ORIGINAL refiled 20070081

IN THE SUPREME COURT OF NORTH DAKOTA

June 4, 2007

State of North Dakota, Plaintiff and Appellee, v. Brian Shawn Hurt, Defendant and Appellant.	Supreme Court No. 20070081 Cass County No. 06-K-1542

APPEAL FROM THE DISTRICT COURT
CASS COUNTY, NORTH DAKOTA
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE DOUGLAS R. HERMAN, PRESIDING

BRIEF OF APPELLANT

AALAND LAW OFFICE, LTD.

By: Jesse N. Lange (ND ID No. 06008)
415 11th St. S.; P.O. Box 1817
Fargo, ND 58107-1817
Telephone: (701) 232-7944
Facsimile: (701) 232-4037
Attorneys for the Appellant

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1. Whether the district court erroneously denied Mr. Hurt's motion to suppress where officers entered Mr. Hurt's home without a warrant, probable cause, exigent circumstances, or consent; where the only proffered justification for the entering Mr. Hurt's home was that his roommate was subject to search as a condition of her probation; and where there was no evidence that Mr. Hurt was aware of his roommate's probation much less its particular conditions?

STATEMENT OF THE CASE

[¶ 4] This is an appeal by Brian Shawn Hurt from the Criminal Judgment and Commitment issued by the Honorable Douglas R. Herman of the East Central Judicial District on February 20, 2007. (Appendix ("App.") at 2, 20-26). On April 24, 2006, the State charged Mr. Hurt with one C Felony and one A Misdemeanor count of possessing of drug paraphernalia. (App. at 1, 3-4). Hurt moved to suppress the evidence against him. (App. at 1, 5-6). His motion came before the court for evidentiary hearing on September 13, 2006. (Transcript ("T.") at 1, 4).

[¶ 5] Testimony at the evidentiary hearing indicated that probation officers entered Mr. Hurt's home without a warrant. (T. at 9, 12). They purportedly entered to visit probationer Jessica Bickler: one of Mr. Hurt's roommates. (T. at 8, 16-17). An officer testified that, upon entry, she saw contraband on the living room coffee table. (T. at 12-13). The State did not contend that the paraphernalia could be seen from the front door, and a defense witness testified that the coffee table was not visible from that vantage point. (T. at 30). After the paraphernalia on the coffee table was discovered, a probation officer handcuffed Mr. Hurt and discovered paraphernalia on his person. (T. at 13, 22).

[¶ 6] Upon hearing the evidence, the district court denied Mr. Hurt's motion to suppress. (App. at 7-10; T. at 36-38). Mr. Hurt entered conditional guilty pleas on February 20, 2007 and filed this appeal on March 20, 2007. (App. at 11-13, 20). He now asks this Court to find that the district court erroneously denied his motion to suppress, to reverse his convictions, and to remand with instructions to allow him to withdraw his guilty pleas.

STATEMENT OF THE FACTS

[¶ 7] On or about April 21, 2006, Rosally Mortenson went to visit the Appellant, Brian Shawn Hurt. whom she had been dating. (T. at 26). When she arrived at Mr. Hurt's apartment building, three women asked Ms. Mortenson to let them inside as it was a security building. (T. at 27). Mortenson agreed and let them inside. Id. Mortenson assumed that these women were officers of some sort because she noticed a badge. Id. Once inside, Mortenson walked to Hurt's apartment. (T. at 27). She knocked on Mr. Hurt's door and heard her friend, Jessica Bickler, say, "It's Rosie," just before opening the door. (T. at 28, 32). As Mortenson knocked on the door, the women she had let into the building stood off to the side. Id. When Bickler opened the door, Mortenson walked in only to have the women brush her off to the side and walk into Hurt's living room. (T. at 29). After entering, the women started yelling commands at the people inside. (T. at 30). They told everyone not to move and to keep their hands out of their pockets. Id. They instructed Mortenson to leave if she did not live there and did not want to be searched. Id.

[¶ 8] As it turned out, the women who entered Hurt's apartment were probation officers. (T. at 7-9, 12, 28-29). They did not have a warrant or consent to enter. (T. at 9, 18, 29-30). Mr. Hurt was present at the time probation officer's entered. (T. at 12). Once they were inside the apartment, a probation officer noticed paraphernalia on the living room coffee table. Id. The State did not contend that the paraphernalia could be seen from the front door, and Mortenson testified that the coffee table was not visible from that vantage point. (T. at 30). After the paraphernalia on the coffee table was discovered, a probation officer who had been called to the seen after the initial entry,

handcuffed Mr. Hurt and discovered paraphernalia on his person. (T. at 13, 21-22). As a result of the incident, Mr. Hurt was charged with felony and misdemeanor counts of possessing drug paraphernalia. (App. at 3).

[¶ 9] Hurt filed a motion to suppress arguing that the probation officers had entered and search his home without a warrant or an exception to the warrant requirement. (App. at 5-6). The State argued that the warrantless entry and search was justified as a probation search, and therefore a warrant was unnecessary. (App. at 1 (item 35, State's Responsive Brief)). The evidence showed that the probation officers entered Hurt's home to visit his roommate Jessica Bickler. (T. at 8, 16-17). Ms. Bickler had been convicted of felony drug crimes and was on supervised probation as a result. (T. at 8-11; App. at 7-13). The terms of Bickler's probation included a search clause. (T. at 10-11; App. at 7-13). Paragraph 16 of Bickler's probation conditions states as follows:

> The Defendant shall:
>
> Submit the Defendant's person, place of residence and vehicle, or any other property to which the Defendant has access, wherever they may be found, to search and seizure, with or without a search warrant, at any time of day or night by: 1) any parole or probation officer; or, 2) any law enforcement officer at the direction of a parole or probation officer; or, 3) any law enforcement officer with a reasonable suspicion or criminal conduct.

(App. at 10-11). The State argued that this search clause was the basis for entry and that it allowed the officers enter without a warrant. (App. at 1 (item 35, State's Responsive Brief)).

[¶ 10] Upon hearing the evidence, the district court denied Mr. Hurt's motion. (T. at 37-38). The district court found that although the probation officers did not have a warrant they could nonetheless enter Mr. Hurt's home based on the search clause of Ms.

Bickler's probation. (T. at 36-38). The district court clarified that in so ruling, it was relying upon the "Moser case,"[1] which the State had cited in support of its position. (T. at 35, 37-38; App. at 15-16). The court seemed to take the view that Hurt had no right to privacy in common areas shared with Bickler. (App. at 15).

[¶ 11] After his motion to suppress was denied, Hurt entered conditional guilty pleas and filed this appeal. (App. at 18-19, 27).

JURISDICTIONAL STATEMENT

[¶ 12] The district court had jurisdiction over this case pursuant to N.D. Const. art. VI, § 8, N.D.C.C. § 27-05-06(1). This Court has jurisdiction over this appeal under N.D. Const. art. VI, § 6, N.D.C.C. § 29-28-06(2). This appeal is timely under N.D.R.App.P. 4(b)(1)(A). Regarding the standard of review, this Court accords deference to the factual findings of the trial court when reviewing the denial of a motion to suppress. State v. Keilen, 2002 ND 133, ¶10, 649 N.W.2d 224 (quoting State v. Huffman, 542 N.W.2d 718, 720 (N.D. 1996)). However, the trial court's legal conclusions are fully reviewable. Id. Questions of law are reviewable de novo. State v. Kitchen, 1997 ND 241, ¶ 12, 572 N.W. 2d 106.

LAW & ARGUMENT

[¶ 13] The Fourth Amendment of the United States Constitution and Article I, Section 8 of the North Dakota Constitution prohibit unreasonable searches and seizures. Government agents "...need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home." Keilen, 2002 ND at ¶ 11 (quoting Kirk v. Louisiana, 536 U.S. 635, 638 (2002)). In fact, "physical entry into a

[1] The district court was referring to United States v. Moser, 240 F.Supp.2d 1068 (D.N.D. 2003), which is cited on pages 3-4 (pages not actually numbered) of the State's Response to Defendant's Motion to Suppress. The State's brief is item 29 on the Docket Sheets. (App. at 1).

home is the chief evil against which the wording of the Fourth Amendment is directed." Keilen, 2002 ND at ¶ 11 (quoting Payton v. New York, 445 U.S. 573, 585 (1980)). A warrantless search is unreasonable unless it falls within a recognized exception to the warrant requirement. State v. Linghor, 2004 ND 224, ¶ 4, 690 N.W.2d 201 (citing State v. Kunkel, 455 N.W.2d 208, 209-10 (N.D. 1990)). The government has the burden of showing that a warrantless search falls within such an exception. State v. Waltz, 2003 ND 197, ¶ 8, 672 N.W.2d 457 (quoting State v. Avila, 1997 ND 142, ¶ 16, 566 N.W.2d 410). Exceptions to the warrant requirement are few in number and carefully delineated. Welsh v. Wisconsin, 466 U.S. 740, 749-50 (1984). Law enforcement bears a heavy burden when attempting to demonstrate an urgent need that might justify a warrantless search or arrest. Id.

[¶ 14] While the preceding rules of Fourth Amendment jurisprudence have a certain rigidity about them, the Fourth Amendment and its State Constitutional counterpart have a built-in flexibility. The "touchstone of the fourth amendment," as its language suggests, "is reasonableness." Ohio v. Robinette, 519 U.S. 33, 39 (1996) (quoting Florida v. Jimeno, 500 U.S. 248, 250 (1991)). Reasonableness is measured in objective terms by exploring the totality of the circumstances. Robinette, 519 U.S. at 39. Court's have routinely achieved and maintained this "reasonableness" by balancing the interests of the government with the rights individuals. Mr. Hurt does not bring this appeal to ask that the entry into to his home be declared unlawful for all purposes, but to implore this Court to strike a reasonable balance by declaring the fruits of that search inadmissible as to him alone.

I. The District Court Erroneously Denied Mr. Hurt's Motion To Suppress Where Officers Entered Mr. Hurt's Home Without A Warrant, Probable Cause, Exigent Circumstances, Or Consent; Where The Only Proffered Justification For The Entering Mr. Hurt's Home Was That His Roommate Was Subject To Search As A Condition Of Her Probation; And Where There Was No Evidence That Mr. Hurt Was Aware Of His Roommate's Probation Much Less Its Particular Conditions.

[¶ 15] It seems appropriate to begin Mr. Hurt's analysis with the district court's reasoning. The district court seemed to suggest that based on its reading of United States v. Moser, 240 F.Supp.2d 1068 (D.N.D. 2003), Mr. Hurt had no expectation of privacy in the common areas of his home due the presence of his probationer roommate. (App. at 15). Like the case at bar, the Moser case concerned the search of a home inhabited by a probationer as well as a non-probationer. 240 F.Supp.2d at 1069. Amy Moser was Denver Evans' girlfriend, and, at the time the government search their home, they had already lived together for a number of years. Id. Moser was a convicted felon, who in accordance with the terms of her probation, was subject to warrantless probation searches. Id. at 1075. Evans was aware that Moser was on probation and subject to probation searches. Id.

[¶ 16] Although Moser had initially complied with the conditions of her probation, she did eventually miss a scheduled visit with her probation officer Rebecca Whitney. Id. at 169. After Moser's unexplained absence, Whitney attempted to make contact, but Moser's phone was disconnected. Id. Fearing that Moser had left the area, Whitney made plans to visit Moser's home. Moser, 240 F.Supp.2d at 169. Before she could actually make the trip, Whitney learned an area task force had received an anonymous tip suggesting Moser was manufacturing methamphetamine in her home. Id. The day after she learned of the anonymous tip, Whitney did go to Moser's home along

with several other officers from an assortment of law enforcement agencies. Id. at 1070. When they arrived, the home belonging to Moser and Evans was searched, and incriminating evidence was discovered. Id. A motion to suppress was submitted and denied. Id. at 1069.

[¶ 17] Admittedly, the Moser court does suggest that the government's actions were justifiable as a probation search, however; Moser does not control the outcome of this case. First, it should be noted that Moser was written by a federal district court and is therefore not a mandatory authority. 240 F.Supp.2d 1068. Secondly, to the extent that Moser is persuasive, it is important to realize that the Moser court's discussion of probation searches is essentially dicta. It is somewhat surprising that Amy Moser's probation was even discussed. The reason it was addressed is likely that, as a trial court, the Moser court has a different role than an appellate court. In contrast to an appellate court, a trial court might be more inclined to discuss each of the arguments raised regardless of whether they control the outcome, thereby satisfying the parties that their arguments were considered and simultaneously creating a record and an additional obstacle to successful appeal. The bottom line is that Amy Moser's status as a probationer did not control outcome of the case because both Moser and Evans consented to the search.

[¶ 18] In Moser, law enforcement knocked at the door, Amy Moser answered, and then, through her own free will, she consented to a search of her home. Moser, 240 F.Supp.2d at 1070, 1074-77. Furthermore, the evidence established that Denver Evans, who was not on probation, also gave his free and voluntary consent to the search. Id. at 1075-77. Having consented to the search, Evans could not credibly complain that his

Fourth Amendment rights were breeched merely because he was not on probation. Id. However, to the extent that Moser's status as a probationer contributed to the outcome of the case, Moser is in that regard distinguishable. The Moser court was careful to explain that Evans "had been living with probationer Amy Moser for several years and obviously was aware of the supervisory conditions that she was subject to as a convicted felon on probation..." Id. at 1076.

[¶ 19] In contrast with Denver Evans, Brian Hurt did not consent to the search of his home. (T. at 29-30). Although, as the State may point out, Hurt did consent to a search of his own bedroom, he did so after probation officers had already entered his home, discovered contraband, and placed him in handcuffs. (T. at 23-25). The importance the Moser court placed on the particular nature of Denver Evans' relationship with Amy Moser also warrants consideration. As the Moser court pointed out, Moser and Evans had a romantic relationship, had lived together for several years, and Evans was fully aware of Moser's status as a probationer and the attendant consequences of that status. 240 F.Supp.2d at 1076. That is simply not the case here. (T. at 17). The record is silent as to how long Mr. Hurt and Ms. Bickler lived under the same roof, the nature of their relationship beyond being roommates, and, perhaps most notably, whether Hurt was aware that Bickler was on probation and subject to warrantless search. Id. The district court made no findings on any of those matters despite the importance placed upon them by the Moser court. (T. 36-38; App at. 14-16).

[¶ 20] A more useful case for this Court to consider is Georgia v. Randolph, 547 U.S. 103, (pinpoint pages not currently available electronically for U.S. Reporter), 126 S.Ct. 1515 (2006). In Randolph, the United States Supreme Court held that "a physically

present co-occupant's stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him." 126 S.Ct. at 1519. This is true even where another tenant has consented to the search. Id. However, the manner in which the Court reached its decision is almost as important as the holding itself. The Court rendered its holding only after balancing the competing governmental and individual interests at stake. Id. at 1523-24.

[¶ 21] In Randolph, a woman named Janet Randolph called the police to report that her husband, Scott Randolph. had removed their son from the home. Id. at 1519. When officers arrived at the Randolph's shared home, Janet told them that Scott was a drug user. Id. Scott Randolph arrived shortly after the police and explained that he did leave their child at a neighboring home. Id. One of the officers left with Janet to retrieve the child. Id. When they returned, Janet told officers that Scott had drugs inside the home. Id. At hearing this, an officer asked Scott Randolph for permission to search the home. Randolph, 126 S.Ct. at 1519. Scott Randolph did not consent to the search, but officers simply turned to Janet Randolph who did give consent. Id. Pursuant to Ms. Randolph's permission, an officer searched the home, discovered incriminating evidence, and charged Scott Randolph with a crime. Id.

[¶ 22] The question of whether the evidence was admissible against Scott Randolph even though he had refused to give permission to search his home was brought before the United States Supreme Court. As it considered the novel issue before it, the Randolph Court engaged in the balancing of interests, focusing heavily on the traditional value placed on the sanctity of the home. The Court explained that "in the balancing of competing individual and governmental interests entailed by the bar to unreasonable

searches and seizures, Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523, 536-537 (1967), the cooperative occupant's invitation adds nothing to the government's side to counter the force of an objecting individual's claim to security against the government's intrusion into his dwelling place." Randolph, 126 S.Ct. at 1523. The Court elaborated:

> Since we hold to the "centuries-old principle of respect for the privacy of the home," Wilson v. Layne, 526 U.S. 603, 610 (1999), "it is beyond dispute that the home is entitled to special protection as the center of the private lives of our people," Minnesota v. Carter, 525 U.S. 83, 99, (1998) (KENNEDY, J., concurring). We have, after all, lived our whole national history with an understanding of "the ancient adage that a man's home is his castle [to the point that t]he poorest man may in his cottage bid defiance to all the forces of the Crown," Miller v. United States, 357 U.S. 301, 307, (1958) (internal quotation marks omitted).[FN4] Disputed permission is thus no match for this central value of the Fourth Amendment, and the State's other countervailing claims do not add up to outweigh it.[FN5]

Id. at 1523-24.

[¶ 23] Having addressed the individual and societal interest in maintaining the privacy of the home, the Court moved on to address the countervailing interests. While acknowledging the consenting occupant's interest in bringing criminal activity to the attention of law enforcement, a co-tenant's "legitimate self-interest in siding with the police to deflect suspicion raised by sharing quarters with a criminal," and the dissenting justices' concern that the majority holding might shield spousal abusers, the Court explained that it was not faced with an all or nothing proposition. Randolph, 126 S.Ct. at 1524-25. As the Court pointed out, the countervailing interests could be maintained without relying on "a theory of consent that ignores an inhabitant's refusal to allow a warrantless search." Id. at 1524. For example, a co-habitant can always bring evidence of wrongdoing to light without having to invite law enforcement inside. Id. at 1524-25.

With regard to spousal abusers, the Court explained that law enforcement may still enter a dwelling over the objection of a tenant for the purpose of protecting another when necessary and that whether an officer may enter for the purpose of obtaining evidence is a different matter entirely. Randolph, 126 S.Ct. at 1519

[¶ 24] Randolph is instructive for more than its narrow holding that a physically present cohabitant's withheld consent immunizes him against a search authorized by another occupant of his dwelling. Randolph highlights the Court's penchant for balancing and the favored, even paramount, status of privacy interests in the home. It is also useful in the instant case, for its implicit acknowledgement that while Scott Randolph immunized himself against the search authorized by his wife, his wife could still be prosecuted as a result of her own consent. Id. at 1526. In other words, the Court's ruling demonstrates that there is no reason to treat people alike simply because they can be found under the same roof. This is important because individual rights, as the term would seem to suggest, are specific to the individual and are not tied solely to and defined by the particular place in question. As the United States Supreme Court has explained from time to time, the Fourth and Fourteenth Amendments protect the "legitimate expectations of privacy of persons, not places." Ybarra v. Illinois, 444 U.S. 85, 91 (1979) (citing Rakas v. Illinois, 439 U.S. 128, 138-143, 148-149 (1978); Katz v. United States, 389 U.S. 347, 351-352 (1967)).

[¶ 25] The Court placed heavy emphasis on the fact that the Fourth Amendment protects people, not places in deciding the well-known case of Ybarra v. Illinois, 444 U.S. 85, 91 (1979). Ventura Ybarra was a bar patron who had the misfortune of being present when law enforcement officers entered with a warrant to search the premises and

the proprietor. Ybarra, 444 U.S. at 88. While executing the warrant one of the officers searched Ybarra. Id. at 89. In ruling that the search of Ybarra ran afoul of the Constitution, the Court explained that each person at the bar was clothed with Fourth Amendment protections that were "separate and distinct" from those of the proprietor and that while the warrant gave officers the right to enter it did not permit them to "invade the constitutional protections possessed individually by the tavern's customers." Id. at 91-92.

[¶ 26] In deciding the case at bar, it is useful to remember Ybarra. 444 U.S. 85. Brian Hurt and Jessica Bickler do not have the same set of generic rights any more than Ybarra and the bar owner did. It is true that Hurt and Bickler shared a similar connection to the property, but while their right to use and enjoy that property might be similar, their Fourth Amendment protections are "separate and distinct." Id. at 91. Since their Fourth Amendment protections are not the same they should not be treated the same. Like the warrant in Ybarra, Bickler's probation conditions authorized the probation officers to enter her apartment. Whatever they found could be used against Bickler. However, the authority to enter, to search, and to seize, should not be conflated with the right to prosecute whoever else might have ties to the premises.

[¶ 27] Randolph is also important because like Randolph the instant case is, at its core, a case premised upon a consent search. See State v. Krous, 2004 ND 136, ¶19, 681 N.W.2d 822. This Court's reasoning in State v. Krous explains why this is true. 2004 ND at ¶19. At the time law enforcement searched her home, Susan Krous was an on probation for drug crimes. Krous, 2004 ND at ¶2. One of the terms of her probation required her to "submit to search of her person, vehicle, or place of residence by any probation officer at any time of the day or night, with or without a search warrant." Id.

As a result of discoveries made during the search, the government sought to revoke her probation. Id. at ¶5. Krous argued that the word "submit" in the search clause of her probation required a person seeking to conduct a probation search to first ask for permission. Id. at ¶12. Her position was that if the probationer withheld consent to search, the government could revoke probation, but could not execute a warrantless search without consent. Id. This Court disagreed. Id. at ¶1.

[¶ 28] As it considered Krous' argument, this Court reflected on its past statements explaining that "a probationer's Fourth Amendment rights were limited by his status as a probationer" and that "the courts have responsibility to regulate a probationer's activities to help in his rehabilitation." Id. at ¶16. As it rejected her argument this Court posited that Krous' interpretation of her search clause would "render the condition meaningless and would defeat the purposes of such conditions to deter further offenses by the probationer and determine compliance with the terms of probation." Krous, 2004 ND at ¶18. The Court went on to explain that Krous' search clause, which included the "word 'submit' means that the probationer consents to reasonable warrantless searches without any request for consent by officers." Id. at ¶19. In other words, "Krous consented to having her Fourth Amendment rights limited when she accepted the conditions of probation." Id.

[¶ 29] Like Susan Krous, Jessica Bickler was subject to a probation condition that required her to "submit" to search. (App. at 11). Bickler "consented to having her Fourth Amendment rights limited when she accepted the conditions of probation." See Id. When present at the time of a consent search, a person has the right to insulate himself against the search by withholding consent even where a cohabitant has given

consent. See Randolph, 126 S.Ct. at 1526. Under the Krous rationale, a probationer consents to search prospectively at the time the probation terms are accepted. Krous, 2004 ND at ¶19. Due to the prospective nature of the consent, probation officers do not need to ask permission before conducting a probation search. Id. Because there is no reason to ask, the parents, siblings, spouses, and roommates of probationers will rarely if ever get the opportunity to exercise the right to withhold their consent: a right addressed by the Randolph Court. 126 S.Ct. at 1526

[¶ 30] Having addressed the preceding cases, a careful balancing of interests must be conducted. The favored status of privacy in the home must be remembered. See Randolph, 126 S.Ct. at 1523-25. That, "physical entry into a home is the chief evil against which the wording of the Fourth Amendment is directed" should be given significant weight. Keilen, 2002 ND at ¶11 (quoting Payton, 445 U.S. at 585). Above all, achieving reasonableness should be the goal. See Robinette, 519 U.S. at 39 (quoting Jimeno, 500 U.S. at 250)(explaining that reasonableness is the "touchstone of the fourth amendment.").

[¶ 31] The implications of the district court's ruling must be examined. The district court essentially ruled that Brian Hurt had no Fourth Amendment protections in the common areas of his home. (T. at 36-38; App. at 14-16). In so ruling, the court's judicial scale was heavily skewed in favor of the government. Hurt's interests were given no weight or consideration. Instead of treating Hurt as a private citizen with the full panoply of Fourth Amendment rights, the district court treated him as though his rights were diminished in the same manner as his probationer roommate. Based on the exceedingly broad language of Bickler's search condition, (App. at 11), and the broad

strokes of the district court's decision, (T. at 36-38; App. at 14-16), the question must be asked: is it reasonable to say that a probationer may prospectively diminish the Fourth Amendment rights of whomever she may visit in the future: anyone she may live with, anyone to whom she may provide house-sitting or cleaning services (See App. at 11; search condition states that Bickeler must submit to search of property to which she has access); whether the person is aware of the danger or not? Clearly, if the person is unaware of the danger posed by living with a probationer or unaware that he is, in fact, living with such a person, then that person's expectation of privacy is no less reasonable. Certainly, a probationer may forfeit her Fourth Amendment rights to a significant degree, See Krous, 2004 ND at ¶16, but a roving zone where those protections wither away for all persons who unwittingly find themselves within the physical proximity of a probationer cannot reasonably exist. If this position were adopted, it could easily be used to subvert the Fourth Amendment and the sanctity of the home. However, because the Fourth Amendment lends itself to reasonable and balanced application, it is simply unnecessary to hinder the government or private persons.

[¶ 32] The search that led to Mr. Hurt's predicament need not be deemed invalid for all purposes, and a ruling in his favor need not impede the efforts of probation officers as they look after those in their charge. Striking the appropriate balance between competing individual and governmental interests is a hallmark of Fourth Amendment analysis. See Randolph, 126 S.Ct. at 1523.

[¶ 33] In Mr. Hurt's case, the search should be deemed invalid as to him alone. The search can still be considered valid as to his probationer roommate. Mr. Hurt's roommate was placed probation for a reason. (App. at 7-13). She was convicted of a

crime, and, as a consequence, she affirmatively squandered her Fourth Amendment protections. (App. at 7-13) See Krous, 2004 ND at ¶16. Admittedly, there is a governmental need for measures calculated to hold her accountable. See Krous, 2004 ND at ¶¶16, 18. On the other hand, Mr. Hurt did not similarly forfeit his rights by merely sharing an apartment with Ms. Bickler. This is especially true since, unlike the Moser case, there was no showing that Hurt knew about Bickler's probation much less its particular conditions.

[¶ 34] Assuming that the true motivation for the search in question was to hold Ms. Bickler accountable in accordance with her probation, the government is made no worse off by the exclusion of evidence against Mr. Hurt. The case against Mr. Hurt was simply a bonus: something the probation officers were not expecting or seeking. The lure of such a bonus prosecution could motivate the government to use probation searches as an effective but pernicious artifice. The government should be encouraged to keep probation searches in their proper sphere. The government does not need the bonus it would receive by gaining evidence against individuals with whom it was not initially concerned or even acquainted. That would simply encourage officers to conduct searches more often and foster ulterior motives. However, if the Court leaves the protections of cohabitants intact, it would do nothing to discourage reasonable and appropriate probation searches. No probation officer would be deterred from doing his job simply because evidence implicating his probationer's cohabitants, should any exist, would be deemed inadmissible against those persons. The exclusionary rule, which was designed, in part, to deter unlawful conduct of government agents by removing any incentive for such conduct, is well-suited to protect persons like Mr. Hurt.

[¶ 35] A rule that would allow the government to use evidence obtained during a probation search against the probationer but not against the probationer's cohabitants strikes a fair and reasonable balance. It recognizes that a probationer's Fourth Amendment protections are "separate and distinct" from the protections of others under the same roof. Ybarra, 444 U.S. at 91. It gives due weight to the "centuries-old principle of respect for the privacy of the home." Randolph, 126 S.Ct. at 1523 (quoting Wilson, 526 U.S. at 610). and the fact that "physical entry into a home is the chief evil against which the wording of the Fourth Amendment is directed." Keilen, 2002 ND at ¶11 (quoting Payton, 445 U.S. at 585). The balance struck by such a rule poses no threat to the courts' "responsibility to regulate a probationer's activities to help in his rehabilitation." Krous, 2004 ND at ¶16. No probation officer would be deterred from conducting a probation officer by the proposed rule. Although the rule would call for the exclusion of evidence against persons like Hurt, it should nonetheless be recognized that such a person would not be able to prevent the actual search, just a tainted prosecution. There is still a sacrifice for persons like Hurt. Their privacy interests would still be compromised as the State's interests must also be considered and reasonably accomodated. Furthermore, there is nothing that would prevent a probation officer from asking the probationer's cohabitants whether they consent to the search. As Krous established, a probationer consents to search at the time the terms are accepted, 2004 ND at ¶19, but it would take virtually no extra effort to ask for the consent search. Again, the withholding of consent would not prevent the search or the use of evidence against the probationer. The withholding of consent under those circumstances would simply protect a person who stands with the full panoply of Fourth Amendment protections intact and

place them as near as possible to position of any other private citizen. On the whole, Bickler's probation condition "adds nothing to the government's side to counter the force of [Hurt's] claim to security against the government's intrusion into his dwelling place." Randolph, 126 S.Ct. at 1523. Mr. Hurt's convictions should be reversed accordingly.

CONCLUSION

[¶ 36] For all of the foregoing reasons, Mr. Hurt asks this Court to reverse his convictions and remand with instructions to allow him to withdraw his guilty pleas.

Dated this the 4th day of June, 2007.

AALAND LAW OFFICE, LTD.

By: /S/ Jesse N. Lange

Jesse N. Lange (ND ID No. 06008)
415 11th St. S.; P.O. Box 1817
Fargo, ND 58107-1817
Telephone: (701) 232-7944
Facsimile: (701) 232-4037
Attorneys for the Defendant

[¶ 37] CERTIFICATE OF SERVICE

A copy of this document and the Appendix to Brief of Appellant in pdf format were e-filed with the North Dakota Supreme Court and served upon Reid A. Brady, pursuant to Administrative Order 14 on the 4th day of June, 2007. Specifically, the preceding Brief of Appellant and the Appendix to Brief of Appellant were electronically filed and served as follows:

The North Dakota Supreme Court
supclerkofcourt@ndcourts.com

Reid A. Brady – Attorney for the Plaintiff and Appellee
bradyr@co.cass.nd.us

/S/ Jesse N. Lange
Jesse N. Lange