State v. Doe, Docket No. 33986

In April 2006, a church employee contacted the police regarding two individuals who were looking in a window and appeared to possibly be attempting to gain access to the church. Dispatch contacted several police officers and, around 9:45 p.m., four police officers arrived at the church. Two officers, in separate patrol cars, cornered two young individuals dressed in black. The officers ordered the two individuals to lie down on their stomachs and they complied. Several of the officers circled the church, and it was determined that the two individuals dressed in black were the ones seen by the church employee. One of those individuals was seventeen-year-old John Doe and the other was his sixteen-year-old friend. After ordering the boys to the ground, one officer placed Doe in handcuffs while he was lying on the ground, and the other officer handcuffed Doe's friend. The officer who handcuffed Doe began to perform a pat-down frisk for weapons. However, when this officer heard the other officer reading Doe's friend his *Miranda* rights, the officer stopped the frisk and ordered Doe to listen to the *Miranda* warnings.

After the *Miranda* warnings were completed, the officer resumed his pat-down frisk of Doe. This frisk led to the discovery of cigarettes and marijuana. The State filed a petition alleging that Doe had possessed marijuana. Doe filed a motion to suppress the marijuana and two admissions he made regarding his ownership. An evidentiary hearing was held before the magistrate. The officer who handcuffed Doe testified that, after he paused his frisk so Doe could hear the *Miranda* warnings, the officer felt a square box in Doe's front pocket. The officer testified that he immediately recognized the box as a cigarette package. The officer testified he asked Doe how old he was, and Doe responded that he was seventeen years old. The officer reached into Doe's pocket and removed the cigarettes and then asked Doe if he had anything else illegal on his person. Doe responded that he had marijuana in another pocket of his pants. The officer retrieved the marijuana from Doe's pocket. Doe admitted to the officer that the marijuana was his. Later at the police station, Doe again confessed that the marijuana was his.

The magistrate denied Doe's motion to suppress and found that Doe had possessed the marijuana. Doe appealed, and the district court reversed the magistrate and suppressed the marijuana and Doe's statements on the ground that the officer had no justification for the frisk which led to the discovery of marijuana. The State now appeals.

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Appellant,	)	**NO. 33986**
	)	
vs.	)	
	)	
JOHN J. DOE,	)	
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

HONORABLE JOHN R. STEGNER
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

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STATEMENT OF THE CASE

Nature of the Case

The state appeals the decision of the district court, reversing the magistrate's denial of Doe's motion to suppress.

Statement of the Facts and Course of the Proceedings

On April 8, 2006, at 9:45 p.m. Officer Blaker of the Moscow City Police Department received a call from dispatch that someone had seen two people on the east side of the Nazarene Church and "it appeared to them that they were trying to enter or somehow gain some type of entry into the church." (Tr., p.7, Ls.19-23.) Officer Blaker took this call seriously because the Nazarene Church had suffered prior break-ins due to a broken window, and had asked the Moscow City Police to place an alarm in the church. (Tr., p.8, Ls.7-24; p.9, Ls.19-23.) In fact, one week prior to April 8, Officer Blaker and Officer Wolverton had responded to a report of an alarm at the church at about 3:00 a.m. (Tr., p.8, Ls.7-24; p.32, L.24 – p.33, L.1) and found two males and a female in the church, and arrested them (Tr., p.8, L.24 – p.9, L.7).

When Officer Blaker responded on the night of April 8, 2006, he entered an adjacent road and turned off all of his patrol car lights before parking in the church's parking lot. (Tr., p.11, Ls.12-17.) Other officers also responded and parked in the lot, but Officer Blaker did not know where the officers were specifically located. (Tr., p.11, L.18 – p.12, L.12.) Officer Wolverton similarly shut off his patrol lights and parked near the church in response to dispatch's call. (Tr., p.33, L.9 – p.34, L.9.) When he pulled in, Officer Blaker saw two males

dressed in black clothing, walking along the west side of the church. (Tr., p.12, Ls.13-18.) The males matched the description given by the dispatcher and were in approximately the same location. (Tr,. p.12, Ls.19-24.) Officer Blaker believed that these were the two males who were reportedly trying to break into the church. (Tr., p.12, L.25 – p.13, L.7.) At the same time Officer Wolverton performed a check of the area surrounding the church to ensure that there were no other individuals present. (Tr., p.35, L.14 – p.36, L.6.)

Desiring to detain the individuals, Officer Blaker identified himself as an officer and "ran up behind them shining [a] flashlight on them and telling them to get down on the ground." (Tr., p.14, Ls.1-12.) Both suspects laid prone on the ground, and Officer Wolverton came to assist. (Tr., p.14, Ls.14-17.) Due to the special risks involved in apprehending burglars caught in the act (Tr., p.31, L.12 – p.32, L.10), Officer Blaker and Officer Wolverton handcuffed the individuals, Officer Blaker handcuffing Doe, and told them that they were not under arrest, but they were being detained for investigation of a possible break in to the church. (Tr., p.14, L.18 – p.15, L.12.)

For purposes of officer safety, Officer Blaker then conducted a pat down of Doe, one of the suspects checking only for weapons. (Tr., p.15, Ls.13-24.) As Officer Blaker initiated the pat down, Officer Wolverton began to recite Miranda warnings to the second individual[1] and Officer Blaker instructed Doe to listen to Officer Wolverton. (Tr., p.15, L.25 – p.16, L6.) Officer Blaker continued his pat

[1] Officer Wolverton testified that he had discovered what appeared to be drug paraphernalia on the second individual and at that time began reading him Miranda rights. (Tr., p.36, Ls.8-19.)

down of Doe and placed his hand on Doe's right front pocket. (Tr., p.16, Ls.8-12.) Officer Blaker felt a square object that felt like a pack of cigarettes. (Id.) Officer Blaker then asked Doe what age he was, because to Officer Blaker, Doe appeared to be under the age of eighteen. (Tr., p.16, Ls.15-19.) Doe answered that he was seventeen. (Id.) Officer Blaker then took the cigarettes from Doe's pocket because it is illegal for a minor under the age of eighteen to possess cigarettes, and asked Doe if "he had anything else illegal on him." (Tr., p.16, Ls.20-22.) Doe stated that he "had marijuana in a cargo pocket on the left front area of his pants." (Tr., p.16, L.25 – p.17, L.1.) Officer Blaker then retrieved the marijuana from Doe's pocket. (Tr., p.17, Ls.4-20.)

The state charged Doe as a juvenile with possession of marijuana (R., pp.6-8), and Doe moved to suppress the evidence (R., pp.33-34). After a full hearing during which the officer's testified and were cross-examined, the magistrate orally denied Doe's motion to suppress, finding and concluding that both the stop and the frisk of Doe were justified. (Tr., p.45, L.11 – p.47, L.20.) Doe appealed to the district court (R., p.72), conceding that the initial Terry stop was lawful, but claiming that the frisk for weapons was unreasonable (R., p.130) The district court agreed and reversed. (R., pp.130-133.) The state appeals.

ISSUE

The state presents the following issue on appeal:

Did the magistrate correctly deny Doe's motion to suppress because the officers were justified in conducting a limited frisk of Doe for weapons?

ARGUMENT

The Magistrate Correctly Denied Doe's Motion to Suppress Because the Officer's Were Justified in Frisking Doe

A. Introduction

The state asserts that the district court erred by reversing the magistrate's finding and conclusion that the frisk of Doe for weapons was reasonable. Under the totality of the circumstances and all applicable law, Officer Blaker was justified in frisking Doe for weapons. The state requests this court affirm the magistrate's denial of Doe's motion to suppress.

B. Standard of Review

On appeal from the decision of a district court sitting in its intermediate appellate capacity, the appellate court reviews the magistrate's ruling independently, giving due consideration to the district court's appellate decision. State v. Hammersley, 134 Idaho 816, 818, 10 P.3d 1285, 1287 (2000) (citing State v. Salisbury, 129 Idaho 307, 308, 924 P.2d 208, 209 (1996) and Ireland v. Ireland, 123 Idaho 955, 957-958, 855 P.2d 40, 42-43 (1993)), overruled on other grounds by State v. Poe, 139 Idaho 885, 88 P.3d 704 (2004).

The standard of review of a motion to suppress is bifurcated. Factual findings are accepted if supported by substantial evidence. State v. Osborne, 130 Idaho 365, 369, 941 P.2d 337, 341 (Ct. App. 1997). The appellate court freely reviews the application of constitutional principles to the facts. State v. Holland, 135 Idaho 159, 15 P.3d 1167 (2000).

C. Officer Blaker Had a Reasonable Suspicion that Doe was Potentially Armed and Dangerous Such that They Could Perform a Protective Search of Doe for Weapons

The Fourth Amendment to the United States Constitution prohibits unreasonable searches. The stop and the frisk constitute two independent actions, each requiring a distinct and separate justification. State v. Babb, 133 Idaho 890, 892, 994 P.2d 633, 635 (Ct. App. 2000); State v. Fleenor, 133 Idaho 552, 556, 989 P.2d 784, 788 (Ct. App. 1999). Merely because there are reasonable grounds to justify a lawful investigatory stop, such grounds do not automatically justify a frisk for weapons. Babb, 133 Idaho at 892, 994 P.2d at 635. Doe conceded on appeal,[2] and the district court agreed, that the officers had a reasonable suspicion that Doe was involved in criminal activity sufficient to justify his detention pursuant to Terry v. Ohio, 392 U.S. 1 (1968). (R., p.127.) The state does not dispute this finding and conclusion, but instead asserts that Officer Blaker was justified in frisking Doe for weapons and the district court erred in reversing the magistrate's denial of Doe's motion to suppress.

A search conducted by law enforcement officers without a warrant is per se unreasonable unless it falls within one of the narrowly drawn exceptions to the warrant requirement. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). One such exception allows an officer to conduct a limited self-protective pat down search of a detainee in order to remove any weapons. State v. Wright, 134 Idaho 79, 82, 996 P.2d 298, 301 (2000); Ybarra v. Illinois, 444 U.S. 85, 93-94 (1979). "Such a search is allowed to permit a police officer to conduct the inquiry

[2] Doe similarly did not challenge the Officers' use of handcuffs to detain him. (R., p.85-100; Exhibit, Appellant's Brief, Lodged November 8, 2006)

without fear of violence being inflicted upon the officer's person." State v. Rawlings, 121 Idaho 930, 933, 829 P.2d 520, 523 (1992). "Whether an officer may reasonably justify such a search is evaluated in light of the 'facts known to the officers on the scene and the inference of the risk of danger reasonably drawn from the totality of the circumstances.'" Wright, 134 Idaho at 82, 996 P.2d at 301. "The officer must be able point to specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry v. Ohio, 392 U.S. 1, 21-22 (1968). The proper inquiry for the court is whether it is objectively reasonable for the officer to conclude a pat down search was necessary for the protection of himself or others. State v. Henage, 143 Idaho 655, 661, 152 P.3d 16, 22 (2007).

It was not unreasonable to believe that the suspected burglars in this case could have been armed and dangerous such that a pat down search for weapons is necessary to protect the officer and others. State v. Burgess, 104 Idaho 559, 561-562, 661 P.2d 344, 346 - 347 (Ct. App. 1983) (citing State v. Nichols, 26 Ariz. App. 455, 549 P.2d 235 (Ariz. Ct. App. 1976)). Idaho courts have regularly recognized the danger faced by officers when confronting burglars at night and have frequently validated elevated investigatory techniques in these situations even where other indicia that a suspect is armed and dangerous are absent. In Burgess, for example, officers responded to an night alarm at a hotel and observed Burgess walking across the hotel parking lot. Burgess, 104 Idaho at 559, 661 P.2d at 334. After asking a cooperative Burgess for his identification and an alibi, the officer's searched Burgess for weapons, finding burglarious

instruments. Id. On appeal, the Idaho Court of Appeals concluded that the officer's were justified in frisking Burgess, regardless of the length of conversation between the stop and the frisk, because "police 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. at 561, 661 P.2d at 346. Similarly, in State v. Simmons, 120 Idaho 672, 677, 818 P.2d 787, 792 (1991), the court concluded that officer's were justified in conducting a pat down for weapons because:

> (1) The detectives were encountering a burglary suspect; (2) he was wearing a long wool coat that seemed out of place for the weather of the day, and which could have been used to conceal weapons; (3) the suspect appeared nervous and was sweating; (4) Detective Clough observed a bulge in an exterior pocket of the suspect's coat; (5) when Detective Marshall frisked the suspect, he felt a hard object in the coat pocket that possibly felt like a small gun or knife; (6) he reached his hand in and pulled out a pipe that appeared to be one used for smoking illegal drugs.

Id.

The proposition that a potential burglar could be armed and dangerous is supported by Terry v. Ohio itself where the United States Supreme Court recognized it was reasonable to assume from the nature of the offense contemplated that Terry was armed and dangerous even though the officer had not observed a weapon or any physical indication of a weapon. Terry, 392 U.S. at 28. See also, State v. Robertson, 134 Idaho 180, 185-86, 997 P.2d 641, 646-647 (2000) (finding and concluding that an officer's frisk of Robertson was justified because the officer was responding to a burglar alarm, Robertson was

the only one in the area and could not account for how he got there or what he was doing, and Robertson failed to follow the officer's instructions to keep his hands out of his pockets).

Like the officers in these cases, the magistrate correctly concluded that, under a totality of the circumstances evaluated in light of the facts know to him at the time, Officer Blaker was justified in searching Doe for weapons (Tr., p.45, L.20 – p.46, L.3) because 1) Officer Blaker responded to a burglar alarm (Tr., p.7, Ls. 19-23), 2) this was the second alarm in one week at the church and prior perpetrators had been found (Tr., p.8, Ls.7-24; p.9, Ls.19-23); 3) the officers responded at night (Tr., p.7, Ls.19-23); 4) Doe was one of two males dressed in black who matched the description dispatch gave (Tr., p.12, Ls.13-24) and Officer Blaker believed that these were the two possible burglars (Tr., p.12, L.25 – p.13, L.7); 5) there were no other individuals at the church (Tr., p.35, L.14 – p.36, L.6), and 6) Officer Blaker did not know how many officer's had responded to assist him or where they were located, besides Officer Wolveton (Tr., p.11, L.18 p p.12, L.12).

In addition to these facts, at the suppression hearing both Officer Blaker and Officer Wolverton testified to that they use extra caution when approaching burglars at night. Officer Blaker stated that he always patted down burglary suspects caught in the act because "the likelihood of them being armed is higher." (Tr., p.15, Ls.21-22.) Officer Wolverton testified that because he does not know the exact location of the burglar, whether they are under the influence of drugs or alcohol, or what their mental state is at the time, he uses special

procedures to protect himself when addressing a burglary in progress situation. (Tr., p.31, L.12 – p.32, L.10.)

Given Idaho courts' recognition of the reasonableness of the belief that burglars are often armed with weapons, and that the need to promptly neutralize this risk is crucial to officer safety, it was objectively reasonable for Officer Blaker to conclude a pat down search was necessary to protect himself and others. As a result, Officer Blaker's frisk was justified.

The district court erroneously relied on State v. Henage, which is distinguishable on the facts of the case. In Henage, Henage's brother's vehicle was stopped for a broken taillight and there was no indication of another serious felony in progress. Henage 143 Idaho at 655, 152 P.3d at 16. Also, the officer was aware that the defendant possessed a knife because Henage told him he had one. Id. However, the defendant exhibited no furtive behavior or suspicious movements or any other actions indicating he was dangerous, threatening, or uncooperative. Id. Conversely, Doe was dressed in black, had set of a burglar alarm, and was walking across a parking lot at night with another male, also dressed in black, where a prior burglary had recently occurred. Furthermore, the officer in Henage had known the defendant for several years, had never had a combative experience with him, and their conversation prior to the frisk had been congenial and substantial. Id. There is no such familiarity or substantial conversation in Doe's case.

The district court, then, erred by reversing the magistrate's denial of Doe's motion to suppress because Officer Blaker had a reasonable suspicion that Doe

was armed and dangerous such that he could conduct a limited frisk for weapons. The magistrate's findings and conclusions reflect this logic, and the denial of Doe's motion to suppress should be affirmed.

CONCLUSION

The state respectfully requests this Court to reverse the decision of the district court and affirm the magistrates' denial of Doe's motion to suppress.

DATED this 21st day of May, 2007.

_____
COURTNEY E. BEEBE
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 21st day of May, 2007, I caused two true and correct copies of the foregoing BRIEF OF APPELLANT to be placed in the United States mail, postage prepaid, addressed to:

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Deputy Attorney General

CEB/pm

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Appellant,	)	**NO. 33986**
	)	
vs.	)	
	)	
JOHN J. DOE,	)	
	)	
Defendant-Respondent.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SECONDJUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

HONORABLE JOHN R. STEGNER
District Judge

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I.
The Magistrate Correctly Denied Doe's Motion to Suppress Because Officer Blaker Had A Reasonable Articulable Suspicion That Doe Was Armed and Dangerous

A. Introduction

The magistrate in this case correctly concluded that Officer Blaker had a reasonable suspicion that Doe may be armed and dangerous because, when approaching burglary suspects in the dark, officers "have a right and even a duty to handle that in a manner that [ ] protects their safety and therefore the safety of others." (Tr., p.45, L.20 – p.46, L.3.) Doe's argument that aggressive and threatening behavior on the part of a suspected burglar must be present before an officer can perform a weapons pat down is inconsistent with United States Supreme Court case law, as well as Idaho case law. The magistrate's order denying Doe's motion to suppress should be affirmed.

B. Officer Blaker Had A Reasonable Articulable Suspicion That Doe Possessed Weapons Such That Officer Blaker Could Conduct a Weapons Pat Down

Doe's claim that he was not aggressive or threatening does not dispel Officer Blaker's well-articulated fears regarding apprehending a suspected burglar in the dark. The United States Supreme Court cases cited by Doe (Respondent's brief, pp.4-8) actually support the state's position that Officer Blaker had a reasonable suspicion that Doe may be armed and dangerous, and show that there is no legal requirement that a suspect act in an aggressive or threatening manner before an officer may conduct a pat down search for weapons.

In Terry v. Ohio, 392 U.S. 1, 28 (1968), the officer testified he merely observed the behavior of three men that looked like the "preface to a stick-up" during daylight hours at a store. The United States Supreme Court concluded that "[the officer] had observed enough to make it quite reasonable to fear that they were armed; and nothing in their response to his hailing them, identifying himself as a police officer, and asking their names served to dispel that reasonable belief." Id. In Adams v. Williams, 407 U.S. 143, 145-48, 92 S.Ct. 1921, 1923-25 (1972), the officer relied on the mere tip of an informant that the defendant was carrying a concealed weapon and the Supreme Court concluded that this tip alone, despite the officer's personal observations, provided the necessary reasonable suspicion such that a search of the defendant for weapons was lawful. In contrast, in Ybarra v. Illinois, 444 U.S. 85, 92-96 (1979) the officer had no articulable suspicion regarding Ybarra beyond Ybarra's presence at a place where a search for narcotics was taking place pursuant to a warrant. In none of these cases did the United States Supreme Court require that the suspect display aggressive or threatening behavior as a predicate to a pat down search for weapons as Doe would have this court believe. In fact, in none of the cases in which a pat down search was justified did the defendants actually show aggressive or threatening behavior.

Idaho case law similarly does not require aggressive or threatening behavior on the part of a suspected burglar prior to a weapons search, and the cases Doe cites support the conclusion that such behavior is not a prerequisite to a frisk. In State v. Davenport, 144 Idaho 99, 102, 156 P.3d 1197, 1200 (Ct. App.

2007), the Idaho Court of Appeals stated that the fact that an encounter takes place at night is a dangerous situation is a factor to consider when determining whether a search is justified, and in combination with other factors can justify a frisk. Moreover, in State v Baxter, 2007 Opinion No. 21, Docket No. 32597 (April 20, 2007), the Idaho Court of Appeals did not hold that aggressive or threatening behavior by a suspect was required for a weapons pat down. Similarly, in State v. Watson, 143 Idaho 840, 153 P.3d 1186 (Ct. App. 2007), the Idaho Court of Appeals concluded that even though Watson was being cooperative, the officer was justified in performing a pat-down search for weapons because of Watson's bizarre behavior prior to the officer's arrival and possible alcohol use. Thus, Watson, Davenport, and Baxter support the state's position that aggressive and threatening behavior is not required before an officer may search a burglary suspect for weapons and that other circumstances must be considered.

The record shows that Officer Blaker's pat down search of Doe for weapons was justified by the circumstances of his late night encounter with Doe and Doe's companion. As set forth in the state's opening brief and supported by the record, Officer Blaker specifically testified that the circumstances of his late night encounter with Doe and another suspect gave rise to a reasonable articulable suspicion that Doe was armed and potentially dangerous. (Appellant's brief, pp.9-10.) It is not unreasonable to believe that burglars can be armed and dangerous." State v. Burgess, 104 Idaho 559, 561-62, 661 P.2d 344, 346-47 (Ct. App. 1983). Doe has failed to show that Officer Blaker's extensive testimony regarding the events is deficient and has failed to support his assertion

that the suspect must display aggressive or threatening behavior before an officer can perform a pat down search of a suspect. The magistrate's denial of Doe's motion to suppress should be affirmed.

II.

The Magistrate Correctly Denied Doe's Motion To Suppress Because The Officer Remained Within The Scope Of The Frisk For Weapons And A Search Incident To Arrest

A. Introduction

As he claimed in the trial court, Doe claims on appeal that Officer Blaker exceeded the scope of a weapons frisk when he removed contraband (a cigarette pack) from Doe's pocket. (Respondent's brief, pp.10-13.) However, as discussed above Officer Blaker was in a lawful position to feel the cigarette pack when he performed a pat down search for weapons, had lawful access to it, and the character of the contraband was immediately apparent.

In addition, because Doe told Officer Blaker that he had marijuana in another pocket of his pants Officer Blaker had probable cause to arrest Doe for possession of marijuana. As a result, Officer Blaker's action of removing the marijuana from Doe's pocket is justified as a search incident to arrest. The magistrate's denial of Doe' motion to suppress should be affirmed this ground.

B. Officer Blaker Had Lawful Access To The Cigarette Package Doe's Pocket And The Character Of the Contraband Was Immediately Apparent

In Minnesota v. Dickerson, the U.S. Supreme Court held that there is a plain feel doctrine analogous to the plain view doctrine, such that if in the course of a pat down for officer safety the officer feels an object which he immediately recognizes as contraband, the officer may reach into the suspect's clothing and

retrieve the object even though he does not believe it to be a weapon. Dickerson, 508 U.S. 366, 375-76, 113 S.Ct. 2130, 2137-38, 124 L.Ed.2d 334 (1993). Under Dickerson, an officer can seize an item without a warrant if three elements are met. First, the officer must be lawfully in a position to observe the item, and second, the officer must have a lawful right of access to the object. Dickerson, 508 U.S. at 374. As discussed above in Part I, and as set forth in the state's opening brief (Appellant's brief, pp.8-11), Officer Blaker was lawfully in a position to observe and access Doe's pockets because he was performing a lawful pat down search for weapons.

The third element in Dickerson is that the incriminating character of the item must be immediately apparent before an officer can reach in and remove the item; that is, the officer must have probable cause to believe that the object is or contains contraband. 508 U.S. at 374. In this case, Officer Blaker stated that he knew that the object he felt in Doe's pocket was a cigarette package and that Doe did not appear of an age to legally possess tobacco projects: "I found a square object that felt uhm like a pack of cigarettes in Mr. Doe's right front pocket . . . I asked him what his age was, because he appeared to be under the age of eighteen . . . he told me he was seventeen." (Tr., p.16, Ls.8-18.) The incriminating character of the cigarette pack was immediately apparent to Officer Blaker such that he could reach into Doe's pockets and remove the item as Dickerson allows.

Consistent with Officer Blaker's unwaivering testimony that he knew that the object in Doe's pocket was a cigarette package the magistrate correctly found

and concluded that Officer Blaker could reach into Doe's pocket and remove it. (Tr., p.46, Ls.4-13). The magistrate's denial of Doe's motion to suppress should be affirmed.

C. The Search Of Doe's Pocket Is A Justified Search Incident to Arrest

While the magistrate reasoned that Doe's admission that he had marijuana in a pocket of his pants created an exigent circumstance such that Officer Blaker was not required to hold Doe and obtain a separate warrant before searching Doe's cargo pocket (Tr., p.46, L.14 – p.47, L.14), the state submits that the magistrate's denial of Doe's motion to suppress should be affirmed because Officer Blaker's search of Doe's pocket for marijuana was justified as a search incident to arrest.

A search incident to a valid arrest is among the well-delineated exceptions to the warrant requirement and, thus, does not violate the Fourth Amendment proscription against unreasonable searches. Chimel v. California, 395 U.S. 752, 762-63 (1969); State v. Moore, 129 Idaho 776, 781, 932 P.2d 899, 904 (Ct. App. 1996). Pursuant to this exception, the police may search an arrestee incident to a lawful custodial arrest. United States v. Robinson, 414 U.S. 218, 235 (1973); Moore, 129 Idaho at 781, 932 P.2d at 904. It is of no consequence whether the search is conducted before or after the arrest is made. Rawlings v. Kentucky, 448 U.S. 98, 111 (1980). However, the probable cause to arrest must be apparent before the search is conducted. State v. Johnson, 137 Idaho 656, 662, 51 P.3d 1112, 1118 (Ct. App. 2002).

Probable cause is the possession of information that would lead a person of ordinary care and prudence to believe or entertain an honest and strong presumption that a person they have placed under arrest is guilty of a crime. See State v. Julian, 129 Idaho 133, 136, 922 P.2d 1059, 1062 (1996). Probable cause is not measured by the same level of proof required for conviction. Id. Rather, probable cause deals with the factual and practical considerations on which reasonable and prudent persons act. Brinegar v. United States, 338 U.S. 160, 175 (1949); Julian, 129 Idaho at 136, 922 P.2d at 1062. When reviewing an officer's actions, the court must judge the facts against an objective standard. Julian, 129 Idaho at 136, 922 P.2d at 1062. That is, would the facts available to the officer, at the moment of the seizure or search, warrant a reasonable person in holding the belief that the action taken was appropriate. Id.

Idaho Code § 37-2732(c)(3) prohibits the possession of marijuana. Officer Blaker had probable cause to believe that Doe possessed marijuana because when Officer Blaker asked Doe if he had anything illegal, Doe told Officer Blaker that he had marijuana in the cargo pocket of his pants. (Tr., p.16, L.20 – p.17, L.13.) Officer Blaker then remained within the scope of a search incident to arrest when he removed the marijuana, and only the marijuana from Doe's pants. Moore, 129 Idaho at 781, 932 P.2d at 904 (citations omitted) ("The permissible scope and purposes of a search incident to arrest is not limited to the removal of weapons but includes the discovery and seizures of evidence of crime and articles of value" (emphasis added)). Officer Blaker arrested Doe, and the state charged Doe with possession of marijuana. (R., p.6.) The magistrate's order

denying Doe's motion to suppress should be affirmed on the basis that Officer Blaker's search was justified as a search incident to arrest for possession of marijuana.

CONCLUSION

The state respectfully requests this Court to affirm the magistrate's denial of Doe's motion to suppress.

DATED this 27th day of August, 2007.

_____
COURTNEY E. BEEBE
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 27th day of August, 2007, I caused two true and correct copies of the foregoing REPLY BRIEF OF APPELLANT to be placed in the United States mail, postage prepaid, addressed to:

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INTHE

SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,

Plaintiff-Appellant,

vs.

JOHN J. DOE

De ndan Respondent

NO. 33986

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO **IN AND** FOR THE COUNTY OF LATAH

HONORABLE JOHN R. STEGNER
District Judge

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TABLE OF CASES AND AUTHORITIES

I.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

Defendant-Respondent John Doe was found guilty of possession of marijuana, Idaho Code §37-2732(c)(3), a misdemeanor, following an evidentiary hearing and hearing on defendant's motions to suppress held on July 5, 2006.

The Honorable Stephen Calhoun, Magistrate Judge, held that Doe's rights were not violated when Moscow Police Department officers contacted, detained, searched, and arrested Doe.

On appeal, the District Court reversed the Magistrate's denial of Doe's motion to suppress, finding that "the State failed to meet its burden of demonstrating specific, articulable facts that yield a reasonable inference that John Doe was armed *and* dangerous, at the time of the frisk, Officer Blaker was not justified in frisking Doe in the way he did." Memorandum Decision on Appeal, Clerk's Record, p. 132.

The State appeals the district court's decision.

B. COURSE OF PROCEEDINGS

Doe was petitioned into juvenile court and had his initial appearance on May 3, 2006. An admit/deny hearing was set for May 10, 2006. An evidentiary hearing was held on July 5, 2006, during which the Magistrate judge also heard argument on defendant Doe's Motions to Suppress. Judge Calhoun orally denied the motions and found him guilty of possession of marijuana.

Doe appealed this decision to the District Court, District Judge John R. Stegner, who reversed and remanded the Magistrate's decision on the suppression motion and vacated Doe's conviction. Memorandum Decision on Appeal, Clerk's Record, p. 133.

C. STATEMENT OF FACTS

In addition to the facts set forth in the above Course of Proceedings, Doe offers the following facts.

On the evening of April 8, 2006, John Doe and David Snow, ages 17 and 16 respectively, were stopped by Moscow Police Department officer Dustin Blaker while they were "walking away from the [Nazarene Church]," Tr., p. 13, l. 22, 1400 East 7th Street, Moscow, Idaho. Officers Dustin Blaker, Rodney Wolverton, Casey Green, and Dan Foreman responded to a report of two people seen on the east side of the Nazarene Church. Sergeant James Frye responded to the scene at a later time. Tr., p. 33, 11. 22-23.

Officer Blaker ran up behind the boys, shined his flashlight on them and ordered "Moscow Police, get down on the ground!" *Id.*, p. 14, 11. 1-2; 10-12. Officer Wolverton trained the spotlight of his patrol car on the boys. The boys lay on the ground as directed. Officers Wolverton and Foreman checked the perimeter of the building. They did not see any other individuals near the church. They also did not find any signs of any illegal or forced entry into the church. *Id.*, p. 38, 11. 1-17.

After securing the grounds, Wolverton joined Blaker. *Id,* p. 14, 11. 14-17. They each handcuffed one of the boys that were still lying prone on the ground. Blaker and Wolverton both told the boys that they were not under arrest but they were being detained at that time. *Id.* at 15, 11. 3-7. The boys were told that they were being detained for investigation into a possible break-in at the church.

Blaker began conducting a weapons search on Doe, but stopped when Wolverton began reading *Miranda [Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d694 (1966)] rights to Snow. Blaker told Doe to listen to Wolverton.

When Blaker continued his weapons search, he felt a square object he believed was a pack of cigarettes located in Doe's right front pocket. *Id.*, p. 16, 11. 11. He questioned Doe about his age, and then removed the cigarettes from Doe's pocket. Blaker next asked Doe if he had anything else illegal on him. When Doe made a positive response, Blaker rolled Doe over, reached into Doe's pants pocket, and retrieved a clear plastic baggy of marijuana. Doe was then transported to the Moscow Police Department.

II.

ISSUES ON APPEAL

1. THE MAGISTRATE ERRED IN DENYING DEFENDANT-RESPONDENT'S MOTION TO SUPPRESS WHERE THE OFFICER HAD NO REASONABLE SUSPICION THAT DOE WAS ARMED AND PRESENTLY DANGEROUS, AND NO IMMEDIATE CONCERN FOR THE SAFETY OF HIMSELF OR OTHERS.

2. THE MAGISTRATE COURT ERRED IN DENYING DEFENDANT-RESPONDENT'S MOTION TO SUPPRESS WHERE THE OFFICER EXCEEDED THE SCOPE OF THE WEAPONS SEARCH.

III.

STANDARD OF REVIEW

When reviewing an order denying a motion to suppress evidence, the appellate court will not disturb factual findings supported by substantial evidence, but will exercise free review over the lower court's determination that constitutional requirements have been satisfied in light of the facts found. *State v. Fabeny,* 132 Idaho 917,920,980 P.2d 581 (Ct.App.1999), *citing State v. Davila,* 127 Idaho 888,891,908 P.2d 581,584 (Ct.App.1995). *See also State v. Atkinson,* 128 Idaho 559,561, 916 P.2d 1284, 1286 (Ct. App. 1996).

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. Watson*, _Idaho____,_ P.3d_, 2007 Idaho 31483 (Ct.App.2007), *citing State v. Valdez-Molina*, 127 Idaho 102,106,897 P.2d 993,997 (1995); *State v. Schevers*, 132 Idaho 786,789,979 P.2d 659,662 (Ct. App. 1999).

IV.

ARGUMENT

A. THE MAGISTRATE ERRED IN DENYING DEFENDANT-RESPONDENT'S MOTION TO SUPPRESS WHERE THE OFFICER HAD NO REASONABLE SUSPICION THAT DOE WAS ARMED AND PRESENTLY DANGEROUS, AND NO IMMEDIATE CONCERN FOR THE SAFETY OF HIMSELF OR OTHERS

The Magistrate erred in denying Defendant-Respondent Doe's Motion to Suppress in this case because the officer had no reasonable suspicion that Doe was armed and presently dangerous, and no immediate concern for the safety of himself or others.

Warrantless searches and seizures are presumptively unreasonable and in violation of the Fourth Amendment. Once a defendant meets the initial threshold burden of establishing a warrantless search or seizure violation his or her legitimate privacy interest, the burden then shifts to the State to show by a preponderance of evidence that the search or seizure fell within one of the well-recognized exceptions to the warrant requirement. *State v. Holland*, 135 Idaho 159, 15 P.3d 1167 (2000); *State v. Weaver*, 127 Idaho 288, 900 P.2d 196 (1995).

While a protective weapons search is a recognized exception to the warrant requirement, it may only be conducted under certain circumstances. To conduct a limited frisk of a suspect for weapons, the officer must have a reasonable, articulable suspicion that the suspect has been, is, or is

about to engage in criminal activity, **the officer must reasonably believe that the suspect is armed and presently dangerous, and the officer must have an immediate concern for the safety of himself or others.** *Terry* v. *Ohio,* 392 U.S. 1, 88 S.Ct. 1868 *(1968);Adams* v. *Williams,* 407 U.S. 143, 92 S.Ct. 1921 (1972); *see also State* v. *Simmons,* 120 Idaho 672, 676, 818 P.2d 787, 791 (Ct.App.1991)(emphasis added).

> The Terry case created an exception to the requirement of probable cause, an exception whose "narrow scope" this Court "has been careful to maintain." Under that doctrine, a law enforcement officer, for his own protection and safety, may conduct a pat-down to find weapons that he reasonably believes or suspects are then in the possession of the person he has accosted. See, e.g., *Adams* v. *Williams,* supra, (at night, in high-crime district, lone police officer approached person believed by officer to possess gun and narcotics). **Nothing in Terry can be understood to allow a generalized "cursory search for weapons" or, indeed, any search whatever for anything but weapons.** The "narrow scope" of the Terry exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, ...

Ybarra v. *Illinois,* 444 U.S. 85, 93-94 (1979)(emphasis added).

In *Ybarra,* the U.S. Supreme Court held that the officer's initial frisk was not supported by a reasonable belief that Ybarra was armed and presently dangerous, a belief which this Court has invariably held must form the predicate to a pat-down of a person for weapons. *Ybarra,* 444 U.S. at 93, *citing Adams,* 407 U.S. at 146; *Terry,* 392 U.S. at 21-24, 27. The Court noted that when the police saw Ybarra:

> ... they neither recognized him as a person with a criminal history nor had any particular reason to believe that he might be inclined to assault them. Moreover, as Police Agent Johnson later testified, Ybarra, whose hands were empty, gave no indication of possessing a weapon, made no gestures or other actions indicative of an intent to commit an assault, and acted generally in a manner that was not threatening. At the suppression hearing, the most Agent Johnson could point to was that Ybarra was wearing a 3/4-length lumber jacket, clothing which the State admits could be expected on almost any tavern patron in Illinois in early March. In short, the State is unable to articulate any specific fact that would have justified a police officer at the scene in even suspecting that Ybarra was armed and dangerous.

Ybarra, 444 U.S. at93

Here, as in *Ybarra,* the initial weapons search of Doe was not supported by any reasonable belief that Doe was armed and presently dangerous. When asked why he conducted a weapons pat down, Officer Blaker testified, "[o]ne, they're being detained. Uhm, **anytime we detain people-** plus the circumstances behind the call, a possible break-in into a business. Uhm, **we always pat people down because the likelihood of them being armed is higher....."** Tr., p. 15, 11. 18-22 (emphasis added).

Neither a police department policy nor an officer's subjective belief make it permissible to pat down a citizen just because they are being detained. These reasons fail to rise to the level necessary to satisfy the standards of *Terry* and *Adams.* Neither does "we always pat people down because the likelihood of them being armed is higher." The testimony shows that the officer did not have a reasonable belief that Doe was armed and presently dangerous as required by *Terry* and *Adams.* The officer did not articulate any particular facts from which he could reasonably infer that Doe, the particular individual in this matter, was presently armed and dangerous.

As this Court stated in *State v. Henage,* 2006 Idaho 31205, "[w]eapons frisks 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. 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 frisk posed a potential threat."

There is no testimony that Doe or Shull, his companion, made any threatening gestures, or reached for waistbands or pockets. Wolverton testified that Doe did not exhibit any threatening behavior or overt signs of a threat to him or any other officers. Tr, p. 39, 11. 4-8. The testimony is

that Doe was cooperative. Tr., p. 26, 11. 10-14.

> An officer may frisk an individual if the officer can point to specific and articulable facts that would lead a reasonably prudent person to believe that the individual with whom the officer is dealing may be armed and presently dangerous and nothing in the initial stages of the encounter serves to dispel this belief. *Fleenor*, Idahoat, 989 P.2d at 787. In our analysis of a frisk, we look to the facts known to the officer on the scene and the inferences of risk of danger reasonably drawn from the totality of those specific circumstances. *Id.*

State v. Babb, 133 Idaho 890,994 P.2d 633 (Ct.App.2000), *citing State v. Fleenor,* 133 Idaho 552, 989 P.2d 784, 788 (Ct. App.1999).

In determining whether an officer acted reasonably in such circumstances, "due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *State v. Davenport,* 2007 Idaho 31883, _ P.3d _ (Ct.App.2007), *citing Terry,* 392 U.S. at 27 (citations omitted)(emphasis added). *See also State v. Henage,* 2006 Idaho 31205.

The Court in *Davenport* noted that the officer's observation of an individual's demeanor, "including his attitude, nervousness, signs that he is under the influence of drugs or alcohol, or other unusual behavior may also give rise to reasonable fear for an officer's safety." *Id.* In *Davenport,* the defendant exhibited neither aggression nor antagonism toward the officer. The Court found that placing hands in pockets is not unusual for someone standing outside on a late autumn night in Boise. *Id., citing People v. Dotson,* 345 N.E.2d 721 (Ill. App. Ct. 1976) (officer not justified in frisk for weapon when defendant had only shifted his weight on his feet, had placed his hands in his pockets, and taken three steps backwards; actions suggested not a reason for police suspicion but an individual trying to stay warm).

In *State v. Baxter,* 2007 Idaho 32597, _ P.3d _ (Ct.App.2007), while the Court found the officer was justified in suspecting Baxter might be J.H. and that he was possibly lying about his identity, there was no evidence that the officer personally knew J.H. or any reputation he may have had for violence. The Court also found no evidence that the officer knew or even reasonably suspected Baxter was armed. No facts from the suppression hearing showed any evidence that Baxter or his companions were uncooperative, violent, or abusive while being detained. There was no evidence that Baxter's clothing had any suspicious bulges. The record did not suggest that Baxter acted furtively, attempted to conceal his hands, or move objects about his person. The Court also noted that the officer testified that, shortly after he made contact with Baxter, other officers were beginning to arrive at the scene. *Id.*

In contrast, the Court of Appeals held in *Watson,* 2007 Idaho 31483,that Watson's pat down search did not violate his constitutional rights. The Court indicated that the facts, including Watson's irrational and violent behavior, a bulge in his pants pocket, his threats to kill people, and that the officer was the sole officer present gave the officer reasonable suspicion that Watson possessed a weapon, and that he had reason to be concerned for his safety.

The facts surrounding the weapons pat down and the suspect' s behavior in *Baxter* mirror the case before this Court. The testimony was that Doe and his companion were cooperative and compliant. There is no evidence of any suspicious bulges in his clothing, nor any furtive movements or gestures. The record also shows that other officers arrived on the scene at about the same time that Officer Blaker proned the boys on the ground. Blaker testified that there was one officer in front of him, and other officers coming behind. Tr. p.11, 1. 18- p. 12, 1. 9. He also testified that Officer Wolverton arrived on the scene as he proned the two boys. *Id.,* p. 14, 11. 5-7. Both boys were then

handcuffed and told they were not under arrest, but were being detained regarding a possible break-in into the Nazarene Church. *Id.*, p. 15, 11. 3-12.

On cross-examination, Blaker testified that Doe was cooperative, and he did not threaten the officer at any time during the encounter. *Id.*, p. 23, 11. 15-19. Blaker testified that when he ordered Doe to the ground, he complied and did not give Blaker any "static." *Id.*, p. 26, 11. 10-14. Officer Wolverton also testified that Doe did not show any overt signs of being a threat. *Id.*, p. 39, 11. 4-8.

The State fails to show evidence of any furtive or aggressive behavior by Doe, or any other suspicious circumstances creating a reasonable suspicion that he was armed and dangerous. Doe was cooperative and compliant, did not make any movements such as reaching into his pockets. There is no testimony that Doe himself appeared armed and presently dangerous. Additionally, there was no testimony that any weapons were involved in the recent break-in at the same church that might have served to heighten officers' concern for their safety.

In regards to a concern for officer safety, the State fails to show evidence that Officer Blaker had an immediate concern for the safety of himself or others.

Officer Blaker's own actions run contrary to any inference of concern for his safety or the safety of others. The evidence shows that Blaker actually suspended his weapons search while Wolverton read out *Miranda* warnings. Any officer with a reasonable belief that Doe was armed and presently dangerous, and with immediate concern for the safety of himself and others would have completed his weapons frisk to dispel that belief and the safety concerns. Here, Blaker stopped his weapons pat down so Doe could listen to *Miranda* rights as they were being read to the other individual. This does not reflect the actions of an officer with an immediate concern for his own or

others' safety at the time he conducted his weapons search. *See also Sibron v. New York*, 392 U.S. 40 (1968).

Thus, Blaker's suspension of the weapons search clearly shows that he had no reasonable belief that Doe was armed and presently dangerous, nor that he had any immediate concern for the safety of himself or others.

The State fails to show any specific facts particularized in regard to Doe to support a conclusion that Doe was both armed and presently dangerous or that he was a potential threat to the safety of officers or other people.

At the trial and motion hearing below, the Magistrate erred in finding the *Terry* weapons search was justified. The Magistrate reasoned that "when the officers approach somebody in the dark that they don't know, it's not actually a question of whether or not somebody's making threatening gestures or being uncooperative. I think that they have a right and even a duty to handle that in a manner that uh protects their safety and therefore the safety of others. And that includes, if-if necessary, proning them, searching them for weapons...." Tr., p.45, 1. 20-p. 46, 1. 2. This justification for a weapons pat down search is contrary to Idaho law and U.S. Supreme Court precedents as cited herein.

Therefore, in light of the facts presented to the Magistrate, Blaker's initial pat down weapons search did not satisfy the constitutional requirements of *Terry* and *Adams*, and all items seized from Doe as a result of that search should be suppressed.

B. THE MAGISTRATE ERRED IN DENYING THE MOTION TO SUPPRESS WHERE THE SCOPE OF THE SEARCH EXCEEDED THAT ALLOWED BY *TERRYV. OHIO.*

The Magistrate erred in denying the motion to suppress items discovered as a result of the weapons search, where the scope of that search exceeded that allowed by *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968). *See* Appellant's Brief, Clerk's Record, p. 90.

The Magistrate incorrectly allowed the weapons search to bootstrap the officer's fishing expedition for contraband. He reasoned, "obviously he [Blaker] thought it was a cigarette pack and not a weapon, but he also had a reason to believe that was contraband in the person's possession. And, under the circumstances... exigent circumstances, I think, apply as far as getting a search warrant. I think it would be unreasonable to hold that person for two or three hours while you obtain a search warrant in order to obtain a cigarette pack. **....''** Tr., p. 46, 11. 4-12.

A frisk is unquestionably a search within the meaning of the Fourth Amendment. *State v. Henage,* 2006 Idaho 31205, *citing Terry v. Ohio,* 392 U.S. 1, 28 (1968). Frisks are not generally for discovering non-weapon contraband; the sole purpose of a frisk is to protect the officer and others nearby. *Id, citing Terry* at 29. Where a frisk is conducted without a warrant, "the burden is squarely on the State to justify it." *Id. citing Weaver,* 127 Idaho at 290, 900 P.2d at 198.

"A protective frisk is designed to allow the officer to conduct his investigation without fear of violence and must be strictly limited to that which is necessary for the discovery of weapons." *State v. Watson,* 2007 Idaho 31483, *citing Minnesota v. Dickerson,* 508 U.S. 366,373 (1993); *Terry,* 392 U.S. at 26. *Terry* does not allow "a generalized 'cursory search for weapons,'" **or "any search whatever for anything but weapons."** *Ybarra,* 444 U.S. at 93-94 (emphasis added).

The Court of Appeals has stated that discovering an unidentified "bulge" in a pocket during the course of a lawful pat-down would entitle the officers to assure themselves that it was not a

weapon. *Watson*, 2007 Idaho 31483, *citing State v. Faith*, 141 Idaho 728, 730, 117 P.3d 142, 144 (Ct.App. 2005).

However, "the permissible scope of a pat-down search for weapons is limited to the minimum intrusion necessary to reasonably assure the officer that the suspect does not have a weapon." *Watson*, 2007 Idaho 31483. "Police officers may not further intrude on a person's privacy without first attempting to determine by touch whether the object causing a bulge could be a weapon." *Id, citing United States v. Campa*, 234 F.3d 733, 739 (1st Cir. 2000) (reaching into pockets whenever officer felt a protrusion and emptying all items indiscriminately not permitted when he did not attempt to distinguish between bulging items that could have been weapons and other types of concealed objects).

The Court of Appeals also stated that officers may not "further intrude on a person's privacy when an objectively reasonable determination can be made by touch that the object causing the bulge is not a weapon based on its size and density." *Id, citing Ellis v. State*, 573 So. 2d 724, 725 (Miss. 1990) (officer exceeded limits of Terry frisk in removing bag causing obvious bulge in pants when he testified bag did not feel like a solid object).

In *Watson*, the officer was found to have exceeded the scope of a pat down weapons search when he emptied Watson's pocket. The officer intentionally removed items that could not have been weapons when it was unnecessary to do so in order to remove a toothpaste container, which he believed could have been a weapon. The Court of Appeals found the officer acted unreasonably and not in a minimally intrusive fashion. *Watson*, 2007 Idaho 31483.

"If evidence is not seized pursuant to a recognized exception to the warrant requirement, the evidence discovered as a result of the illegal search must be excluded as the fruit of the poisonous

tree." *Id, citing State v. Van Dorne,* 139 Idaho 961, 963, 88 P.3d 780, 782 (Ct. App. 2004). In *Watson,* the baggy of methamphetaminethe officer removed from Watson's pocket was found to be fruit of an unreasonable search and should have been suppressed.

Officer Blaker testified that when he continued his pat down search, he "found a square object that felt uhm like a pack of cigarettes in Mr. Doe's right front pocket." Tr., p. 16,11. 10-12. He later indicated that when he felt the cigarette box, he knew what it was, and went ahead and took it out of Doe's pocket. *Id,* p. 24, 11. 11-16. He questioned Doe about his age, and then removed the cigarettes from Doe's pocket. Blaker next asked Doe ifhe had anything else illegal on him. When Doe made a positive response, Blaker rolled Doe over, reached into Doe's pants pocket, and retrieved a clear plastic baggy of marijuana. *Id.,* p. 16, 1. 13- p. 17, 1. 6.

Blaker knew the object he felt in Doe's pocket was a pack of cigarettes. Once Blaker determined the item he felt in his weapons pat down was not a weapon, he was not empowered to further intrude upon Doe's privacy. By questioning Doe and removing the cigarette pack, and then retrieving the baggy of marijuana, he acted beyond the scope of the weapons search. Thus, any and evidence removed as a result of the unreasonable search should be suppressed as fruit of the poisonous tree.

IV.

CONCLUSION

The State fails in its burden to show that the officer reasonably believed that Doe was armed and presently dangerous, and that the officer had an immediate concern for the safety of himself and others. Consequently, the items taken from Doe were not seized pursuant to a recognized exception to the warrant requirement. Therefore, the Magistrate erred in denying Doe's motions to suppress evidence retrieved as a result of the unreasonable search of Doe.

Additionally, the scope of the weapons search exceeded that allowed by *Terry v. Ohio,* because the officer had determined that the item he felt in Doe's pocket was not a weapon. Once the officer made that determination, he was not permitted to further intrude upon Doe's privacy by removing the object. Therefore, the items discovered as a result of the weapons search, as well as statements made to the police following the illegal weapons search should also be suppressed as fruit of the poisonous tree. The Respondent respectfully requests this Court affirm the decision of the District Court which reversed the Magistrate's denial of Doe's motions to suppress.

DATED this 7th day of July, 2007.

Charles E. Kovis
Attorney for Defendant-Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the /£aayo , 2007, I caused to be served two copies of the foregoing by the method indicated below and addressed to the following:

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