730 F.3d 968, 973 (9th Cir. 2013). Accordingly, it has held, in no uncertain terms, that "there is no question that [the parolee] had standing to challenge the search and seizure of his own person," despite the fact that he had a Fourth Amendment wavier as a term of his release. *Moreno v. Baca*, 431 F.3d 633, 641 (9th Cir. 2005). Procedurally, the probationer can ask the Court to determine whether the intrusion into the privacy of his person, an intrusion into the most "sacred or is more carefully guarded" right, was, substantively, justified by "clear and unquestionable authority of law." *See id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 9 (1968)) (internal quotes from *Terry* omitted). The waiver, in effect, functions as a substantive exception to the

warrant requirement (consent) which provides the officers with the clear and unquestionable authority to invade on the person's privacy without a warrant. *See Knights*, 534 U.S. at 121-22 (reiterating that "the general or individual circumstances, including 'diminished expectations of privacy,' may justify an exception to the warrant requirement") (quoting *Illinois v. McArthur*, 531 U.S. 326, 330 (2001)).

The Idaho Court of Appeals has, in fact, expressly recognized this precise point. *See State v. Cruz*, 144 Idaho 906, 907 & 908 (Ct. App. 2007). In that case, the Court held that the defendant "had a reasonable expectation of privacy in his girlfriend's apartment which he frequented regularly, either as a social guest or 'part-time' resident, and that he was therefore *entitled to challenge* the reasonableness of the search" despite the fact that, as a term of his parole, he had agreed to "submit to a search of person or property, to include residence and vehicle, at any time and place by any agent of Field and Community Services and [he] does waive constitutional right to be free from such searches."[1] *State v. Cruz*, 144 Idaho 906, 907 & 908 (Ct. App. 2007) (emphasis added). The evidence in this case shows that Mr. Maxim was in nearly the same situation as the defendant in *Cruz* – he was at his girlfriend's house, which he frequented either as a guest or part-time resident.[2] (*See* Tr., p.7, Ls.11-23; Defense Exhibit 1,

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[1] *Cruz* ultimately held that "Cruz's Fourth Amendment rights were not violated because the government's substantial interest in supervising parolees outweighs Cruz's significantly diminished expectation of privacy in his girlfriend's apartment." *Cruz*, 144 Idaho at 910. That decision, like the decision in *Samson*, was based on the substantive application of the Fourth Amendment analysis, not, as *Cruz* expressly noted, on a determination that the defendant could not procedurally challenge the search in the first place. *See id.* at 908

[2] In finding Mr. Maxim had standing, the district court noted that one of the purposes of the exclusionary rule, which is what Mr. Maxim sought to invoke, was to address misconduct by the officers. (Tr., p.26, L.19 - p.27, L.9.) That assertion was consistent with the rationale behind the standing requirement – that a person who shows that their privacy has been invaded should have the procedural ability to seek a remedy for that injury. *See Rakas*, 439 U.S. at 139-40

~1:17:45.) Therefore, because the officers invaded his privacy by entering the apartment and searching his person, he, like the defendants in *Cruz* and *Moreno*, had standing, the procedural ability to challenge the lawfulness of those actions, despite the fact that the terms of his probation contained a Fourth Amendment waiver. The State's arguments to the contrary, based on its misunderstanding of *Samson* and its progeny, are meritless.

2. The officers' actions were not objectively reasonable, and so, the warrantless searches were unlawful

As noted *supra*, the question which the State is actually attempting to raise is whether, substantively, the search was reasonable under the Fourth Amendment. As the United States Supreme Court has pointed out, "almost without exception in evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him." *Scott v. United States*, 436 U.S. 128, 137 (1978). As such, it was proper for the district court to consider whether the officers knew

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(explaining that the issue of standing involves two questions – whether there was an injury-in-fact, and whether the proponent is asserting his own legal rights).

However, to the extent the State was correct, and the district court improperly considered the purpose of the exclusionary rule in deciding whether Mr. Maxim had standing (Resp. Br., p.16), that does not make the determination that Mr. Maxim actually had standing wrong, since, as discussed *supra*, he had standing for the same reason the defendant in *Cruz* did. Moreover, that was a proper consideration in regard to the issue on which the district court ultimately focused on in its written order – whether the exclusionary rule should apply to Mr. Maxim's case. (*See* R., pp.65-70.) Therefore, if there was error in that regard, it does not create a valid alternative reason to affirm the order denying the motion to suppress. *Compare State v. Godwin*, 164 Idaho 903, ___, 436 P.3d 1252, 1271 (2019) (noting that the district court had corrected any possible error in its oral statement when it issued its written order, which correctly addressed the issue).

about the probation waiver at the time of the search as part of its assessment of whether the search was unreasonable.[3]

Based on its misunderstanding of *Samson*, the State contends that the courts do not actually follow this rule because they routinely consider factors the officers could not have known at the time of the search. (Resp. Br., pp.13-15.) The point which the State failed to appreciate in that regard is that the cases were genuinely dealing with the question of standing – whether the defendant had the procedural ability to raise a Fourth Amendment argument. *O'Connor v. Ortega*, 480 U.S. 709, 717-18 (1987) (holding that the defendant could procedurally challenge the search of his desk in in his public workplace); *State v. Mann*, 162 Idaho 36, 42 (2017) (holding the defendant could not procedurally bring a challenge to the search of a rental car when he was not an authorized driver on the rental agreement), *overruled by Byrd v. United States*, __ U.S. __, 138 S. Ct. 1518 (2018) (holding that person could procedurally bring that challenge); *United States v. Wong*, 334 F.3d 831, 839 (9th Cir. 2003) (holding a defendant could not procedurally challenge the search of a laptop, conducted pursuant to a warrant, since the laptop belonged to his employer); *State v. Vasquez*, 129 Idaho 129, 131 (Ct. App. 1996) (holding the defendant could not procedurally challenge the search of an apartment in which he was a brief visitor, rather than owner, renter, or overnight guest, concluding he could not).

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[3] As discussed in note 2, *supra*, to the extent the State is correct, and the district court erred by including a discussion of the officers' knowledge in its oral ruling on standing (Resp. Br., pp.13-14), that does not actually make its conclusion that Mr. Maxim had standing wrong. Therefore, it is not a valid alternative reason to affirm the order denying the motion to suppress.

Moreover, since this was actually a proper consideration within the substantive analysis of the merits of the motion, that comment actually helps demonstrate why the district court focused on the exclusionary rule in its ultimate written order – it implicitly found the search was not lawful. *Compare Godwin*, 436 P.3d at 1271 (noting that the district court had corrected any possible error in its oral statement when it issued its written order, which correctly addressed the issue).

In *Samson* and its progeny, the defendant could procedurally challenge the search and the courts were (as discussed *supra*) evaluating whether, substantively, the search actually violated the protections of the Fourth Amendment. That means those courts were evaluating whether *the officers*' actions were objectively reasonable. *See Scott*, 436 U.S. at 137. Thus, the State has crossed the streams, and, as a result, is seeing a contradiction in the precedent that does not actually exist.

In fact, *Samson* itself belies the State's point in this regard. *Samson* specifically noted that "an officer would not act reasonably in conducting a suspicionless search absent knowledge that the person stopped for the search is a parolee," as the law prohibits parole searches from being "arbitrary, capricious, or harassing" searches. *Samson*, 547 U.S. at 856 & n.5 (specifically discussing this principle in terms of the California law at issue in that case); *see, e.g., United States v. Caseres*, 533 F.3d 1064, 1075-76 (9th Cir. 2008) (citing *Samson* for this overarching legal principle); *State v. Donaldson*, 108 A.3d 500, 504-05 (Md. Ct. Spec. App. 2015) (same, and noting that *Samson* had favorably cited the portion of *People v. Sanders*, 73 P.3d 496, 505-06 (Cal. 2003), where the California Supreme Court had discussed that same principle).

Caseres, *Donaldson*, and *Sanders* are not the only other courts to recognize and reaffirm this principle. *See, e.g., United States v. Job*, 871 F.3d 852, 859-60 (9th Cir. 2017); *Moreno*, 431 F.3d at 641; *United States v. Gibson*, 254 F.Supp.3d 982, 988-89 (E.D. Tenn. 2017); *United States v. Williams*, 702 F.Supp.2d 1021, 1030-31 (N.D. Ill. 2010). *See also State v. Brusuelas*, 219 P.3d 1, 5 (N.M. Ct. App. 2009) (noting that, had the officer's lack of knowledge about the term of probation actually been raised below, it would likely have been dispositive for the reasons set forth in the dissenting opinion (*id.* at 9-10)); *Fenton v. State*, 154 P.3d 974, 981 (Wyo. 2007) (noting that, for a search to be justified by the terms of parole, the officer "must be

able to point to specific and articulable facts that, taken together with rational inference from those facts, reasonably warrant a belief that *a condition of parole* has been or is being violated") (emphasis added) (internal quote and alterations omitted); *State v. Barnett*, 790 S.W.2d 662, 663-64 (Tex. App. 1990) (affirming the district court's decision to suppress evidence because none of the officers testified to knowing that the defendant was on probation, and so, making a credibility determination that the probation waiver was being offered as an uncredible, after-the-fact justification); *cf. State v. Albertson*, __ P.3d __, 2019 WL 1397277, *6 n.8 (Mar. 28, 2019) ("We note that, although the test is an objective one, if an officer *is actually aware* that a person has acted to revoke the implied license, he would not be free to approach the home.") (emphasis added), *petition for rev. pending.*[4]

In fact, this rule – that the officers had to know about the term of probation for that term to justify the search – is reflected in the cases involving probation waivers to which the State cited to try to support its argument. (*See* Resp. Br., pp.10-11.) The Court in every one of those cases took time to expressly note the fact that the officers conducting the searches in those case were aware that the defendant was on probation or parole and the search was actually conducted under the authority of those terms. *Samson*, 547 U.S. at 846-47 ("Officer Rohleder was aware that petitioner was on parole" and "based solely on petitioner's status as a parolee, Officer Rohleder searched petitioner"); *State v. Purdam*, 147 Idaho 206, 206 (2009) ("[A] police officer

[4] In addition to those published decisions, several other courts have applied the same rule in unpublished decisions. *Muse v. Harper*, No. 2:07-cv-723, 2017 WL 3633746, *5 (M.D. Tenn. 2017); *New v. Perry*, No. 3:15-cv-615, 2009 WL 483341, *9 (S.D. Ohio 2009); *Curtis v. Commonwealth*, 2016 WL 6311218, *5 (Ky. Ct. App. 2016). These cases are not offered as controlling precedent, but rather simply as additional examples of how learned courts have approached this issue. *See Staff of Idaho Real Estate Comm'n v. Nordling*, 135 Idaho 630, 634 (2001) (quoting *Bourgeois v. Murphy*, 119 Idaho 611, 617 (1991)).

who knew of Purdam's probation conditions [to submit to random drug tests] . . . decided to stop him for a drug test."); *State v. Gawron*, 112 Idaho 841, 842 (1987) ("Housley [a Senior Probation and Parole officer] confirmed that Gawron was then on probation" and had a Fourth Amendment wavier as a term of that probation, and that Probation Officer Housley, himself, conducted the search of Gawron's residence); *State v. Spencer*, 139 Idaho 736, 737 (Ct. App. 2004) ("Conklin's probation officer, along with two police officers, went to Conklin's house to perform a probationary search," where they found the defendant in a locked bedroom, which they searched because "that all areas of the residence were subject to search pursuant to Conklin's probation").

Thus, the district court properly considered the fact that the officers did not know about the term of probation at the time they acted in its apparent determination that the search was not lawful under the Fourth Amendment. (*See* Tr., p.26, L.19 - p.27, L.9; R., pp.65-70.) The State's arguments to the contrary, which are based on a fundamental misunderstanding of the relevant legal principles, should be rejected.

B. Based On Recent Idaho Supreme Court Precedent, Which The State Does Not So Much As Mention, The Totality Of The Circumstances In This Case Do No Justify The Frisk Because They Do Not Show Mr. Maxim Presented An Actual Danger

The Idaho Supreme Court recently reaffirmed that "*Terry* and its progeny require more than general unease or confusion" to show there was an actual danger to justify a frisk for weapons. *State v. Downing*, 163 Idaho 26, 30 (2017). That is because a "general unease" would simply be an inchoate suspicion or mere hunch. *See State v. Bishop*, 146 Idaho 804, 811 (2009).

As a result of those principles, the *Downing* Court held that the frisk was not justified because, even though the suspects had admitted to using methamphetamine and there was some confusion at the scene, some of which was actually caused by the defendant's erratic behavior, there was no bulge in the defendant's clothing, his hands were secured in handcuffs, and he was

calmed down by the time the officer conducted the frisk. *Downing*, 163 Idaho at 30. Likewise, in *Bishop*, the Supreme Court held that there was no actual risk even though the officer was acting on a tip from known informants that the defendant had drugs, and Bishop actually appeared to be under the influence of a narcotic, initially refused to consent to the frisk, was acting nervous, was clutching a bag to his chest, and said he was on probation, because nothing about the way in which he made those actions indicated he presented an *actual* risk of danger. *Bishop*, 146 Idaho at 809 (also noting that, despite being initially cooperative, the defendant interrupted the frisk by turning around and telling the officer "no" again, and struggled when the officers tried to handcuff him).

The State does not cite *Downing* at all in its brief, and it only mentions *Bishop* for the overarching standard. (*See generally* Resp. Br.) Instead, it relies solely on the Court of Appeals decision in *State v. Fleenor*, 133 Idaho 552, 554 (Ct. App. 1999). That is troubling because the analysis in *Bishop* and *Downing* appears to contradict, if not wholly abrogate, the analysis in *Fleenor*. *Compare State v. Islas*, ___ P.3d ___, 2019 WL 1053379, *4 n.1 (Ct. App. 2019) (criticizing the State's reliance on old precedent without acknowledging more recent Supreme Court precedent on point).

In *Fleenor*, officers were conducting a probation search on a third party's house. *State v. Fleenor*, 133 Idaho 552, 553-54 (Ct. App. 1999). They saw Fleenor, who was not the probationer, standing near the kitchen, and saw that he had a knife sheath on his belt. *Id.* The officer wanted to take the knife apparently inside the sheath for safety purposes,[5] and Fleenor became "very uncooperative." *Id.* Unfortunately, the opinion does not describe what Fleenor

[5] The opinion is not clear whether the officer could see the knife itself, or just the sheath. *See generally Fleenor*, 133 Idaho at 553-54.

actually did that was "very uncooperative" except that he tried to walk away from the officer. *See id.*

However, *Bishop* has subsequently reiterated that a person may peacefully refuse to consent to a frisk. *Bishop*, 146 Idaho at 817-18; *compare Fleenor*, 133 Idaho at 553-54 (noting the defendant was not the one on probation, which would suggest he was not the one subject to the search provisions). As such, the refusal to cooperate with a frisk, by itself, is *not sufficient* to justify a frisk. *See Bishop*, 146 Idaho at 820-21 (finding a frisk was not justified even though the defendant had initially refused to consent to the frisk, and during the frisk, he had stopped being cooperative to the point that the officers placed him under arrest for obstruction). Moreover, *Downing* held that the general unease or confusion in the officer's initial interactions with the people when he arrived on the scene *was not sufficient* to justify a frisk. *Downing*, 163 Idaho at 30. Thus, the only articulated basis for the decision is *Fleenor* – the fact that the defendant did not cooperate with the frisk and tried to walk away during the initial stages of the encounter – would not be sufficient to justify the frisk under *Bishop* and *Downing*. As such, the State's reliance on *Fleenor*, particularly without discussing *Bishop* or *Downing*, is improper.

Moreover, applying the analysis from *Bishop* and *Downing* to this case reveals that the frisk was not justified. The encounter happened during the day, while it was still light out. *Compare Bishop*, 146 Idaho at 821. There was no indication that Mr. Maxim appeared to be under the influence of drugs. *Compare Bishop*, 146 Idaho at 809; *State v. Henage*, 143 Idaho 655, 661 (2007)[6]; *see also Downing*, 163 Idaho at 30 (the suspects admitting to have smoked

[6] As the State noted, (Resp. Br., pp.19-20) there are some factors that were present in *Henage* which were not present in Mr. Maxim's case. (Resp. Br., pp.19-20.) There are, however, several factors which were the same – that the encounter occurred during daylight hours, that the defendant admitted having a knife, not appearing to be under the influence – and which, as

methamphetamine recently). There was no indication that there were suspicious bulges in Mr. Maxim's clothing. *Compare Bishop*, 146 Idaho at 821. Mr. Maxim's statements during that time were calm, and actually provided the officer with information relevant to what he was doing. *Compare Bishop*, 146 Idaho at 820 ("Neither the substance nor the manner in which the statements were made suggest that [he] posed a threat.").

And while Mr. Maxim did admit to having a knife and reached toward his pockets, there was nothing "furtive" about those movements, nor did it appear that he was trying to reach inside his pockets, as opposed to just patting the exterior to recall what was there. (*See* Defense Exhibit A, ~2:10.) Moreover, when the officer instructed him to put his hands on his head instead, Mr. Maxim complied. *Compare Bishop*, 146 Idaho at 821 (noting there was no issue because the defendant stood in such a manner that his hands remained visible to the officer and was somewhat compliant with the officer's instructions). Thus, any risk that might have been apparent from the fact that Mr. Maxim felt at his pockets was not enough to outweigh all the other factors which showed those actions were not aggressive or threating, such as to justify the frisk. *Compare State v. Tyler*, 153 Idaho 623, 628 (Ct. App. 2012) (affirming the district court's conclusion that a frisk was not justified even though the defendant had, on *three* different occasions, and despite the officer's repeated instructions, reached toward the pocket in which he admitted he had a knife).

Likewise, the fact that Mr. Maxim had initially tried to hide in the bathroom was not sufficient to justify the frisk, particularly in light of all those subsequent factors. *Compare*

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discussed *infra*, demonstrated neither person presented an actual danger. *Henage*'s continuing applicability is also demonstrated by the fact that *Bishop* specifically relies on *Henage*, while none of the Supreme Court's recent decisions rely on *Fleenor*. *See Bishop*, 146 Idaho at 818-20; *see generally, e.g., Downing*, 163 Idaho 26; *Bishop*, 146 Idaho 804; *Henage*, 143 Idaho 655.

Downing, 163 Idaho at 28 & 30 (holding the frisk was not justified even though the defendant had initially tried to hide behind the couch). Officer Ludwig's actions after Mr. Maxim put his hands on his head further objectively demonstrate that he did not harbor immediately concerns about his safety – he did not immediately secure the knife, nor did he further restrain Mr. Maxim. (*See* Defense Exhibit A, ~2:15.) Instead, he let Mr. Maxim walk toward the front door because the officer wanted more room to maneuver. (*See* Defense Exhibit A, ~2:15.) Even couched in the most negative light – that Mr. Maxim was trying to walk away from the officer – that would not necessarily justify the frisk. *Bishop*, 146 Idaho at 821 (holding the defendant's refusal to consent to, or fully cooperate with, the frisk did not justify the frisk in light of all the other circumstances). At any rate, the officer's reason for letting Mr. Maxim walk down the hallway does not change the objective impact of that fact because, "[t]he fact that the officer may have had a subjective feeling that his safety was compromised was irrelevant under the objective totality of the circumstances analysis." *Bishop*, 146 Idaho at 819. Rather, his behavior – allowing Mr. Maxim to keep the knife during that time and still move about without further restraints – objectively demonstrates Mr. Maxim did not objectively present an actual danger, and so, the frisk was not justified. *Compare Downing*, 163 Idaho at 30 (noting the risk was reduced because the defendant was restrained at the time of the search); *Henage*, 143 Idaho at 662 (noting the fact that the officer returned the knife to Henage objectively demonstrated there was no concern that he presented an actual danger during the encounter).

As such, applying the actual controlling precedent, it is apparent from the totality of the circumstances that Mr. Maxim did not present an actual danger. That means the frisk was unjustified. The State's arguments to the contrary, based solely on an apparently-abrogated case, should be rejected.

C. The State's Argument As To Inevitable Discovery Rely Entirely On The Same Speculative Analysis About What Officer Ludwig Might Have Done, Had He Not Actually Violated Mr. Maxim's Constitutional Rights

As noted *supra*, the State did not mention *Downing*, which is troubling since *Downing* represents the Idaho Supreme Court's most recent discussion of how the inevitable discovery doctrine works. Worse yet, the State proceeds to make the precise argument that *Downing* held to be improper – that, had Officer Ludwig had not frisked Mr. Maxim without valid justification,[7] he would have asked for additional information, run it through dispatch, and found the warrant. (Resp. Br., pp.20-23) The Court of Appeals has actually rejected this *precise* argument – "if the police had not searched illegally, but instead had done whatever was necessary to make the search legal (*e.g.*, obtain a warrant ***or secure additional information to establish reasonable cause***), the evidence in question would have been obtained" – specifically because it would render the warrant requirement embodied in the Fourth Amendment dead letter. *State v. Cook*, 106 Idaho 209, 225-26 (Ct. App. 1984) (Burnet, J., with whom Walters, C.J., joined, specially concurring) (internal quotation omitted, capitalization altered) (emphasis added). Thus, the State is simply asking this Court to substitute what the officer should have done for what he actually did, which *Downing* and *Cook* have clearly held is improper.

Here, as in *Downing* and *Cook*, the error which actually occurred tainted all the information subsequently gathered in that line of investigation, and there was no other untainted line of investigation which was already going to lead the officers to that same information.

[7] The State actually notes that there were several other aspects of the officer's actions which were potential bases to suppress the evidence – that the officer may have exceeded the scope of a permissible pat down by manipulating the items in Mr. Maxim's pocket or by opening the container he found in Mr. Maxim's pocket – but it accurately noted that those issues had not been raised by trial counsel below. (Resp. Br., p.8 n.1.) To be clear, Mr. Maxim reserves his right to raise those issues in post-conviction, if it becomes necessary.

Therefore, the inevitable discovery doctrine does not apply, because if it did, it would swallow the exclusionary rule. Therefore, for the reasons set forth in the Appellant's Brief, this Court should reject the State's arguments and reverse the order denying the motion to suppress on that basis.

CONCLUSION

Mr. Maxim respectfully requests this Court reverse the district court's order denying his motion to suppress under the inevitable discovery doctrine.

DATED this 9th day of May, 2019.

/s/ Brian R. Dickson
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of May, 2019, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
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/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

BRD/eas