Electronically Filed
9/22/2021 9:36 AM
Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 48633-2021**
Plaintiff-Respondent,	)	
	)	**ADA COUNTY NO. CR01-19-21037**
v.	)	
	)	
CLARENCE EDWARD LANCASTER,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

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

HONORABLE JASON D. SCOTT
District Judge

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STATEMENT OF THE CASE

Nature of the Case

This case presents an issue regarding the interpretation of the Idaho Constitution. In this case, the district court correctly found that officers failed to comply with I.C. § 19-608 when they arrested Clarence Lancaster. Specifically, the officers repeatedly refused to notify him of the reason for his arrest, despite his inquiries for that information. Instead, they misrepresented their knowledge in that regard and made cryptic and dramatic comments, such as, "All will be revealed here shortly."

Despite this blatant disregard of the statutory requirements for arrest procedures, the district court refused to suppress the fruits of that unlawful arrest. Mr. Lancaster contends that was erroneous because the Framers of the Idaho Constitution would have considered the failure to comply with the requirements of I.C. § 19-608's territorial counterpart to also be an unreasonable seizure under Article I, Section 17 of the Idaho Constitution. He notes that the Idaho Supreme Court recently commented on this concept, *see State v. Sutterfield*, 484 P.3d 839, ___, slip opinion pp.11-12 (Idaho 2021), but that conclusion should be reconsidered because it purported to resolve a constitutional question without the input of the parties and did so by using an abrogated, and thus, manifestly wrong, rationale. A proper examination of that issue, which is now squarely presented on appeal, reveals that this Court should reverse the order denying Mr. Lancaster's motion to suppress and remand this case for further proceedings.

In addition, Mr. Lancaster asserts the district court erred by not granting certain aspects of his motion to strike a prior presentence report which the district court acknowledged contained information which was not reliable.

Statement of the Facts and Course of Proceedings

On May 26, 2019, Officer Orton joined an investigation into the alleged burglary and theft of an ATM machine. (R., p.168 (Defense Exhibit A – Officer Orton's report).) Specifically, he was provided a license plate number of the suspect's rental car, and he sent that information to a contact with the rental company (Enterprise) to try to identify the person who rented the car. (R., p.168.) The rental company provided information and a photograph for one "Clarence Lancaster," and that information was forwarded to the officers assigned to the case. (R., p.168.) During the ensuing conversation with the other officers, Officer Orton was told there was probable cause to arrest Mr. Lancaster for burglary if he was located. (R., p.168.)

Several hours later, at about 6:00 p.m., Officer Orton observed a car generally matching the description of the suspect rental car, which he said did not have license plates displayed.[1] (R., p.168.) When he turned around, the vehicle quickly drove away. (R., p.168.) Officer Orton found the car a few minutes later in a nearby Albertson's parking lot.[2] (R., p.168.) He also saw a man who matched the photograph provided by Enterprise walking from the direction where the car was parked and toward the store entrance. (*See* R., pp.168-69; R., p.172 (the district court's findings of fact that Officer Orton recognized the man as Mr. Lancaster from the photograph).) Officer Orton pulled up next to the man and said, "Clarence, stop! You—Clarence!"

[1] While the rear license plate was not attached to the back of the car, it was displayed in the rear window. (*See* Defense Exhibit E, ~3:54.)

As the district court explained, there was some confusion as to which video file on the DVD submitted as Defense Exhibit E came from which officer's body camera. (R., p.172.) In addition to Officer Orton's body camera video (DR 19-910045 OBV Orton – PROBSUB-Problem_With_Subject.mp4), there are also body camera videos from Officers Lane and Wilson. However, Officer Lane's video is also provided in Defense Exhibit B, and Officer Wilson's in Defense Exhibit D. Therefore, references to "Defense Exhibit E" are to Officer Orton's video. Quotations from all the video exhibits are transcribed to the best of appellate counsel's ability.

[2] There was no indication that Officer Orton activated his overhead lights during this time. (*See generally* R., p.168; Defense Exhibit E, ~0:00; *compare* Defense Exhibit E, ~1:50 (showing Officer Orton's car without the overhead lights on).)

(R., p.172.) The man responded that his name was Wally Johnson.[3] (R., p.168; Defense Exhibit E, ~0:43.)

The officer asked if the man had identification, and he replied it was in his car. (Defense Exhibit E, ~0:46.) Officer Orton told the man to go back to the car to get his identification. (R., p.172; Defense Exhibit E, ~1:00.) At that time, the man also asked why the officer had called him "Clarence." (Defense Exhibit E, ~1:02.) The officer said, "Because that's your name," and that he believed that to be the case based on the picture he had of "Clarence Lancaster." (Defense Exhibit E, ~1:05.) The officer also said if the man kept lying, he would receive a criminal charge. (Defense Exhibit E, ~1:09.)

On the way back to the car, the officer asked if the car belonged to the man, and he said no, it was from Enterprise. (R., p.172; Defense Exhibit E, ~2:18.) At that point, the officer stopped the man and placed him in handcuffs. (Defense Exhibit E, ~2:24.) As he did so, Officer Orton asked why the man had lied about his identity.[4] (Defense Exhibit E, ~2:52.) He responded, "Because I figured you would want me for something." (Defense Exhibit E, ~2:53.) He then specifically asked Officer Orton what he was being arrested for. (Defense Exhibit E, ~3:02.) All Officer Orton said was, "Well, I think you probably know." (Exhibit E, ~3:07.)

Officer Orton proceeded to search the man's pockets and found a credit card issued to "Clarence Lancaster." (Defense Exhibit E, ~4:05.) As he searched, Mr. Lancaster said, "But if

[3] The district court found that the first time he was asked, the man gave the name "Willy" and the second time, he gave the name "Wally." (R., p.172 (referencing Officer Orton's body camera video).) However, Officer Orton's report only indicates that he gave the name "Wally." (R., pp.168-69.)

[4] Mr. Lancaster was not read his rights until he had been taken to the police station. (*See generally* Exhibits B, D, E.) However, no issue was raised with respect to whether his various responses to questions in the parking lot were obtained in violation of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). (*See generally* R.) As such, Mr. Lancaster reserves the right to raise that issue in post-conviction if he ultimately deems it appropriate to do so.

you're looking for me that means I'm already in trouble." (Defense Exhibit E, ~4:06.) Officer Orton responded, "Well, there's a reason I'm looking for you and we'll explain all that to you when we get you up to the station." (Exhibit E, ~4:07.)

At about that time, Officer Lane and Sergeant Rogers arrived on the scene. (*See* R., p.169; Defense Exhibit E, ~4:54.) Officer Lane took control of Mr. Lancaster while Officer Orton retrieved Mr. Lancaster's medications from the car. (Defense Exhibit E, ~4:55; Defense Exhibit B, ~0:43.) Officer Lane then moved Mr. Lancaster away from the other officers. (Defense Exhibit B, ~1:59.) As he did so, Mr. Lancaster asked him, "So what's going on?" (Defense Exhibit B, ~2:08.) Officer Lane responded vaguely, "Well, there's going to be somebody who wants to come talk to you. Okay? Well, and actually we're probably going to go somewhere else to talk to this person." (Defense Exhibit B, ~2:10.)

Meanwhile, Sergeant Rogers asked Officer Orton on what the charges Mr. Lancaster was being arrested, and Officer Orton responded, "That burg. Basically for burg." (Defense Exhibit E, ~7:05.) The sergeant asked if there was anything else and Officer Orton said, "No. I mean he tried to ditch me but then he lied to me, so I can . . . ."[5] (Defense Exhibit E, ~7:10.)

Officer Orton then went over to where Officer Lane and Mr. Lancaster were standing. (Defense Exhibit E, ~7:35.) Mr. Lancaster asked again, "So tell me what's going on?" (Defense Exhibit E, ~7:50; Defense Exhibit B, ~3:21.) Officer Orton responded, "I said we're going to take you up to our police station and there's a detective who wants to speak with you. Okay? He'll be able to advise you everything that's going on." (Defense Exhibit E, ~7:51; Defense Exhibit B, ~3:22.) Officer Orton then went to move his car. (Defense Exhibit E, ~8:03.)

[5] Officer Orton's response trailed off when Sergeant Rogers answered his radio and called for a transport officer to come to the scene. (Defense Exhibit E, ~7:11.)

As Mr. Lancaster and Officer Lane waited, Mr. Lancaster told the officer, "I'm just trying to figure out what's going on." (Defense Exhibit B, ~4:14.) Officer Lane responded, "Like my partner over there said, we're going to take you up to our police station. There's a detective who wants to speak with you. (Defense Exhibit B, ~4:17.) Officer Lane then moved Mr. Lancaster to a nearby shelter to get out of the rain which had begun to fall. (Defense Exhibit B, ~4:47.) At that point, Mr. Lancaster asked him directly, "So you can't tell me what's going on?" (Defense Exhibit B, ~5:41.) Officer Lane responded, "I don't know what's going on. I just know that a detective wants to talk with you. About what, I don't know. I just run a dog. I'm a dog guy. I was close and he asked for another officer." (Defense Exhibit B, ~5:42.)

Subsequently, Officer Wilson arrived on scene to transport Mr. Lancaster to the police station. (Defense Exhibit B, ~9:14.) As she got Mr. Lancaster situated in her car, she said they would be leaving for the jail shortly. (Defense Exhibit D, ~4:11.) Mr. Lancaster told her that Officer Orton said he had to go talk to a detective. (Defense Exhibit D, ~4:15.) Officer Wilson said she would find out the details and closed the car door. (Defense Exhibit D, ~4:17.) She then asked the other officers where she was supposed to take Mr. Lancaster. (Defense Exhibit D, ~4:20.) Officer Lane told her, "He's going to CID to speak with Bourgeau." (Defense Exhibit D, ~4:27.) Officer Wilson asked if Mr. Lancaster had warrants, and Officer Lane said, "This is your smash-and-grab ATM thief." (Defense Exhibit D, ~4:45.) At the same time, Officer Orton also said, "The ATM thief." (Defense Exhibit, ~4:48.)

During the drive to the police station, Mr. Lancaster asked Officer Wilson if she knew why he had been arrested. (Defense Exhibit D, ~8:24.) However, she responded evasively: "I have an idea, but it's not my case, so I'd hate to talk out of turn. As far as we know, the detectives wanted to talk to you about a case and put out your information." (Defense Exhibit D,

~8:24.) Officer Wilson asked what the other officers had told Mr. Lancaster, and he repeated that it was just had to go somewhere else to talk to someone. (Defense Exhibit D, ~9:10.) He added that, "if they've got vehicle information and my description, somebody's [inaudible]." (Defense Exhibit D, ~9:43.) Officer Wilson then responded dramatically, "Well, I'm sure everything will be explained here shortly. All will be revealed here shortly and once we're there . . . ." (Defense Exhibit D, ~9:50 (proceeding to describe what she would do when they arrived at the jail).)

At the police station, the detectives began interrogating Mr. Lancaster. Detective Bourgeau's report noted that, Mr. Lancaster "initially did not know why he was being held." (R., p.121.) The detectives provided Mr. Lancaster with *Miranda* warnings at that point and proceeded to ask about the ATM thefts. (R., pp.121, 125.) He ultimately confessed to all three incidents. (R., pp.121-22; 125-26.) They then asked him where the ATM machines were located, and he gave them the location. (R., pp.122, 126.) Based on his disclosures, crime scene investigators were dispatched at about 9:00 p.m. and found the ATM machines. (R., p.126; *see generally* R., pp.133-51.)

The State ultimately charged Mr. Lancaster with burglary and theft for each ATM incident. (R., pp.11-13.) It subsequently added four additional burglary charges for other incidents.[6] (*See* R., pp.29-31.)

Mr. Lancaster subsequently moved to suppress all the evidence obtained as the result of his arrest, alleging that the arrest was unlawful and violated Article I, Section 17 of the Idaho Constitution. (R., p.87.) Specifically, he argued that the officers violated I.C. § 19-608 by refusing to tell him the reason for his arrest, particularly when he had repeatedly asked them to

[6] All the offenses ultimately charged were alleged to have occurred, at the latest, by the day before Mr. Lancaster's arrest. (*Compare* R., pp.29-31; *with* R., p.168.)

tell him the reason. (R., p.89.) He also asserted that I.C. § 19-608 had territorial roots.[7] (R., p.89.) Based on that, he argued that the failure to follow the procedures required by I.C. § 19-608 amounted to an unreasonable seizure which violated Article I, Section 17 of the Idaho Constitution. (R., pp.89-90 (citing *State v. Clarke*, 165 Idaho 393, 396 (2018).) Therefore, he asserted, the proper remedy for the unlawful arrest was suppression of the fruits of that arrest. (R., pp.90-91.)

In its response, the State argued that Mr. Lancaster was not actually placed under arrest in the parking lot, but rather, at the end of the interrogation at the police station. (R., pp.107-09.) As such, it asserted the detectives complied with I.C. § 19-608 when they informed Mr. Lancaster of the reason for his arrest after the interrogation concluded. (R., p.108.) It also asserted that Mr. Lancaster's actions of trying to elude and lie to the officer demonstrated he knew the reason Officer Orton was detaining him based on the burglaries. (R., p.107.) The parties submitted the motion to suppress on the briefing and evidence which accompanied the briefs. (R., p.174.)

The district court noted there were three questions which it had to resolve in ruling on the motion: (1) at what point the arrest occurred; (2) whether the officers complied with I.C. § 19-608 when the arrest occurred; and (3) whether a violation of I.C. § 19-608 required suppression of the resulting evidence. (R., pp.174-75.) It specifically noted the State had not addressed the question of remedy in any of its arguments. (R., p.175.)

The district court concluded that Mr. Lancaster was under arrest at the latest by the time he was placed in the patrol car and taken to the police station. (R., p.176.) It also concluded that the plain language of the statute did not create an exception based on the arrestee's apparent

[7] Trial counsel attached a copy of I.C. § 19-608's territorial counterpart to his motion. (*See* R., p.50 (specifically, Section 138).)

knowledge of the reason for the arrest. (R., p.179.) As such, it determined the officers had failed to comply with I.C. § 19-608 by refusing to tell Mr. Lancaster the reason for the arrest when it was effectuated in the parking lot. (R., p.178.)

However, the district court concluded suppression was not an appropriate remedy for the violation of I.C. § 19-608. The district court believed that the Supreme Court's decision in *Clarke*, which clarified the test for whether a statutory violation was also a violation of the state constitution, hinged on the fact that the Supreme Court had found uniform agreement in the other states about the applicable common law rule. (R., pp.183, 186.) Based on that understanding, the district court examined other state court decisions related to this issue and found that there was significant disagreement among the other states as to the nature of the arrest procedure requirements, potential exceptions thereto, and the ability to remedy violations thereof. (R., pp.183-86.) Based on its finding that there was not uniformity in the other states' decisions, the district court concluded it could not find that a violation of I.C. § 19-608 was also of constitutional dimension. (R., p.183.) It also concluded that none of the rationales behind Idaho's exclusionary rule would be served by suppressing the fruits of an arrest conducted in violation of I.C. § 19-608 because the purpose of that statute was to foster peaceable arrests. (R., p.189.)

Mr. Lancaster filed a motion to reconsider the order denying his motion to suppress. (R., pp.193-200.) He argued the district court's focus on whether there was unanimous agreement between the other states was improper because the actual focus of the *Clarke* analysis was on the intent of the Framers of the Idaho Constitution. (R., p.196.) Therefore, he asserted, an Idaho territorial statute should carry more weight in the analysis of the Framers' understanding of the provisions of the new state constitution than what other states might have

done under their own statutes because the Framers would have been aware of what Idaho's laws required in that regard and crafted the new constitution based on such understandings. (R., p.196.) Mr. Lancaster also pointed out that many of the state decisions to which the district court had looked were not applicable to his case because they did not actually find violations of the statutes in those scenarios. (R., pp.197-98.) As such, Mr. Lancaster argued, many of those other states would have still suppressed the evidence found in a case where there actually was a violation of the statute. (R., p.198.)

Moreover, he pointed out that the Idaho Supreme Court had actually already held suppression was the appropriate remedy for the violation of this sort of statute. (R., p.194 (citing *State v. Rauch*, 99 Idaho 586 (1978)).) As such, he argued, there was not even a reason to resort to a survey of what other states had done when Idaho law already indicated how Idaho's Framers intended Idaho's Constitution to function in this context. (R., p.194.)

The district court denied that motion. (R., pp.193-200.) It concluded that *Rauch* only reaffirmed its analytical approach – to look to other state courts for their interpretation of the same legal issue. (R., p.206.) It also made it clear that its decision was based on its understanding that *Clarke* required unanimity in the other states' interpretations of the issue before any statutory protection could be deemed of constitutional dimension under the Idaho Constitution. (R., p.207 n.2.)

Mr. Lancaster then entered a conditional binding plea agreement which called for him to plead guilty to one count of burglary and one count of grand theft, with concurrent sentences of ten years, with one and one-half years fixed, imposed on each of those two counts. (R., p.220.) He specifically reserved his right to appeal the denial of his motion to suppress. (R., p.221.) The district court ultimately agreed to be bound by that plea agreement. (Tr., p.57, L.17.)

In advance of the sentencing hearing, Mr. Lancaster filed a motion to correct numerous alleged errors in the presentence investigation report (PSI). (R., pp.237-47.) For example, he asserted, *inter alia*, that the 2009 Utah PSI report which was attached to this PSI should be stricken, as well as the references to it in the new Idaho PSI, because the Utah PSI contained several inaccuracies, particularly with respect to his criminal history. (R., pp.238 & 243 (motion items 4, 35, and 36); *accord* Tr., p.41, L.10 - p.42, L.20.) He also asserted that reliance on such irrelevant information would violate his right to due process. (R., p.244.)

At the sentencing hearing, the district court went through each of the alleged errors, accepting some corrections and rejecting others. (*See generally* Tr) With respect to the Utah PSI issue, the district court acknowledged, "There may be discrepancies in the criminal history as recited there compared to the federal pre-sentence report. I'll just indicate that I'm treating the federal pre-sentence report as authoritative when it comes to the defendant's criminal history, and to the extent the Utah pre-sentence report conflicts with it, the discrepancies in the Utah report won't be considered." (Tr., p.42, L.24 - p.43, L.6.) The district court made various redline notations on its copy of the PSI based on its rulings, including to its discussion of Mr. Lancaster's criminal history. (*See* Conf. Exh., pp.5, 11-14.) In addition, a corrected copy of the PSI was presented with those corrections taken into account. (*See generally* Conf. Exh., pp.408-26.) However, the Utah PSI still appears in the PSI materials. (*See* Conf. Exh., pp.524-33 (listing the page number of the "Amended PSI" in the bottom center of the page).)

Mr. Lancaster filed a notice of appeal timely from the judgment of conviction. (R., pp.280, 287.)

ISSUES

I. Whether the Framers would have considered a violation of I.C. § 19-608's territorial counterpart to also violate Article I, Section 17 of the Idaho Constitution.

II. Whether the district court erred by not striking the Utah PSI, which it acknowledged contained unreliable information.

ARGUMENT

I.

The Framers Would Have Considered A Violation Of I.C. § 19-608's Territorial Counterpart To Also Violate Article I, Section 17 Of The Idaho Constitution

A. Introduction

The district court properly concluded that Mr. Lancaster was under arrest at least by the time he was handcuffed and placed in a patrol car to be taken against his will to the police station. (R., p.176.) Idaho Code § 19-608 provides: "The person making the arrest *must inform* the person to be arrested of the intention to arrest him, *of the cause of the arrest,* and of the authority to make it, except when the person to be arrested is actually engaged in the commission of, or an attempt to commit, an offense, or is pursued immediately after its commission, or after an escape." (Emphasis added). As such, the district court also properly concluded that, at the time of that arrest, the officers did not tell Mr. Lancaster the reason they were arresting him in violation of the plain language of I.C. § 19-608. (R., p.178.) Therefore, the only question left for this appeal is whether the violation of that statute also violated the Idaho Constitution, such that the fruits of the unlawful arrest should be suppressed. (*See* R., p.181.)

B. Standard Of Review

When, as here, a motion to suppress was decided without a hearing and the appellate court has all the same evidence that was before the district court, the appellate court reviews the motion *de novo*. *State v. Andersen*, 164 Idaho 309, 312 (2018). Additionally, questions of constitutional interpretation are questions of law which are reviewed *de novo*. *State v. Le Veque*, 164 Idaho 110, 113 (2018).

C. The Current Supreme Court Precedent Does Not Resolve This Issue

At the time it ruled on this issue, the district court noted the question of whether a violation of I.C. § 19-608 was also of constitutional dimension was an open question. (R., p.181.) While the Idaho Supreme Court did comment on that question a year later in *State v. Sutterfield*, 484 P.3d 839, ___, slip opinion p.12 (Idaho 2021), that conclusion should be reconsidered because it purported to resolve that constitutional question of first impression even though the parties had not argued that issue on appeal, and its conclusion was based on an overruled rationale. As such, *Sutterfield*'s conclusion was manifestly wrong, unjust, or unwise. *See, e.g., Houghland Farms v. Johnson*, 119 Idaho 72, 77 (1990) (reaffirming that courts should not follow controlling precedent which has been revealed to be manifestly wrong, has proven to be unjust or unwise, or doing so is necessary to vindicate plain, obvious principles of law and remedy continued injustice).

Sutterfield's decision is, in part, a product of the particular facts of that case, as well as the procedural footing on which it reached the Supreme Court. In that case, the defendant stole a cell phone from a restaurant employee's presence. *Id.*, slip opinion at p.2. Upon discovering the theft, the employee went to a nearby laundromat, where he confronted the defendant, who returned the phone. *Id.* The employee then called police to report the theft and that he believed the defendant had a weapon. *Id.* An officer arrived and immediately approached the defendant and conducted a pat search. *Id.* Upon completing that search, he placed the defendant in handcuffs and read him his *Miranda* rights. *Id.* Only after doing that did the officer talk to the employee. *Id.* At that time, he explained he could simply cite and release the defendant, or the employee could direct him to effectuate a citizen's arrest. *Id.* The employee indicated he wanted

to effectuate a citizen's arrest. *Id*., slip opinion at p.3. During the ensuing search of the defendant, the officer found various contraband. *Id.*

The district court concluded that the employee's and the officer's failure to comply with I.C. § 19-608 in effecting the defendant's arrest meant the arrest was actually for a misdemeanor not committed in the officer's presence. *Id*., slip opinion at pp.3-4. Based on that conclusion, the district court suppressed the resulting evidence under *State v. Clarke*.[8] *Id.*, slip opinion at p.4. The State appealed that decision. *Id.*

On appeal, the defendant-respondent conceded the district court erred in concluding it was the failure to comply with the statute which created the *Clarke* violation in that case. *See id*., slip opinion, pp.11-12. Rather, he argued, it was the fact that the officer had effectively arrested him before talking to the employee which created the *Clarke* violation. *See id*., slip opinion at p.4; *see also id.*, slip opinion pp.14-15 (Stegner, J., dissenting). In other words, he argued the officer had effectively arrested him before he talked to the employee, and so, could not justify the arrest on the citizen's arrest theory; it was simply the officer effectively arresting him for a misdemeanor not committed in his presence. *See id*.

The Supreme Court concluded that the arrest did not actually happen until after the officer talked with the employee, and thus, the employee was, in fact, the arresting entity, and he simply elicited the officer's assistance in effectuating the arrest. *Id*., slip opinion at pp.6-9. As such, the Supreme Court concluded the offense had occurred in the arresting agent's (the employee's) presence, and therefore, did not amount to a *Clarke* violation. *Id*., slip opinion at p.8.

[8] *State v. Clarke*, 165 Idaho 393 (2018).

After resolving the issue actually argued by the parties, the Supreme Court proceeded to note that the officer had still violated I.C. § 19-608 by not ultimately informing the defendant that his authority for the arrest was as a citizen's arrest.[10] *Sutterfield*, slip opinion at p.12. However, acknowledging that the defendant-respondent had not presented an argument about whether the violation of the statute also amounted to a violation of the Idaho Constitution, the Supreme Court stated, "we decline to make such a ruling today." *Id*. at slip opinion, p.11 (citing *Bach v. Bagley*, 148 Idaho 784, 790 (2010), for the premise that the Court "will not consider an issue that is not supported by argument and authority"). Instead, it simply stated that the statutory violation was not of constitutional dimension because the facts of that case were similar to the facts presented in *State v. Green*,[11] and therefore, "suppression of evidence is not the appropriate remedy for the reasons articulated by this Court in *Green*." *Sutterfield*, slip opinion at p.12.

Sutterfield's conclusion in that regard should be reconsidered because it was based on an abrogated rationale and was made without the benefit of briefing from the interested parties.[12] First, as the Idaho Supreme Court recently reaffirmed, "'The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.'" *Reclaim Idaho v. Denney*, ___ P.3d ___, slip opinion p.13 n.6 (2021) (quoting, *State v.*

[10] There is an exception in the language of I.C. § 19-608, which provides the requirement to give notice is excused if the person to be arrested is actually engaged in the commission of the offense or pursued immediately thereafter. I.C. § 19-608. *Sutterfield* did not discuss the interplay of this exception with its conclusion that the employee, who pursued the defendant immediately upon discovering the crime and summoned assistance to help him arrest the defendant as part of that pursuit, was the arresting entity in its determination that there was a violation of that statute for failure to give the required notice. *See generally Sutterfield*, slip opinion pp.9-10.

[11] *State v. Green*, 158 Idaho 884 (2015), *abrogated as stated in Clarke*, 165 Idaho at 397.

[12] Alternatively, *Sutterfield* could be limited to the facts of that case, given the unique procedural stance on which the issue approached the Supreme Court.

Chambers, 166 Idaho 837, 847 (2020) (Brody, J., concurring) (quoting *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. App. 1983))). As then-Judge Scalia explained in *Carducci*, while this limitation does not prevent the appellate courts from supplementing upon the contentions of counsel, "where counsel has made no attempt to address the issue, we will not remedy the defect, especially where, as here, important questions of far-reaching significance are involved." *Carducci*, 714 F.2d at 177 (internal quotation omitted); *accord State v. Barton*, 154 Idaho 289, 293-94 (2013) (Horton, J., concurring) (noting the impropriety of ruling on issues, particularly those of constitutional dimension, without input from the parties). This is because, for example, the parties could offer insight as to the proper understanding of the issue which may not necessarily be apparent to the appellate court itself. *See, e.g.*, *State v. Lantis*, 165 Idaho 427, 433 (2019) (Brody, J., with whom Burdick, C.J., joined, specially concurring); *cf. Sprague v. Burley*, 109 Idaho 656, 663 (1985) (refusing to unnecessarily resolve an open question, lest by attempting to do so, it adopt "what may be an overly broad holding by the district court").

Sutterfield's conclusion about whether the violation of I.C. § 19-608 is also a violation of the Idaho Constitution runs contrary to this fundamental premise of the adversarial system. Despite the fact that the parties did not argue the issue, the Supreme Court purported to answer a question of constitutional dimension which, at that point, was an open question. That analysis should be reconsidered now that the issue is squarely presented by the parties, particularly since the full analysis of the issue discussed in Section D, *infra*, reveals that *Sutterfield*'s conclusion, reached without that input, was manifestly wrong.

Sutterfield's conclusion was also manifestly wrong because it was expressly based on an abrogated rationale. Specifically, *Sutterfield* concluded there was no constitutional violation in that case "for the reasons articulated by this Court in *Green*." *Sutterfield*, slip opinion at p.12.

Green's analysis hinged on the idea that statutes which existed prior to the adoption of the Idaho Constitution were "incorporated" within the Idaho Constitution. *Green*, 158 Idaho at 888. Thus, *Green*'s reasoning was expressly: "Because these subsequently enacted arrest standards did not exist at the time the Idaho Constitution was adopted, and because they were not incorporated by constitutional amendment, they cannot be considered part of the *constitutional* standard for what constitutes a reasonable seizure of the person."[14] *Id.* at 888-89 (emphasis from original); *accord Clarke*, 165 Idaho at 397 (referring to this as the holding in *Green*).

The Idaho Supreme Court affirmatively rejected *Green*'s reasoning in that regard as being "overbroad" because it essentially elevated statutes to constitutional status. *Clarke*, 165 Idaho at 397. Rather, the *Clarke* Court explained, all *Green* should have said is that pre-existing statutes may be used to help interpret provisions of the Idaho Constitution. *Id.* In other words, under *Clarke*'s standard, a pre-constitutional statute might ultimately not address an issue of constitutional dimension while a statute enacted after the constitution could, in fact, address an issue of constitutional dimension. *See id*. It all depended, the *Clarke* Court made clear, on whether the Framers ultimately intended the Constitution to also address that issue. *Id*.

However, *Sutterfield*'s did not examine the Framer's intent, as *Clarke* required. *See generally Sutterfield*, slip opinion. Rather, it simply relied on the abrogated rationale from *Green*. As such, *Sutterfield*'s attempt to answer this constitutional question of first impression,

[14] Even if it were proper for *Sutterfield* to rely on *Green*'s rationale, *Sutterfield* was still manifestly wrong because its conclusion was not actually consistent with *Green*'s rationale on the merits. As *Sutterfield* expressly acknowledged, I.C. § 19-608 has a pre-constitutional counterpart. *Sutterfield*, slip opinion at p.11. Therefore, under *Green*'s abrogated rationale, I.C. § 19-608's counterpart would have been incorporated into the state constitution, and thus, *Green*'s abrogated rationale would have dictated that a violation of that statute did, in fact, constitute a violation of the state constitution. *See Green*, 158 Idaho at 888-89. Thus, *Sutterfield*'s conclusion – that there was no constitutional violation under *Green*'s rationale – was actually contrary to *Green*'s rationale. As a result, even on its merits, that conclusion should be overruled as being manifestly wrong.

particularly without the input of parties, should be reconsidered since that conclusion was manifestly wrong, unjust, and unwise.

D. The Framers Would Have Considered An Arrest Conducted In Violation Of The Procedures Set Forth In I.C. § 19-608's Territorial Counterpart To Constitute An Unreasonable Seizure, And Thus, A Violation Of Article I, Section 17 Of The Idaho Constitution

1. A proper analysis under *Clarke* reveals that suppression is the remedy for a violation of the procedures identified in I.C. § 19-608

As the Idaho Supreme Court has made clear: "When construing the Idaho Constitution, the primary object is to determine the intent of the Framers." *Clarke*, 165 Idaho at 397 (internal quotations omitted). The best evidence of the Framers' intent are the notes and debates from the constitutional convention. *Id.* Unfortunately, Article I, Section 17 was adopted without debate, and so, the courts must look to other sources of information to determine the Framers' intent for that section. *Id*.

One of the best alternative sources of information in that regard is the territorial statutes of Idaho and the common law as applied in Idaho. *Id.* This is "'[b]ecause many of the delegates to the Constitutional Convention were outstanding lawyers in their day, [so] we generally presume that they knew and acted on such prior and contemporaneous interpretations of constitutional words which they used.'" *Id*. (quoting *Paulson v. Minidoka Cnty. Sch. Dist. No. 331*, 93 Idaho 469, 472 n.3 (1970)). As such, the proper analysis evaluates whether the Framers intended the constitutional provisions to address a principle which had also been addressed in the territorial statutes or common law. *See id*.

The Framers would have considered an arrest which was not conducted in accordance with the requirements of I.C. § 19-608's territorial counterpart to be an "unreasonable" seizure of

the person under Article I, Section 17. That is, in fact, apparent from the fact that the Idaho Supreme Court has already held that one of I.C. § 19-608's sister sections, I.C. § 19-611, is of constitutional dimension. *State v. Rauch*, 99 Idaho 586, 593 (1978).[16] Both code sections have the same territorial root – the Idaho Criminal Practice Act – and both use substantially the same language as their territorial counterpart. (*See* R., p.50 (specifically, Section 132 and Section 138).) Moreover, both statutes require the officers[17] provide the same type of notice of the authority for their actions, just in different contexts. *Compare* I.C. § 19-608 (requiring that, when arresting a person, the officer "must inform the person to be arrested of the intention to arrest him, *of the cause of the arrest*, and the authority to make it") (emphasis added); *with* I.C. § 19-611 (requiring that, before an officer can break into a house in which he believes a person to be arrested is located, he must have first "demanded admittance and *explained the purpose* for which admittance is desired") (emphasis added).

As such, those two code sections should be "construed together *in pari materia*" because "[i]t is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions." *See Goodrick v. Field*, 167 Idaho 280, 283 (2020) (internal quote omitted). Accordingly, the analysis which reveals that the Framers intended a violation of I.C. § 19-611 to also violate

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[16] In *Green*, the Supreme Court confirmed that *Rauch* was based on constitutional grounds. *See e.g.*, *Green*, 158 Idaho at 889-90 & 891 (effectively abrogating *State v. Koivu*, 152 Idaho 511, 517 (2012), which had declared *Rauch* purely a statutory-based decision). While the *Clarke* Court subsequently abrogated *Green*'s ultimate analysis as to why such issues amounted to constitutional violations, it did not disrupt *Green*'s conclusion that *Rauch* was based on finding a constitutional violation. *See generally Clarke*, 165 Idaho 393 (not citing *Rauch* at all). Indeed, as discussed in detail *infra*, the analysis conducted by the *Rauch* Court comports with *Clarke*'s standards. As such, to the extent there is any confusion in this regard, *Rauch* remains good law under *Clarke*.

[17] Both statutes also address actions by private individuals, but for ease of reference, this brief will refer to the portions directed at peace officers, since the actors in Mr. Lancaster's case were officers.

Article I, Section 17 likewise reveals the Framers intended a violation of I.C. § 19-608 to similarly violate the state constitution.

Specifically, the *Rauch* Court explained that a violation of I.C. § 19-611 (and its counterpart, I.C. § 19-4406) was of constitutional dimension because the principle embodied in those statutes was deeply rooted: "'The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application.'" *Rauch*, 99 Idaho at 593 (quoting *Miller v. United States*, 357 U.S. 301, 313-14 (1958)). Moreover, it noted that, at the time I.C. § 19-611's territorial counterpart was enacted, those deeply-rooted principles were already protected at the federal level by the Fourth Amendment. *Id.* at 592. However, at that time, the Fourth Amendment had not been incorporated upon the states. *Id*. Thus, the Idaho Supreme Court concluded, the Framers of Idaho's Constitution would have intended the new state constitution to protect the deeply-rooted principles embodied in I.C. § 19-611's territorial counterpart in the new state system, just as they were protected at the federal level by the Fourth Amendment. *Id.* at 593 (quoting *State v. Anderson*, 31 Idaho 514, 527 (1918) (Morgan., J., dissenting)). Accordingly, the *Rauch* Court held that evidence obtained in violation of the territorial statutes was also "procured in violation of defendant's constitutional immunity from search and seizure," and so, needed to be suppressed. *Id*. at 592.

That analysis with respect to I.C. § 19-611 is equally applicable to its sister section, I.C. § 19-608. The protection of a citizen's right to be secure in their own person is as deeply rooted, if not more so, than the protection of a citizen's right to be secure in their house. After all, the right to security in one's own person is listed first in both the state and the federal constitutions. IDAHO CONST. art. I, § 17 ("The right of the people to be secure in *their persons,*

houses, papers and effects against unreasonable searches and seizures shall not be violated . . . .") (emphasis added); U.S. CONST. amend. IV (same). In fact, the United States Supreme Court has commented on the deeply-rooted nature of that right while also addressing officers acting in contravention of an arrest-procedure statute: "The history of liberty has largely been the history of observance of procedural safeguards." *McNabb v. United States*, 318 U.S. 332, 347 (1943); *accord Corley v. United States*, 556 U.S. 303, 321 (2009) (reaffirming *McNabb* on this point, declaring "Justice Frankfurter's point in *McNabb* is as fresh as ever"); *see also Lamar v. Dana*, 14 F. Cas. 975, 976 (Cir. Ct. S.D.N.Y. 1873) ("The government is one of law, and nobody can be legally arrested except it be according to known and established principles of law of some kind.").

In fact, as one Idaho jurist has observed, such statutes, including specifically I.C. § 19-608, "were enacted to fulfill constitutional requirements." *State v. Mitchell*, 104 Idaho 493, 509 (1983) (Bistline, J., dissenting). For example, providing a person the notice required by I.C. § 19-608 is necessary for the arrestee to be able to knowingly and intelligently invoke the constitutional right to remain silent at the outset of the ensuing interrogation. *Id.* This particular consideration is unique to the requirement that officers inform the person of the reason for the arrest, as opposed to, for example, the requirement to give notice of the authority for the arrest that was at issue in *Sutterfield*. As such, even if this Court were unwilling to reconsider *Sutterfield*, it would still be distinguishable on this basis in terms of whether the Framers would have considered this particular violation of I.C. § 19-608's territorial counterpart to be a violation of the Idaho Constitution even if other violations of that statute might not be.

The failure to follow such statutes also has an impact on whether the arrestee can attempt to defend his liberty. If the officer does not follow statutes akin to I.C. § 19-608, the arrestee

could potentially, legitimately conclude the officer is acting outside the ambit of his official duties, such that the arrestee might be able to resist the attempted arrest without being subject to prosecution for doing so. *See People v. Daniels*, 139 N.Y.S.2d 597, 601-02 (N.Y. App. Div. 1955) (actually vacating a conviction for resisting arrest based on the failure to follow such statutes); *see also Roberts v. State*, 711 P.2d 1131, 1137 (Wyo. 1985) (specifically recognizing this potential issue); *Galvin v. State*, 46 Tenn. 283, 294 (Tenn. 1869) (same). This is, in fact, the reason why statutes such as I.C. § 19-608 have been described as serving the goal of promoting peaceable arrests – if the arrestee is properly notified of the basis for the arrest, he will understand that he should surrender peacefully to lawful custody. *See, e.g., People v. Marendi*, 213 N.Y. 600, 609-10 (N.Y. 1915) ("The reason of the requirement that a person arrested without a warrant be informed of the cause of the arrest is . . . to acquaint the person arrested of the cause of the arrest, not only that he may know whether he is bound to submit, but also that he may know what measures to take to regain his liberty.").

However, the fact that such statutes promote peaceable arrests does not mean, as the district court believed (R., pp.185-86), the Framers would not have still considered the failure to follow such statues to also be constitutionally unreasonable. In fact, the Supreme Court's decision in *Rauch* actually indicates precisely the opposite. The *Rauch* Court noted that the similar notice requirements in I.C. § 19-611 were also specifically intended, in part, to prevent "situations which are conducive to violent confrontations" between the arrestee and the officer. *Rauch*, 99 Idaho at 589 (internal quotation omitted). Despite that recognized purpose, the Supreme Court still concluded the violation of that statute was still of constitutional dimension. *See id*. For the same reasons, the Framers would have intended the similar notice requirements in its sister section, I.C. § 19-608, to encompassed by Article I, Section 17.

The conclusion that a violation of I.C. § 19-608 would have also been considered of constitutional dimension is further reinforced by the fact that the Framers of Idaho's Constitution intended suppression to be a broad remedy under the new state constitution. *See State v. Guzman*, 122 Idaho 981, 993 (1992). For example, suppression was intended to "deter the police from acting unlawfully in obtaining evidence." *Id.* Since, as the district court found, the officers were acting unlawfully in Mr. Lancaster's case (R., pp.178-80), that rationale weighs in favor of suppressing the resulting evidence. *Compare Green*, 158 Idaho at 892 (noting with concern the fact that there was no remedy for a violation of I.C. § 49-1407, but based on its ultimate conclusion that a violation of that statute was not of constitutional dimension, suppression could not be the remedy absent legislative directive to that effect).

Additionally, Idaho's Framers also intended exclusion of unlawfully-obtained evidence to "preserve judicial integrity," and to "avoid having the judiciary commit an additional constitutional violation by considering evidence which has been obtained through illegal means." *Guzman*, 122 Idaho at 993. As the United States Supreme Court explained, "'a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law.'" *Elkins v. United States*, 364 U.S. 206, 223 (1960) (quoting *McNabb*, 318 U.S. at 345). Thus, where "[t]he circumstances in which the statements admitted in evidence against the petitioners were secured reveal a plain disregard of the duty enjoined by Congress upon federal law officers," suppression was necessary even though the statutes did not expressly authorize suppression as a remedy. *McNabb*, 318 U.S. at 344.

McNabb was decided prior to *Mapp v. Ohio*, 367 U.S. 643 (1961), in which the Fourth Amendment was incorporated against the states. As such, *McNabb*'s conclusion that suppression

was appropriate in a similar factual situation reinforces the conclusion that the Framers of the Idaho Constitution would have understood Article I, Section 17 to apply in a similar manner for similar reasons, so as to protect those same deeply-rooted principles in the state system. *See Rauch*, 99 Idaho at 592-93.

As in *McNabb*, he circumstances of Mr. Lancaster's case reveal the officers' plain disregard for the duty that the Idaho Legislature has enjoined upon them since territorial days, as they affirmatively refused to carry out that duty. Officer Orton's body camera shows him candidly telling Sergeant Rogers, out of earshot of Mr. Lancaster, that the basis on which he had actually arrested Mr. Lancaster was, "That burg. Basically for Burg." (Defense Exhibit E, ~7:05.) And yet, rather than inform Mr. Lancaster of that fact as I.C. § 19-608 required, he cryptically told Mr. Lancaster: "Well, there's a reason I'm looking for you and we'll explain all that to you when we get you up to the station," (Defense Exhibit E, ~4:07), and "I said we're going to take you up to our police station and there's a detective who wants to speak with you. Okay? He'll be able to advise you everything that's going on."[18] (Defense Exhibit E, ~7:51; Defense Exhibit B, ~3:22.)

Likewise, the body camera video shows Officer Lane knew that Mr. Lancaster had been arrested because he readily informed Officer Wilson, "This is your smash-and-grab ATM thief." (Defense Exhibit D, ~4:45.) However, rather than carry out the duty set forth in I.C. § 19-608, he misrepresented his knowledge in that regard to Mr. Lancaster, telling him: "I don't know what's going on. I just know that a detective wants to talk with you. About what, I don't know. I just run a dog. I'm a dog guy. I was close and he asked for another officer." (Defense Exhibit

[18] As the district court noted (R., p.179), the plain language of I.C. § 19-608 does not excuse the officer's duty to actually inform the person of the reason for the arrest even if he might believe the arrestee "already kn[e]w" the reason for the arrest. (*See* Exhibit E, ~3:07.)

B, ~5:42; *see also* Defense Exhibit B, ~2:10 (Officer Lane telling Mr. Lancaster, "Well, there's going to be somebody who wants to come talk to you. Okay? Well, and actually we're probably going to go somewhere else to talk to this person.").)

Similarly, Officer Wilson's body camera footage shows that, after she had put Mr. Lancaster in her car and closed the door (meaning he could not hear her subsequent conversations, which were in low-pitched tones anyway), she specifically asked the other officers what the reason for the arrest was. (Defense Exhibit D, ~4:45.) Officers Lane and Orton candidly told her, "This is your smash-and-grab ATM thief." (Defense Exhibit D, ~4:47.) And yet, she, too, subsequently refused to carry out the duty set forth in I.C. § 19-608 when Mr. Lancaster asked if she knew the reason for his arrest. (Defense Exhibit D, ~8:24 (Officer Wilson stating she did not want "to talk out of turn").) Rather, she chose the overly-dramatic lines: "Well, I'm sure everything will be explained here shortly. All will be revealed here shortly and once we're there . . . ." (Defense Exhibit D, ~9:50.)

As the United States Supreme Court has pointed out, "The burden of making an express announcement [of the reason for the arrest] is certainly slight. A few more words by the officers would have satisfied the requirement in this case." *Miller*, 357 U.S. at 309. But Officers Orton, Lane, and Wilson all affirmatively chose not to make that slight effort. Thus, as in *McNabb*, the facts reveal a blatant disregard of the duty continuously enjoined by the Idaho Legislature since territorial days. Therefore, for the same reasons articulated in *McNabb*, the Framers would have considered suppression of the resulting evidence the appropriate remedy under the Idaho Constitution in such cases so as to prevent the appearance of impropriety of implicitly condoning that sort of willful disobedience of Idaho law.

Since the Framers of the Idaho Constitution would have intended that an arrest which did not conform with the requirements of I.C. § 19-608's territorial counterpart to also constitute an unreasonable seizure under Article I, Section 17, the evidence discovered as the result of Mr. Lancaster's unlawful arrest in this case should have been suppressed under the Idaho Constitution, just as the Idaho Supreme Court did in *Rauch*.

2. The subsequent interrogation is fruit of the unlawful arrest, and is, therefore suppressible because of the unlawful arrest, as is any evidence discovered based on what Mr. Lancaster said during that interrogation

The district court's alternative basis for refusing to suppress the evidence despite the violation of I.C. § 19-608 – that there was no "causal relationship" between the unlawful arrest and any evidentiary fruits to justify suppression of any particular piece of evidence (R., pp.189-90) – is contrary to the applicable precedent. That is because the district court's analysis was specifically based on the singular fact that *Miranda* warnings preceded the subsequent interrogation. (R., p.189.) However, the United States Supreme Court has made it clear that there are other relevant factors which must be considered in such cases because the singular fact of *Miranda* warnings usually will not be enough to break the causal chain. *Kaupp v. Texas*, 538 U.S. 626, 632-33 (2003); *Brown v. Illinois*, 422 U.S. 590, 603 (1975); *accord State v. Bainbridge*, 117 Idaho 245, 248-49 (1990) (applying this same analysis to an argument raised under both the federal and the state constitutions); *see also State v. Donato*, 135 Idaho 469, 471 (2001) (reiterating the United States Supreme Court sets the constitutional floor, meaning it identifies the minimum protections which must be enforced by the states).

It is clearly established that confessions obtained following an unlawful arrest must be suppressed unless the State makes a showing that the confession was the product of "'an act of free will [sufficient] to purge the primary taint of the unlawful invasion.'" *Kaupp*, 538 U.S. at

632-33 (quoting *Wong Sun v. United States*, 371 U.S. 471, 486 (1963)). Within that analysis "the *Miranda* warnings, alone and *per se*, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession." *Brown*, 422 U.S. at 603. Holding otherwise would make *Miranda* warnings a "cure-all" in such cases and would reduce the constitutional guarantee against unlawful searches and seizures to "'a form of words.'" *Id*. at 602-03 (quoting *Mapp*, 367 U.S. at 648).

And yet, that is exactly what the district court did here by finding the *Miranda* warnings alone were sufficient to break the causal chain in this case. (R., p.189.) In fact, since the district court did not discuss these standards or any of the other relevant factors in its analysis (*see generally* R., pp.189-90), it failed to conduct the analysis required by the controlling precedent. For that reason alone, its conclusion in this regard should be rejected. *See State v. Orellana-Castro*, 158 Idaho 757, 762 (2015) (holding the district court committed reversible error because it only discussed one part of the analysis required by the applicable precedent), *abrogated on other grounds.*

This is particularly true since, as in *Kaupp*, all the other relevant factors run contrary to the district court's conclusion. *Compare Kaupp*, 538 U.S. at 633. Here, as in *Kaupp*, [t]here is no indication from the record that any substantial time passed between" the arrest and the confession.[19] *Id*. Moreover, as in *Kaupp*, the State did not identify any meaningful intervening

[19] The record indicates that Officer Orton initially encountered Mr. Lancaster at approximately 6:00 p.m. (R., p.168.) Mr. Lancaster and Officer Wilson arrived at the police station some 45 minutes later. (*See generally* Defense Exhibits B, D, E.) The record also notes that, at approximately 9:00 p.m., crime scene investigators were dispatched to look for the ATM machines based on statements Mr. Lancaster made during the interrogation. (R., p.133.) As such, the record indicates the interrogation must have begun, at most, within an hour or two of the unlawful arrest.

event between the illegal arrest and the confession.[20] (*See generally* R., pp.107-09.) Thus, as in *Kaupp*, the only potential factor to break the causal connection was the *Miranda* warnings. *Kaupp*, 538 U.S. at 633. However, as *Brown* made clear, *Miranda* warnings themselves are not enough to break that connection in cases such as this because doing so would render the constitutional protection against unreasonable searches and seizures meaningless. *Brown*, 422 U.S. at 603.

Therefore, the district court erred in concluding there were no fruits to suppress based on the unlawful arrest. Mr. Lancaster's confession, as well as any physical evidence discovered as a result of those tainted statements, should be suppressed as a result of the unlawful arrest. *State v. Barwick*, 94 Idaho 139, 142 (1971) (upon concluding the arrest in that case was unlawful and that it tainted the subsequent interrogation, the Supreme Court added that "[e]vidence obtained as a result of conversations between appellant and the police were also inadmissible"); *accord Wong Sun*, 371 U.S. at 485-86.

E. The District Court Employed An Improper Standard By Insisting That The Interpretation Of The Idaho Constitution Hinged On Whether There Was Unanimity On The Question In The Other States

1. The district court's analysis is wholly inconsistent with the standard articulated in *Clarke*

While the district court recited the applicable standards articulated in *Clarke*, its analysis does not reflect a proper application of those standards. (*See* R., pp.182-90.) That is because,

[20] Indeed, as the district court expressly noted (*see* R., p.175), the State offered no argument on the concept of remedy at all, and so, it should be deemed to have waived such argument. *See State v. Zichko*, 129 Idaho 259, 263 (1996). In other words, since the State did not attempt to meet its burden to show attenuation, it was not proper for the district court to essentially deem that burden satisfied by ruling in the State's favor on that basis. *Compare State v. Almaraz*, 154 Idaho 584, 598-99 (2013) (refusing to find an error harmless despite apparent evidence to that fact because the State had not made any argument in that regard, and so, had failed to meet its burden).

rather than assess how the Framers of the Idaho Constitution would have understood the issue, the district court focused expressly and solely on how *other states* addressed this issue, holding the other states' unanimous agreement on a point dictated how the Idaho Constitution would be interpreted. (R., p.186; *accord* R., p.207 n.2.) The district court's conclusion to that effect is wholly improper because it essentially cedes Idaho's sovereignty in interpreting its own constitution to the other states.

In fact, the Idaho Supreme Court effectively rejected the district court's unanimity requirement in *Guzman*, 122 Idaho at 993. In *Guzman*, the Idaho Supreme Court was evaluating whether the Framers of the Idaho Constitution intended a broader exclusionary rule under the Idaho Constitution than the narrow one subsequently adopted for the federal Constitution. *Id.* The Idaho Supreme Court expressly noted that there was disagreement between the other states on that issue – some agreed that broader suppression was appropriate while others agreed with the narrower federal standard. *Id.* Despite that clear lack of unanimity in the other states' interpretations of suppression law, the Idaho Supreme Court interpreted the Idaho Constitution differently than the federal Constitution because it concluded that the Framers intended exclusion under the Idaho Constitution to be more broadly available. *Id.* As such, *Guzman* affirmatively demonstrates that unanimity in the other states' analysis of an issue was not the lynchpin in interpreting the Idaho Constitution as the district court believed.

A full examination of *Clarke*'s analysis confirms the district court's unanimity requirement to be erroneous. While it is true that the Supreme Court in *Clarke* noted the apparent unanimous agreement with respect to the rule at issue in that case, it did so specifically in the context of examining how Idaho's Framers would have understood the applicable common law. *See Clarke*, 165 Idaho at 397-98. In other words, the Supreme Court was explaining that

the fact there was apparently unanimous agreement about how the common law operated in that context *reinforced* the Court's conclusion that the Idaho Framers would have understood the common law worked in that way and intended the new state constitution to correspond with that understanding.[21] *See id.*

However, nothing about the Supreme Court's analysis which *required* that sort of unanimity to interpret the Idaho Constitution. *See id*. Certainly, if the Framers' notes clearly stated they held a view about the scope of the Idaho Constitution which was directly at odds with how every other state viewed the same issue, the Framers' clear view would control the interpretation of the Idaho Constitution. *See id.* at 397. As such, the district court's analysis, which allowed other states to dictate the interpretation of Idaho's Constitution rather than evaluating how the Framers of Idaho's Constitution would have understood Idaho's Constitution, was erroneous and should be rejected.

2. Several other state courts actually did agree that suppression was a proper remedy for a violation of arrest procedure statutes, thereby reinforcing the conclusion that Idaho's Framers would have intended the same result under Idaho's Constitution

The district court's analysis is also flawed because a proper understanding of the other states' decisions indicates that some did, in fact, agree with the relevant general principle – that, if the statute was actually violated, the fruits of the unlawful arrest could have been suppressed.

[21] Indeed, the examination of the other states' understanding of *the common law* was appropriate in *Clarke* because, by definition, the common law is derived from the decisions of the many courts, *as opposed to* from statutes. BLACK'S LAW DICTIONARY, 117-18 (3rd pocket ed. 2006). In other words, the assessment of how the Framers would have understood the Idaho Constitution based on *Idaho's territorial statutes* would depend more on the statutory language and any interpretations thereof rather than on how other states interpreted their own statutes. That is particularly true in this context where, as the district court itself acknowledged, some states recognized exceptions to their statutes on this point which Idaho did not. (R., pp.184-85.) The fact that the states can have different statutory language leading to different legal conclusions only further demonstrates why unanimity in the other states' interpretations of such issues cannot be the lynchpin to interpreting the Idaho Constitution.

As such, they reinforce the conclusion that the Framers intended the same result under the Idaho Constitution. *Compare Guzman*, 122 Idaho at 993 (interpreting the Idaho Constitution consistent with the views of some of, but not all, the other states).

For example, in *People v. Superior Court of Merced Cnty.*, 70 Cal. Rptr. 362, 363 (Cal. Ct. App. 1968), the Court concluded that, because the officer had not informed the defendant of his intent to arrest him, or of the reason for doing so, "[t]he asserted arrest by Officer Draper did not conform with the requirements of the Penal Code." *Id.* It proceeded to hold: "such failure will render any evidence found inadmissible if such unusual circumstances [as would constitute a recognized exception to the statute] do not exist. A detention purporting to be an arrest carried out in an unlawful manner is invalid; the courts will not countenance incriminating incidents accompanying an arrest which is unlawful."[22] *Id.* (internal citations omitted).

Other courts have indicated a similar willingness to suppress fruits of arrests upon actually finding those arrests had violated statues akin to I.C. § 19-608.[23] *See, e.g., Clay v. State*,

[22] The Arizona Court of Appeals declared that *Superior Court of Merced Cnty.* was *dicta* on this particular point. *State v. Vaughn*, 471 P.2d 744, 747 (Ariz. Ct. App. 1970). However, it did not explain how it had reached that conclusion. *See generally id*. Nor does that conclusion appear accurate. The California Court's discussion about the lawfulness of the defendant's arrest was necessary to resolve one of the two independent issues raised on appeal in that case – whether the fruits of the search of the defendant's person incident to his unlawful arrest should be suppressed. *Superior Court of Merced Cnty.*, 70 Cal. Rptr. at 365. As such, it was not *dicta*. *See State v. Hawkins* 155 Idaho 69, 74 (2013) (defining *dicta* as language in an opinion not necessary to the decision).

[23] Many of the cases cited by the district court as stating exclusion was not the proper remedy (*see generally* R., pp.186-88) actually affirmed because they did not find a violation of the statutes at issue in first place, either because the officer had actually stated the reason for arrest, or the officer substantially complied with the statute to the point that any error was harmless, or a particular exception applied to the facts of the case. Thus, any commentary on the nature of the potential remedy in those cases is of less persuasive authority than those cases which, like in Mr. Lancaster's case, actually considered the question of remedy upon finding a statutory violation.

184 So. 2d 403, 406 (Miss. 1966); *State v. Gagnon*, 207 N.W.2d 260, 264 (N.D. 1973); *Basden v. Lawson*, 1992 Tenn. App. LEXIS 285, 1992 WL 58501 (Tenn. Ct. App. 1992), *unpublished*.[24] Still others have acknowledged that suppression may be remedy, but one which is only available if the violation actually affected the defendant's substantial rights. *State v. Kelm*, 300 P.3d 687, 692 (Mont. 2013); *see also Miami v. Nelson*, 186 So. 2d 535, 537 n.1 (Fla. Ct. App. 1966) (observing that the fact that a person is not informed of the reason for the arrest until sometime after the arrest is effectuated "does not *necessarily* deprive him of his rights") (emphasis added).

As such, these opinions all demonstrate that several states agree with the overarching principle – that suppression is a viable remedy for a violation of arrest procedure statutes akin to I.C. § 19-608. Therefore, as in *Guzman*, it would not be unreasonable to conclude the Framers intended such a result under Article I, Section 17 despite the lack of uniform agreement on that point.

[24] Mr. Lancaster recognizes that unpublished decisions do not constitute precedent, and he does not cite *Basden* as authority for a particular decision in this case. Rather, he merely references it as a historical example of how a learned court has analyzed a similar issue. *Compare Staff of the Idaho Real Estate Comm'n v. Nordling*, 135 Idaho 630, 634 (2001) (quoting *Bourgeois v. Murphy*, 119 Idaho 611, 617 (1991)) ("When this Court had cause to consider unpublished opinions from other jurisdictions because an appellant discussed the cases in his petition, we found the presentation of the unpublished opinions as 'quite appropriate.' Likewise, we find the hearing officer's consideration of the unpublished opinion, not as binding precedent but as an example, was appropriate.").

II.

The District Court Erred By Not Striking The Utah PSI, Which It Acknowledged Contained Unreliable Information

A. Standard Of Review

The district court's decisions with respect to a motion to strike portions of the PSI are reviewed for an abuse of discretion. *State v. Rodriguez*, 132 Idaho 261, 263 (Ct. App. 1998). In this case, the district court's decision was an abuse of discretion because it was not consistent with the applicable legal standards. *See Lunneborg v. My Fun Life*, 163 Idaho 856, 863-64 (2018) (articulating the four-part standard for abuse-of-discretion review).

This argument specifically focuses on the district court's decision to not strike the Utah PSI and references thereto from the new Idaho PSI materials.[25] (*See, e.g.*, Tr., p.41, Ls.10-14.)

B. Because The District Court Actually Recognized The Utah PSI Contained Inaccurate Information, It Should Have Stricken The Utah PSI From The Record

The applicable legal standards are clear that, when the district court finds information in the PSI to be unreliable, it must strike that information from the PSI. *See, e.g., State v. Molen*, 148 Idaho 950, 961-62 (Ct. App. 2010); *accord State v. Golden*, 167 Idaho 509, 511 (Ct. App. 2020). That is because the defendant has a due process right to be sentenced only upon reliable information. *State v. Griffin*, 122 Idaho 733, 737 (1992); *see generally* U.S. CONST. amends. V, XIV.

[25] By focusing on this issue, Mr. Lancaster does not concede propriety in the district court's denial of his other challenges to the PSI materials based on trial counsel's failure to present evidence supporting those challenges. (*See, e.g.*, Tr., p.23, Ls.8-16, p.40, L.18 - p.41, L.9.) Rather, Mr. Lancaster reserves the right to address those issues in post-conviction, should he ultimately deem it necessary and appropriate to do so.

However, when it comes to previously-prepared PSIs, the Court of Appeals has also held the sentencing court is not authorized to strike a portion of the information therein in a subsequent case or proceeding.[26] *State v. Person*, 145 Idaho 293, 296 (Ct. App. 2007) ("Accordingly, we hold that a district court's authority to change the contents of a PSI ceases once a judgment of conviction and sentence are issued). Since the new district court judge cannot alter the contents of a previously-prepared PSI, when a previously-prepared pre-sentence report is determined to contain unreliable information, the entire report should simply not be included in the new PSI. Only by doing so can the new district court fulfill its obligation to ensure that only reliable information is included in the new PSI. *See Rodriguez*, 132 Idaho at 262 n.1.

In this case, the district court acknowledged that the 2009 Utah PSI contained inaccurate or unreliable information: "There may be discrepancies in the criminal history as recited there compared to the federal pre-sentence report . . . and to the extent the Utah presentence report conflicts with it, the discrepancies in the Utah report won't be considered; in other words, the federal report is the one I'll consider as authoritative." (Tr., p.42, L.24 - p.43, L.7.) Because it determined the Utah PSI contained inaccurate or unreliable information, the applicable legal standards required that it strike that PSI, and the references to it, from the new Idaho PSI. *E.g.*, *Molen*, 148 Idaho at 961-62.

This is true even though the district court indicated it would not consider the inaccuracies in the Utah PSI regarding Mr. Lancaster's criminal history and redlined other aspects of the PSI materials consistent with that decision. (*See* Tr., p.43, Ls.4-7; Conf. Exh., pp.5, 11-14.) In fact, the Idaho Supreme Court essentially rejected that precise procedure in *State v. Mauro*, 121 Idaho

[26] Not that an Idaho court would have the authority to direct the Utah courts to alter their PSI in any event.

178 (1991). In *Mauro*, the defendant objected to the inclusion of several documents from the United States Attorney's office as being unreliable. *Id.* at 182-83. The district court ""indicated that [it] would not take into consideration the information regarding Mauro's federal prosecutions or the improper statements contained in the presentence report." *Id.* at 183. However, it still left most of that information in the PSI. *Id*. ("I think the Court struck that which needed to be struck. I think the rest of it is proper in a pre-sentence report.") (punctuation altered). The Supreme Court held that was reversible error because, with the determination that some of the information was unreliable, there was no lingering basis to leave it in the PSI. *Id.* at 183-84 (explaining that, just because the information came from a governmental agency did not *ipso facto* make the information reliable). As a result, the Supreme Court remanded that case for a new sentencing hearing based upon a properly-prepared PSI report. *Id.*

In fact, as the Court of Appeals explained in *Rodriguez*, there is an independent problem with leaving inaccurate information in the PSI – without striking the inaccurate information, subsequent agencies reviewing the PSI could mistakenly rely on the inaccurate information. *Rodriguez*, 132 Idaho at 262 n.1. "[A] PSI follows a defendant indefinitely, and information inappropriately included therein may prejudice the defendant even if the initial sentencing court disregarded such information." *Id*. Thus, the better practice is to strike the information being disregarded by the district court. *Id.* "This procedure not only ensures a clear record for review but also protects the defendant against misuse of the unreliable information in the future.'" *Golden*, 167 Idaho at 511-12 (quoting *Molen*, 148 Idaho at 961 (quoting *Rodriguez*, 132 Idaho at 262 n.1))).

As such, the district court erred by not striking the Utah PSI and the references thereto upon determining the Utah PSI contained unreliable and inaccurate information. Therefore, this

case should, at least, be remanded for a new sentencing hearing based only on reliable information, as due process requires.

CONCLUSION

Mr. Lancaster respectfully requests this Court reverse the order denying his motion to suppress and remand this case for further proceedings. Alternatively, he respectfully requests this Court remand this case for a new sentencing hearing after the necessary corrections are made to the PSI report.

DATED this 22nd day of September, 2021.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of September, 2021, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF to be served as follows:

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/s/ Evan A. Smith
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BRD/eas