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State v. Wolfe Respondent's Brief Dckt. 46194

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

STATE OF IDAHO,	)	
	)	
Plaintiff-Appellant,	)	**NO. 46194-2018**
	)	
v.	)	**CANYON COUNTY NO. CR14-17-21410**
	)	
MONICA F. WOLFE,	)	**RESPONDENT'S BRIEF**
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

HONORABLE DAVIS F. VANDERVELDE
District Judge

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STATEMENT OF THE CASE

Nature of the Case

A police officer seized Monica F. Wolfe's cell phone during an interview at the police station. The officer did not have a warrant or other exigent circumstances to justify the seizure. Consequently, Ms. Wolfe moved to suppress the evidence obtained following the seizure, and the district court granted her motion. The State now appeals. In arguing the district court erred by denying the motion, the State relies entirely upon an exception to the exclusionary rule that the State did not present to the district court. Due to the State's failure to preserve this basis for denying the motion, and, if considered, the absence of factual findings to rule on or support it, Ms. Wolfe respectfully requests that this Court affirm the district court's order granting her motion to suppress.

Statement of Facts and Course of Proceedings

On June 16, 2017, Detective Kari Siebel with the Nampa Police Department interviewed Ms. Wolfe regarding Detective Siebel's investigation of a poisoned dog and a conspiracy to murder Ms. Wolfe's ex-husband. (Tr., p.10, Ls.6–12, p.25, Ls.7–9, p.26, Ls.10–18; R., p.117; State's Aug. R., pp.11–12.) Detective Siebel seized Ms. Wolfe's cell phone during the interview. (Tr., p.15, Ls.23–24, p.25, Ls.7–12.) Detective Siebel hoped to find text messages, photographs, Google searches, or emails related to these alleged offenses on the phone. (Tr., p.26, Ls.10–23.)

Detective Siebel subsequently applied for a search warrant for the phone. (Tr., p.27, L.24–p.28, L.1.) She did not search the phone until she obtained the warrant. (Tr., p.28, Ls.2–4.) The search of Ms. Wolfe's phone led to the application for another search warrant for a Google account presumably used by Ms. Wolfe. (State's Aug. R., pp.5–15.) Detective Siebel's affidavit of probable cause to search the Google account stated that, during the search of phone, law

enforcement observed this Google account, but did not log in because the phone search warrant did not authorize it. (State's Aug. R., p.12.) Detective Seibel also stated in her affidavit that, upon seizing Ms. Wolfe's phone, Detective Seibel asked Ms. Wolfe, "if when the cell phone was searched, would there be any text messages or emails asking people to kill [your ex-husband]," and Ms. Wolfe said, "yes." (State's Aug. R., p.12.) Ms. Wolfe explained to Detective Seibel that these texts or emails were "pillow talk" and "fantasy" and "you have to take them in context . . . if I was angry . . . or joking." (State's Aug. R., pp.11–12.) The magistrate judge issued a search warrant for Google account. (State's Aug. R., pp.1–3.)

In November 2017, the State filed an Indictment charging Ms. Wolfe with conspiracy to commit first-degree murder and aiding and abetting poisoning animals. (R., pp.11–13.) Ms. Wolfe filed a motion to suppress on two grounds: a void search warrant for the Google account and the warrantless seizure of her phone. (R., pp.63–66.) With respect to the phone, Ms. Wolfe argued Detective Seibel seized her phone without a warrant, consent, or exigent circumstances. (R., p.65.) As such, she argued the phone and "any fruits of the illegally seized phone . . . must be suppressed." (R., p.65.) Ms. Wolfe also filed a motion to dismiss the charges due to improperly admitted evidence and violations of the Idaho Criminal Rules during the grand jury proceedings. (R., pp.54–61.)

The State objected to the motion to suppress. (R., pp.72–79.) For the phone, the State argued Detective Seibel "had ample cause for issuance of the warrant in advance of the seizure," so the warrantless seizure was "permissible to preserve evidence." (R., pp.75–76 (capitalization omitted).) Put another way, the State asserted, "[P]robable cause existed to obtain the search warrant at the time of the seizure, therefore, the holding of the cell phone while a warrant was obtained is reasonable under the Fourth Amendment." (R., p.77.) The State continued, if the

seizure "does implicate the Fourth Amendment, the seizure was justified by exigent circumstances." (R., p.77; *see* R., pp.77–78.) The State concluded:

> [T]he seizure of the defendant's phone was a temporary measure to ensure preservation of evidence while a warrant was obtained. Probable cause existed before the seizure to issue a search warrant, thus the Defendant's fourth amendment rights were not infringed upon. Finally, even if the court determines the seizure of the phone did touch upon the defendant's fourth amendment rights, it was justified by exigent circumstances.

(R., pp.78–79 (sic).) The State offered no other exceptions to the warrant requirement to allow Detective Seibel's warrantless seizure of the phone. (*See* R., pp.74–79.) The State also objected to Ms. Wolfe's motion to dismiss. (R., pp.80–92.)

At a hearing on Ms. Wolfe's motions, Detective Seibel testified that Ms. Wolfe did not give her consent to seize the phone. (Tr., p.16, Ls.5–7.) Detective Seibel also testified that she had no reason to believe Ms. Wolfe would destroy the phone. (Tr., p.18, Ls.20–22.) The district court admitted the search warrant documents for the Google account as Defendant's Exhibits B, C, D, and E. (Tr., p.12, Ls.1–2, p.14, Ls.7–8; State's Aug. R., pp.1–37.) The State did not offer any exhibits. (*See generally* Tr., p.5, L.4–p.81, L.2.)

After Detective Seibel's testimony, Ms. Wolfe argued Detective Seibel had neither consent nor exigent circumstances to seize the phone without a warrant. (Tr., p.38, L.15–p.40, L.7.) With respect to the phone, the State argued:

> And secondly, on the issue of the seizure of the phone, we've also heard testimony today that the testimony or that the seizure of the phone was based on prior investigations that led her to believe that there was certain information or evidence that may be contained on that phone.
>
> We also heard testimony today that at the time that it was seized, the Defendant was not under arrest. She could have left at any time with that phone. We've also heard testimony that everything that she anticipated searching, the text messages, the emails, et cetera, are all able to be deleted off of that phone.
>
> The question that was asked by defense counsel is whether or not she believed that there was any -- whether or not she believed the Defendant would

> destroy the phone. I believe that's a distinct question. And to that, she answered no.
>
> But when it comes down to the actual contents of the phone, the text messages and the emails that would potentially be searched through, that is readily destructible.
>
> Your Honor, there was also testimony and it's contained in the brief that she did understand that she was under investigation. That becomes very clear in the interview and the portions that I've contained in my brief.
>
> She knew that she was under investigation. She did have in her possession a phone that potentially contained incriminating evidence. And I believe -- and the officer didn't want her simply leaving with that.
>
> The process of obtaining a search warrant would have forced her to either detain the Defendant or to do as she did and detain simply or seize simply the phone. And then she did go through the process of obtaining that search warrant subsequent [sic].
>
> There was no search of the phone. As such, there's no actual evidence that was obtained by the seizure of the phone alone and nothing to be suppressed there.

(Tr., p.42, L.7–p.43, L.20.) The parties also submitted argument on the other basis for suppression and on Ms. Wolfe's motion to dismiss. (*See generally* Tr., p.33, L.19–p.73, L.6, p.79, L.22–p.80, L.20.) The district court took both motions under advisement. (Tr., p.73, Ls.7–8.)

On April 23, 2018, the district court issued a single order granting in part and denying in part both of Ms. Wolfe's motions. (R., pp.103–21) After reviewing the alleged issues with the grand jury proceedings, (R., pp.104–13), the district court dismissed the conspiracy to commit murder charge due to insufficient evidence. (R., pp.113–16.) The district court characterized the evidence for aiding and abetting poisoning animals as "tenuous," yet adequate to meet the low standard of probable cause. (R., p.117.)

The district court then turned to Ms. Wolfe's motion to suppress. (R., pp.117–21.) The district court first noted that the search warrant for Ms. Wolfe's phone was not offered into evidence at the hearing. (R., p.118.) The district court also recognized that there were no challenges to the validity of the phone search warrant or the existence of probable cause to seize

the phone. (R., p.118.) The district court identified the issue as the legality of the warrantless seizure of the phone and the delay until the issuance of the warrant. (R., p.118.) The district court rejected both of the State's proffered exceptions to the warrant requirement: consent or exigent circumstances. (R., pp.118–19.) The district court ruled, based on Detective Seibel's testimony, Ms. Wolfe did not consent to the seizure. (R., p.118.) Next, the district court ruled, "[u]nder the totality of the circumstances, . . . there were no exigent circumstances in this case that would justify the seizure of the phone without a warrant." (R., p.119.) "Given this," the district court held, "the warrantless seizure of the phone was illegal and any information obtained therefrom shall be suppressed." (R., p.119.) On the second ground for suppression (the void search warrant for the Google account), the district court denied the motion. (R., pp.119–20.)

On May 4, 2018, the State moved for reconsideration of the district court's order granting the motion to suppress in part. (R., pp.136–43.) The State made two new arguments against suppression. (R., pp.137–43.) First, the State argued Ms. Wolfe abandoned the phone. (R., pp.137–39.) Second, and related to its prior argument, the State argued Detective Seibel's warrantless seizure of the phone, with probable cause, "in order to get a warrant is valid under the Fourth Amendment." (R., p.139 (capitalization omitted), *see also* R., pp.141–42.) As part of this argument, the State argued the attenuation doctrine applied to the seizure of the phone. (R., pp.139–42.) The State summarized *State v. Page*, 140 Idaho 841 (2004), and *State v. Bingham*, 141 Idaho 732 (Ct. App. 2005), two attenuation doctrine cases. (R., pp.139–40.) The State also summarized *State v. Russo*, 157 Idaho 299 (2014), an independent source doctrine case, along with a conclusory statement, "[i]n the present case, regardless of whether the warrant application were to include the statements obtained after the seizure of the phone, there was probable cause to obtain a warrant." (R., p.140.) The State then argued the attenuation doctrine

was "appropriate" and discussed the three relevant factors for attenuation. (R., p.142.) Ms. Wolfe objected to the State's motion. (Def.'s Aug. R., pp.19–23.)

On May 15, 2018, the district court held a hearing on the State's motion to reconsider. (Tr., p.82, L.4–p.139, L.16.) During the State's argument, the State realized that the search warrant for Ms. Wolfe's phone had not been admitted into evidence at the first hearing. (*See* Tr., p.92, L.3–p.93, L.15, p.100, L.4–p.101, L.11.) The State "offered no explanation . . . other than to indicate that it mistakenly believed" the district court had the exhibit. (R., p.164 n.1.) To remedy this omission, the State moved for admission of the phone search warrant as State's Exhibit 1, and the district court took its admission under advisement. (Tr., p.92, L.3–p.93, L.15.) The parties primarily disputed whether the State could move for reconsideration with new arguments (and the newly offered evidence of the phone search warrant). (*See generally* Tr., p.87, L.17–p.137, L.17.) As for the merits, the State first argued Ms. Wolfe abandoned the phone. (Tr., p.101, L.12–p.105, L.17.) Second, the State argued for the application of the attenuation doctrine. (Tr., p.105, L.18–p.111, L.24.) At the end of the State's argument, the district court asked the State:

> THE COURT: One of the questions that I have -- and I believe it's the *Russo* (phonetic) case that you cited to. That's an independent source case. You put it under the heading of attenuation doctrine. But are you arguing attenuation or are you arguing independent source as well?
>
> [PROSECUTOR]: Your Honor, I did wish to fit that within the realm of attenuation. I understand that there are some -- there is some overlap in the way the case could be interpreted as an independent source. But I think I'm fitting that within the umbrella of attenuation.

(Tr., p.111, L.25–p.112, L.10.) The district court took the motion under advisement. (Tr., p.137, Ls.6–10.)

On May 25, 2018, the district court issued a memorandum and order denying the State's motion to reconsider. (R., pp.162–70.) The district court admitted State's Exhibit 1 (the search warrant for Ms. Wolfe's phone) "for the purpose of the pending motion to establish when a warrant was initially sought following the seizure of the telephone." (R., p.165; *see* Def.'s Aug. R.,[1] pp.1–18.) The district court found that Detective Seibel applied for a search warrant on June 21, 2017, five days after its seizure, and law enforcement executed the warrant on July 6, 2017.[2] (R., p.164; Def.'s Aug. R., pp.14, 18.) The district court again rejected the State's arguments to justify the warrantless seizure. (R., pp.165–70.) The district court first held Ms. Wolfe did not abandon the phone. (R., pp.165–67.) The district court then reiterated the absence of exigent circumstances. (R., pp.167–68.) Next, the district court held the "issuance of a subsequent warrant did not cure the unlawful seizure." (R., pp.168–69.) Finally, the district court held the attenuation doctrine did not apply to the facts. (R., pp.169–70.)

On June 4, 2018, the State filed a notice of appeal. (R., pp.172–74.)

[1] Contemporaneously with this brief's filing, Ms. Wolfe has moved to augment the record with (1) State's Exhibit 1, the search warrant for Ms. Wolfe's phone, and (2) her objection to the State's motion for reconsideration.

[2] The Search Warrant Return, however, states law enforcement executed the warrant on July 11, 2017. (Def.'s Aug. R., p.18.)

ISSUE

The State frames the issue on appeal as:

> Did the district court err by applying the exclusionary rule where the cell phone in question was seized without a warrant but was searched only after, and pursuant to, a valid search warrant?

Ms. Wolfe rephrases the issue as:

> Did the district court properly grant Ms. Wolfe's motion to suppress when, for the first time on appeal, the State offers an unpreserved, yet still inapplicable, exception to the exclusionary rule to admit evidence from the illegal seizure?

ARGUMENT

The District Court Properly Granted Ms. Wolfe's Motion To Suppress When, For The First Time On Appeal, The State Offers An Unpreserved, Yet Still Inapplicable, Exception To The Exclusionary Rule To Admit Evidence From The Illegal Seizure

A. Introduction

For the first time on appeal, the State argues the district court erred by granting Ms. Wolfe's motion to suppress because the independent source doctrine applied to the subsequent search of the phone pursuant to the warrant. The State did not argue this doctrine below. In fact, the State briefed and then orally confirmed its presentation of the attenuation doctrine only. The State cannot present this new exception to the exclusionary rule for the first time on appeal. For this reason alone, Ms. Wolfe submits this Court should affirm the district court's order granting her motion to suppress in part.

Even if the State's argument is preserved, the independent source doctrine does not apply for multiple reasons. For one, the State did not present sufficient evidence in the district court to provide the necessary factual findings for this Court to evaluate the independent source doctrine. Similarly, application of the existing facts found by the district court demonstrates that this doctrine would not permit the admission of evidence following the illegal seizure. Therefore, if the independent source doctrine is considered, this Court still should affirm the district court's decision.

B. Standard Of Review

The Court uses a bifurcated standard to review a district court's order on a motion to suppress. *State v. Danney*, 153 Idaho 405, 408 (2012). The Court will accept the trial court's findings of fact "unless they are clearly erroneous." *State v. Wulff*, 157 Idaho 416, 418 (2014).

"At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court." *State v. Ellis*, 155 Idaho 584, 587 (Ct. App. 2013). The Court exercises free review of "the trial court's application of constitutional principles to the facts found." *Danney*, 153 Idaho at 408.

C. This Court Should Affirm The District Court's Order Granting Ms. Wolfe's Motion To Suppress Because The State's Only Argument Is Neither Preserved Nor Applicable

Ms. Wolfe submits two arguments on appeal. First, she contends this Court should decline to consider the State's only argument on appeal—the independent source doctrine—because the State did not argue this exception to the exclusionary rule in the district court. Second, she asserts the independent source doctrine does not apply to the facts found by the district court. Since the State put forth no other argument on appeal,[3] Ms. Wolfe maintains the State has shown no error in the district court's decision to grant her motion to suppress in part.

1. The Independent Source Doctrine Is Not Preserved And Thus Cannot Be Raised On Appeal Because The State Never Argued The Search Warrant Provided An Independent Source Of Evidence From The Illegal Seizure

On appeal, the State argues this Court should apply the independent source doctrine to allow the admission of evidence from the search of Ms. Wolfe's phone. The State never presented this exception to the exclusionary rule to the district court and arguably waived this exception at the hearing on its motion for reconsideration. Based on this Court's and the Courts of Appeals' now well-established precedent barring new arguments on appeal, this Court should decline to address the State's argument.

[3] The State does not challenge the district court's factual findings or any other rulings on appeal. (*See* App. Br., pp.4–7.)

a. The State did not argue the independent source doctrine below

In its Appellant's Brief, the State framed the issue as: "The district court erred when it applied the exclusionary rule where the cell phone in question was searched pursuant to a valid search warrant." (App. Br., p.4 (capitalization omitted).) The State explained, "Application of relevant legal standards to the facts found by the district court shows that the evidence obtained from the cell phone was the product of a search conducted under a valid search warrant, untainted by any illegality in the seizure of the phone, and therefore the evidence was not subject to exclusion." (App. Br., p.4.) After reviewing general Fourth Amendment and exclusionary rule principles, (App. Br., pp.5–6), the State referenced the inevitable discovery and independent source doctrines. (App. Br., p.6.) The State next argued this case contained "indistinguishable facts" from *State v. Davis*, 159 Idaho 491 (Ct. App. 2015), an independent source doctrine case. (App. Br., p.6.) The State summarized *Davis* and then argued: "The exclusionary rule did not apply in this case. The evidence was obtained by execution of a search warrant that was untainted by any illegality in the seizure. (R., pp.118-19.)[4] The district court erred by granting suppression." (App. Br., pp.6–7.) The State offered no other argument on appeal.

The State's argument is not preserved. In the district court, the State argued in its objection to the suppression motion:

> Seizure of property prior to obtaining a warrant in order to preserve evidence does not necessitate suppression of evidence seized after a valid warrant

[4] The State's citation here refers to the district court's analysis in its order granting Ms. Wolfe's motion to suppress. It contains the district court's discussion of the consent and exigent circumstances exceptions put forth by the State. (R., pp.118–19.) It contains no factual findings or legal conclusions pertaining to a search warrant untainted by the seizure's illegality, *i.e.*, the independent source doctrine. Indeed, the district court stated, "It is the Court's understanding that there were multiple search warrants issues in this case. Neither of those offered into evidence at the hearing encompassed the phone that was seized by Detective Seibel." (R., p.118.) Although the district court later admitted the phone search warrant for a limited purpose, the State has not included this search warrant in the record on appeal.

> is obtained, as long as probable cause to obtain a search warrant is based entirely on facts known prior to the seizure. *Segura v. United States*, 468 U.S. 796, 800 (1984). In *Segura*, officers entered a home, effectively seizing the contents, 19 hours prior to obtaining a search warrant. *Id.* at 801. Segura sought suppression of all evidence seized after the entry into the home. *Id.* at 804. Suppression was denied, as the court determined, the agents had abundant probable cause in advance of their entry to believe that there was a criminal drug operation being carried on in petitioners' apartment. *Id.* at 810. In the present case, Detective Seibel had ample cause for issuance of the warrant in advance of the seizure. See [State's Exhibit 1].[5] No evidence was obtained from the seizure. All evidence from the phone was secured after the issuance of the warrant.
>
> Different interests are implicated by a seizure than by a search. *Segura*, 468 U.S. at 806, (citing to *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *Texas v. Brown*, 460 U.S. 730 (1983); *United States v. Chadwick*, 433 U.S. 1, 13-14 (1977); *Chambers v. Maroney*, 399 U.S. 42, 51-52 (1970)). A seizure affects only the person's possessory interests; a search affects a person's privacy interests. *Id.*, (citing to *Jacobsen*, 466 US at 113; *Chadwick*, 433 US at 13-14.) Recognizing the generally less intrusive nature of a seizure, the Court has frequently approved warrantless seizures of property, on the basis of probable cause, for the time necessary to secure a warrant, where a warrantless search was either held to be or likely would have been held impermissible. *Id.* (citing to *Chambers*, 399 US at 51; *Chadwick*, 433 U.S. at 13-14; *Arkansas v. Sanders*, 442 U.S. 753 (1979)).
>
> The *Chambers* Court declared, "[f]or constitutional purposes, we see no difference between on the one hand seizing and holding the car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." *Id.* at 808. As discussed above, probable cause existed to obtain the search warrant at the time of the seizure, therefore, the holding of the cell phone while a warrant was obtained is reasonable under the Fourth Amendment.
>
> If the court determines the seizure of the phone does implicate the Fourth Amendment, the seizure was justified by exigent circumstances. . . .

(R., pp.75–77 (sic).) Although *Segura* is, in part, an independent source case, the State did not rely on it for that exception to the exclusionary rule. Rather, the State presented the argument that Detective Seibel's seizure of the phone was permissible and reasonable, and thus not a Fourth Amendment violation, because the seizure's purpose was to preserve evidence until the issuance of the warrant. The State's argument as a whole plainly addresses whether the seizure

[5] Again, the State did not offer Detective Seibel's affidavit in support of the phone search warrant at the suppression motion hearing. (*See* R., p.118.)

itself "implicate[d]" the Fourth Amendment, not whether the evidence was admissible from an independent source. (R., p.77.) In short, the State argued the seizure was lawful.

Moreover, four subsequent representations by the State and the district court support this reading of the State's argument. First, the State's argument at the suppression motion hearing did not assert the independent source doctrine. (Tr., p.42, L.7–p.43, L.20.) The State argued the seizure was reasonable to secure the phone or justified by exigent circumstances and, since the Detective Seibel did not search the phone, there was "nothing to be suppressed there." (Tr., p.42, L.7–p.43, L.20.) Second, the district court did not understand the State's argument to be an assertion of the independent source doctrine. (R., pp.117–19.) Third, the State's motion for reconsideration clearly argued an exception to the exclusionary rule, and that exception was not the independent source doctrine. (R., pp.139–42.) Along with the State's renewed argument that, because Detective Seibel had probable cause, the seizure of the phone to preserve evidence until the issuance of the warrant was reasonable, the State argued the "application of the attenuation doctrine" was "appropriate." (R., p.142.) Not once did the State assert the district court misunderstood its initial argument and failed to apply the independent source doctrine.[6]

[6] Similarly, the district court did not understand the State's arguments on reconsideration to be assertions of the independent source doctrine:

> Defendant argued that the cell phone was improperly seized without a warrant and that no exception to the warrant requirement existed. *The State responded that seizure of the cell phone was permissible because probable cause existed at the time of the seizure and that a search warrant was obtained prior to search of the telephone.* The State also argued that if an exception to the warrant requirement was necessary, exigent circumstances existed allowing a warrantless seizure of the cell phone. . . . The motion for reconsideration asserts that the Court erred in its initial decision. *The State once again asserts that a cell phone may always be seized prior to a warrant where probable cause exists, and a warrant is subsequently obtained for its search.* The State also asserted new theories that were not made at the time of the initial hearing. The State now

(R., pp.139–42.) Finally, the State's argument at the hearing on its motion confirmed the State was not pursuing the independent source doctrine. For one, the State again referenced *Segura*, but not for the independent source doctrine. (Tr., p.105, Ls.18–21.) The State maintained *Segura* allowed "the seizure of the phone for preservation of evidence to obtain a warrant." (Tr., p.105, Ls.18–21.) Further, upon the district court's inquiry if the State was arguing for an independent source (based on its *Russo* citation), the State answered: "Your Honor, I did wish to fit that within the realm of attenuation. I understand that there are some -- there is some overlap in the way the case could be interpreted as an independent source. But I think I'm fitting that within the umbrella of attenuation." (Tr., p.111, L.25–p.112, L.10.) The State's answer was, at most, a waiver of the independent source doctrine and, at the very least, a confirmation that the State was not pursuing this argument. In summary, the State's written and oral representations to the district court are a far cry from the State's argument on appeal that the independent source doctrine applies to the evidence obtained from Ms. Wolfe's phone. The State failed to preserve this issue for appellate review.

b. Unpreserved issues cannot be raised for the first time on appeal

This Court has "long held that '[a]ppellate court review is limited to the evidence, theories and arguments that were presented below.'" *State v. Garcia-Rodriguez*, 162 Idaho 271, 275 (2017) (quoting *Nelson v. Nelson*, 144 Idaho 710, 714 (2007)); *see also State v. Fuller*, 163 Idaho 585, 591 (2018) (same). Moreover, the State is bound by its legal concessions made in the lower court. *State v. Cohagan*, 162 Idaho 717, 721 (2017). The preservation doctrine exists for a

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> asserts that the cell phone was abandoned by the Defendant and alternatively that the Attenuation Doctrine precludes suppression.

(R., pp.162–63 (emphasis added).) These arguments are not assertions of the independent source doctrine.

variety of reasons: to divide labor between the trial and appellate courts, to limit the cost of litigation by narrowing issues, to ensure the court's review of the strongest possible arguments, and to define the bounds of judicial power. *State v. Islas*, No. 45174, 2018 WL 6332537, at *3 (Idaho Ct. App. Dec. 5, 2018) (citations omitted).

"Issues not raised below will not be considered by this court on appeal, and the parties will be held to the theory upon which the case was presented to the lower court." *Garcia-Rodriguez*, 162 Idaho at 275 (quoting *Heckman Ranches, Inc. v. State ex rel. Dep't of Pub. Lands*, 99 Idaho 793, 799–800 (1979)). This preservation rule extends to exceptions to the warrant requirement or other grounds to justify a warrantless search or seizure. *Fuller*, 163 Idaho at 590–91 (State cannot argue new justification for seizure for first time on appeal); *Cohagan*, 162 Idaho at 721 (State cannot argue seizure was lawful when conceded as illegal below); *Garcia-Rodriguez*, 162 Idaho at 274–76 (State cannot argue new justification for warrantless arrest for first time on appeal); *Islas*, 2018 WL 6332537, at *9 (State bound by concession that certain evidence subject to suppression, and State cannot argue new exceptions, including inevitable discovery, for the first time on appeal).

Recently, the Court of Appeals in *Islas* explored the preservation doctrine in the Fourth Amendment context. The *Islas* Court reasoned, because the State has the burden to establish an exception to the warrant requirement or other "reasonableness" to justify the warrantless intrusion, the onus is on the State to determine "the exceptions it intends to argue as the basis for admitting the evidence, admit the evidence that is relevant to that exception, and then argue the exception to the district court." 2018 WL 6332537, at *6. Through the State properly raising its argument, the defendant has an opportunity to address it and the district court can make the relevant findings. *Id.* The *Islas* Court further explained it is not the district court's "job . . . to

identify all the possible exceptions to the warrant requirement and provide factual findings and legal conclusions on each possible exception." *Id.* at *7. "Instead," it is the State's job "to identify, *with particularity*, the exceptions on which it is basing the admission of the evidence so the trial court can make the appropriate factual and legal findings." *Id.* (emphasis added). "To require appellate courts to do that which [the appellate courts] do not require of the trial court means that appellate courts would not review, but instead decide in the first instance, the validity of a search and subsequent seizure on a theory or argument not addressed by the district court." *Id.* This would run contrary to the many purposes of the preservation doctrine. Thus, the Court's preservation rules require "the specific argument (the precise exception to the warrant requirement or the basis for the application of the exception) be presented to the trial court in order to be raised on appeal." *Id.* at *6. This requirement "permits the trial court to rule on the issue with which it is presented and provides a level appellate playing field." *Id.*

Here, as explored above, the State did not argue the independent source doctrine in the district court. And the State bore the burden to establish this exception to the exclusionary rule. *See, e.g.*, *Nix v. Williams*, 467 U.S. 431, 444 & n.5 (1984). By failing to make this argument below, Ms. Wolfe did not have the opportunity to respond to the independent source doctrine, and the district court was unable to make the relevant factual findings. The State now asks this Court, in the first instance, to decide whether the independent source doctrine applies, to identify the relevant facts and inferences, and to apply those facts to the doctrine—all without the benefit of the State's argument, its presentation of pertinent evidence, Ms. Wolfe's response or evidence in opposition, and findings of fact or analysis by the district court. This Court should decline to rule on the independent source doctrine for the first time on appeal. *See, e.g.*, *Garcia-Rodriguez*,

162 Idaho at 274–76. For this reason alone, Ms. Wolfe respectfully requests that this Court affirm the district court's order granting her motion to suppress in part.

2. Even If Preserved, The Independent Source Doctrine Does Not Apply To The Facts Found Because The State Presented No Evidence That The Search Warrant Was Independent From Or Untainted By The Illegal Seizure

Assuming the State argued the independent source doctrine in the district court, it does not apply based on the unchallenged factual findings. The facts show that Detective Seibel interviewed Ms. Wolfe, seized her phone, and then applied for a search warrant for the phone. The State did not prove, based on these facts, that Detective Seibel's acquisition of the search warrant was genuinely independent from the illegal seizure. Moreover, these facts do not show that probable cause for the search warrant would exist absent the information tainted by the illegal seizure.

a. The search warrant was not genuinely independent from the illegal seizure

"It is well-established that the exclusionary rule provides that 'evidence obtained as a result of an unlawful search may not be used against the victim of the search.'" *State v. Downing*, 163 Idaho 26, 30 (2017) (quoting *Page*, 140 Idaho at 846). As an exception to the exclusionary rule, the United States Supreme Court developed the independent source doctrine. *Murray v. United States*, 487 U.S. 533, 537 (1988). This doctrine "allows admission of evidence that has been discovered by means wholly independent of any constitutional violation." *Russo*, 157 Idaho at 306 (quoting *Williams*, 467 U.S. at 443). In other words, if the State's "knowledge of [facts] is gained from an independent source they may be proved like any others, but the knowledge gained by the [State]'s own wrong cannot be used by it in the way proposed." *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920). The State must establish the independent source by a preponderance of the evidence. *Williams*, 467 U.S. at 444 & n.5.

In *Murray*, for example, the United States Supreme Court considered whether the independent source doctrine applied to tangible evidence that the police had initially observed during an unlawful entry, but later obtained pursuant to a search warrant. 487 U.S. at 535–36, 541–44. The United States Supreme Court acknowledged that the search warrant application "did not mention the prior entry" or "rely on any observations made during that entry." *Id.* at 535–36. "The ultimate question, therefore," was "whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here." *Id.* at 542. The *Murray* Court elaborated:

> To determine whether the warrant was independent of the illegal entry, one must ask whether it would have been sought even if what actually happened had not occurred—not whether it would have been sought if something else had happened. That is to say, what counts is whether the actual illegal search had any effect in producing the warrant, not whether some hypothetical illegal search would have aborted the warrant. Only that much is needed to assure that what comes before the court is not the product of illegality; to go further than that would be to expand our existing exclusionary rule.

Id. at 542 n.3. This exception to the exclusionary rule therefore serves to place law enforcement in the same position but for the illegality. Otherwise, as explained in *Murray*, the exclusion of evidence with an independent source "would put the police in a worse position than they would have been in absent any error or violation." *Id.* at 537 (quoting *Williams*, 467 U.S. at 443).

The United States Supreme Court's application of the independent source doctrine in *Murray* provides guidance for its application here. The *Murray* Court recognized that it would be difficult for State to prove a truly independent source if the police kept the unlawfully seized evidence until the use of the alleged independent source: "So long as a later, lawful seizure is genuinely independent of an earlier, tainted one (*which may well be difficult to establish where the seized goods are kept in the police's possession*) there is no reason why the independent source doctrine should not apply." *Id.* at 542 (emphasis added). The *Murray* Court also outlined

what would not qualify as a "genuinely independent source." *Id.* If the police's "decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant," then the search warrant was not genuinely independent. *Id.* To this end, the United States Supreme Court remanded the case to lower court for further factual findings on the alleged independent source. *Id.* at 543. Although "one could perhaps infer" the police "already planned" to obtain the tangible evidence "through a warrant-authorized search," especially since preservation of evidence was the purpose of the initial illegal entry, that inference alone was not "clear enough to justify the conclusion" of an independent source. *Id.* The lower court never "explicitly" found that the police "would have sought a warrant if they had not earlier" illegally entered the area to be searched. *Id.* Accordingly, the *Murray* Court held remand was necessary for the lower court to make these independent source findings. *Id.* at 543–44.

Here, the State simply lacks the necessary factual findings to prove that Detective Seibel obtained the evidence on Ms. Wolfe's phone from an alleged independent source: the phone search warrant. For one, Detective Seibel kept the seized phone in the police's possession until the issuance of the warrant. *See id*. at 542. This cuts strongly against a purported independent source for the evidence on the phone. Moreover, the State cannot prove that the search warrant "would have been sought even if what actually happened"—the seizure of the phone—"had not occurred." *Id.* at 542 n.3. "That is to say," the State cannot show that the "actual illegal" seizure of the phone had no "effect in producing the warrant." *Id.* The State is unable to meet its burden because there is no evidence that the illegal seizure of the phone and the subsequent search warrant were not one series of events "flowing directly from" Detective Seibel's unlawful conduct. *Downing*, 163 Idaho at 32 (rejecting the State's inevitable discovery argument to

"speculate on the course of action the investigation *could* have taken absent" the illegality). On the contrary, the evidence shows one causal chain: Detective Seibel seized the phone, applied for a search warrant for the phone, and then searched the phone. (R., pp.117–18, 164, 170.) Although one could potentially infer that Detective Seibel already planned to apply for the search warrant and would have done so regardless of her seizure of the phone, there is absolutely no evidence in the record to support those inferences. The district court never made those findings (likely because the independent source doctrine was not before it),[7] and therefore the doctrine does not apply to cure the initial illegal seizure.

Along the same lines, the State has not challenged the district court's ruling on its admission of the phone search warrant, State's Exhibit 1, for a limited purpose. "When issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered. . . . A party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking." *State v. Zichko*, 129 Idaho 259, 263 (1996). Here, the district court admitted State's Exhibit 1 for the limited purpose "to establish when a warrant was initially sought following the seizure of the telephone." (R., p.165.) This purpose restricts this Court's review of the search warrant. The district court did not admit the search warrant for its substance. The State's only argument, however, is that "[t]he evidence was obtained by execution of a

[7] In the attenuation doctrine context, the district court found a single causal chain:

> Analyzing each of the factors required by the attenuation doctrine there is no intervening circumstance to justify application of the doctrine. *The actions of law enforcement from the time of seizure through the search were continuous in nature.* There was no intervening circumstance outside of these acts, such as a pre-existing warrant or a warrant obtained on another basis, to justify police action. The causal string is therefore not sufficiently broken to support the doctrine of attenuation.

(R., p.170 (emphasis added).) The State has not challenged these facts or conclusions on appeal.

search warrant that was untainted by any illegality in the seizure." (App. Br., p.7.) The State did not contest the district court's evidentiary ruling. (*See generally* App. Br.) Without the substance of the search warrant in the record, the State simply cannot make its argument that the search warrant "was untainted by any illegality in the seizure." (App. Br., p.7.) This Court cannot review whether the illegal seizure tainted the search warrant without the search warrant itself. Therefore, because the State lacks the necessary factual findings to demonstrate an independent source, this Court should affirm the district court's decision.

b. The information in the search warrant was tainted by the illegal seizure

Finally, even if the search warrant (reviewed for its substance) could be an independent source, the State still has not shown that the information in Detective Seibel's warrant application was untainted by the information gained from the illegal seizure.[8] This is where the State's reliance on *Davis* is misplaced. (*See* App. Br., pp.6–7.) In *Davis*, the Court of Appeals held the independent source doctrine applied to the subsequent warrant-authorized search of the defendant's cell phone after its initial illegal seizure and search. 159 Idaho at 492–95. In holding the independent doctrine applied, the Court of Appeals emphasized that the police "coordinated their efforts before" they arrested the defendant and seized his phone. *Id.* at 494. Moreover, one of the detectives testified that he intended to determine whether to apply for a search warrant for the phone after his pre-planned interviews with the alleged victims, not after the phone's seizure. *Id.* As such, the information in the search warrant application, excluding the information obtained from the illegal search, "came from a wholly independent source." *Id.* That untainted information still provided probable cause for the search of the phone. *Id.* at 494–95. Because

[8] Although the State has the burden to provide an adequate record, *see, e.g., State v. Willoughby*, 147 Idaho 482, 488 (2009), Ms. Wolfe has moved to augment the record with State's Exhibit 1.

there was "sufficient non-tainted evidence for a search warrant," the evidence was not subject to suppression. *Id.* at 493; *see also id.* at 494–95.

In the case at bar, the State has not shown that Detective Seibel's decision to seek the warrant was independent, let alone untainted by, the phone's seizure. Again, there is no evidence in the record that Detective Seibel determined whether to apply for the search warrant *before* the illegal seizure and based solely upon independent information. *See Davis*, 159 Idaho at 494. If Detective Seibel's "decision to seek the warrant was prompted by" her seizure of the phone, then the search warrant does not cure the initial illegality. *See Murray*, 487 U.S. at 542.

More importantly, Detective Seibel included information gained from the illegal seizure in her affidavit for the search warrant, and this tainted information established probable cause for the phone. "[A] search warrant is not validly issued if, once the illegally obtained evidence is excluded from the evidence presented to the magistrate, there is insufficient information to provide the probable cause necessary for the issuance of a warrant." *Davis*, 159 Idaho at 494 (quoting *State v. Revenaugh*, 133 Idaho 774, 779 (1999)). "In order for a search warrant to be valid, it must be supported by probable cause to believe that evidence or fruits of a crime may be found in a particular place." *Id.* at 495. A review of the warrant application shows that the only information establishing probable cause to search Ms. Wolfe's phone came from her incriminating statements made to Detective Seibel after the illegal seizure. (*See* Def's Aug. R., pp.6–14.) Detective Seibel averred:

> Monica entered the Nampa Police Department Interview room with a black in color smart phone. I seized Monica's cell phone and advised that it would be placed in evidence. Monica asked me what I would be looking for on the cell phone. I explained to Monica, any evidence related to committing murder, staging a suicide, solicitation of murder, poisoning, and antifreeze. I asked Monica if when the cell phone was searched, would there be any text messages or emails asking people to kill Robert. She stated, "yes". I asked Monica how many text messages would be related to having Robert killed. She stated, "a lot". I asked

> Monica, what was I supposed to make of that. She stated, "you have to take them in context . . . if I was angry . . . or joking". I seized Monica's cell phone and placed it in airplane mode.

(Def.'s Aug. R., p.11 (sic).) No other facts give rise to probable cause that evidence of a crime may be found on Ms. Wolfe's phone. (*See* Def's Aug. R., pp.9–11.) To be sure, Detective Seibel's affidavit recites other information pertinent to Ms. Wolfe's alleged commission of the crimes, but only Ms. Wolfe's statements establish probable cause for the phone. (*See* Def's Aug. R., pp.9–11.) These statements, however, are tainted by the initial seizure. There is no evidence that Detective Seibel would have asked Ms. Wolfe about the contents of her phone or that Ms. Wolfe would have provided inculpatory responses but for the seizure. By using this tainted information in her affidavit, Detective Seibel is put in a better, not the same, position than she would have been if no misconduct had occurred. This runs contrary to the purpose of independent source doctrine. *See Williams*, 467 U.S. at 443 ("The independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred."); *Russo*, 157 Idaho at 307 ("Disregarding the unlawfully obtained information when determining probable cause would put the police in the same, not a worse, position than they would have been in absent the misconduct."). Thus, unlike *Davis*, the information obtained by Detective Seibel in support of probable cause to search the phone did not come "from a wholly independent source." 159 Idaho at 494. It came from the illegal seizure.[9]

[9] Similarly, the information establishing probable cause to search Ms. Wolfe's Google account also came directly from the initial unlawful seizure. In Detective Seibel's affidavit to search the Google account, Detective Seibel included the same paragraph from her affidavit to search the

In summary, if preserved, the independent source doctrine does not apply because the State did not show that the search warrant for the phone was a genuinely independent source of evidence from the illegal seizure of the phone. Further, if the doctrine applies and the search warrant was independent, "there is insufficient information to provide the probable cause necessary for the issuance of a warrant" once the tainted information is excluded from the warrant application. *Davis*, 159 Idaho at 494 (quoting *Revenaugh*, 133 Idaho at 779). The tainted information is the only information to establish probable cause for the phone. Accordingly, the search of Ms. Wolfe's phone remains unlawful, and the district court properly granted her motion to suppress in part.

CONCLUSION

Ms. Wolfe respectfully requests this Court affirm the district court's order granting in part and denying in part her motion to suppress.

DATED this 9th day of January, 2019.

/s/ Jenny C. Swinford
JENNY C. SWINFORD
Deputy State Appellate Public Defender

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phone regarding her seizure of the phone and Ms. Wolfe's statements. (*Compare* Def.'s Aug. R., p.11, *with* State's Aug. R., pp.11–12.) Then, for the Google account, Detective Seibel simply added that law enforcement searched the phone and observed the Google account, and that she "believe[d]" information in the account "would assist" her "in obtaining evidence related to solicitation of murder." (State's Aug. R., p.14.) Notably, she did not state that any information on the phone, such as text messages, contained evidence of the alleged crimes. (State's Aug. R., p.12.) Like the phone search warrant, the subsequent Google search warrant is not an independent source of evidence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of January, 2019, 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

JCS/eas