7-18-2012

State v. Brown Appellant's Brief Dckt. 38347

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38347
	)	
v.	)	
	)	
KEITH ALLAN BROWN,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

HONORABLE FRED GIBLER
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Mr. Brown appeals following his conditional guilty pleas to the charges of voluntary manslaughter and accessory after the fact to grand theft, from which he reserved the right to appeal the denial of all pre-trial motions. On appeal, Mr. Brown asserts that the district court erred when it denied a number of those motions, and that the district court abused its discretion when it refused to allow the presentation of evidence at the hearing held on his Idaho Criminal Rule 35 (*hereinafter,* Rule 35) motion, and denied the motion without considering the new information he provided in support of the motion.

Statement of the Facts and Course of Proceedings

This case arose out of a complicated relationship between Mr. Brown, his then-wife, Tyrah, and a man named Leslie Breaw, whose disappearance and death resulted in the criminal charges brought against Mr. Brown. At some point prior to his death, Mr. Breaw raped Tyrah. (Tr., p.275, L.15 – p.277, L.21 (both parties stipulating that Mr. Breaw raped Tyrah Brown during a trip to Montana, and that the jury would be so informed).) Following his preliminary hearing, Mr. Brown was charged with murder in the first degree and grand theft. (R., pp.184-86.)

Defense counsel filed a number of pre-trial motions, most of which were denied.[1] (*See generally* R. and Miscellaneous Exhibits; *see also* Tr., p.379, L.7 – p.395, L.15.)

[1] The district court granted a Motion for Change of Venue (R., pp.768, 776), declined to issue a pre-trial ruling on a Motion to Exclude Confidential Communications (R., pp.852-53; Tr., p.333, L.17 – p.334, L.7), and did not rule on a Motion in Limine re: Photos of Victim. (Tr., p.310, Ls.8-13.) Three other motions filed by Mr. Brown's previous attorneys: a Motion to Suppress Evidence Obtained from Search Warrant Issued

Following mediation, Mr. Brown and the State agreed to a plea bargain on the following terms:

> Mr. Brown will have an opportunity to present three additional motions – or basically it's one motion to suppress with three independent grounds. He will – the State will amend the [murder] charge to voluntary manslaughter, and the grand theft charge will be amended to accessory to a grand theft after the fact. Mr. Brown will enter Alford[2] pleas to both charges and reserve his appellate rights in writing to challenge all pretrial motions.
>
> The sentences – the State would agree to have sentences on both charges run concurrently and that we would enter into a Rule 11 agreement with you, Your Honor, that you would agree that any sentence imposed would run concurrently on both charges. Other than that, there would be open recommendations. The State has indicated it will recommend a fixed 15-year term [on the manslaughter charge].

(Tr., p.377, L.13 – p.379, L.6; R., p.900 (reserving right to appeal from "[t]he denial of all of the Defendant's pretrial motions").)

Following the denial of the remaining motion to suppress, Mr. Brown entered *Alford* pleas to the two reduced charges. (Tr., p.395, L.14 – p.405, L.16.) At the sentencing hearing, the State requested that the district court impose the maximum sentences of fifteen years on the voluntary manslaughter charge and five years on the accessory to grand theft charge, to run concurrently. (Tr., p.436, L.5 – p.437, L.21.)

March 22, 2007, (R., pp.295-96), a Motion to Suppress Confessions (R., pp.269-70), and a Motion to Suppress Evidence Obtained from Welfare Check on February 7, 2007 (R., pp.275-76), were not ruled upon. Additionally, Mr. Brown filed a number of *pro se* motions (*see generally* R. and Exhibit Volumes 1-9), which the district court declined to consider. (Tr., p.42, Ls.11-20 ("[A]s long as you have counsel, the motions that we'll hear will be the ones that are presented by counsel.").) Because all of the foregoing were either granted or were not decided they are not subject to appeal under the terms of the plea agreement. Two additional motions, a Motion to Dismiss Based on Spoliation of Evidence (R., pp.273-74), and a Motion to Suppress Evidence Obtained from a Search Warrant Issued on February 7, 2007 (R., pp.293-94), are not being pursued on appeal, despite having been denied by the district court. (Tr., p.61, Ls.3-5; R., pp.886-87.) A Motion to Allow View of Premises by Jury which was conditionally denied, with leave to re-raise it at trial, is also not being pursued on appeal. (R., pp.847-48, 895.)

[2] *North Carolina v. Alford*, 400 U.S. 25 (1970).

Defense counsel requested either a unified sentence of twelve years, with six years fixed, or a ten year fixed sentence, suspended in favor of probation, with a condition of probation being one year of local jail time.[3] (Tr., p.444, Ls.5-10.) Ultimately, the district court imposed a unified sentence of fifteen years, with ten years fixed, on the voluntary manslaughter charge, and a concurrent, fixed sentence of five years on the accessory charge. (Tr., p.452, L.14 – p.453, L.5.)

Mr. Brown filed a Notice of Appeal timely from the judgment of conviction. (R., p.959.) Mr. Brown then filed a Rule 35 motion, requesting reduction of the sentences imposed, and requesting a hearing on the motion.[4] (R., pp.965-68.) Mr. Brown also filed a document entitled, "Reasons to Ameliorate the Sentence Imposed"[5] which appears to have been at one point attached to his *pro se* Rule 35 motion.[6] The district court held a hearing on the Rule 35 motion, but refused to allow Mr. Brown to testify and refused to allow defense counsel to present any witnesses in support of the Rule 35 motion, concluding:

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[3] Since the accessory to grand theft charge carries a maximum sentence of five years, defense counsel was presumably only requesting a sentence on the manslaughter charge.

[4] Defense counsel also filed a Rule 35 motion, dated December 17, 2010, and file-stamped as entered on December 17, 2010. (R., p.971.) Mr. Brown's *pro se* Rule 35 motion is dated December 15, 2010, and file-stamped as entered on December 20, 2010. (R., p.965.)

[5] This document begins in Volume 8 of the nine volumes prepared in response to Mr. Brown's objection to the record, and its attachments appear to continue into Volume 9.

[6] Mr. Brown's *pro se* Motion for Correction or Reduction of Sentence, ICR 35, is file-stamped as having been entered on December 20, 2010 at 12:32 p.m., while the Reasons to Ameliorate the Sentence Imposed was file-stamped as having been entered one minute earlier. (R., p.965; Reasons to Ameliorate the Sentence Imposed, p.3.) Furthermore, the *pro se* Rule 35 motion consists of two pages, one of which references an attached statement that "would call for some form of amelioration of the sentence imposed, for the reasons given herein" (R., p.966), while the first page of the document entitled Reasons to Ameliorate the Sentence Imposed is numbered as page 3. (Reasons to Ameliorate the Sentence Imposed, p.3.)

> The request for additional evidence is discretionary with the Court. When I think back on the case and we had a number of hearings in Sandpoint, pretrial hearings, Mr. Brown was quite prolific in his written documents submitted to the Court[[7]] and to everyone else. We had a mediation, a plea, Alford plea, after the mediation. We had the presentence report prepared and had the sentencing hearing with the full opportunity to call any witnesses who might have something relevant to say at the sentencing hearing.
>
> It doesn't seem to me that – that there is much to be gained here by calling a pathologist, a firearms expert, and a polygrapher. And as far as those – any testimony from those people would go to the – seems to me would go to issues of guilt, innocence or guilt, and that was taken care of when we took the plea.
>
> And as far as Mr. Brown is concerned, he had the opportunity, as I stated, and he submitted reams and reams of written material.[[8]] So I think that anything he's had to present to the Court has been presented. So I'm going to exercise my discretion and deny the request for additional [sic] testimony.

(Supp.Tr.,[9] p.10, L.20 – p.11, L.17.) Ultimately, the district court denied the Rule 35 motion, concluding, "in looking back on it and thinking about all that was presented back at the time of sentencing and prior thereto, the sentence that I imposed, I think, is the correct one. And I'm not going to modify that sentence." (Supp.Tr., p.13, Ls.14-18.)

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[7] The district court is undoubtedly referring to the numerous *pro se* motions filed by Mr. Brown which the district court previously announced that it would not consider. (Tr., p.42, Ls.11-20.)

[8] *See* note 4, *supra*.

[9] References to the transcript of the Rule 35 hearing, prepared on May 1, 2012, will be to "Supp.Tr."

ISSUES

1. Did the district court err when it denied Mr. Brown's Motion to Exclude from Evidence Defendant's Mail Correspondence obtained in violation of the Fourth Amendment?

2. Did the district court err when it denied Mr. Brown's motions to suppress evidence obtained as a result of his arrest because material exculpatory information discovered after the issuance of the arrest warrant undermined the magistrate's probable cause finding?

3. Did the district court err when it denied Mr. Brown's motion to suppress statements obtained when he was incapable of intelligently and voluntarily waiving his right to remain silent because the State failed to establish that his statements were made voluntarily?

4. Did the district court abuse its discretion when it denied Mr. Brown's request to present testimony at the hearing on his Rule 35 motion and denied his motion without considering the new information he provided in support?

5. Mindful of this Court's holding in *State v. Manzanares*, did the district court err when it denied Mr. Brown's Motion to Dismiss for Lack of Probable Cause at Preliminary Hearing?

6. Mindful of the inapplicability of the Federal Rules of Criminal Procedure and 18 U.S.C. § 3501(c) in a state court prosecution, did the district court nevertheless err when it denied Mr. Brown's motion to suppress statements obtained in violation of those provisions?

ARGUMENT

I.

The District Court Erred When It Denied Mr. Brown's Motion To Exclude From Evidence Defendant's Mail Correspondence Obtained In Violation Of The Fourth Amendment

A. Introduction

Defense counsel filed a Motion to Exclude from Evidence Defendant's Mail Correspondence,[10] which had been opened and copied over the three year period during which Mr. Brown was subject to pre-trial detention. In that motion, he requested exclusion of "all correspondence from Mr. Brown while in custody at the Bonner County Jail," arguing "that the Defendant has a right as a pretrial detainee to communicate, and the prosecutor's direction to jail staff to photocopy Mr. Brown's writings unconstitutionally infringes his right to privacy and to freely communicate." (R., pp.854-55.)

At the hearing on Mr. Brown's Motion to Exclude from Evidence Defendant's Mail Correspondence, defense counsel argued,

> He has certain rights that apply as a pretrial detainee that would be different from some other inmate who's merely in custody.
>
> . . .
>
> [I]n this case there is a large body of evidence disclosed by the State which is every piece of mail Mr. Brown has written over the last three years. Such surveillance of his communications is beyond the security interests of the facility. Simply being able to review, check, inspect

[10] Defense counsel also filed a Motion *In Limine* to Exclude Confidential Communications (R., pp.852-53), concerning letters sent by Mr. Brown to his then-wife. The district court declined to rule on that motion "at this point," explaining that it would consider objections on an item-by-item basis at trial. (Tr., p.333, L.17 – p.334, L.7.) While Mr. Brown does not pursue that undecided motion on appeal, he does note that such letters fall within his Motion to Exclude from Evidence Defendant's Mail Correspondence. Obviously, if this matter is returned to the district court for a trial, Mr. Brown would retain the ability to challenge the admission of confidential communications with his then-wife.

> outgoing inmate mail to determine whether or not there's a security violation or security threat is far different than photocopying each and every piece of mail, providing that to the detectives, and providing that to the prosecuting attorney as evidence in a homicide. It's beyond the scope, I think, of what the purpose for allowing the State to invade his freedom to communicate and his constitutional right to privacy in his communications with others. Opening and inspecting his mail and photocopying it for content pertaining to each and every statement he makes is simply violative of the constitutional right to privacy as well as his First Amendment right to communicate.

(Tr., p.365, L.7 – p.366, L.10.) Defense counsel later clarified the scope of the motion, arguing that it was based on "a violation of Fourth Amendment and First Amendment rights . . .."[11] (Tr., p.367, Ls.24-25.)

The State acknowledged that the jail's practice involved "copying all of his nonlegal mail." (Tr., p.366, Ls.16-17.) The State then argued that its wholesale opening and copying of Mr. Brown's mail was appropriate because: (1) he had a history of identity theft, (2) he has sent out materials in violation of jail rules, including to his wife, a fellow inmate, (3) he was communicating "with persons associated with other persons charged with violent crimes," (4) he communicated with a convicted child molester about attempting to obtain state and federal relief, and (5) he was using visitors and jail chaplains "to violate communications orders . . . ." (Tr., p.368, L.3 – p.370, L.25.) The State, however, presented no evidence in support of its arguments supporting the wholesale surveillance of Mr. Brown's outgoing mail.

Ultimately, the district court denied the motion on three grounds: (1) that probable cause is probably not required to monitor mail in the way that the jail did; (2) "to the extent that probable cause was required for implementation of the jail policy with respect particularly to Mr. Brown, that probable cause did exist"; and (3) "the policy

[11] Mr. Brown does not pursue the First Amendment claim on appeal.

passes constitutional muster." (Tr., p.371, L.21 – p.372, L.19.) In making its ruling, the district court assumed the existence of a jail policy when no evidence was presented of such a policy in place. (Tr., p.371, L.25 – p.372, L.6) ("[I]t sounds like there was a policy in effect for the Bonner County jail regarding communications from prisoners and that there really is no right to privacy, at least of the nature asserted here, to communications which would be in violation of jail rules. The attack here seems to be on the jail policy of monitoring mail.").

Mr. Brown asserts that the district court erred when it denied his motion because he established that his Fourth Amendment rights were violated when the jail opened and photocopied all of his non-legal, outgoing mail without presenting evidence that such activities were conducted pursuant to a search warrant or a recognized exception to the Fourth Amendment's warrant requirement.

B. The District Court Erred When It Denied Mr. Brown's Motion To Exclude From Evidence Defendant's Mail Correspondence Obtained In Violation Of The Fourth Amendment

The Fourth Amendment, in relevant part, provides, "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated . . . ." U.S. CONST. amend. IV. This provision has been held to protect a person's "legitimate expectations of privacy against intrusion by the government." *State v. Morris*, 131 Idaho 562, 565 (Ct. App. 1998) (citing, *inter alia*, *Katz v. United States*, 389 U.S. 347 (1967)). "Warrantless searches are presumed to be unreasonable and therefore violative of the Fourth Amendment." *State v. Foster*, 127 Idaho 723, 726 (Ct. App. 1995) (citations omitted).

When a defendant challenges a warrantless search or seizure, the burden is on the State to establish that a recognized exception to the warrant requirement justifies

the search or seizure. *State v. Woolery*, 116 Idaho 368, 370 (1989) (citing *Schmerber v. California*, 384 U.S. 757 (1966), *State v. Harwick*, 94 Idaho 615 (1972), and *State v. Curtis*, 106 Idaho 483 (Ct. App. 1984)). Even when the State proves the existence of an exception to the warrant requirement, the search or seizure "'must still be reasonable in light of all of the other surrounding circumstances.'" *State v. Diaz*, 144 Idaho 300, 302 (2007) (quoting *Halen v. State*, 136 Idaho 829, 833 (2002)).

In *United States v. Savage*, 482 F.2d 1371 (9th Cir. 1973), the Ninth Circuit considered whether Savage's Fourth Amendment rights were violated when, while in custody prior to trial, a letter he mailed was opened and photocopied by his jailers (and ultimately admitted in the government's case against him at trial). In concluding that the letter was unconstitutionally obtained, the Court announced, "absent a showing of some justifiable purpose of imprisonment or prison security the interception and photocopying of the letter was violative of the fourth amendment and the letter should have been excluded as evidence."[12] *Id.* at 1373.

In *United States v. Vallez*, 653 F.2d 403 (9th Cir. 1981), *receded from on other grounds by United States v. Goseyun*, 789 F.2d 1386, 1387 (9th Cir. 1986) (*per curiam*), the Court considered the denial of a motion to suppress the contents of a sealed letter taken from the cell of an inmate during a warrantless search. The search occurred "during a cell-by-cell search which was prompted by a tip that an escape plan was underway." *Id.* at 406. The Court began its analysis by explaining that while "[a] prisoner's fourth amendment rights are extremely limited . . . a prison inmate does have a reasonable expectation of privacy in a sealed letter." *Id.* (citing *Lanza v. New York*, 370 U.S. 139, 143 (1962), and *United States v. Savage*, 482 F.2d 1371, 1373 (9th Cir.

[12] The Court ultimately found the error to be harmless beyond a reasonable doubt. *Id.*

1973)). Recognizing that the "warrantless seizure of a sealed letter from a prisoner's cell therefore violates the fourth amendment, unless it serves a justifiable purpose of imprisonment or prison security," the Court concluded that the motion to suppress was properly denied because

> [The] letter was discovered during a search conducted according to prison regulations which allowed security searches "to detect contraband, prevent escapes, maintain sanitary standards and to eliminate fire and safety hazards." This rule is reasonably designed to promote prison security, a legitimate government purpose. There is no indication that the search went further than necessary to effect its purpose.

Id. (internal citations omitted).

In Mr. Brown's case, the State presented no evidence to meet its burden to prove an exception to the warrant requirement justifying its actions in seizing, searching, and copying all of his outgoing, non-legal mail, items in which he enjoyed a reasonable expectation of privacy. Additionally, the district court appears to have erroneously believed that Mr. Brown enjoyed no reasonable expectation of privacy in the contents of his outgoing, non-legal mail, and, therefore, did not rule that an exception to the warrant requirement applied, relied on a non-existent jail policy to justify its holding, and to the extent that the district court believed that some general jail exception to the warrant requirement existed, it was legally incorrect. Finally, to the extent that some exception to the warrant requirement did apply to the State's conduct, the State failed to show that seizing, searching, and copying *all* of Mr. Brown's outgoing, non-legal mail was reasonable in light of the circumstances in his case.

Because Mr. Brown entered a conditional guilty plea, the proper remedy upon a finding of error is for this Court to remand this matter to the district court for entry of an order excluding his mail correspondence, and to conduct an inquiry as to whether Mr. Brown wishes to withdraw his guilty pleas. *See* I.C.R. 11(a)(2) ("If the defendant

prevails on appeal [from a conditional guilty plea], the defendant shall be allowed to withdraw defendant's plea.").

II.

The District Court Erred In Denying Mr. Brown's Motions To Suppress Obtained As The Result Of His Arrest Because The Material Exculpatory Information Discovered After The Issuance Of The Arrest Warrant Undermined The Magistrate's Probable Cause Finding

A. Introduction

Mr. Brown filed a motion for a *Franks*[13] hearing as to an arrest warrant issued for a charge of grand theft of a debit card belonging to Mr. Breaw.[14] In that motion, defense counsel sought to "challenge the truthfulness of certain statements in the testimony of Detective Tony Ingram of the Bonner County Sheriff's Office, and to challenge his reckless omission of material exculpatory evidence from the warrant testimony." (Motion for Franks Hearing Regarding Warrants Issued in CR-07-621[15] (*hereinafter,* Motion for Franks Hearing), p.2.) In the motion, Mr. Brown argued, *inter alia*, that Detective Ingram failed to inform the magistrate of material changes to the facts contained in his testimony in support of the arrest warrant prior to its execution, material changes which would have resulted in the magistrate no longer possessing probable

[13] *Franks v. Delaware*, 438 U.S. 154 (1978).

[14] The United States Supreme Court has yet to decide whether a *Franks* hearing is available to challenge the issuance of an arrest warrant. *State v. Pona*, 926 A.2d 592, 612 n.18 (R.I. 2007) (so stating, and noting "that a fair number of courts confronted with this issue have extended *Franks* also to include challenges to arrest warrants") (citations omitted). It does not appear that the appellate courts of this state have ruled on this issue.

[15] This motion is in Volume 6 of the nine volumes prepared in response to Mr. Brown's objection to the record.

cause to support the previously issued arrest warrant.[16] (Motion for Franks Hearing, pp.2-9.)

Mr. Brown also filed a related Motion to Suppress Evidence for Lack of Probable Cause in Case No. CR-07-621, arguing that there was insufficient probable cause to support the charge of grand theft of the debit card belonging to Mr. Breaw, which provided "insufficient evidence to support the filing of the Complaint against Mr. Brown in CR-07-621," and therefore "insufficient reason and evidence to take Mr. Brown into custody in Florida, to interrogate him, and to proceed with any search warrants." (R., pp.277-78.) In another motion to suppress statements made following his arrest due to the dissipation of probable cause to arrest him, he argued that probable cause to arrest him for crimes related to the financial transaction card dissipated when that card was discovered on Mr. Breaw's body prior to his arrest and interrogation. (Motion to Suppress: Presentment to Magistrate; Involuntary Confession; Dissipation of Probable Cause; Memorandum in Support of Motion to Suppress: Presentment to Magistrate; Involuntary Confession; and Dissipation of Probable Cause, p.6.[17]) Because the three motions sought the same remedy for the same reason: suppression of evidence obtained as a result of Mr. Brown's arrest in Florida due to a lack of probable cause, Mr. Brown relies on the same argument in appealing from the denial of all three motions.

The following facts were developed in support of Mr. Brown's *Franks* motion and the related motions to suppress. Detective Ingram appeared before a magistrate and

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[16] Mr. Brown also argued that the warrant was invalid because Detective Ingram failed to conduct an adequate investigation prior to seeking the arrest warrant. Mr. Brown does not renew that argument on appeal.

[17] Both this motion and memorandum are in Volume 8 of the nine volumes prepared in response to Mr. Brown's objection to the record.

provided sworn testimony in support of the issuance of an arrest warrant[18] for Mr. Brown for the crime of grand theft by possession of stolen property, specifically, a debit card belonging to Mr. Breaw. Detective Ingram testified that his investigation began on February 5, 2007, when a truck belonging to Mr. Breaw was discovered in a snow bank, having been abandoned there for at least a week. The keys were with the truck, as were several other items, including a checkbook, legal papers, several pieces of mail, and Mr. Breaw's wallet, containing his Montana driver's license. No financial transaction cards were found. Police suspected that Mr. Breaw may have walked into the woods to commit suicide. Due to the presence of two to four feet of snow on the ground, they were only able to conduct a limited search of the woods near the truck, after which they decided to go to Mr. Breaw's residence to see if he had gone home and not yet returned for his truck. It was then that they discovered that Mr. Breaw's house was one-quarter of a mile from the location of his truck (three-quarters of a mile by road). Once they realized how close Mr. Breaw's house was to the location of his truck, combined with the large number of empty beer cans in the bed of the truck, they began to suspect that Mr. Breaw "may have been intoxicated and ran off the road and in an attempt to try to walk home made the wrong turn and he had stumbled off into a path." (Transcript of Probable Cause for Search Warrant Hearing[19] (*hereinafter,* P.C.Tr., p.3, L.15 – p.9, L.13.)

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[18] Detective Ingram also sought – and received – search warrants for the Brown and Breaw residences at the same hearing and based on the same testimony.

[19] This transcript is contained in Volume 6 of the nine volumes of exhibits prepared in response to Mr. Brown's objection to the record. The district court took judicial notice of this transcript for purposes of both the *Franks* hearing and a hearing on the motion to suppress items obtained via the search warrant issued on February 6, 2007. (Tr., p.255, L.18 – p.256, L.11.)

Police then conducted a welfare check at Mr. Breaw's property. They entered one of two houses on the property, 525 Scranton, noticed paperwork with the Browns' names on it, and "realized we were in the wrong location." They then went next door to 514 Scranton and found items indicating that it was Mr. Breaw's residence. Police later learned that the Browns and Mr. Brown's mother-in-law, Rebekka Harding, resided together at 525 Scranton. Police noticed no evidence of fresh traffic in the driveway area of either of the two houses. A neighbor told police that the neighbor had not seen Mr. Breaw for approximately two weeks and had last seen the Browns on approximately January 25, 2007, "packing in a very hurriedly [sic] manner and that basically the only thing they were taking were clothes." Having been inside both houses, Detective Ingram concluded that "all indications" were that the Browns and Mr. Breaw "had just stepped out and planned to return." (P.C.Tr., p.9, L.13 – p.12, L.16.)

Detective Ingram contacted Mr. Breaw's mother, who lives in Sacramento, California, who told him that she had last spoken with her son by telephone on either January 14 or 15. He had told her that he would call her the next day to discuss plans to meet with her in Oregon. He also learned that Mr. Breaw's dogs had been picked up by animal control because they were reported as abandoned, were "starving and had no food." A review of Mr. Breaw's bank records showed that his financial transaction cards were last used on January 25, 2007, and that one check, along with the carbon copy, was missing from his checkbook and had not been cashed. Detective Ingram also discovered that, on January 18, 2007, someone who looked like Mr. Brown used Mr. Breaw's debit card at Mac's, a nearby gas station. (P.C.Tr., p.12, L.17 – p.15, L.21.)

In researching the backgrounds of the Browns, Detective Ingram learned that they "both have an extensive criminal history," including an arrest of both for identity theft eight months earlier, and a bank account with a fake name purportedly established by Mr. Brown. Mrs. Brown's parole officer described Mr. Brown as having "a very extensive reputation with them to be a hard-core person, I guess" and "that she had no doubt that Mr. Brown would be – would be capable of anything at this point involving money." He also learned that neither of the Browns had picked up their most recent paychecks, and that Mr. Brown had been employed by Mr. Breaw. (P.C.Tr., p.16, L.18 – p.20, L.14.)

Detective Ingram then testified that Mr. Breaw's abandoned truck was first noticed on January 20, 2007, and "[t]he only physical person that actually can verify contact with Mr. Breaw would be his mother either on the 14th or 15th [of January]. All the other store owners would vaguely give that it had been a couple weeks since they saw him. Nobody was actually able to pinpoint an exact day." He also noted that the most recent postmark on the mail in the truck was January 18, 2007, which was the same date that a person matching Mr. Brown's description was seen using Mr. Breaw's debit card. In speaking with one of Mrs. Brown's co-workers, Pam, Detective Ingram learned that Mrs. Brown had said "that around the 24th, [she] made a comment to her that they were gonna take Mr. Breaw to the airport in Seattle and he was going to fly to Thailand to pick up a sailboat." A different co-worker told Pam "that they [sic] overheard Tyrah having a phone conversation in which Tyrah was telling an unknown person on the phone that they were actually going to drive Mr. Breaw to Oregon." Having found Mr. Breaw's wallet, car keys, and passport in his car, along with his dogs, that he took with him everywhere he went, running wild, Detective Ingram concluded that "whatever

happened to him it was quick and sudden." (P.C.Tr., p.20, L.15 – p.23, L.7.) He also spoke to "several locations that said [Mr. Breaw] stopped by on a daily [basis]. And then approximately at least two weeks ago it just stopped." (P.C.Tr., p.24, Ls.20-22.)

He noted that the crimes under investigation "at this point would be "taking a transaction card with intent to defraud [which] constitutes grand theft as well as the specific crime for fraudulent use."[20] (P.C.Tr., p.23, L.15 – p.27, L.16.) After Detective Ingram finished testifying, the State requested, in addition to a search warrant for both residences, an arrest warrant for Mr. Brown for "possession [of a financial transaction card] with intent to defraud." (P.C.Tr., p.29, Ls.8-18.)

In granting the requests for the search warrants and the arrest warrant, the district court explained,

> I do find probable cause to believe that they're [the Browns] involved in the crime of fraudulent use of a financial transaction card or grand theft. Also have very significant concerns about what is [sic] happened to Mr. Leslie Breaw. But at this point that's – that's unknown. The abandoned car, the abandoned personal effects, someone who is very close to two dogs and I mean the dogs being found unfed and running loose.
>
> In any event I believe there is probable cause for the issuance of a search warrant to search for the items listed on Pages 1 and 2 of the warrant. And I also believe based on what we've heard about Mr. Brown using that debit card at the Mac's stations, [in] Priest River, that there is probable cause to charge him with the felony crime of fraudulent use of a financial transaction card to issue a criminal complaint and arrest warrant.

(P.C.Tr., p.30, Ls.3-19.)

On February 7, 2007, a state warrant was issued for the arrest of Mr. Brown on a charge of grand theft, based on a felony criminal complaint accusing Mr. Brown of grand theft by possession of stolen property alleged to have been committed as follows, "That the Defendant, Keith Brown, on or before the 18th day of January, 2007, in the County

of Bonner, State of Idaho, did obtain or possess stolen property to wit: a Panhandle State Bank debit card belonging to Leslie Breaw with the intent to appropriate to himself said property." These two documents provided the basis upon which a federal warrant for unlawful flight to avoid prosecution was issued. (Defendant's Exhibit B.)

On March 19, 2007, a body later identified as Leslie Breaw's was discovered, with the financial transaction card at issue found on the body shortly after it was discovered. (Ingram Deposition, p.63, L.25 – p.64, L.14.) Detective Ingram testified that he had informed the prosecuting attorney of this new information but did not return to the issuing magistrate with it because "decisions involving a judge are his [the prosecuting attorney's], not mine." (Ingram Deposition, p.65, Ls.17-23.) Mr. Brown was arrested in Florida on the federal fugitive warrant on March 20, 2007 at 12:30 p.m. (likely Eastern Standard Time). As of 1:12 p.m. (likely Pacific Standard Time) on March 20, 2007, Leslie Breaw's body had not been identified by the medical examiner. (Tr., p.214, L.20 – p.218, L.2, p.245, Ls.4-11.)

In rejecting Mr. Brown's argument that, had the police returned to the issuing magistrate upon learning material exculpatory information prior to the service of the arrest warrant, the magistrate would have lacked probable cause for the warrant to remain in effect, the district court explained,

> [I]f all of the facts, both exculpatory and incupatory [sic], known to police at [the time of] defendant's arrest, albeit unknown to Ingram at the time fo the warrant hearing, had been presented to the magistrate, she would no doubt have sustained her determination that there was probable cause to arrest defendant for grand theft, as explained in greater detail in the next section.

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[20] Most of Detective Ingram's testimony on these points consisted of answering "[c]orrect" to leading questions posed by the prosecuting attorney.

(Opinion and Order Re: Motions to Suppress, p.7.) In the next section, the district court reasoned, "Even if defendant had shown that the arrest warrant was invalid, the evidence obtained because of defendant's arrest should not be suppressed because, at the time defendant was arrested, police had probable cause to arrest him *without* a warrant." (Opinion and Order Re: Motions to Suppress, p.8 (citing *Whiteley v. Warden of Wyoming State Penitentiary*, 401 U.S. 560 (1971) and *United States v. Rose*, 541 F.2d 750 (8th Cir. 1976) (emphasis in original)).

B. The District Court Erred In Denying Mr. Brown's Motions To Suppress Obtained As The Result Of His Arrest Because The Material Exculpatory Information Discovered After The Issuance Of The Arrest Warrant Undermined The Magistrate's Probable Cause Finding

Mr. Brown asserts that the district court erred when it concluded that the magistrate's probable cause finding would not have been different had she been informed of the material exculpatory information learned after the issuance of the warrant but before its execution, and when it concluded that, even if Mr. Brown had established the invalidity of the arrest warrant, the evidence obtained as a result of his arrest in Florida "should not be suppressed because, at the time [he] was arrested, police had probable cause" to conduct a warrantless arrest. Had the arrest warrant been invalidated prior to its execution, Mr. Brown would not have been arrested in Florida and would not have made inculpatory statements.

In *Franks*, the United States Supreme Court held that when a defendant establishes by a preponderance of the evidence that a law enforcement officer knowingly, intentionally, or with reckless disregard for the truth made a false statement in support of the issuance of a search warrant, the trial court is required to reconsider the issue of probable cause with that false information excised. Upon doing so, if the

remaining information is insufficient to establish probable cause, the court must void the search warrant and exclude the fruits of the search conducted under the warrant. *Franks*, 438 U.S. 154, 155-56 (1978). *Franks* has been adopted by this Court. *See State v. Lindner*, 100 Idaho 37, 41 (1979). The *Franks* doctrine has been expanded in this State to apply "not only to affirmative falsehoods in a warrant application but also to a deliberate or reckless omission of material exculpatory information." *State v. Rounsville*, 136 Idaho 869 (Ct. App. 2002) (citations omitted). A number of courts have extended the *Franks* rationale to material exculpatory information learned after the issuance of the warrant but before its execution. *See United States v. Marin-Buitrago*, 734 F.2d 889 (2nd Cir. 1984), *United States v. Bowling*, 900 F.2d 926, 932 (6th Cir. 1990), and *United States v. Perez*, 484 F.3d 735 (5th Cir. 2007) (applying *Bowling* and *Marin-Buitrago*).[21]

In *Marin-Buitrago*, the Second Circuit considered whether new information potentially casting doubt on probable cause, obtained after the issuance of a search warrant but prior to its execution, invalidated the warrant. As an initial matter, the Court held, relying on *Franks*, that "when a definite and material change *has* occurred in the facts underlying the magistrate's determination of probable cause, it is the magistrate, not the executing officers, who must determine whether probable cause still exists. Therefore, the magistrate must be made aware of any material new or correcting information." *Marin-Buitrago*, 734 F.2d at 894 (emphasis in original). The Court then analyzed the information presented at the time of the issuance of the warrant along with

[21] These cases all concerned search warrants, but there is no reason that an arrest warrant, authorizing the seizure of a person under the Fourth Amendment, should be dealt with any differently than a warrant authorizing the search of premises under the Fourth Amendment.

the new information to assess whether probable cause still existed. Ultimately, the Court concluded that the new information did not affect the existence of probable cause. *Id.* at 895-96.

The *Bowling* Court, relying on the reasoning of the Supreme Court in *Johnson v. United States*, 333 U.S. 10 (1948), in which the Court had held, with respect to a warrantless search, "when the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent," held that it is "equally applicable to cases in which officers possess a warrant but are alerted to circumstances which affect the probable cause for its execution." *Id.* at 933. This is because the Fourth Amendment requires that probable cause exist both at the time that a warrant is issued and at the time the warrant is executed. *Id.* at 932.

At his *Franks* hearing, Mr. Brown established that, after the issuance of the arrest warrant *but before it was executed*, the police learned material information, not provided to the magistrate, calling into question whether probable cause to arrest Mr. Brown for theft of the financial transaction card still existed. Specifically, Detective Ingram learned that several people had seen Mr. Breaw alive in the days following Mr. Brown's suspected use of the debit card, including one person who saw Mr. Breaw use the debit card at issue, another witness who told Detective Ingram that Mr. Breaw had authorized Mr. Brown to use the debit card to purchase gas, and that the debit card was found on Mr. Breaw's body.

Detective Ingram testified that the day after the warrant hearing, he interviewed several local business owners and Rebekka Harding, Mrs. Brown's mother. Pat Aikin told him that he may have seen Leslie Breaw on January 24, 2007, but "was not 100

percent sure." Ralph Ahlefeld, the owner of a local bakery, said that on January 20, 2007, he saw Mr. Breaw use the debit card that Mr. Brown was suspected of stealing two days earlier. Dan Mack, said that he last saw Mr. Breaw on January 22, 2007. Finally, Mrs. Brown's mother, Ms. Harding told Detective Ingram that she had last seen Mr. Breaw on January 25, 2007, and that Mr. Breaw had previously given Mr. Brown permission to use his debit card to buy gas.[22] (Defendant's Exhibit D (Deposition of Tony J. Ingram) (*hereinafter,* Ingram Deposition), p.26, L.22 – p.34, L.9.) Detective Ingram acknowledged passing all of this information along to the prosecuting attorney, who responded by saying "that we would keep the warrant where it was." (Ingram Deposition, p.34, L.19 – p.36, L.15.) He also testified that he never went back before the magistrate who issued the arrest warrant. (Ingram Deposition, p.36, Ls.2-4.)

Additionally, on March 19, 2007, after discovering Mr. Breaw's body *but before Mr. Brown was arrested on the warrant*, police found the debit card at issue on the body. (Ingram Deposition, p.63, L.25 – p.64, L.14.) Detective Ingram testified that he informed the prosecuting attorney of the discovery of the debit card, but did not take that information to the magistrate because "[t]he decisions involving a judge are his, not mine."[23] (Ingram Deposition, p.65, Ls.17-23.) He also testified that he did not seek a warrant to arrest Mr. Brown for the murder of Mr. Breaw because he didn't have probable cause to obtain such a warrant. (Ingram Deposition, p.67, Ls.4-15.)

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[22] Detective Ingram noted that he "didn't believe [Ms. Harding] one hundred percent." (Ingram Deposition, p.35, L.25 – p.36, L.1.)

[23] More troubling was Detective Ingram's recitation of what the prosecuting attorney told him with respect to Ms. Harding's exculpatory statement regarding Mr. Brown having permission to use Mr. Breaw's debit card, specifically, "We do not have the word of the victim. We don't know if that card was used or not, because our victim is no longer around. So how can we take light of one person's word over our victim when the one person we're talking to is a possible suspect in the disappearance of Mr. Breaw at the time?" (Ingram Deposition, p.77, L.13 – p.78, L.2.)

Mr. Brown asserts that, in light of the undisclosed material exculpatory information learned after the issuance of the arrest warrant but before its execution, the district court erred when it denied his *Franks* motion and his motions to suppress for lack of probable cause with respect to the charge of grand theft by possession of a debit card belonging to Mr. Breaw.[24]

III.

The District Court Erred When It Denied Mr. Brown's Motion To Suppress Statements Obtained When He Was Incapable Of Intelligently And Voluntarily Waiving His Right To Remain Silent Because The State Failed To Establish That His Statements Were Made Voluntarily

A. Introduction

Mr. Brown asserts that the district court erred when it denied his motion "to suppress all statements made while he was in custody, and all evidence flowing from those statements" on the basis that they were not made voluntarily because the State failed to meet its burden of establishing, by a preponderance of the evidence, that the statements were made voluntarily.

B. The District Court Erred When It Denied Mr. Brown's Motion To Suppress Statements Obtained When He Was Incapable Of Intelligently And Voluntarily Waiving His Right To Remain Silent Because The State Failed To Establish That His Statements Were Made Voluntarily

In order for a confession to be considered voluntary and constitutionally-admissible under the Fourteenth Amendment's Due Process Clause, it must be "the

[24] Because Mr. Brown maintains that there was no probable cause at the time he was arrested on the warrant in Florida, he need not respond to the district court's alternative holding that the Florida arrest could have been justified as a warrantless arrest based on probable cause. It is worth noting, however, that the district court cited to no law in support of its conclusion that a warrantless arrest for an out-of-state offense could have been lawfully made by Florida officers.

product of an essentially free and unconstrained choice," with the defendant's "capacity for self-determination" not "critically impaired." *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961). The choice to confess must be "freely self-determined." *Rogers v. Richmond*, 365 U.S. 534, 544 (1961), and be "the product of a rational intellect and a free will." *Blackburn v. Alabama*, 361 U.S. 199, 208 (1960). "The question of the voluntariness of the defendant's statements must be resolved by examining the totality of the circumstances surrounding the statements to determine whether it is the product of a rational intellect and a free will." *State v. Mitchell*, 104 Idaho 493, 499 (1983) (citations omitted).

"It is the state's burden to prove, by a preponderance of the evidence, that a statement was voluntarily made." *State v. Wilson*, 126 Idaho 926, 928 (Ct. App. 1995) (citation omitted). In making such a determination, an appellate court considers the totality of the circumstances, which may include "the characteristics of the accused as well as the details of the interrogation, including whether *Miranda* warnings are given." *Id.* (citations omitted). Some of the circumstances that must be considered are: "1. "Whether *Miranda* warnings were given; 2. The youth of the accused; 3. The accused's level of education; 4. The length of the detention; 5. The repeated and prolonged nature of the questioning; and 6. Deprivation of food or sleep." *State v. Troy*, 124 Idaho 211, 214 (1993) (citing *Scheckloth v. Bustamonte*, 412 U.S. 218, 226 (1973).)

Mr. Brown filed a motion to suppress statements obtained when he was incapable of making an intelligent and voluntary waiver of his right to remain silent. (Motion to Suppress: Presentment to Magistrate; Involuntary Confession; Dissipation of

Probable Cause.[25]) In that motion, he argued that his statements to law enforcement must be suppressed because he was incapable of intelligently and voluntarily waiving his right to remain silent because he was of unsound mind when the statements were made and was not competent to make any statements. (*Id.*, p.2.) At the hearing on the motion, defense counsel described the issue as "whether or not the confession was voluntary." (Tr., p.382, Ls.4-5.)

In support of his motion, Mr. Brown cited to the district court's Amended Order of Commitment (Motion to Suppress: Presentment to Magistrate; Involuntary Confession; Dissipation of Probable Cause, p.2), in which the district court found Mr. Brown "unfit to proceed or to assist in his defense, lacks the capacity to make an informed decision regarding treatment of his mental illness, and is dangerously mentally ill as defined in Idaho Code 66-1305." As a result of these findings, the district court ordered that proceedings against Mr. Brown be suspended "until such time as it is determined that he is fit to proceed," and that he be committed to the State Secured Medical Facility. (R., p.495-96.) At the hearing on the motion to suppress, the State stipulated that "from the time Mr. Brown was arrested until the time of that order of commitment, Mr. Brown was not given any psychotropic medications, nor was he given any mental health counseling during that period of time." (Tr., p.383, Ls.1-6.)

The State presented no evidence in opposing Mr. Brown's motion or in support of its assertion that any statements obtained by officers following Mr. Brown's arrest were made voluntarily, nor did it present any evidence concerning the circumstances under

[25] This motion is in Volume 8 of the nine volumes prepared in response to Mr. Brown's objection to the record.

which the statements were obtained. (Tr., p.377, L.5 – p.395, L.16.) The State merely argued,

> So our position is that there's nothing in the record, to indicate that the statements that he made to Detective Long and/or others in the state of Florida meet anybody's definition of involuntary. And in fact there's – because it's factual. There's never been a claim that he was not advised of his rights. He acknowledged his – during those interviews that he had numerous experiences, not only of his own with the criminal justice system, the rights of defendants, et cetera, but also based on his own legal training and his own paralegal services, had assisted others in interpreting rights under the law. So Mr. Brown is actually in a very unique position to maybe understand his situation and his rights more than almost anybody we've ever dealt with.

(Tr., p.388, L.16 – p.389, L.6.)

In denying Mr. Brown's motion, the district court explained,

> The result of the commitment proceeding was that – a conclusion, after some considerable time spent with Mr. Brown, that he was competent, was able to assist in his own defense. All parties have proceeded since that order – or that report was issued on the basis that he is competent and is able to participate in his own defense, that there was no objection by anyone to the report from the – the 18-210/211 report concluding that he was competent – or claiming that he was not competent to proceed. And it seems to me like it's a little bit late now, well after that hearing, to in effect claim that conclusions reached that he is competent were improper.
>
> Certainly it's been my observation that, particularly since [defense counsel] has been involved in the case, that Mr. Brown has been actively participating in his defense as witnesses by the hearing that we had just a little over a week ago where Mr. Brown was certainly able to assist in – in some of the issues that – the legal issue that were being raised, not simply factual issues, but legal issues.
>
> Accordingly, the – any statements that he made to law enforcement agencies were not rendered involuntary based upon any claim of a mental health deficiency.

(Tr., p.393, L.18 – p.394, L.17.) The district court made no findings of fact with respect to the circumstances surrounding the taking of custodial statements from Mr. Brown, including whether he was advised of his *Miranda* rights, the length of any questioning,

whether he was offered meal or bathroom breaks, or any of the other circumstances that are relevant to the voluntariness determination.

Mr. Brown asserts that the district court erred when it concluded that his statements were voluntarily made in the absence of any evidence establishing the circumstances under which those statements were obtained. As it was the State's burden to establish – by a preponderance of the evidence – the voluntariness of those statements, and the State presented no evidence concerning the circumstances under which the statements were obtained, the district court erred by denying Mr. Brown's motion to suppress those statements. As such, he respectfully requests that this Court vacate the district court's order denying his motion to suppress, and remand this matter for entry of an order suppressing all statements made while he was in custody.[26]

IV.

The District Court Abused Its Discretion When It Denied Mr. Brown's Request To Present Testimony At The Hearing On His Rule 35 Motion, And When It Denied His Motion Without Considering The New Information He Provided In Support

Mr. Brown asserts that the district court abused its discretion by unduly narrowing the scope of that discretion when it refused to allow him to testify or present witnesses in support of his Rule 35 motion at the hearing held on that motion, and when it denied his motion without considering the new information he provided in support. In refusing to allow the presentation of testimony or evidence in support of the motion, the district court reasoned:

> The request for additional evidence is discretionary with the Court. When I think back on the case and we had a number of hearings in Sandpoint, pretrial hearings, Mr. Brown was quite prolific in his written documents

[26] As a result of prevailing on this issue, Mr. Brown would then have the opportunity, pursuant to the terms of his Rule 11 plea agreement, to move to withdraw his guilty pleas and proceed to trial on the original charges.

> submitted to the Court[27] and to everyone else. We had a mediation, a plea, Alford plea, after the mediation. We had the presentence report prepared and had the sentencing hearing with the full opportunity to call any witnesses who might have something relevant to say at the sentencing hearing.
>
> It doesn't seem to me that – that there is much to be gained here by calling a pathologist, a firearms expert, and a polygrapher. And as far as those – any testimony from those people would go to the – seems to me would go to issues of guilt, innocence or guilt, and that was taken care of when we took the plea.
>
> And as far as Mr. Brown is concerned, he had the opportunity, as I stated, and he submitted reams and reams of written material.[28] So I think that anything he's had to present to the Court has been presented. So I'm going to exercise my discretion and deny the request for additional [sic] testimony.

(Supp.Tr., p.10, L.20 – p.11, L.17.) In denying the Rule 35 motion, the district court concluded, "in looking back on it and thinking about all that was presented back at the time of sentencing and prior thereto, the sentence that I imposed, I think, is the correct one. And I'm not going to modify that sentence." (Supp.Tr., p.13, Ls.14-18.)

It has long been held that a district court abuses its discretion when it "unduly limits the information to be considered in deciding a Rule 35 motion." *State v. James*, 112 Idaho 239, 242 (Ct. App. 1986) (citing *State v. Torres*, 107 Idaho 895 (Ct. App. 1984)). In *Torres*, the Court of Appeals confronted a situation in which the district court judge who denied the Rule 35 motion refused to allow Torres to present a social worker's evaluation, prepared after he was sentenced, in support of that motion. The district court excluded the report in part because he felt "constrained to consider only the information available to the prior judge when the sentence was imposed." In reversing the denial of the Rule 35 motion, the Court of Appeals explained, "[i]t would ill

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[27] The district court was likely referring to the numerous *pro se* motions filed by Mr. Brown which the district court previously announced that it would not consider. (Tr., p.42, Ls.11-20.)

serve the purpose of a Rule 35 motion to preclude the defendant from presenting fresh information about himself or his circumstances." Because the Court of Appeals did not know how the excluded report might have affected the district court's ruling on the Rule 35 motion, it remanded the matter to the district court for reconsideration in light of the excluded report. *Torres*, 107 Idaho at 898.

Here, as in *Torres*, the district court held that it would consider only information presented to it at, and before, sentencing. The district court refused to allow Mr. Brown to testify or present any witnesses in support of his Rule 35 motion. While the district court did not have to exercise its discretion and hold a hearing on the Rule 35 motion, once it held a hearing, it could not unduly narrow its own discretion at that hearing. Furthermore, the district court's reference only to information presented at sentencing and before sentencing demonstrates that it did not consider the new information submitted by Mr. Brown in support of his Rule 35 motion. In doing so, the district court abused its discretion, and the proper remedy is for this Court to vacate the order denying Mr. Brown's Rule 35 motion and remand this matter for a new Rule 35 hearing at which Mr. Brown and his witnesses can testify and at which the new information filed in support of his Rule 35 motion will be considered.

V.

Mindful Of This Court's Holding In *State v. Manzanares*, The District Court Erred When It Denied Mr. Brown's Motion To Dismiss Based On Lack Of Probable Cause At Preliminary Hearing

Mindful of this Court's holding in *State v. Manzanares*, 152 Idaho 410 (2012), that when a charge has been dismissed pursuant to a conditional guilty plea, challenges to the sufficiency of the evidence at a preliminary hearing on such a charge are moot for

[28] *See* note 4, *supra*.

purposes of appeal, Mr. Brown nevertheless asserts that the district court erred when it denied his Motion to Dismiss Based on Lack of Probable Cause at Preliminary Hearing.[29]

VI.

Mindful Of The Inapplicability Of The Federal Rules Of Criminal Procedure And 18 U.S.C. § 3501(c) In A State Prosecution, The District Court Erred When It Denied Mr. Brown's Motion To Suppress Statements Obtained In Violation Of Those Provisions

Mr. Brown filed a motion to suppress statements following his arrest in Florida as having been obtained in violation of Rule 5 of the Federal Rules of Criminal Procedure and 18 U.S.C. § 3501(c). (Motion to Suppress: Presentment to Magistrate; Involuntary Confession; Dissipation of Probable Cause; Memorandum in Support of Motion to Suppress: Presentment to Magistrate; Involuntary Confession; and Dissipation of Probable Cause, pp.2-4.) The district court denied that motion. (R., p.923.)

Mindful of the inapplicability of the Federal Rules of Criminal Procedure and 18 U.S.C. § 3501(c) to a state prosecution,[30] Mr. Brown asserts that the district court erred

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[29] In Mr. Brown's case, the charges at issue in the motion were replaced by lesser charges in the form of an amended information. However, in arguing this motion, defense counsel maintained, "This type of killing at most was a voluntary manslaughter," (Defendant's Memorandum in Support of his Motion to Dismiss Based on Lack of Probable Cause at Preliminary Hearing, Miscellaneous Exhibits, Vol.2), and that he was at most an "accessory after the fact" for the charge of grand theft. (Tr., p.64, L.25 – p.65, L.6.) In light of the fact that Mr. Brown pleaded guilty to voluntary manslaughter and accessory to grand theft (Tr., p.395, L.14 – p.405, L.16), this issue is likely moot, under *Manzanares*, for purposes of this appeal. Assuming that is the case, Mr. Brown maintains that he retains the right to re-raise the issue in a future appeal if he is convicted of the greater charges in a future trial in this matter.

[30] The Federal Rules of Criminal Procedure provide, "These rules govern the procedure in all criminal proceedings in the United States district courts, the United States courts of appeals, and the Supreme Court of the United States." F.R.C.P. 1(a)(1). 18 U.S.C. § 3501(c) begins with the language, "In any criminal prosecution by the United States or by the District of Columbia . . . ." 18 U.S.C. § 3501(c).

when it denied his motion to suppress statements obtained in violation of those provisions.

CONCLUSION

For the reasons set forth herein, Mr. Brown respectfully requests that this Court vacate the orders denying the motions discussed herein, along with the judgment of conviction entered following his conditional guilty pleas, and remand this matter to the district court for entry of appropriate orders granting those motions, as well as a hearing at which Mr. Brown can decide whether to withdraw his guilty pleas. In the alternative, if this Court denies Mr. Brown's appeals from the denial of his pre-trial motions, he respectfully requests that this Court remand this matter for a new Rule 35 hearing, at which the new information provided in support of his Rule 35 motion can be considered by the district court.

DATED this 18th day of July, 2012.

SPENCER J. HAHN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 18th day of July, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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FRED GIBLER
DISTRICT COURT JUDGE
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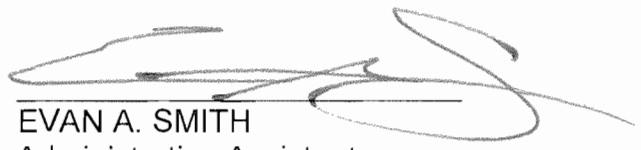

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