11-21-2018

State v. Saldivar Respondent's Brief Dckt. 46098

Electronically Filed
11/21/2018 7:40 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,	)	
	)	
Plaintiff-Appellant,	)	**NO. 46098-2018**
	)	
v.	)	**ADA COUNTY NO. CR01-17-49307**
	)	
ISAAC LYLE SALDIVAR,	)	**RESPONDENT'S BRIEF**
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF RESPONDENT

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

ERIC D. FREDERICKSEN
State Appellate Public Defender
I.S.B. #6555

BEN P. MCGREEVY
Deputy State Appellate Public Defender
I.S.B. #8712
322 E. Front Street, Suite 570
Boise, Idaho 83702
Phone: (208) 334-2712
Fax: (208) 334-2985
E-mail: documents@sapd.state.id.us

ATTORNEYS FOR
DEFENDANT-RESPONDENT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR
PLAINTIFF-APPELLANT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

STATEMENT OF THE CASE

Nature of the Case

When officers responded to the scene of a reported shooting at an apartment, they found Isaac Lyle Saldivar outside the apartment building. Even though Mr. Saldivar cooperated with the officers, and the officers never presented specific facts showing Mr. Saldivar was dangerous, the officers handcuffed and frisked him. The pat-down search of Mr. Saldivar revealed a firearm on his person. After the frisk, the officers checked for warrants and confirmed Mr. Saldivar had an outstanding warrant for his arrest. At the time of the frisk, the officers did not know Mr. Saldivar was on parole, or that he had agreed to a parole waiver of his constitutional rights concerning searches.

The State charged Mr. Saldivar with felony unlawful possession of a firearm. The district court granted Mr. Saldivar's motion to suppress, ruling the frisk was unreasonable and the inevitable discovery doctrine did not apply. On appeal, the State argues the district court erred when it granted Mr. Saldivar's motion to suppress. However, the district court's decision to grant the motion to suppress was correct.

Statement of the Facts and Course of Proceedings

As the district court wrote in its factual findings from the Order Granting Motion to Suppress, early one morning, "Boise City Police officers Joseph Martinez and Trent Schneider responded to an apartment complex on [Shellie] Lane in Boise, based upon information that a woman had been shot at that location." (*See* R., p.114.) "Although later investigation would reveal that the gunshot wound was self-inflicted, police did not know this at the time." (R., p.114.) "The police only knew that the apartment was the scene of a recent shooting, the

occupants of the apartment were intoxicated, and the gun was still inside the apartment." (R., pp.114-15.) "It was dark when the police arrived and, as the officers approached the apartment building from the front, the defendant, Mr. Saldivar, came around the side of the building, carrying a tote." (R., p.115.)

The district court found, "The officers ordered Mr. Saldivar to stop, show his hands, turn around, and get down on his knees." (R., p.115.) "Mr. Saldivar complied with all of these commands." (R., p.115.) "Officer Schneider handcuffed Mr. Saldivar and, after Mr. Saldivar was handcuffed and on the ground, Officer Schneider patted down Mr. Saldivar for weapons." (R., p.115.) "The search revealed a firearm in Mr. Saldivar's front-left pants pocket." (R., p.115.)

According to the district court, there was no evidence presented at the motion to suppress hearing that "Mr. Saldivar threatened the officers or challenged the officers with his body language," or that he "reached for a weapon or exhibited any other furtive movements." (R., p.115.) Moreover, "There was no evidence of any bulges or anything remarkable about Mr. Saldivar's clothing." (R., p.115.) The district court found, "Although Officer Schneider was responding to a call that had the potential to be dangerous, there was no evidence that Officer Schneider considered this particular man to be dangerous." (R., p.115.) "Indeed, the evidence was to the contrary—that Officer Schneider patted down Mr. Saldivar as part of standard operating procedure." (R., p.115.)

The district court noted that, although Officer Schneider testified at the hearing that he patted down Mr. Saldivar "solely based on officer safety concerns, this testimony came in response to a leading question by the prosecuting attorney." (R., p.116; *see* Tr., p.16, Ls.5-24.) "More importantly, Officer Schneider never testified that he had safety concerns about

Mr. Saldivar specifically. All the officer safety concerns expressed by Officer Schneider were general concerns." (R., p.116.)

While the district court did not "doubt that Officer Schneider had officer safety concerns," the district court specifically found the officer's testimony credible that "Officer Schneider frisked Mr. Saldivar because it is standard operating procedure for the Boise City Police Department to frisk anyone in handcuffs." (R., p.116.) "After the pat-down search of Mr. Saldivar, Officer Schneider checked for warrants and confirmed that Mr. Saldivar had an outstanding warrant for his arrest." (R., p.116.)

The district court observed that, at the time of the frisk, "Mr. Saldivar was on parole and, as a parolee, had signed a waiver, waiving his Fourth Amendment Rights." (R., p.116.) The waiver provided: "I consent to the search of my person, residence, vehicle, personal property, and other real property or structures owned or leased by me, or for which I am the controlling authority conducted by any agent of IDOC or a law enforcement officer. I hereby waive my rights under the Fourth Amendment and the Idaho constitution concerning searches." (R., pp.116-17; State's Ex. 1, p.1.) However, "Officer Schneider did not know that Mr. Saldivar was on parole when he frisked him, nor did Officer Schneider know about the Fourth Amendment waiver that Mr. Saldivar had signed." (R., p.117.)

The State charged Mr. Saldivar by Information with unlawful possession of a firearm, felony, I.C. § 18-3316. (R., pp.29-30.) Mr. Saldivar entered a not guilty plea. (R., p.32.)

Mr. Saldivar subsequently filed a Motion to Suppress, requesting an order "suppressing all evidence obtained as the result of an illegal seizure and/or illegal search as well [as] statements made by Mr. Saldivar to law enforcement during custodial interrogations," under "the

Fourth and Fourteenth Amendments of the United States Constitution, Article I, Section 17 of the Idaho State Constitution, and I.C.R. 12." (R., p.49.)

Mr. Saldivar's Memorandum in Support of Motion to Suppress asserted the officers' detention and frisk of Mr. Saldivar was unlawful. (R., pp.50-53.) Mr. Saldivar asserted the facts known to the officers at the time of the pat-down search did not meet the criteria for justifying such a search from *State v. Bishop*, 146 Idaho 804 (2009). (*See* R., p.51.) He asserted that, when the officers contacted him, the officers did not know if any weapons were still involved and did not know his identity. (*See* R., p.52.) Mr. Saldivar had complied with the officers' orders. (*See* R., p.52.) He asserted that, although "the encounter occurred at night in the dark," the record was otherwise "devoid of evidence that support any of the other [*Bishop*] factors to be considered." (R., p.52.) Mr. Saldivar also asserted he "did nothing to indicate to the officers that he may be armed or dangerous." (R., p.52.) Thus, he asserted "the immediate detention, and pat search of Mr. Saldivar's person was unlawful." (*See* R., p.52.) Mr. Saldivar concluded, "The gun seized was a result of an illegal seizure and pat down for weapons and should be suppressed." (R., p.52.)

Later, the State filed an Objection to Motion to Suppress. (R., pp.71-78.) The State argued Mr. Saldivar "has a valid waiver of his constitutional rights as part of his conditions of parole," and he "lacks standing to object to a search because he has waived that right." (R., p.75.) The State also contended, "even if the Court does find that the defendant's waiver of his rights is somehow inapplicable, Officer Schneider's pat-search of the defendant for weapons was reasonable given the facts and circumstances known to the officer at the time." (R., p.76.) The State argued, "Based on the totality of those circumstances which were known to Officer Schneider at the time he performed a minimally invasive pat-search of the defendant, it was

objectively reasonable for Officer Schneider to believe that the defendant may pose a threat to the Officer's safety." (R., p.76.)

Further, the State argued that even if the pat search was not reasonable, "the attenuation doctrine would prevent exclusion of the evidence because of . . . an unrelated intervening event." (*See* R., p.76.) The State further argued, "the Court should not exclude the presence of the firearm if there was a violation because the firearm would have been discovered inevitably." (R., p.77.) The State requested that the district court deny the motion to suppress. (R., p.77.)

Mr. Saldivar filed an affidavit averring he "was not presented with a warrant during my encounter with police." (R., pp.94-95.) At the hearing on the motion to suppress, Officer Schneider testified. (*See* R., pp.91-93.) When the State asked Officer Schneider why he conducted a pat-search on Mr. Saldivar, the officer replied, "It's standard operating procedure for anyone that is put in cuffs to make sure there are no knives and guns that could be pulled while in cuffs." (Tr., p.16, Ls.5-12.) The State asked, "Did you do it for officer safety reasons?" and Officer Schneider answered, "Officer safety reasons only, yes." (Tr., p.16, Ls.13-16.) He testified he was concerned about officer safety because "[t]here was a gun involved. And any other times someone is detained, we have officers walking around to make sure there are no guns pulled on ourselves or others." (Tr., p.16, Ls.16-21.) Further, the officer was concerned that it was dark out and he could not see clearly. (*See* Tr., p.16, Ls.22-24.)

Mr. Saldivar's parole officer also testified, and he confirmed Mr. Saldivar had agreed to follow all the terms of supervision, including the term involving searches. (*See* Tr., p.26, L.17 – p.29, L.18.) On cross-examination, Officer Schneider testified he did not recall discussing Mr. Saldivar's parole status at all. (*See* Tr., p.22, Ls.17-21.)

During the hearing, Mr. Saldivar's counsel asserted with respect to the waiver, "In regards to whether he had waived his right to be free from search and seizure at any time, and I know that it's a fairly broad waiver on paper, but I don't believe anyone had any information about that when they made the encounter." (*See* Tr., p.33, Ls.15-20.) Defense counsel asserted the officers "didn't rely on that as the purpose of it. It was—the only real justification was just kind of general officer safety. And so I don't believe that the Fourth Amendment waiver should bar Mr. Saldivar from proceeding [on] a motion to suppress here." (Tr., p.33, Ls.20-25.) Mr. Saldivar's counsel also asserted the waiver should not bar the motion to suppress in light of Idaho's exclusionary rule. (*See* Tr., p.34, Ls.1-9.)

The district court asked Mr. Saldivar's counsel for authority on the proposition that the officers not knowing about the waiver would affect how the district court should rule. (*See* Tr., p.35, L.15 – p.36, L.13, p.37, L.7 – p.38, L.2.) The district court granted Mr. Salidvar additional time to provide case citations on that topic. (*See* Tr., p.39, Ls.16-18.) The State then argued the waiver was similar to the full waiver held to be valid in *State v. Gawron*, 112 Idaho 841 (1987). (*See* Tr., p.41, L.25 – p.42, L.12.)

The State filed a Supplemental Memorandum to the Court, arguing Mr. Saldivar did not have standing to go forward on the motion to suppress. (*See* R., pp.98-107.) The State argued Mr. Saldivar had no subjective expectation of privacy, because he had entirely waived his right to be free from unreasonable searches. (*See* R., pp.101-02.) The State also argued Mr. Saldivar did not have an expectation of privacy that society was willing to recognize as reasonable, based on *Samson v. California*, 547 U.S. 843 (2006). (*See* R., p.102.) Further, the State contended Mr. Saldivar's waiver would be treated as consent to search under Idaho case law, and the search

was within the scope of that consent. (*See* R., pp.103-05 (citing *State v. Purdum*, 147 Idaho 206 (2009); *Gawron*, 112 Idaho 841).)

Mr. Saldivar filed a Supplemental Brief in Support of Defendant's Motion to Suppress. (R., pp.108-12.) He asserted, "an officer cannot rely on an unknown Fourth Amendment waiver to uphold an otherwise illegal seizure, detention, stop or search." (R., pp.108-09.) Mr. Saldivar also asserted that, in *Samson*, "the [United States] Supreme Court reasoned that parolees have even fewer expectations of privacy that probationers, but disavowed the proposition that parolees, like prisoners, have no Fourth Amendment rights." (R., p.109.) He asserted, "the officers were unaware of the 4th Amendment waiver[] at the time of the search, and did not have reason to believe the [suspect was] on probation or parole. As such, Mr. Saldivar believes that this Court should find that his waiver was ineffective as to the unlawful pat down." (R., p.111.)

The district court then issued its Order Granting Motion to Suppress. (R., pp.114-24.) The district court ruled, "Based upon the totality of the circumstances confronting Officer Schneider, a reasonable person would not conclude that Mr. Saldivar was armed and presently dangerous." (R., p.118.) Even though the officers "knew that Mr. Saldivar was near a potentially dangerous crime scene," and "[p]roximity to the scene of a dangerous crime does factor into the reasonableness inquiry . . . it does not by itself justify a frisk." (R., p.118 (citing *Bishop*, 146 Idaho at 819).) Further, Mr. Saldivar "complied with all of the officers' commands," he "did not threaten the officers or engage in any behavior that caused the officers concern," and he "did not appear to have a weapon [and] did not engage in furtive movements." (R., p.119.) Also, "There is no evidence that Mr. Saldivar appeared to be under the influence of drugs or alcohol." (R., p.119.) The district court wrote, "The officers did not testify that they feared for their safety because of Mr. Saldivar or his words or actions; rather, any safety

concerns the officers had seem to have been based solely upon the nature of the call—that they were responding to an apartment where a woman had been injured by a gun." (R., p.119.)

The district court highlighted that "Officer Schneider never testified that he believed that Mr. Saldivar was armed and dangerous." (R., p.119.) The district court was therefore "not in a position of having to determine whether Officer Schneider possessed 'specific and articulable facts' which justified the officer's belief that the suspect was armed and dangerous. There is no evidence in the record that the officer believed Mr. Saldivar was armed and dangerous." (R., p.119.) The district court ruled: "Based upon a totality of the circumstances, including the fact that these events took place at night, the pat-down of Mr. Saldivar was not justified and therefore violated the Fourth Amendment of the United States Constitution and Article I, section 17 of the Idaho Constitution." (R., p.120.)

The district court then stated the consent to search in Mr. Saldivar's "broad" waiver could only mean one of two things: either the State's argument "that Mr. Saldivar waived his right to challenge any search conducted by any law enforcement officer at any time; which is to say, that Mr. Saldivar has no Fourth Amendment constitutional protections whatsoever and could, by definition, never succeed on any motion to suppress," or "it means something else." (R., p.120.) The district court ruled, "the consent is not as broad as argued by the State and that the consent is only valid if the law enforcement officers knew about it before conducting the search." (R., p.120.) The district court adopted the reasoning of the United States Court of Appeals for the Ninth Circuit, which had held in *Moreno v. Baca*, 431 F.3d 633 (9th Cir. 2005), "that a parolee waiver discovered post-search could not retroactively justify the search." (R., p.120.) The Ninth Circuit had reasoned "that Fourth Amendment violations 'almost without exception' involve an 'objective assessment of an officer's actions in light of the facts and circumstances

then known to him.'" (R., p.120 (quoting *Moreno*, 431 F.3d at 639).) The district court ruled, "A constitutionally defective search cannot be justified after the fact by information unknown to the officer at the time of the search." (R., p.121 (citing *State v. Donaldson*, 108 A.3d 500, 505 (Md. Ct. App. 2015).)

Next, the district court ruled the attenuation doctrine did not apply. (R., pp.121-22.) The district court also ruled the inevitable discovery doctrine did not apply. (*See* R., pp.122-23.) The district court characterized the State's argument as being, "regardless of the frisk, routine questioning by Officers Martinez and Schneider would have inevitably led to the discovery of the warrant for Mr. Saldivar's arrest. According to the State's speculative chronology, the discovery of the warrant would have led to Mr. Saldivar's arrest and a valid search incident to that arrest." (R., pp.122-23.) The district court ruled it "cannot adopt this position as it is based solely upon speculation." (R., p.123.) The district court noted, "The Idaho Court of Appeals rejected similar arguments . . . ." (R., p.123 (citing *State v. Liechty*, 152 Idaho 163-170 (Ct. App. 2011); *State v. Holman*, 109 Idaho 382, 393 (Ct. App. 1985).) Thus, the district court concluded "that the inevitable discovery exception to the warrant requirement does not apply here." (R., p.123.)

In sum, the district court held the warrantless frisk of Mr. Saldivar "violated his rights under the Fourth Amendment of the United States Constitution and Article I, section 17 of the Idaho Constitution. Because no exception to the exclusionary rule applies, Saldivar's motion to suppress is GRANTED." (R., p.123.)

The State filed a Notice of Appeal timely from the district court's Order Granting Motion to Suppress. (R., pp.137-39.)

ISSUES

The State frames the issues on appeal as:

I. 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?

II. 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?

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

Mr. Saldivar rephrases the issues on appeal as:

I. Was the district court correct in implicitly ruling Mr. Saldivar had the requisite legitimate expectation of privacy to challenge the warrantless frisk of his person?

II. Did the district court correctly rule the warrantless frisk of Mr. Saldivar was unreasonable, where Mr. Saldivar cooperated with the officers and the officers never presented specific facts showing Mr. Saldivar was dangerous?

III. Did the district court correctly rule the inevitable discovery doctrine did not allow the admission of the evidence gained from the unlawful frisk of Mr. Saldivar, where the district court used the proper legal standard?

ARGUMENT

I.

The District Court Was Correct In Implicitly Ruling Mr. Saldivar Had The Requisite Legitimate Expectation Of Privacy To Challenge The Warrantless Frisk Of His Person

A. Introduction

Mr. Saldivar asserts the district court was correct in implicitly ruling he had the requisite legitimate expectation of privacy to challenge the warrantless frisk of his person. The State argues that, because of the parole waiver, Mr. Saldivar did not have a legitimate expectation of privacy, otherwise known as "standing," to challenge the frisk. (*See* App. Br., pp.4-10.) The State contends: "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." (App. Br., p.7.) "The state's only position is that [Mr.] 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." (App. Br., p.7.)

However, the State's arguments on standing misunderstand the cases upon which the State relies. Those cases largely do not address whether a person has standing to challenge a search. The district court's implicit ruling, that Mr. Saldivar had standing to challenge the warrantless frisk of his person, was correct.

B. Standard Of Review And Relevant Law

The standard of review for a motion to suppress is bifurcated. An appellate court defers to the trial court's findings of fact unless the findings are clearly erroneous, and freely reviews

the trial court's application of constitutional principles to the facts as found. *State v. Hankey*, 134 Idaho 844, 846 (2000).

The Fourth Amendment to the United States Constitution, and Article I, Section 17 of the Idaho Constitution, provide protection against unreasonable searches. U.S. Const. amend. IV; Idaho Const. art. I, § 17. "However, even if a search is unreasonable, a defendant must have a privacy interest that was invaded by the search in order to suppress evidence discovered in the search." *State v. Mann*, 162 Idaho 36, 41 (2017) (citing *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978)). The term "standing," in the context of motions to suppress, "is used as shorthand for the question whether the moving party had a legitimate expectation of privacy in the area that was searched." *Id.* at 39 n.1. "When a search is challenged, the defendant bears the burden of showing that he or she had a reasonable expectation of privacy in the place searched." *Id.* at 41. "That 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?" *State v. Pruss*, 145 Idaho 623, 626 (2008).

Whether a defendant has standing to challenge a search, and whether, after a defendant has shown they have standing, a warrantless search was reasonable, are two separate issues. "A defendant attempting to suppress evidence obtained from a search must come forward with evidence sufficient to show there was a Fourth Amendment search, she has standing to challenge the search, and the search was illegal. When the defendant challenges the illegality of the search based upon the absence of a search warrant, the burden then shifts to the State to prove the legality of the search." *State v. Holland*, 135 Idaho 159, 162 (2000). In other words, "once the search is shown to have been made without a warrant, the search is deemed to be 'per se unreasonable,' and the burden shifts to the state to show that the search was pursuant to one of

the exceptions to the warrant requirement." *State v. Bottelson*, 102 Idaho 90, 92 (1981) (citation omitted).

C. The State's Arguments On Standing Misunderstand The Cases Upon Which The State Relies, Which Largely Do Not Address Standing

The State's arguments on standing misunderstand the cases upon which the State relies. The State, based on cases including *Samson v. California*, 547 U.S. 843 (2006), and *State v. Gawron*, 112 Idaho 841 (1987), contends Mr. Saldivar "did not have a subjectively held privacy right that society would recognize as reasonable." (*See* App. Br., pp.5-6.) However, the cases upon which the State relies largely do not address whether a person has standing to challenge a search.

Rather than address standing to challenge a search, *Samson* and *Gawron* deal with whether a search was reasonable, after the burden shifted to the State to prove that. The United States Supreme Court in *Samson* concluded "that the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee." *Samson*, 547 U.S. at 856. The *Samson* Court framed the issue as "whether a condition of release can so diminish or eliminate a released prisoner's reasonable expectation of privacy that a suspicionless search by a law enforcement officer would not offend the Fourth Amendment." *Id.* at 847. The Court addressed that issue "under our general Fourth Amendment approach," by examining "the totality of the circumstances to determine whether a search is reasonable within the meaning of the Fourth Amendment." *Id.* at 848 (alterations and internal quotation marks omitted). "Whether a search is reasonable is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Id.* (internal quotation marks omitted).

The *Samson* Court held that, on the continuum of state-imposed punishments, "parolees have fewer expectations of privacy that probationers, because parole is more akin to imprisonment than probation is to imprisonment." *Id.* at 850. The Court, "[e]xamining the totality of the circumstances pertaining to petitioner's status as a parolee . . . including the plain terms of the parole search condition," concluded "that petitioner did not have an expectation of privacy that society would recognize as legitimate." *Id.* at 852. The Court then held, "The State's interests, by contrast, are substantial." *Id.* at 853.

Thus, when the *Samson* Court concluded the petitioner did not have an expectation of privacy that society would recognize as legitimate, it reached that conclusion in the context of whether the search, balancing the petitioner's privacy interest and the governmental supervisory interests under the general Fourth Amendment approach, was reasonable. *See id.* at 848, 852-53. The Court did not determine the petitioner lacked a legitimate expectation of privacy in the context of whether the petitioner had standing to challenge the search in the first place. Further, the *Samson* Court emphasized it was not equating "parolees with prisoners for the purpose of concluding that parolees, like prisoners, have no Fourth Amendment rights." *Id.* at 850 n.2. According to the Court: "That view misperceives our holding. If that were the basis of our holding . . . there would have been no cause to resort to Fourth Amendment analysis." *Id.*

Moreover, the *Samson* Court discussed how parolees have a "substantially diminished expectation of privacy." *Id.* at 855. The Court also noted that, under California law, "an officer would not act reasonably in conducting a suspicionless search absent knowledge that the person stopped for the search is a parolee." *Id.* at 856 n.5 (citing *People v. Sanders*, 73 P.3d 496, 505-06 (Cal. 2003)).

In sum, the State's argument's reliance on *Samson* is based on a misunderstanding of that case. As the Ninth Circuit has explained, "*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).

The Idaho Supreme Court's decision in *Gawron* is likewise not a case about standing. In *Gawron*, the Court held that persons "conditionally released to societies have a reduced expectation of privacy, thereby rendering intrusions by governmental authorities 'reasonable' which otherwise would be unreasonable or invalid under traditional constitutional concepts." *Gawron*, 112 Idaho at 843. Although "[t]he scope of the search in the instant case well may have exceeded the permissible limits announced in *Chimel v. California*, [395 U.S. 752 (1969)]," the Court wrote that *Chimel* "acknowledged the existence of well recognized exceptions to the general rule requiring a warrant in order to conduct a house search. One of those exceptions set forth in *Katz v. United States*, [389 U.S. 347 (1967)], is a search to which an individual consents." *Gawron*, 112 Idaho at 843 (internal quotation marks omitted).

The *Gawron* Court upheld the search at issue, based upon the probationer's "consent to warrantless searches."[1] *Id.* In other words, the *Gawron* Court held the search at issue was reasonable based on consent as an exception to the warrant requirement, and did not decide the probationer lacked standing to challenge the search. Thus, the State's arguments on standing also misunderstand *Gawron*.

Two of the other cases relied upon by the State (*see* App. Br., pp.5, 7), also do not address standing to challenge a search. The United States Supreme Court in *United States v.*

[1] In *Samson*, the United States Supreme Court stated that, "Because we find that the search at issue here is reasonable under our general Fourth Amendment approach, we need not reach the issue whether acceptance of the search condition constituted consent in the . . . sense of a complete waiver of his Fourth Amendment rights." *Samson*, 547 U.S. at 852 n.3.

Knights, 534 U.S. 112 (2001), held the search of a probationer's apartment was reasonable "under our general Fourth Amendment approach of examining the totality of the circumstances, with the probation search condition being a salient circumstance." *Knights*, 534 U.S. at 118 (internal quotation marks and citation omitted). The Idaho Supreme Court in *State v. Purdum*, 147 Idaho 206 (2009), held a probationer, by consenting to random evidentiary tests, also impliedly consented to limited seizures of his person necessary for such searches. *Purdum*, 147 Idaho at 210. The *Purdum* Court, in light of *Gawron*, discussed the probationer's consent to searches in the context of the consent exception to the warrant requirement. *See id.* at 208. Neither *Knights* nor *Purdum* held the respective probationers in those cases lacked standing to raise their challenges.

Even the case cited by the State that actually addresses a parolee's standing to challenge a search, (*see* Resp. Br., p.6), *State v. Cruz*, 144 Idaho 906 (Ct. App. 2007), does not support the State's argument that Mr. Saldivar lacked standing here. The Idaho Court of Appeals in *Cruz* held, "We agree that Cruz [the parolee] 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." *Cruz*, 144 Idaho at 908.

In short, the State's arguments on standing misunderstand the very cases upon which the State relies. Those cases largely do not address whether a person has standing to challenge a search. Because the State's arguments on standing misunderstand *Samson*, *Gawron*, and the other cases upon which the State relies, the State's contention that Mr. Saldivar did not "prove he had an expectation of privacy" (*see* App. Br., p.6.), fails.

D. Mr. Saldivar Had The Requisite Legitimate Expectation Of Privacy To Challenge The Warrantless Frisk Of His Person, Because He Had A Subjective Expectation Of Privacy That Society Was Willing To Recognize As Reasonable

By addressing whether the warrantless search here fit within an exception to the warrant requirement (*see* R., pp.117-21), the district court implicitly ruled that Mr. Saldivar had standing to challenge the search, *see Holland*, 135 Idaho at 162. This implicit ruling by the district court was correct. Mr. Saldivar had the requisite legitimate expectation of privacy to challenge the search, because he had a subjective expectation of privacy that society was willing to recognize as reasonable.

First, there is no question that Mr. Saldivar had a subjective expectation of privacy in his own person. As the United States Supreme Court has long recognized, "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (quoting *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)); *accord Moreno v. Baca*, 431 F.3d 633, 641 (9th Cir. 2005).

Based on *Terry*, the Ninth Circuit in *Moreno* held, "there is no question that [a parolee] had standing to challenge the search and seizure of his own person." *Moreno*, 431 F.3d at 641. The State contends, "The analysis of *Moreno*, that a parolee has the same privacy rights in his person as a non-parolee, is directly contrary to precedent." (App. Br., p.7.) However, the Ninth Circuit in *Moreno* made no such holding. Rather, the *Moreno* Court held that all it had said "with respect to the necessity that the officers know of the existence of a warrant before they can make an arrest pursuant to that warrant applies with equal force to a parole condition—an officer must know of a detainee's parole status before that person can be detained and searched pursuant

to a parole condition." *Moreno*, 431 F.3d at 641. *Moreno's* discussion of standing was not contrary to cases like *Samson* and *Gawron*, considering those cases do not deal with standing.

The State further contends the Maryland Court of Special Appeals' decision in *State v. Donaldson*, 108 A.3d 500 (Md. Ct. Spec. App. 2015), is "similarly flawed." (*See* App. Br., p.7). The *Donaldson* Court held, "a constitutionally defective search cannot be justified after the fact by information unknown to the officer at the time of the warrantless search." *Donaldson*, 108 A.3d at 506. But as the *Donaldson* Court explained, *Samson* does "not hold that an otherwise unconstitutional search is authorized and beyond challenge on a motion to suppress if the police discover after the arrest that the suspect was on parole." *Donaldson*, 108 A.3d at 503. In sum, despite the State's arguments to the contrary, Mr. Saldivar had a subjective expectation of privacy in his own person. *See Pruss*, 145 Idaho at 626.

Second, Mr. Saldivar had an expectation of privacy society was willing to recognize as reasonable. As examined above, *Samson* "left open . . . the possibility that a parolee subject to a search condition could challenge searches conducted by officers who lacked 'knowledge that the person stopped for the search is a parolee.'" *See Grandberry*, 730 F.3d at 975 (quoting *Samson*, 547 U.S. at 856 & n.5). Because *Samson* contemplated parolees could challenge a search under such circumstances, it follows such parolees (like Mr. Saldivar) would have an expectation of privacy society was willing to recognize as reasonable, in order to have standing to challenge the search. *See Pruss*, 145 Idaho at 626; *see also Moreno*, 431 F.3d at 641 ("[T]here is no question that Moreno had standing to challenge the search and seizure of his own person."); *Cruz*, 144 Idaho at 908 ("We agree that *Cruz* 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.").

Thus, the district court's implicit ruling, that Mr. Saldivar had the requisite legitimate expectation of privacy to challenge the warrantless frisk of his person, was correct. Mr. Saldivar had a subjective expectation of privacy in his person, and society was willing to recognize that expectation of privacy as reasonable. The State's arguments to the contrary misunderstand cases like *Samson* and *Gawron*, which largely do not address standing at all.[2] Mr. Saldivar had standing to challenge the warrantless frisk.

II.

The District Court Correctly Ruled The Warrantless Frisk Of Mr. Saldivar Was Unreasonable, Where Mr. Saldivar Cooperated With The Officers And The Officers Never Presented Specific Facts Showing He Was Dangerous

A. Introduction

Mr. Saldivar asserts the district court correctly ruled the warrantless frisk of his person was unreasonable, where he cooperated with the officers and the officers never presented specific facts showing he was dangerous. The State argues, "The district court erred when it concluded that more was required to stop and frisk [Mr.] Saldivar than suspicion that [Mr.] Saldivar was leaving a potential shooting scene where the gun was believed to be located." (App. Br., pp.15-16.) However, the frisk of Mr. Saldivar was unlawful, because under the totality of the circumstances here, a reasonable person would not conclude that Mr. Saldivar posed a risk of danger.

[2] The State has forfeited any argument on appeal that the warrantless search here was reasonable because Mr. Saldivar consented to the search through the parole waiver. As seen above, the State argues, "The state's position in this case is not (nor has it ever been) that the search was 'justified' by the parole waiver." (App. Br., p.7.) Because the State thereby expressly eschewed any argument on appeal that Mr. Saldivar's consent through the parole waiver justified the warrantless search, making the search reasonable, it has forfeited any future argument to that effect. *See State v. Raudebaugh*, 124 Idaho 758, 763 (1993) (declining to address an issue the appellant did not raise until the reply brief stage).

B. Standard Of Review And Relevant Law

An appellate court defers to the trial court's findings of fact unless the findings are clearly erroneous, and freely reviews the trial court's application of constitutional principles to the facts as found. *Hankey*, 134 Idaho at 846.

"[T]o be reasonable a search must be authorized by a warrant that is based on probable cause, unless one of the exceptions to the warrant requirement applies." *State v. Bishop*, 146 Idaho 804, 818 (2009) (citing *Katz v. United States*, 389 U.S. 347, 357 (1967)). "One such exception is the pat-down search for weapons acknowledged by the United States Supreme Court in *Terry v. Ohio*, [392 U.S. 1, 27 (1968)]." *Bishop*, 146 Idaho at 818. "Under *Terry*, an officer may conduct a limited pat-down search, or frisk, 'of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons.'" *Id.* (quoting *Terry*, 392 U.S. at 16, 30) (citing *Florida v. J.L.*, 539 U.S. 266, 270 (2000). "Such a frisk is only justified when, at the moment of the frisk, the officer has reason to believe that the individual he or she is investigating is 'armed and presently dangerous to the officer or to others' and nothing in the initial stages of the encounter dispels the officer's belief." *Id.* (citing *Terry*, 392 U.S. at 24, 30).

"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.* (citing *Terry*, 392 U.S. at 27; *State v. Henage*, 143 Idaho 655, 660-61 (2007)). "To satisfy this standard, the officer must indicate 'specific and articulable facts which, taken together with rational inferences from those facts,' in light of his or her experience, justify the officer's suspicion that the individual was armed and dangerous." *Id.* at 818-19 (quoting *Henage*, 143 Idaho at 660). "Although an officer need not possess absolute certainty that an

individual is armed and dangerous, an officer's 'inchoate and unparticularized suspicion or "hunch"' is not enough to justify a frisk." *Id.* at 819 (quoting *Terry*, 392 U.S. at 27).

"Several factors influence whether a reasonable person in the officer's position would conclude that a particular person was armed and dangerous." *Id.* "These factors include: whether there were any bulges in the suspect's clothing that resembled a weapon; whether the encounter took place late at night or in a high crime area; and whether the individual made threatening or furtive movements, indicated that he or she possessed a weapon, appeared nervous or agitated, appeared to be under the influence of alcohol or illegal drugs, was unwilling to cooperate, or had a reputation for being dangerous." *Id.* "Whether any of these considerations, taken together or by themselves, are enough to justify a *Terry* frisk depends on an analysis of the totality of the circumstances." *Id.* (citing *Terry*, 392 U.S. at 27; *Henage*, 143 Idaho at 661-62).

"For a frisk to be held constitutional, an officer must demonstrate how the facts he or she relied on in conducting the frisk support the conclusion that the suspect posed a risk of danger." *Id.* (citing *Henage*, 143 Idaho at 661-62).

C. The State Has Failed To Show That, Under The Totality Of The Circumstances, A Reasonably Prudent Person Would Be Justified In Concluding That Mr. Saldivar Posed A Risk Of Danger

Here, the State has failed to show that, under the totality of the circumstances, a reasonably prudent person would be justified in concluding that Mr. Saldivar posed a risk of danger. The State argues, "[g]iven the nature of the potential crime, the involvement of a gun that was still at the scene, and [Mr.] Saldivar's potential connection to the potential crime, the gun, and the location, officers were justified in taking the reasonable approach of frisking [Mr.] Saldivar." (App. Br., p.13.)

The State's argument is unavailing. While the frisk occurred at night and near a potentially dangerous crime scene (*see* R., pp.118-20), the totality of the circumstances does not support the conclusion Mr. Saldivar posed a risk of danger. As the district court found, Mr. Saldivar complied with all of the officers' commands, did not threaten the officers or engage in any behavior that caused the officers concerns, and did not appear to have a weapon. (R., p.119.) He did not engage in furtive movements, and there was no evidence he appeared to be under the influence of drugs or alcohol. (R., p.119.) Although the district court found Mr. Saldivar came around the side of the apartment building as the officers approached the building from the front, the district court did not find they saw him actually leave the particular apartment to which they were responding. (*See* R., pp.114-15.) The officers did not testify they feared for their safety because of Mr. Saldivar or his words or actions, and their safety concerns appear to have been based solely on the nature of the call—that they were responding to an apartment where a woman had been injured by a gun. (R., p.119.)

The totality of the circumstances here therefore presents important parallels with the circumstances in *Bishop* and *Henage*, where the Idaho Supreme Court held the respective frisks in those cases were unlawful. *See Bishop*, 146 Idaho at 819-21 (the subject did not make any furtive movements, and there was no evidence that he appeared to be carrying a weapon or that he was acting in a threatening manner); *Henage*, 143 Idaho at 661-62 (the subject was cooperative and polite, and did not make any furtive or suspicious movements). Additionally, the *Bishop* Court held the frisk there was unlawful even though the subject was acting nervous and may have been under the influence of a narcotic, *see Bishop*, 146 Idaho at 820, a factor not present here (*see* R., p.119). Likewise, the *Henage* Court held that frisk was unlawful even though the subject there admitted to carrying a knife, *see Henage*, 143 Idaho at 662, while

Mr. Saldivar did not appear to be carrying a weapon (*see* R., p.119). Thus, *Bishop* and *Henage* strongly support the district court's conclusion that a reasonable person would not conclude that Mr. Saldivar was armed and presently dangerous at the time of the frisk. (*See* R., p.118.)

Additionally, *Henage* supports the district court's conclusion here because Officer Schneider, much like the officer in *Henage*, did not particularize his general statement of safety concerns to Mr. Saldivar. The *Henage* Court held the district court's finding that the officer, Sergeant Baker, felt that his safety had been compromised was clearly erroneous. *See Henage*, 143 Idaho at 662. The Court held that finding was "flawed for two reasons—it is not supported by Sgt. Baker's testimony and it appears to be based on a subjective standard." *Id.* "The only evidence upon which the court could have based Sgt. Baker's feeling that his safety had been compromised was Jeremy's [the subject's] nervousness and the officer's statement that 'once a person tells me they're in possession of a weapon, it compromises my safety.'" *Id.*

The *Henage* Court held, "this does not constitute the type of specific and articulable fact necessary to justify initiating a search under *Terry*. Sgt. Baker did not particularize this general statement to Jeremy, a person who had never given him any trouble, and he testified to an amiable, non-threatening consensual encounter." *Id.* The Court also held, "Weapons searches are not justified by an officer's subjective feeling, especially when that feeling is not particularized to a particular individual in a specific fact situation." *Id.* "Rather, the court must find that the officer has presented specific facts that can be objectively evaluated to support the conclusion that the subject of the intended search posed a potential risk. That is not the situation here." *Id.*

Nor is that the situation in this case. As the district court found, the officers did not testify that they feared for their safety because of Mr. Saldivar or his words or actions, and any

safety concerns the officers had seemed to have been based solely on the nature of the call. (*See* R., p.119.) Indeed, Officer Schneider testified he frisked Mr. Saldivar because it was standard operating procedure to frisk anyone who had been handcuffed. (*See* R., p.116.) The officer did not particularize his general concerns about officer safety to Mr. Saldivar in this specific fact situation. (*See* R., p.116.) Thus, as the district court indicated (*see* R., p.119), Officer Schneider did not present specific facts that can be objectively evaluated to support the conclusion that Mr. Saldivar posed a potential risk, *see Henage*, 143 Idaho at 662.

The State leans more on *Bishop* than *Henage*, contending *Bishop* "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.' Rather, it stands for the proposition that a single factor may justify a frisk." (App. Br., p.14 (quoting R., p.118).) But this argument by the State neglects to mention that the district court recognized, "[t]he totality of the circumstances determines whether these factors, either alone or jointly, justify a search." (R., p.118 (citing *Bishop*, 146 Idaho at 819).) Contrary to the State's argument (*see* App. Br., p.13), the district court therefore did not apply an incorrect legal standard. Rather, the district court properly considered the totality of the circumstances and ruled they do not support the conclusion Mr. Saldivar posed a risk of danger.

Moreover, the State argues "the district court's minimization of the nature of the suspected crime is directly contrary to Idaho precedent." (App. Br., p.14.) But the two cases relied upon by the State do not actually support that proposition.

In the first case, *State v. Burgess*, 104 Idaho 559 (Ct. App. 1983), officers responded to a late-night call from an alarm company, indicating a burglary was in progress at a bar. *Burgess*, 104 Idaho at 559. The officers' police cars were parked about four blocks from the bar, and when the officers arrived at the scene, they saw the defendant walking across the parking lot

some twenty feet from the bar. *Id.* The defendant provided his name and identification, and told the officers he was walking to his girlfriend's house from a restaurant. *Id.* An officer noted the defendant's purported path would have taken him past where the officers had been, but when asked, the defendant stated he had not seen any police cars parked along his route. *Id.* After a few minutes of further conversation, the officer frisked the defendant and found tools that could be used to commit a burglary. *See id.*

The Idaho Court of Appeals in *Burgess* held, "the police had reason to suspect that [the defendant] may have been engaged in a burglary." *Id.* at 561. The officers "were investigating a serious crime believed to be in progress; they found an individual at the scene of the crime at 3:00 a.m.; and the individual gave a questionable account of how he happened to be there." *Id.* The Court also observed, "It is not unreasonable to believe that burglars can be armed and dangerous." *Id.* at 561. The *Burgess* Court held the delay of the frisk for a few minutes was not in itself a sufficient basis to find that the officer's reasonable fear for his safety had been dispelled or that the search had become unreasonable. *See id.*

The Idaho Court of Appeals in the other case cited by the State, *In the Matter of Doe*, 145 Idaho 980 (Ct. App. 2008), held that, "Although we decline to adopt a bright-line rule that officers are automatically entitled to frisk every burglary suspect, we acknowledge that specific circumstances combined with certain crimes like burglary make it much more likely that a suspect will be armed and dangerous." *In re Doe*, 145 Idaho at 983-84. The officers in that case had responded to a possible burglary call at night, at a church where officers had found three individuals unlawfully inside the building a week prior. *Id.* at 984. The Court continued: "On this occasion, when the officers arrived they found the two suspects walking quickly away from

the church. Both Doe and his friend were dressed all in black, indicating they may be trying to avoid being seen." *Id.*

Importantly, the *In re Doe* Court noted "that factors which militate against a frisk discussed by our Supreme Court's opinion in [*Henage*]—a known, cooperative individual with no history of posing a danger toward the officer—are not present here." *Id.* at 984 n.1. Further, the officer who frisked the other suspect "testified regarding the special risks associated with investigating a possible burglary," and the two suspects "could have been in possession of burglary tools—screwdrivers, hammers, picks—that could easily have been used as weapons." *Id.* at 984. Thus, the *In re Doe* Court concluded the frisk was justified based on the facts of that case. *Id.*

There are salient differences between the facts here and those from *Burgess* and *In re Doe*. In contrast to the defendant in *Burgess*, who "gave a questionable account of how he happened to be" at the crime scene, *see Burgess*, 104 Idaho at 560, there is no evidence Mr. Saldivar attempted to deceive the officers before they handcuffed and frisked him (*see* R., pp.116, 119). Additionally, unlike the *In re Doe* suspect, *see In re Doe*, 145 Idaho at 984 n.1, Mr. Saldivar cooperated with the officers (*see* R., pp.116, 119). In view of those differences, the district court's examination of the totality of the circumstances, including the nature of the reported crime, was not contrary to Idaho precedent. *See Bishop*, 146 Idaho at 819-21; *Henage*, 143 Idaho at 660-61.

The State has failed to show that, under the totality of the circumstances, a reasonably prudent person would be justified in concluding that Mr. Saldivar posed a risk of danger. The frisk of Mr. Saldivar was therefore unlawful. *See Bishop*, 146 Idaho at 821; *Henage*, 143 Idaho at 662. The district court correctly ruled the warrantless frisk of Mr. Saldivar was unreasonable,

where he cooperated with the officers and the officers never presented specific facts showing he was dangerous.

III.

The District Court Correctly Ruled The Inevitable Discovery Doctrine Did Not Allow The Admission Of The Evidence Gained From The Unlawful Frisk Of Mr. Saldivar, Where The District Court Used The Proper Legal Standard

A. Introduction

Mr. Saldivar asserts the district court correctly ruled the inevitable discovery doctrine did not allow the admission of the evidence gained from the unlawful frisk of Mr. Saldivar, where the district court used the proper legal standard. The State argues the district court erred when it ruled the inevitable discovery doctrine did not apply, by applying an incorrect legal standard.[3] (App. Br., p.16.) Specifically, the State contends the district court, citing *State v. Liechty*, 152 Idaho 163, 170 (Ct. App. 2011), incorrectly concluded "the state did not prove 'that some additional line of investigation would have inevitably resulted in the evidence being discovered.'" (*See* App. Br., p.18.) However, the district court actually used the proper legal

[3] On appeal, the State "does not challenge the district court's ultimate conclusion that the attenuation doctrine does not apply." (App. Br., p.17 n.3.)

While the State disputes the district court's factual finding on attenuation that "the officer testified that it was 'standard operating procedure' to frisk 'anyone that is put in cuffs'" (*see* App. Br., p.17 n.3 (quoting R., pp.116, 122)), the State has not shown this finding was clearly erroneous. Officer Schneider testified, "Due to the nature of our call and not knowing what we had and coming from the same complex, we asked [Mr. Saldivar] to get on the ground and detained him for identification purposes." (Tr., p.15, L.25 – p.16, L.4.) Contrary to the State's argument (*see* App. Br., p.17 n.3), the officer did not testify on direct examination that he handcuffed Mr. Saldivar out of concerns for officer safety. Rather, Officer Schneider only testified he conducted the frisk because of general officer safety reasons. (*See* Tr., p.16, Ls.5-21.) Indeed, when the State asked Officer Schneider why he conducted a pat-search of Mr. Saldivar, the officer replied, "It's standard operating procedure for anyone that is put in cuffs to make sure there are no knives and guns that could be pulled while in cuffs." (Tr., p.16, Ls.5-12.) Thus, there was ample factual support for the district court's conclusion that the standard operating procedure was in purposeful and flagrant disregard of the law. (*See* R., p.122.)

standard. Under the proper legal standard, because the officers' discovery of the warrant here flowed directly from the officers' unlawful conduct, the district court correctly ruled the inevitable discovery doctrine did not allow the admission of the evidence gained from the unlawful frisk.

B. Standard Of Review And Relevant Law

An appellate court defers to the trial court's findings of fact unless the findings are clearly erroneous, and freely reviews the trial court's application of constitutional principles to the facts as found. *Hankey*, 134 Idaho at 846.

Evidence obtained in violation of the United States and Idaho constitutional protections against unreasonable searches generally may not be used as evidence against the victim of the illegal government action. *See State v. Koivu*, 152 Idaho 511, 515-19 (2012); *Bishop*, 146 Idaho at 810-11. This exclusionary rule "applies to evidence obtained directly from the illegal government action and to evidence discovered through the exploitation of the original illegality, or the fruit of the poisonous tree." *Bishop*, 146 Idaho at 811. However, there are various exceptions to the exclusionary rule, including the inevitable discovery doctrine. *See State v. Cohagan*, 162 Idaho 717, 721 (2017).

"[T]he 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, ___, 407 P.3d 1285, 1290 (2017) (citing *Nix v. Williams*, 467 U.S. 431, 459 (1984) (Brennan, J., dissenting); *Stuart v. State*, 136 Idaho 490, 497 (2001)). "The premise is that law enforcement should be in 'the same, not a worse, position that they would have been' absent the misconduct." *Id.* 407 P.3d at 1290 (quoting *Nix*, 467 U.S. at 443 (majority opinion)). "The doctrine must presuppose inevitable

hypotheticals running in parallel to the illegal actions, not in series flowing directly from the officers' unlawful conduct." *Id.* at ___, 407 P.3d at 1291.

C. The District Court Used The Proper Legal Standard When It Ruled The Inevitable Discovery Doctrine Did Not Apply

The district court used the proper legal standard when it ruled the inevitable discovery doctrine did not apply. The district court did not apply an incorrect standard as the State argues (*see* App. Br., pp.16, 18), because *Liechty* is in accord with the later *Downing* and *Rowland* decisions. The *Liechty* Court quoted the Idaho Court of Appeals' earlier description of the doctrine from *State v. Holman*, 109 Idaho 382, 391-92 (Ct. App. 1985). *Liechty*, 152 Idaho at 171. The *Liechty* Court held, "As discussed by this Court in *Holman*, the issue before us is whether an additional line of investigation would have revealed the methamphetamine . . . . The record does not disclose any additional line of investigation and, as a result, the inevitable discovery doctrine does not apply." *Id.*

The holding in *Liechty* accords with *Downing* and *Rowland*. The Idaho Court of Appeals in *Rowland* held, "Although those lawful means 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." *Rowland*, 158 Idaho at 787. The language about an "additional line of investigation" from *Liechty*, rather than describing "a wholly independent investigation," encompasses the "some action that actually took place (or was in the process of taking place)" language from *Rowland*. Similarly, the Idaho Supreme Court in *Downing* held, "The doctrine must presuppose inevitable hypotheticals running in parallel to the illegal actions," i.e., additional lines of investigation. *See Downing*, 163 Idaho at ___, 407 P.3d at 1291.

Additionally, both *Downing* and *Rowland* quote from *Holman*, 109 Idaho at 392, the source of the inevitable discovery doctrine's description in *Liechty*, for the following proposition: "The inevitable discovery doctrine is not intended to swallow the exclusionary rule whole by substituting what the police should have done for what they really did." *See Downing*, 163 Idaho at ___, 407 P.3d at 1291 (alterations and internal quotation marks omitted); *Rowland*, 352 P.3d at 509-10.

Liechty is actually in accord with later inevitable discovery doctrine cases, such as *Downing* and *Rowland*, and thus the State's argument that the district court used an incorrect legal standard fails.

D. Because The Officers' Discovery Of The Warrant Flowed Directly From Their Unlawful Conduct, The District Court Correctly Ruled The Inevitable Discovery Doctrine Did Not Allow The Admission Of The Evidence Gained From The Unlawful Frisk

Because the officers' discovery of the warrant here flowed directly from their unlawful conduct, the district court correctly ruled the inevitable discovery doctrine did not allow the admission of the evidence gained from the unlawful frisk. The State argues the inevitable discovery doctrine should apply here "[b]ecause 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." (*See* App. Br., p.19.)

The State's argument ignores the district court's finding that the warrants check came after the warrantless frisk and discovery of the gun. (*See* R., p.116.) Thus, the warrants check here flowed directly from the officers' unlawful conduct. *See Downing*, 163 Idaho at ___, 407 P.3d at 1291. There were no "inevitable hypotheticals running in parallel to the illegal actions," *see id.* 407 P.3d at 1291; in other words, there were no lawful means that were "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," *see State v. Rowland*, 158 Idaho 784, 787 (Ct. App. 2015). Unlike the parallel search already underway in *Nix*, *see* 467 U.S. at 442-43, there were no actions already being undertaken by the officers here that would have inevitably led to the discovery of the warrant.

The State argues, "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." (App. Br., p.18.) However, that argument relies on speculation on the course of action the investigation could have taken absent the unlawful conduct. The Idaho Supreme Court rejected that approach in *Downing*, holding, "The inevitable discovery exception does not permit us to speculate on the course of action the investigation could have taken in the absence of pre-*Miranda* statements, an unlawful pat-search, and subsequently tainted admissions—even if that alternate course likely would have yielded the evidence." *See Downing*, 163 Idaho at ___, 407 P.3d at 1291. The exception likewise does not permit the State's speculation on the course of action the investigation could have taken in the absence of the unlawful frisk of Mr. Saldivar.

In other words, the State's argument would improperly substitute what the police should have done for what they really did. *See Holman*, 109 Idaho at 392. The district court found, "After the pat-down search of Mr. Saldivar, Officer Schneider checked for warrants and confirmed that Mr. Saldivar had an outstanding warrant for his arrest." (R., p.116.) As examined above, Idaho's appellate courts have held: "The inevitable discovery doctrine is not intended to swallow the exclusionary rule whole by substituting what the police should have done for what they really did." *Downing*, 163 Idaho at ___, 407 P.3d at 1291 (alterations and internal quotation marks omitted); *Rowland*, 352 P.3d at 509-10. The State's speculation on

what the officers could have done is exactly the kind of substitution our appellate courts have roundly rejected.

The State has failed to show the inevitable discovery doctrine applies here. The district court used the proper legal standard when it ruled the inevitable discovery doctrine did not apply. Because the discovery of the warrant flowed directly from the officers' unlawful conduct, the district court correctly ruled the inevitable discovery doctrine did not allow the admission of the evidence gained from the unlawful frisk of Mr. Saldivar.

CONCLUSION

For the above reasons, Mr. Saldivar respectfully requests that this Court affirm the district court's order granting his motion to suppress.

DATED this 21st day of November, 2018.

/s/ Ben P. McGreevy
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of November, 2018, I caused a true and correct copy of the foregoing RESPONDENT'S BRIEF, to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
E-Service: ecf@ag.idaho.gov

/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

BPM/eas