Electronically Filed
10/24/2018 11:26 AM
Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

| | |
|---|---|
| **STATE OF IDAHO,** | ) |
| | ) **No. 46098** |
| **Plaintiff-Appellant,** | ) |
| | ) **Ada County Case No.** |
| **v.** | ) **CR01-2017-49307** |
| | ) |
| **ISAAC LYLE SALDIVAR,** | ) |
| | ) |
| **Defendant-Respondent.** | ) |
| | ) |

# 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 MELISSA MOODY**
**District Judge**

**LAWRENCE G. WASDEN**
**Attorney General**
**State of Idaho**

**PAUL R. PANTHER**
**Deputy Attorney General**
**Chief, Criminal Law Division**

**KENNETH K. JORGENSEN**
**Deputy Attorney General**
**Criminal Law Division**
**P. O. Box 83720**
**Boise, Idaho 83720-0010**
**(208) 334-4534**
**E-mail: ecf@ag.idaho.gov**

**ATTORNEYS FOR PLAINTIFF-APPELLANT**

**ERIC D. FREDERICKSEN**
**State Appellate Public Defender**
**322 E. Front St., Ste. 570**
**Boise, Idaho 83702**
**(208) 334-2712**
**E-mail: documents@sapd.state.id.us**

**ATTORNEY FOR DEFENDANT-RESPONDENT**

## TABLE OF CONTENTS

**PAGE**

TABLE OF AUTHORITIES ........ iii

STATEMENT OF THE CASE ........ 1

Nature Of The Case ........ 1

Statement Of The Facts And Course Of The Proceedings ........ 1

ISSUES ........ 3

ARGUMENT ........ 4

I. The District Court Erred By Concluding That Saldivar Retained A Privacy Right Despite His Parole Status And Waiver Of His Rights Against Police Searches ........ 4

A. Introduction ........ 4

B. Standard Of Review ........ 4

C. The District Court Erred By Applying An Incorrect Legal Standard ........ 4

II. The Frisk Was Constitutionally Reasonable ........ 11

A. Introduction ........ 11

B. Standard Of Review ........ 11

C. The Frisk For Possible Weapons Was Reasonable Because Saldivar Was Present At The Scene Of A Shooting Where A Gun Was Believed To Still Be ........ 12

III. The District Court Erred By Requiring An "Additional Line Of Inquiry" Before The Inevitable Discovery Doctrine Would Apply ........ 16

A. Introduction ........ 16

B. Standard Of Review ........ 16

C. The District Court Applied An Incorrect Legal Standard To The State's Claim Of Inevitable Discovery ........ 17

CONCLUSION ........ 20

CERTIFICATE OF SERVICE ........ 20

# TABLE OF AUTHORITIES

**CASES** **PAGE**

Byrd v. United States, ___ U.S. ___, 138 S. Ct. 1518 (2018) ...................................... 8, 9

In the Matter of Doe, 145 Idaho 980, 188 P.3d 922 (Ct. App. 2008) ........................ 14, 15

Michigan v. Long, 463 U.S. 1032 (1983) ........................................................................ 12

Minnesota v. Carter, 525 U.S. 83 (1998) ........................................................................ 8, 9

Moreno v. Baca, 431 F.3d 633 (9th Cir. 2005) ............................................................... 6, 7

Nix v. Williams, 467 U.S. 431 (1984) ........................................................................ 18, 19

Oliver v. United States, 466 U.S. 170 (1984) .................................................................. 10

Rakas v. Illinois, 439 U.S. 128 (1978) ............................................................................ 7, 8

Rawlings v. Kentucky, 448 U.S. 98 (1980) ..................................................................... 5, 9

Samson v. California, 547 U.S. 843 (2006) ......................................................... 5, 6, 7, 10

Sibron v. New York, 392 U.S. 40 (1968) ......................................................................... 15

Simmons v. United States, 390 U.S. 377 (1968) ................................................................ 7

State v. Ashworth, 148 Idaho 700, 228 P.3d 381 (Ct. App. 2010) ................................ 4, 5

State v. Bishop, 146 Idaho 804, 203 P.3d 1203 (2009) ...................................... 12, 13, 14

State v. Bordeaux, 148 Idaho 1, 217 P.3d 1 (Ct. App. 2009) ............................................ 8

State v. Bunting, 142 Idaho 908, 136 P.3d 379 (Ct. App. 2006) ............................... 17, 19

State v. Burgess, 104 Idaho 559, 661 P.2d 344 (Ct. App. 1983) .................................... 14

State v. Buterbaugh, 138 Idaho 96, 57 P.3d 807 (Ct. App. 2002) .................................. 18

State v. Cruz, 144 Idaho 906, 174 P.3d 876 (Ct. App. 2007) ............................................ 5

State v. Davis, 162 Idaho 874, 406 P.3d 886 (Ct. App. 2017) ......................................... 16

State v. Donaldson, 108 A.3d 500 (Md. App. 2015) ........................................................ 7

State v. Downing, 163 Idaho 26, 407 P.3d 1285 (2017) ..... 19

State v. Fancher, 145 Idaho 832, 186 P.3d 688 (Ct. App. 2008) ..... 5

State v. Foldesi, 131 Idaho 778, 963 P.2d 1215 (Ct. App. 1998) ..... 8

State v. Gawron, 112 Idaho 841, 736 P.2d 1295 (1987) ..... 5, 9, 10

State v. Henage, 143 Idaho 655, 152 P.3d 16 (2007) ..... 12, 15

State v. Huffaker, 160 Idaho 400, 374 P.3d 563 (2016) ..... 11, 12

State v. Liechty, 152 Idaho 163, 267 P.3d 1278 (Ct. App. 2011) ..... 16, 18

State v. McNeely, 162 Idaho 413, 398 P.3d 146 (2017) ..... 16

State v. Pruss, 145 Idaho 623, 181 P.3d 1231 (2008) ..... 5

State v. Purdum, 147 Idaho 206, 207 P.3d 182 (2009) ..... 7, 9

State v. Rowland, 158 Idaho 784, 352 P.3d 506 (Ct. App. 2015) ..... 18

State v. Spencer, 139 Idaho 736, 85 P.3d 1135 (Ct. App. 2004) ..... 5

State v. Wright, 134 Idaho 79, 996 P.2d 298 (2000) ..... 12

State v. Wulff, 157 Idaho 416, 337 P.3d 575 (2014) ..... 4

Stuart v. State, 136 Idaho 490, 36 P.3d 1278 (2001) ..... 17, 18

Terry v. Ohio, 392 U.S. 1 (1968) ..... 12, 15

United States v. Knights, 534 U.S. 112 (2001) ..... 5

United States v. Payner, 447 U.S. 727 (1980) ..... 8, 9

Wong Sun v. United States, 371 U.S. 471 (1963) ..... 17

## STATEMENT OF THE CASE

### Nature Of The Case

The State of Idaho appeals from the district court's order granting suppression. The state challenges the district court's determination that a parolee has the same expectation of privacy as a non-parolee in an encounter with an officer if the officer is unaware of the defendant's parole status. The state also challenges the ruling that frisking a person for weapons where that person is present at the scene of a suspected shooting, and the gun used in the shooting is still believed to be at that scene, is not reasonable.

### Statement Of The Facts And Course Of The Proceedings

Officers Trent Schneider and Joe Martinez responded to a report of a shooting at an apartment where intoxicated people, other than the person shot, were still present and the whereabouts of the gun used in the shooting was unknown. (Tr., p. 14, L. 24 – p. 15, L. 18; p. 19, Ls. 5-16.) As officers approached the front of the apartment a man, later identified as Isaac Lyle Saldivar, walked from around the back of the apartment. (Tr., p. 15, Ls. 22-25.) Because of the circumstances, the officers detained Saldivar and frisked him. (Tr., p. 15, L. 25 – p. 16, L. 24.) They found a stolen handgun in his left front pants pocket. (R., p. 54.) Officers arrested Saldivar, ran a warrant check and, upon learning of an outstanding arrest warrant, arrested him. (Tr., p. 16, L. 25 – p. 18, L. 19.) The gun in Saldivar's pocket was the only gun the officers found at the scene of the shooting. (R., p. 54.)

Saldivar was also at that time on parole. (Tr., p. 28, L. 10 – p. 29, L. 12; State's Exhibit 1.) As part of his parole agreement Saldivar consented to searches of his person

and waived his "rights under the Fourth Amendment and the Idaho constitution concerning searches." (State's Exhibit 1.)

The state charged Saldivar with unlawful possession of a firearm. (R., pp. 29-30.) Saldivar filed a motion to suppress, claiming that he was illegally seized and improperly subjected to a frisk search. (R., pp. 49-52, 108-11.) The state objected to the motion, asserting that as a parolee Saldivar did not have a reasonable expectation of privacy; that the stop and frisk were lawful; and that suppression was not an appropriate remedy because of inevitable discovery. (R., pp. 71-87, 98-106.)

The district court granted the motion, finding that Saldivar was improperly frisked, that he had a right to privacy despite his parole waiver because officers were unaware of the waiver, and that the inevitable discovery doctrine was not applicable because the arrest on an arrest warrant (which would have revealed the gun in a search incident to arrest) was not part of a different investigation. (R., pp. 114-23.) The state filed a notice of appeal within 42 days of the district court's order. (R., pp. 137-38.)

## ISSUES

1. Did the district court err by concluding that Saldivar retained a privacy right despite his parole status and waiver of his rights against police searches?

2. Did the district court err by concluding that the frisk of Saldivar was unreasonable despite his presence at the scene of a shooting where officers believed a gun was still present?

3. Did the district court err by requiring an "additional line of inquiry" before the inevitable discovery doctrine would apply?

# ARGUMENT

## I.
## The District Court Erred By Concluding That Saldivar Retained A Privacy Right Despite His Parole Status And Waiver Of His Rights Against Police Searches

### A. Introduction

As a condition of parole, Saldivar waived his rights and agreed to submit to searches of his person by law enforcement. (State's Exhibit 1.) The district court held that this waiver of rights was only effective where law enforcement officers were aware of it, and therefore Saldivar demonstrated that he had a privacy right infringed by the frisk search conducted by the officers. (R., pp. 120-21.) This holding is incompatible with the precedents of the Supreme Court of the United States and the Supreme Court of Idaho.

### B. Standard Of Review

This Court reviews suppression motion orders with a bifurcated standard. State v. Wulff, 157 Idaho 416, 418, 337 P.3d 575, 577 (2014). When a decision on a motion to suppress is challenged, the appellate court accepts the trial court's findings of fact that are not clearly erroneous, but freely reviews the application of constitutional principles to those facts. Id.

### C. The District Court Erred By Applying An Incorrect Legal Standard

Constitutional protections against unreasonable searches and seizures "apply only to a person's reasonable expectation of privacy—one which the party subjectively held and which society is willing to recognize as reasonable." State v. Ashworth, 148 Idaho 700, 702, 228 P.3d 381, 383 (Ct. App. 2010). "A person challenging a search has the burden of showing that he or she had a legitimate expectation of privacy in the item or place

searched." State v. Pruss, 145 Idaho 623, 626, 181 P.3d 1231, 1234 (2008) (citing Rawlings v. Kentucky, 448 U.S. 98, 104 (1980)).

Whether protections against unreasonable searches and seizures apply "involves a two-part inquiry: (1) Did the person have a subjective expectation of privacy in the object of the challenged search? and (2) Is society willing to recognize that expectation as reasonable?" Id. at 626, 181 P.3d at 1234. See also Ashworth, 148 Idaho at 702, 228 P.3d at 383 ("Therefore, a Fourth Amendment analysis involves a determination of whether the defendant had an actual, subjective expectation of privacy and, if so, whether the defendant's expectation of privacy, when viewed objectively, was reasonable under the circumstances."); State v. Fancher, 145 Idaho 832, 837, 186 P.3d 688, 693 (Ct. App. 2008) ("An expectation of privacy is objectively reasonable when it is legitimate, justifiable, and one society should both recognize and protect."). "The burden is on the defendant to prove the existence of a legitimate expectation of privacy." State v. Spencer, 139 Idaho 736, 739, 85 P.3d 1135, 1138 (Ct. App. 2004).

"Idaho appellate courts have long-recognized that parolees and probationers have a diminished expectation of privacy and will enforce Fourth Amendment waivers as a condition of parole or probation." State v. Cruz, 144 Idaho 906, 908, 174 P.3d 876, 878 (Ct. App. 2007). See also Samson v. California, 547 U.S. 843 (2006); United States v. Knights, 534 U.S. 112 (2001). "[P]ersons conditionally released to societies have a reduced expectation of privacy, thereby rendering intrusions by government authorities 'reasonable' which otherwise would be unreasonable or invalid under traditional constitutional concepts." State v. Gawron, 112 Idaho 841, 843, 736 P.2d 1295, 1297

(1987). Thus, "the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee." Samson, 547 U.S. at 856.

Application of these standards shows Saldivar did not have a subjectively held privacy right that society would recognize as reasonable. Saldivar did not testify that he believed he had a right to be free of a frisk search by officers who were unaware of his parole status. If he had so testified there is no reason such a belief would be considered reasonable. The waiver he signed certainly makes no provision for officer knowledge, nor does it indicate that waived rights are restored if an officer is unaware of the waiver. (State's Exhibit 1.) That Saldivar in fact subjectively and reasonably believed he had a right to not be searched after he affirmatively waived his right to not be searched is not shown on this record. Saldivar failed to prove he had an expectation of privacy, and therefore failed to demonstrate that the Fourth Amendment even applied in this case.

The district court did not apply the standards articulated by the Supreme Court of the United States and the appellate courts of the State of Idaho. (R., pp. 120-21.) Rather, it applied Ninth Circuit and Maryland precedent. (Id. (citing cases).) The authority relied on by the district court is incompatible with the standards articulated by the Supreme and the Idaho courts.

In Moreno v. Baca, 431 F.3d 633 (9th Cir. 2005) (cited at R., p. 120), the Ninth Circuit addressed whether Moreno, a parolee, had "'standing'" to challenge the seizure and search of his person. Id. at 640-41. The court concluded that cases addressing "'standing'" addressed a "question as to whether the person challenging the search had standing because he or she lacked a legitimate expectation of privacy in the place searched or the thing seized." Id. at 640. "By contrast there is no question that Moreno had standing to challenge

the search and seizure of his own person." Id. at 641. The court's holding that a parolee enjoys the same expectation of privacy against search or seizure of his person as that of a non-parolee is contrary to the above-cited authority of the Supreme Court of the United States and the Idaho appellate courts.

In Samson, 547 U.S. at 846 (decided a year after Moreno), the officer stopped and searched Samson's person. The Court held that "the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee." Id. at 857. In State v. Purdum, 147 Idaho 206, 208-10, 207 P.3d 182, 184-86 (2009), a probation condition that Purdum submit to warrantless and suspicionless BAC testing meant the officer properly seized and searched Purdum's person. The analysis of Moreno, that a parolee has the same privacy rights in his person as a non-parolee, is directly contrary to precedent.

The reasoning of the Court of Special Appeals of Maryland is similarly flawed. That court reasoned that "a constitutionally defective search cannot be justified after the fact by information unknown to the officer at the time of the warrantless search." State v. Donaldson, 108 A.3d 500, 506 (Md. App. 2015). The state's position in this case is not (nor has it ever been) that the search was "justified" by the parole waiver. Indeed, the state stipulates (for purposes of this argument only) that the search and seizure were not "justified" by reasonable suspicion. The state's only position is that Saldivar did not have a subjective expectation of privacy that society would recognize as reasonable, and therefore could not assert that the *rights he specifically waived* had been violated even if the officer's conduct did not otherwise meet Fourth Amendment standards.

Saldivar had the burden of establishing that his "'own protection was infringed by the search and seizure.'" Rakas v. Illinois, 439 U.S. 128, 138 (1978) (quoting Simmons v.

United States, 390 U.S. 377, 389 (1968)). See also Minnesota v. Carter, 525 U.S. 83, 88 (1998) ("[I]n order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; *i.e.,* one that has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." (internal quotation omitted)); State v. Bordeaux, 148 Idaho 1, 9, 217 P.3d 1, 9 (Ct. App. 2009) ("The rule is well established that in order to assert standing to suppress evidence, the individual seeking suppression must demonstrate some proprietary interest in the premises searched or some other interest giving a reasonable expectation of privacy."); State v. Foldesi, 131 Idaho 778, 780, 963 P.2d 1215, 1217 (Ct. App. 1998) ("Since *an illegal search* violates the rights only of those who have a legitimate expectation of privacy in the place or property searched, only those with such a privacy interest may obtain suppression of the fruits of the search." (emphasis added)). This is because "Fourth Amendment rights are personal rights" that "may not be vicariously asserted." Rakas, 439 U.S. at 133-34 (internal quotations omitted). "A person who is aggrieved by an *illegal search and seizure* only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." Id. at 134 (emphasis added). See also United States v. Payner, 447 U.S. 727, 731 (1980) ("a court may not exclude evidence under the Fourth Amendment unless it finds that an unlawful search or seizure violated the defendant's own constitutional rights"). Thus, even if an illegal search were established, the exclusionary rule applies only to "defendants whose Fourth Amendment rights have been violated." Rakas, 439 U.S. at 134. See also Byrd v. United States, ___ U.S. ___, 138

S. Ct. 1518, 1530 (2018) ("a person must have a cognizable Fourth Amendment interest in the place searched before seeking relief for an unconstitutional search"). Simply put, the defendant "bears the burden of proving" that "he had a legitimate expectation of privacy" infringed by the illegal search. Rawlings v. Kentucky, 448 U.S. 98, 104 (1980) (holding there was no expectation of privacy in a companion's purse). The question is not whether the search was improper, but "whether governmental officials violated any legitimate expectation of privacy held by petitioner." Id. at 106. Regardless of the constitutionality of the challenged search, a "defendant's Fourth Amendment rights are violated only when the challenged conduct invaded *his* legitimate expectation of privacy." United States v. Payner, 447 U.S. 727, 731 (1980) (emphasis original).

Under this well-established rubric, a decision that the movant seeking suppression lacks a privacy interest infringed by the governmental action ends the inquiry without regard for whether the challenged search or seizure was otherwise justified. Thus, in Carter, 525 U.S. at 91, the Supreme Court concluded because "respondents had no legitimate expectation of privacy" in the place they alleged was improperly searched, it need not reach the question of whether there had even been a search. In Gawron, 112 Idaho at 843, 736 P.2d at 1297, the Idaho Supreme Court acknowledged that the search "may well have exceeded the permissible limits" of a constitutional search, but that did not matter because it was within the scope of Gawron's Fourth Amendment waiver as a condition of probation. See also Purdum, 147 Idaho at 210, 207 P.3d at 186 (probation term allowing random blood or breath tests "at any time and at any place by any law enforcement officer" allowed search and seizure to conduct random blood and breath tests). Whether the search

at issue in this case was otherwise constitutionally justified is simply irrelevant if Saldivar's reasonable expectation of privacy was not infringed.

It was not. "[T]he touchstone of [Fourth] Amendment analysis has been the question whether a person has a constitutionally protected reasonable expectation of privacy." Oliver v. United States, 466 U.S. 170, 177 (1984) (internal quotation omitted). Saldivar's waiver of his Fourth Amendment rights extinguished his expectation of privacy. Gawron, 112 Idaho at 843, 736 P.2d at 1297. The Supreme Court of the United States has held, "the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee." Samson, 547 U.S. at 857. The district court's holding that the officer's ignorance of Saldivar's parole status and waiver restored Saldivar's privacy expectation to the same as a non-parolee who had not waived his Fourth Amendment rights is without basis. Indeed, bestowing a privacy interest on every individual unless the officers know that no privacy interest exists would confer almost limitless privacy interests, and completely eviscerate the two-step analysis set forth by controlling precedent. The district court erred by adding a requirement of officer knowledge to the expectation of privacy inquiry.

Saldivar failed to establish that he had an expectation of privacy infringed by his detention and frisk for weapons. He therefore failed to show that any of the evidence the state acquired in this case was obtained by an unlawful search or seizure. The district court's conclusion that the evidence should be suppressed anyway because Officer Schneider could not have realized his actions were lawful is without legal or logical basis. Because Saldivar's rights were not violated, he was not entitled to suppression. The district court erred and should be reversed.

II.
The Frisk Was Constitutionally Reasonable

A. Introduction

The district court concluded that officers lacked sufficient justification to frisk Saldivar for weapons. (R., pp. 117-120.[1]) In doing so the district court concluded that the nature of the possible crime and presence of a gun at the scene were not enough, without more, to justify a frisk for weapons. It is well-established, however, that the nature of the crime can be a determinative factor in justifying a frisk. Add in reason to believe that a gun was present and the officer had reasonable suspicion Saldivar could be armed and dangerous. Because the district court employed an erroneous legal standard, it committed reversible error.

B. Standard Of Review

This Court reviews a district court's order resolving a motion to suppress "using a bifurcated standard of review." State v. Huffaker, 160 Idaho 400, 404, 374 P.3d 563, 567 (2016). "This Court accepts the trial court's findings of fact unless they are clearly

[1] The district court's factual findings include one finding that may be clearly erroneous, depending on how it is interpreted. The district court stated there was no evidence that Officer Schneider considered Saldivar to be dangerous, and that the evidence showed the officer patted down Saldivar because of standard operating procedure. (R., p. 115.) Officer Schneider did testify that he conducted the frisk because it is standard operating procedure to frisk anyone they place in handcuffs, but that he undertook these safety measures of cuffing and frisking for "[o]fficer safety reasons only" and was concerned for officer safety because "there was a gun involved." (Tr., p. 16, Ls. 5-21.) Because the cuffing was not standard procedure, but initiated based on officer safety concerns, the evidence establishes that the safety precautions of cuffing, followed by frisking, were both undertaken because of safety concerns arising from the recent use of a gun in a shooting. The evidence establishes that Officer Schneider cuffed and frisked Saldivar based upon safety concerns arising exclusively from the fact of the presence of a gun, recently used in a shooting, at the apartment, and not from any fact particular to Saldivar.

erroneous, but may freely review the trial court's application of constitutional principles in light of those facts." Id.

C. The Frisk For Possible Weapons Was Reasonable Because Saldivar Was Present At The Scene Of A Shooting Where A Gun Was Believed To Still Be

An officer may, consistent with the Fourth Amendment, "conduct a limited self-protective pat down search of a detainee in order to remove any weapons." State v. Henage, 143 Idaho 655, 660, 152 P.3d 16, 21 (2007) (citing State v. Wright, 134 Idaho 79, 82, 996 P.2d 298, 301 (2000)). Such searches are "evaluated in light of the facts known to the officers on the scene and the inference of the risk of danger reasonably drawn from the totality of the circumstances." Henage, 143 Idaho at 660, 152 P.3d at 21 (quotations and citation omitted). The ultimate inquiry is an objective one, which requires the court to consider whether the facts available to the officer would "warrant a man of reasonable caution in the belief that the action taken was appropriate." Id. (quoting Terry v. Ohio, 392 U.S. 1, 22 (1968)). Such protective searches are allowed in situations where a "danger may arise from the possible presence of weapons in the area surrounding a suspect." Michigan v. Long, 463 U.S. 1032, 1049 (1983).

The Idaho Supreme Court has further held that "[a] person can be armed without posing a risk of danger," such that the mere knowledge that an individual has a weapon is insufficient to justify a frisk; there must also be a basis for concluding the armed individual is dangerous. Henage, 143 Idaho at 660, 152 P.3d at 21. "Several factors influence whether a reasonable person in the officer's position would conclude that a particular person was armed and dangerous." State v. Bishop, 146 Idaho 804, 819, 203 P.3d 1203, 1218 (2009). The factors include whether: (1) "there were any bulges in the suspect's clothing that

resembled a weapon"; (2) "the encounter took place at night or in a high crime area"; (3) "the individual made threatening or furtive movements"; (4) "the individual indicated that he or she possessed a weapon"; (5) "the individual appeared to be under the influence of alcohol or illegal drugs"; (6) the individual "was unwilling to cooperate"; and (7) the individual "had a reputation for dangerousness." Id. (citations omitted). This list is neither exclusive nor exhaustive, however, because the "test is an objective one that asks whether, under the totality of the circumstances, a reasonably prudent person would be justified in concluding that the individual posed a risk of danger." Id. at 818, 203 P.3d at 1217. "Whether any of these circumstances, taken together or by themselves, are enough to justify a *Terry* frisk depends on an analysis of the totality of the circumstances." Id. at 819, 203 P.3d at 1218.

In this case officers found Saldivar possibly leaving an apartment where there had been a "recent shooting." (R., pp. 114-15.) The information officers had was that the gun was still at the scene of the shooting. (Tr., p. 15, Ls. 6-15.) Given the nature of the potential crime, the involvement of a gun that was still at the scene, and Saldivar's potential connection to the potential crime, the gun, and the location, officers were justified in taking the reasonable approach of frisking Saldivar.

The district court discounted Saldivar's potential dangerousness by concluding that although "[p]roximity to the scene of a dangerous crime does factor into the reasonableness inquiry," it "does not by itself justify a frisk." (R., pp. 118-19.) This is an erroneous legal standard.

First, the very case cited by the district court (with a "cf." citation) does not say that the nature of the suspected crime is not enough alone to justify a frisk. The court cited[2] Bishop, 146 Idaho at 819, 203 P.3d at 1218. In Bishop, however, the Court, after listing several factors including whether the encounter was in a high crime area, stated, "Whether any of these circumstances, taken together *or by themselves*, are enough to justify a *Terry* frisk depends on an analysis of the totality of the circumstances." Id. at 819, 203 P.3d at 1218 (emphasis added). The Bishop opinion simply does not support the district court's holding that "[p]roximity to the scene of a dangerous crime … does not by itself justify a frisk." (R., p. 118.) Rather, it stands for the proposition that a single factor may justify a frisk. Moreover, there is a large analytical difference between presence in a "high crime area" (R., pp. 118-19 (quoting Bishop, 146 Idaho at 819, 203 P.3d at 1218)), and presence at an actual shooting where the gun is still believed to be located.

Indeed, the district court's minimization of the nature of the suspected crime is directly contrary to Idaho precedent. In State v. Burgess, 104 Idaho 559, 661 P.2d 344 (Ct. App. 1983), officers responded to a burglar alarm at a tavern and found Burgess walking through a parking lot "some twenty feet" from the tavern, stopped him, questioned him, and frisked him finding burglary tools. The court found the stop and frisk reasonable, stating: "It is not unreasonable to believe that burglars can be armed and dangerous." Id. at 561, 661 P.2d at 346.

The case of In the Matter of Doe, 145 Idaho 980, 188 P.3d 922 (Ct. App. 2008), also involved a suspect stopped for burglary who was found near a church and who

[2] There is an obvious typo in the court's citation. (R., p. 118.) In context, however, it is clear the district court was citing to Bishop, 146 Idaho at 819, 203 P.3d at 1218.

generally matched the description of someone reportedly seeking to gain access to the building at night. The court noted that "[s]everal jurisdictions have concluded that certain crimes, like burglary, by their very nature are so suggestive of the presence and use of weapons that a frisk is always reasonable when officers have reasonable suspicion that an individual might be involved in such a crime." Id. at 983, 188 P.3d at 925. The court declined to "adopt a bright line rule," but did acknowledge that "specific circumstances combined with certain crimes like burglary make it much more likely that a suspect will be armed and dangerous." Id. at 983-84, 188 P.3d at 925-26. Because Doe "could have been in possession of burglary tools … that could easily have been used as weapons," the frisk was "justified." Id. at 984, 188 P.3d at 926. See also Sibron v. New York, 392 U.S. 40, 74 (1968) (Harlan, J., concurring) ("I think that, as in *Terry*, the right to frisk is automatic when an officer lawfully stops a person suspected of a crime whose nature creates a substantial likelihood that he is armed"); Henage, 143 Idaho at 663, 152 P.3d at 24 (Schroeder, J., specially concurring) ("The right to frisk can arise simply from the nature of the possible crime the officer is investigating." (Citing Terry, 392 U.S. 1)).

Here there was more than a mere suggestion that the crime at issue may involve a weapon. To the contrary, the officers had every reason to believe that a gun was involved in a potentially criminal shooting at the apartment Saldivar was walking away from. Officer Schneider testified that he was responding to an apartment where a woman had been shot, that "there were other people inside that were intoxicated, and a gun was still inside." (Tr., p. 15, Ls. 6-15.) He stopped Saldivar and cuffed and frisked him for officer safety reasons because "[t]here was a gun involved" and he wished to be "sure there [were] no guns pulled on ourselves or others." (Tr., p. 16, Ls. 13-21.) The district court erred

when it concluded that more was required to stop and frisk Saldivar than suspicion that Saldivar was leaving a potential shooting scene where the gun was believed to be located.

## III.
## The District Court Erred By Requiring An "Additional Line Of Inquiry" Before The Inevitable Discovery Doctrine Would Apply

### A. Introduction

Even if the frisk were constitutionally unreasonable, Saldivar's lawful arrest pursuant to an outstanding warrant made the discovery of the gun inevitable, and therefore not subject to suppression. The district court rejected application of the inevitable discovery doctrine because the state did not prove "that some additional line of investigation would have inevitably resulted in the evidence being discovered." (R., p. 122 (citing State v. Liechty, 152 Idaho 163, 170, 267 P.3d 1278, 1285 (Ct. App. 2011)). This is an incorrect legal standard. By applying an incorrect legal standard the district court erred.

### B. Standard Of Review

"When a decision on a motion to suppress is challenged, the Court accepts the trial court's findings of fact that are supported by substantial evidence, but freely reviews the application of constitutional principles to the facts as found." State v. McNeely, 162 Idaho 413, 414-15, 398 P.3d 146, 147-48 (2017) (internal quotation omitted). See also State v. Davis, 162 Idaho 874, 876, 406 P.3d 886, 888 (Ct. App. 2017).

C. The District Court Applied An Incorrect Legal Standard To The State's Claim Of Inevitable Discovery

"The exclusionary rule is the judicial remedy for addressing illegal searches and bars the admission or use of evidence gathered pursuant to the illegal search." State v. Bunting, 142 Idaho 908, 915, 136 P.3d 379, 386 (Ct. App. 2006). "The United States Supreme Court has articulated the three exceptions" to the exclusionary rule, "independent origin, inevitable discovery, and attenuated basis." Stuart v. State, 136 Idaho 490, 495, 36 P.3d 1278, 1283 (2001). The question underlying all three exceptions "is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Wong Sun v. United States, 371 U.S. 471, 488 (1963) (internal quotation omitted).

The inevitable discovery rule applies in this case.[3] The inevitable discovery doctrine makes suppression of evidence improper where, even if the evidence was actually obtained by constitutionally improper means, the prosecution establishes by a

[3] The state does not challenge the district court's ultimate conclusion that the attenuation doctrine does not apply. The state concedes that the discovery of the gun *preceded* the discovery of the outstanding warrant, and therefore there was no intervening circumstance that would have attenuated said discovery. The state disputes the district court's determination that any "misconduct by law enforcement was purposeful and flagrant." (R., p. 122.) Although, as stated by the district court, the officer testified that it was "standard operating procedure" to frisk "anyone that is put in cuffs" (R., pp. 116, 122), the officer testified that he put Saldivar in cuffs (and therefore frisked him) because he was concerned for the safety of officers and others because "[t]here was a gun involved." (Tr., p. 15, L. 22 – p. 16, L. 21.) Officer Schneider did not testify that safety precautions such as cuffing and frisking are routinely taken for investigative stops—quite the contrary. Indeed, a policy that officers frisk where they have legitimate concerns for safety that justify handcuffing is both constitutional and laudable. That Officer Schneider took both precautions of cuffing and frisking out of safety concerns was not purposeful or flagrant misconduct.

preponderance of proof that the evidence inevitably would have been found by lawful means. Nix v. Williams, 467 U.S. 431, 444 (1984); Stuart, 136 Idaho at 497-98, 36 P.3d at 1285-86. The underlying rationale of this rule is that suppression should leave the prosecution in the same position it would have been absent the police misconduct, not a worse one. Nix, 467 U.S. at 442-44; State v. Buterbaugh, 138 Idaho 96, 102, 57 P.3d 807, 813 (Ct. App. 2002).

Here Officer Schneider testified that, after identifying Saldivar, police ran a warrants check, learned of an outstanding arrest warrant, and arrested Saldivar on that arrest warrant. (Tr., p. 17, Ls. 1-10; R., p. 54.) The search incident to that arrest would have revealed the gun in Saldivar's pocket had it not been previously removed because of the frisk. (Tr., p. 17, L. 11 – p. 18, L. 19.) The facts of this case show that the gun would have been discovered in a valid search incident to arrest but for it having been previously found in the frisk. Thus, even granting establishment of the primary illegality, the gun would inevitably have been discovered by means sufficiently distinguishable to be purged of the primary taint.

The district court, citing Liechty, 152 Idaho at 170, 267 P.3d at 1285, concluded the state did not prove "that some additional line of investigation would have inevitably resulted in the evidence being discovered." (R., p. 122.) However, more recently, in State v. Rowland, 158 Idaho 784, 352 P.3d 506 (Ct. App. 2015), the Court of Appeals clarified this proposition, stating that the lawful means which would have uncovered the evidence "need not be the result of a wholly independent investigation ... they must be the result of some action that actually took place (or was in the process of taking place) that would inevitably have led to the discovery of the unlawfully obtained evidence." Id. at 787, 352

P.3d at 509. More to the point, the Idaho Supreme Court has stated "the inevitable discovery doctrine asks courts to engage in a hypothetical finding into the lawful actions law enforcement *would have inevitably taken* in the absence of the unlawful avenue that led to the evidence." State v. Downing, 163 Idaho 26, 31, 407 P.3d 1285, 1290 (2017) (emphasis original). Thus, while the inevitable discovery exception does not permit the court to speculate on the course of action the investigation *could* have taken in the absence of the constitutional violation, "even if that alternate course likely would have yielded the evidence," it must "presuppose inevitable hypotheticals running in parallel to the illegal actions." Id. at 32, 407 P.3d at 1291.

The underlying rationale of the inevitable discovery doctrine is that a preponderance of the evidence proves that some action that actually took place, or was in the process of taking place, would have led to the discovery of the evidence that was already obtained through unlawful police action. See Nix, 467 U.S. at 448-49; Bunting, 142 Idaho at 916, 136 P.3d at 387. Because the warrants check, discovery of the warrant, and arrest thereon were police actions that in fact took place without regard for the frisk, and a search incident to the warranted arrest would have discovered the gun, evidence of the gun in Saldivar's pocket was not suppressible.

The district court applied an incorrect standard. Application of the correct legal standard leads to the opposite result. The district court should be reversed.

## CONCLUSION

The state respectfully requests this Court to reverse the district court's order suppressing evidence.

DATED this 24th day of October, 2018.

/s/ Lori A. Fleming
for KENNETH K. JORGENSEN
Deputy Attorney General

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 24th day of October, 2018, served a true and correct copy of the foregoing BRIEF OF APPELLANT to the attorney listed below by means of iCourt File and Serve:

ERIC D. FREDERICKSEN
STATE APPELLATE PUBLIC DEFENDER
documents@sapd.state.id.us

/s/ Lori A. Fleming
for KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/dd