8-8-2019

State v. Cox Appellant's Reply Brief Dckt. 46219

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8/8/2019 2:27 PM
Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 46219-2018**
	)	
v.	)	**ADA COUNTY NO. CR01-18-881**
	)	
SPENCER EDWARD COX,	)	**REPLY BRIEF**
	)	
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

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

HONORABLE STEVEN J. HIPPLER
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Spencer Cox appeals, contending that, by facilitating the dog's entry into the car before it alerted, the dog sniff amounted to an impermissible warrantless search under the Fourth Amendment, or alternatively, that it violated his rights under the Idaho Constitution, which should be read to provide greater protections than its federal counterpart.

The State's response under the Fourth Amendment relies on cases which turn on who physically opened the car door without mentioning the Court of Appeals decision which expressly held that who opens the door is "constitutionally irrelevant." *State v. Irwin*, 143 Idaho 102, 106 (Ct. App. 2006). Under the proper analysis, since the officers made it easier for the drug dog to enter and sniff the interior of Mr. Cox's car, which he had not voluntarily exposed to the public, by not shutting the door before conducing the sniff, they facilitated the dog's entry into the car. As such, that intrusion violated Mr. Cox's Fourth Amendment rights.

The State also contends the district court implicitly ruled on Mr. Cox's claim under the Idaho Constitution. However, the fact that the district court was skeptical, and so, asked questions of Mr. Cox at the argument does not reveal the legal basis for any such implicit decision, especially as it relates to how it considered the precedent Mr. Cox presented in answer to those questions. On the merits of that issue, the State only responded to three of reasons for greater protections discussed in the Appellant's Brief, thereby waiving its responses to the other reasons discussed therein. Moreover, the arguments the State did make are either contrary to the applicable precedent or miss the point entirely.

For all those reasons, this Court should reject the State's arguments and reverse the district court's decision under either the state or the federal constitution.

Statement of the Facts and Course of Proceedings

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

ISSUES

I. Whether the officers facilitated Geno's entry into the car, such that the dog sniff of the interior was warrantless search in violation of the Fourth Amendment, by not shutting the car door, which had been opened in response to their knock.

II. Alternatively, whether Article I, Section 17 of the Idaho Constitution provides greater protections against warrantless entries into, and thus, unreasonable searches of, the protected interiors of cars by drug dogs.

ARGUMENT

I.

The Officers Facilitated Geno's Entry Into The Car, Such That The Dog Sniff Of The Interior Was Warrantless Search In Violation Of The Fourth Amendment, By Not Shutting The Car Door, Which Had Been Opened In Response To Their Knock

A. The State Has Essentially Conceded That The Two Statements Of Fact Challenged By Mr. Cox Were Clearly Erroneous

Mr. Cox identified two statements of fact from the district court's order which were not supported by substantial and competent evidence – that, "[a]t no point did Geno actually get into the vehicle" and that Mr. Cox "voluntarily opened the door for the officers." (App. Br., pp.7-9.) The State responded that the district court did not actually mean what it said in both those instances. Specifically, to the first statement, it argued, "it is clear that the court meant that the dog did not, unlike the drug dogs in [other cases], *fully* enter the vehicle, but instead merely crossed the threshold of the open door."[1] (Resp. Br., p.12 (emphasis from original).) Similarly, the State argued it was clear that the second statement "was limited to factual findings that: (1) Cox, and not the officers, physically opened the door; and (2) officers did not directly order Cox to open the door. The court understood that Cox opened the door in response to the officers knocking on the window." (Resp. Br., p.13.)

By arguing that the district court's understanding was more limited than its statements actually asserted, given what the facts in the record actually show, the State has effectively conceded that the overly-broad statements appearing in the district court's order are, in fact,

[1] The State also effectively concedes that the dog "entered the car" by going into the negative space between the open door and the body of the car by arguing that the distinction between crossing the threshold of the open door and entering the negative space "is of no significance in this case because the drug dog clearly intruded both into this area and into the car itself." (Resp. Br., p.13.)

clearly erroneous. As such, this Court should not defer to them. *See State v. Liechty*, 152 Idaho 163, 166 (Ct. App. 2011). Rather, this Court should evaluate this case in light of the actual facts as conceded by the State – that Geno did, in fact, "enter" the car during the sniff and that Mr. Cox only opened the door in response to the officers knocking on the window. (*See* Resp. Br., pp.12-13.)

B. Geno's Entry Into The Car During The Sniff Was Unlawful Under The Fourth Amendment Because It Was Facilitated By The Officers' Decision To Not Close The Door Before Conducting The Sniff

As the State has conceded, Geno crossed the threshold of the car during the sniff by entering the negative space created by the open door and by putting his nose into the body of the car. (*See* Resp. Br., p.12.) Cars, particularly their interiors, are protected under the Fourth Amendment. *See, e.g., United States v. Jones*, 565 U.S. 400 (2012) (hooding a physical trespass against a car left in a public parking lot violated the Fourth Amendment); *State v. Gibson*, 141 Idaho 277, 281 (Ct. App. 2005) (reiterating that the automobile exception only allows a search of the interior of a car if the officers have probable cause that it contains contraband or evidence of a crime). Any physical invasion of a protected space by a government agent, "'even a fraction of an inch'" constitutes a violation of the Fourth Amendment.[2] *State v. Maland*, 140 Idaho 817, 822 (2004) (quoting *Kyllo v. United States*, 533 U.S. 27, 37 (2001)).

The State argues directly contrary to this precedent, asserting that, since "the drug dog's intrusion into the car was minimal – the dog did not jump entirely into the car[, t]he district court properly denied Cox's motion to suppress." (Resp. Br., p.12.) That argument should be rejected

[2] Drug dogs are tools used by government agents, and so, cannot invade the protected space any more than their human companion could. *See generally Flordia v. Jardines*, 569 U.S. 1, 9 (2013).

because it is flatly contrary to Idaho Supreme Court and United States Supreme Court precedent. Geno's intrusion into the protected space, however minimal that intrusion might have been, still violated Mr. Cox's Fourth Amendment rights. *Kyllo*, 533 U.S. at 37; *Maland*, 140 Idaho at 822.

To try to avoid that conclusion, the State relies heavily on the Court of Appeals' decision in *State v. Naranjo*, 159 Idaho 258 (Ct. App. 2015), and the related federal court decisions which draw a distinction under the Fourth Amendment between a dog entering the car on its own, as opposed to having its entry facilitated by the officer. (Resp. Br., pp.9-12.) However, the State offers no response to Mr. Cox's argument about how that rule improperly promotes arbitrary enforcement of the Fourth Amendment's protections in such situations. (*See* App. Br., p.12 n.5; *see generally* Resp. Br.) Since the Fourth Amendment does not tolerate rules which allow for arbitrary enforcement at the total discretion of the officer, *Delaware v. Prouse*, 440 U.S. 648, 654, 661 (1979), this Court should reject the State's argument in that regard.

Moreover, the State's argument fails to even acknowledge another Court of Appeals decision that is directly relevant to that analysis – *State v. Irwin*, 143 Idaho 102 (Ct. App. 2006). (*See generally* App. Br.) The *Irwin* Court held that the question of who physically opens a car door is "constitutionally irrelevant." *Irwin*, 143 Idaho at 105-06 (finding no Fourth Amendment violation in the fact that the officer himself opened the car door when he ordered the occupants out during a justified traffic stop). Thus, the State's reliance on the contrary federal district court decisions is improper because those decisions turn, at least in part, on an analysis of who physically opened the door. *See, e.g., United States v. Sharp*, 689 F.3d 616, 619-20 (6th Cir. 2012) (distinguishing cases on that fact); *United States v. Pierce*, 622 F.3d 209, 214 (3d Cir. 2010) (same).

Finally, the State's reliance on *Naranjo* does not save its argument in the face of *Irwin*. That is because dog sniffs are only permissible, according to the United States Supreme Court, if they are sniffing an area that the defendant has voluntarily exposed to the public examination. *United States v. Place*, 462 U.S. 696, 707 (1983). That is important because, when a dog is deployed beyond the permissible scope, the dog sniff constitutes a search under the Fourth Amendment. *Florida v. Jardines*, 569 U.S. 1, 8-9 (2013) (holding that bringing a dog to the door of a house exceeded the limited license, and therefore, was a search of the protected curtilage). *Irwin* indicates that, when the door is opened at the officer's direction, the interior is not "voluntarily" exposed to the public. *See Irwin*, 143 Idaho 105-06; *accord United States v. Berkowitz*, 927 F.2d 1376, 1388 (7th Cir. 1991) (quoting *United States v. Santana*, 427 U.S. 38, 42 (1976)) (specifically holding that to be the case). Therefore, a dog cannot properly enter and sniff the interior of a car when the door is only opened in response to the officer's knock (his non-verbal request for the door to be opened), because the interior in that case was not voluntarily exposed to the public.

That rule even seems to be present in *Naranjo*, where the Court of Appeals explained only that "Naranjo left his driver's side window open," and "no officer opened Naranjo's window." *Naranjo*, 159 Idaho at 259, 260. Since *Irwin* had already made it clear that it was not important who opened the window because it (likely involuntarily) revealed the interior to the same extent, and since *Place* holds that the focus is on whether the area sniffed had been voluntarily exposed, what the *Naranjo* Court was necessarily getting at was that the defendant in

that case had voluntarily exposed the interior of his car to the public.[3] Only in that way would the dog sniff of the interior of his car be consistent with *Place* and *Irwin*.[4]

Here, unlike *Naranjo*, the record is clear that Mr. Cox did not expose the interior of his car to the public of his own volition because when the officers approached his car, the doors and windows were all closed, and he only opened the door response to the officer's knock. (*See generally* Exhibit 1.) As such, Geno's sniff was, contrary to the sniff in *Naranjo*, not of a place Mr. Cox voluntarily exposed to the public. That means the sniff of the interior of the car was not proper under *Place*. In other words, by not closing the car door before conducting the dog sniff, the officers made it easier for Geno to enter and sniff the still-protected interior of Mr. Cox's car, which means they facilitated the dog's improper entry into the car. As such, even under the rule for which the State is arguing, Mr. Cox's Fourth Amendment rights were violated in this case.

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[3] For example, if the defendant in *Naranjo* had been driving with his window open prior to the traffic stop, he could be said to have already voluntarily exposed the interior of his car to the public.

[4] *Naranjo* remains troubling because the rule it adopted from the federal courts does not address, much less mesh with, the United States Supreme Court's decision in *Jones*, where the Supreme Court found a violation of the Fourth Amendment simply in the physical trespass into a car. *See Jones*, 565 U.S. at 406 n.3. Under *Jones*, the dog's actual intrusion into the car would be a physical trespass, and thus, a Fourth Amendment violation regardless of whether the entry was instinctual or facilitated. That is also one of the reasons why, as discussed in Section II(B) *infra*, the Idaho Constitution should be read to provide more protection in that context, at least until the United States Supreme Court has the opportunity to address that particular issue. (*See also* App. Br., pp.10, 19.)

II.

Alternatively, Article I, Section 17 Of The Idaho Constitution Provides Greater Protections Against Warrantless Entries Into, And Thus, Unreasonable Searches Of, The Protected Interiors Of Cars By Drug Dogs

A. The State's Request For This Court To Find An Implicit Conclusion On Mr. Cox's Claim Under The Idaho Constitution Is Improper Because The Record Does Not Reveal Any Analysis By The District Court On That Issue Upon Which To Base Such An Implicit Conclusion

The Idaho Supreme Court has made it clear that the district court will abuse its discretion if it does not provide "an adequate basis upon which to understand the premise behind the district court's determination" in the record. *Dawson v. Cheyovich Family Trust*, 149 Idaho 375, 380 (2010). Thus, the appellate courts will defer to the implicit findings by the district court only when the district court's analysis on that issue is apparent from the record. *See, e.g., Schultz v. Schultz*, 145 Idaho 859, 863 (2008) (finding an implicit decision regarding the best interests of a child because "the record contains sufficient admissible evidentiary facts [in the form of affidavits] for this Court to review" the basis of that implicit decision).

In fact, this rule is apparent in the cases upon which the State relies, and they disprove the State's point. For example, in *Lester v. Salvino*, "it is clear from the district court's statements at the two hearings and in its memorandum decision and order that the finding was implicitly made" that the party did not make a reasonable inquiry into the facts and legal theories when the district court expressly ordered sanctions under I.R.C.P. 11. *Lester v. Salvino*, 141 Idaho 937, 941 (Ct. App. 2005). Since the district court's analysis of the specific question in *Lester* was apparent on the face of the record, the appellate court had an adequate basis upon which to understand the implicit conclusion. In *State v. Wheaton*, on the other hand, the dispositive point

was that there was no indication of any analysis by the appellant below, and as a result, the appellate court refused to consider that issue. *State v. Wheaton*, 121 Idaho 404, 407 (1992).

Like in *Wheaton*, the record in this case reveals no analysis on the question of whether there should be greater protections under the Idaho Constitution, except it was the district court, not the appellant, that failed to conduct the analysis. Instead, all the record shows is that the district court was skeptical of that argument, and so, asked trial counsel if there was any case law to support that argument, such as finding additional protections under the Idaho Constitution beyond the good faith exception, as the district court was unaware of such precedent. (Tr., p.62, L.24 - p.63, L.10.) Mr. Cox expressly cited to *State v. Thompson*, which provided exactly the information sought by the district court's question: it held Idaho provided greater protections in regard to the use of pen registers, and did not discuss the good faith exception. *See State v. Thompson*, 114 Idaho 746 (1988); *compare State v. Schaffer*, 133 Idaho 126, 130 (Ct. App. 1999) (in which no such justification was offered for providing additional protections). Moreover, *Thompson*'s determination that the Idaho Constitution provided those additional protections was based on "the uniqueness of our state, our Constitution, and our long-standing jurisprudence." *State v. Donato*, 135 Idaho 469, 472 (2010).

That the record shows the district court may have had misgivings about the argument does not indicate the basis on which the district court distinguished this case from *Thompson* or otherwise how it might have concluded those considerations did not justify a similar protections in the context of this case. (*See generally* Tr., R.) As such, the record does not provide the necessary basis upon which to find an "implicit" decision on Mr. Cox's claim under the Idaho Constitution. *Compare Schaffer*, 133 Idaho at 130; *Lester*, 141 Idaho at 941. Therefore, this Court should remand this case so that the district court might actually conduct the required

analysis in the first instance, as precedent requires. *See State v. Fuller*, 138 Idaho 60, 63-64 (2002).

B. The State Did Not Address Three Of The Reasons Idaho's Constitution Should Provide More Protection In This Situation, And Its Responses To The Other Three Either Miss The Point Entirely Or Are Contrary To The Applicable Precedent

On appeal, Mr. Cox provided additional authorities and explanations in support of his position that, as in *Thompson*, Idaho's uniqueness and its long-standing jurisprudence reveal that the state constitution should be more protective than its federal counterpart in this regard[5]:

(1) that Idaho's Constitution is different from the federal constitution, in that the state constitution protects against more than just officer misconduct, and it is those justifications which should merit additional protections against the actual intrusion into the protected space regardless of whether the officer was trying to act reasonably (App. Br., pp.16-17);

(2) that Idaho's jurisprudence has rejected analyses of searches and seizures which turn on a consideration of the officer's after-the-fact description of his subjective intent, and since that is precisely what the current federal test does, the Idaho Constitution should stand as a bulwark against that improper analysis (App. Br., pp.17-18);

(3) that Idaho's Constitution should provide more protection because the federal test does not protect against the scenario where the dog only appears to be acting instinctively, when it is, in fact, reacting to unconscious or subtle cues from its handler (App. Br., pp.18-19);

(4) that there is no need to risk this sort of warrantless intrusion at all since the legitimate government interest can be served equally well by requiring the officers to close the door first (App. Br., p.19);

(5) that Idaho's jurisprudence disfavors rules that allow for arbitrary enforcement of search and seizure principles, and deferring to the officer's discretion as it relates to honoring a request to close the door, or to providing the occupant a realistic opportunity to close the door himself authorizes arbitrary enforcement of those principles (App. Br., pp.20-21); and

(6) that Idaho's Constitution actually provides more protection against the warrantless seizure of cars without particularized suspicion of wrongdoing, and those additional protections should also prevent officers from using dogs to warrantlessly search the interior of cars without particularized suspicion of drug use. (App. Br., pp.21-22.)

In its Response Brief, the State only challenged the first three of those explanations. (*See* Resp. Br., p.20 (identifying the three arguments it was taking issue with); *see generally* Resp. Br., pp.20-24.) As such, it has waived any response to the latter three explanations. *State v. Zichko*, 129 Idaho 259, 263 (1996). As such, this Court should find the Idaho Constitution provides additional protections in this scenario for those three reasons. A contrary rule would allow for arbitrary enforcement of search and seizure principles, as not all officers may share Officer Green's practice of honoring requests to shut or allow the person to shut the door themselves. Such a rule is particularly troubling since it does not actually further any legitimate government interest. (*See, e.g.,* Tr., p.25, Ls.2-22 (Officer Green testifying that whether the door is opened or closed should not affect the dog's ability to detect an odor, if one is present).) Thus, there is no reason to endorse a rule which creates an unnecessary risk for purposeless intrusions into the spaces in every traffic stop, regardless of whether there is particularized suspicion of drug use, under Article I, Section 17 of the Idaho Constitution.

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[5] Presenting additional arguments and authorities in support of the position taken below is, of course, proper on appeal. *State v. Hoskins*, 165 Idaho 217, ___, 443 P.3d 231, 239 (2019); *Ada County Highway Dist. v. Brooke View, Inc.*, 162 Idaho 138, 142 n.2 (2017).

This Court should reach the same conclusion under the first three reasons Mr. Cox presented because the State's responses in those regards is contrary to the applicable precedent or misses the point entirely. The State's argument about *State v. Pettit* and *State v. Guzman* fails for both reasons. First, the State's attempt to distinguish those cases on their facts misses the point. The rationales underlying the decisions in both *Pettit and Guzman* demonstrate that the protections in the Idaho Constitution are, at a basic level, different from their federal counterparts (despite the similarity of the wording) because Idaho's protections do more than address officer misconduct. *See State v. Pettit*, 162 Idaho 849, 854-55 (Ct. App. 2017); *State v. Guzman*, 122 Idaho 981, 992-93 (1992). Essentially, the additional scenarios in which Idaho will suppress evidence outline the scope of Idaho's additional protections. As such, even if those two cases were not directly applicable, the rationales underlying those decision is still relevant because they show that this situation falls within the scope of Idaho's additional protections because Mr. Cox was still subjected to an unreasonable search.

This is why, in fact, both cases are relevant to the question in this case. In *Guzman* and *Pettit*, as here, the concern was with the fact that the person's privacy had actually invaded contrary to what the law allows, albeit by a well-meaning officer. *See id.* Just as it did in those cases, Idaho's Constitution should stand as a bulwark against such actual intrusions regardless of whether the handling officer was acting reasonably or in good faith or the dog acting instinctively. *Compare Jones*, 565 U.S. 400 (holding that a physical trespass constituted a violation of the Fourth Amendment regardless of whether there was a reasonable expectation of privacy in the car while it was left in a public parking lot). This is particularly true since the United States Supreme Court does not appear to have addressed the rule the federal courts use in light of *Jones*. *Compare Thompson*, 114 Idaho at 751 (noting the Idaho Constitution would

stand as a bulwark against that particular type of search until the United States Supreme Court had a chance to reconsider its precedent on that question).

The State's response to the second reason – the consideration of the officer's subjective intent under the federal test – is contrary to the applicable precedent. That is because, rather than discuss the Idaho Supreme Court cases which expressly discuss the role an officer's subjective intent plays in the context of the right to be free from unreasonable searches and seizures (a right provided in the Fourth Amendment and Article I, § 17), the State's response relies solely on cases discussing that concept in the context of the right to remain silent (a right provided in the Fifth Amendment and Article I, § 13). (Resp. Br., pp.22-23 (citing *Missouri v. Seibert*, 542 U.S. 600 (2004); *Miranda v. Arizona*, 384 U.S. 436 (1966); and *State v. Doe*, 163 Idaho 323 (Ct. App. 2017); *compare* App. Br., p.18 (relying on the decisions involving searches and seizures – *Whren v. United States*, 517 U.S. 806 (1996), and *State v. Lee*, 162 Idaho 642 (2017).) Therefore, the State's analysis does not alter Mr. Cox's assertion that Idaho's precedent on this particular point signals that the Idaho Constitution should provide more protection in this context.

Specifically, the precedent directly on point holds the only time an officer's subjective intent is a relevant consideration in the context of searches and seizures is when that intent is actually articulated at the time of the search or seizure because, in that situation, the officer's actual statement is a contemporaneous part of the totality of the circumstances at the time of the seizure. *Lee*, 162 Idaho at 652; *accord State v. Ray*, 153 Idaho 564, 569-70 (2012) ("[A]n officer's subjective intent is only relevant if that intent has been objectively conveyed to the person in question."). Since the determination of whether the drug dog acted instinctively, as opposed to at the officer's intended direction, will almost always be discussed and determined

after the fact, it is not, under Idaho precedent, a valid basis upon which to evaluate the propriety of the warrantless intrusion. Thus, even if *Naranjo* represents a proper understanding of the federal constitutional rule, this Court should still reject it under the Idaho Constitution because it is inconsistent with Idaho's existing precedent.

Finally, the State's response to the third reason – the risk that the dog will only appear to be acting instinctively when it is, in fact, being subconsciously cued – misses the point at issue. While the reliability of a drug dog can, as the State asserts, be challenged under the current rules, the quality of the dog's training has nothing to do with whether it was reacting to a cue from its handler in a particular situation. *See* Matthew Slaughter, *Supreme Court's Treatment of Drug Detection Dogs Doesn't Pass the Sniff Test*, 19 New Crim. L.Rev. 279, 299 (2016) (discussing a study in which law-enforcement-certified drug dogs erroneously alerted 85% of the time when there was actually no odor present but the handler believed there would be an odor at that location).[6] Since even well-trained dogs can succumb to subconscious or subtle cues by their handlers, and only appear to be acting instinctively in a particular situation, the State's argument fails to address the concern at issue. More importantly, since that concern is not addressed under

[6] The State urges this Court to ignore commentaries such as Mr. Slaughter's article because they contain information that was not presented to the district court. (Resp. Br., p.24 n.10.) That argument is unfounded, as Idaho's courts have routinely relied on such commentaries with no indication that they were presented below when determining what the law allows or should allow (as opposed to addressing factual questions about the underlying case itself). *E.g., Ballad v. Kerr*, 160 Idaho 674, 714 (2016) (relying on similar articles discussing empirical studies to determine whether Idaho law should prevent juror questions during trial); *State v. Wright*, 147 Idaho 150, 157 (Ct. App. 2009) (relying on articles discussing empirical studies to help it define the circumstances relevant to deciding whether to allow expert testimony on eyewitness identification). After all, questions of law, such as questions about the interpretation of the state constitution, are subject to free review by the appellate court. *Leavitt v. Craven*, 154 Idaho 661, 665 (2012).

the current federal test, the Idaho's Constitution should, as it did under *Thompson*, stand as a bulwark against such warrantless intrusions into the privacy of its citizens.

For any or all of those reasons, this Court should hold that the Idaho Constitution, at least, protects against a drug dog's warrantless entry into the interior of a car while conducting a sniff by requiring the officers to shut the door before conducting that sniff.

CONCLUSION

Mr. Cox respectfully requests this Court reverse the order denying his motion to suppress under either the federal or state constitution and remand this case for further proceedings.

DATED this 8th day of August, 2019.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of August, 2019, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served as follows:

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BRD/eas