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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

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

REPLY BRIEF OF APPELLANT

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

HONORABLE JASON D. SCOTT
District Judge

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

STATEMENT OF THE CASE

Nature of the Case

Clarence Lancaster contended the district court erred by denying his motion to suppress the fruits of his unlawful arrest even though it had found the officers failed to comply with I.C. § 19-608 when effecting that arrest which, he argued, also violated his rights under the Idaho Constitution. As part of that argument, he asserted the Supreme Court's intervening decision in *State v. Sutterfield*, ___ Idaho ___, 484 P.3d 839 (Apr. 8, 2021), should not be considered controlling precedent in this regard, and that a proper analysis under *State v. Clarke*, 165 Idaho 393 (2019), reveals that the Framers would have considered a violation of I.C. § 19-608's territorial counterpart to also be a violation of the state constitution's protection against unreasonable seizures, such that suppression is a proper remedy for such a violation. The State made several arguments in response, none of which are meritorious. Indeed, several of its responses to the second of those questions were not even preserved for appeal.

Mr. Lancaster also argued the district court erred by not striking the Utah presentence report (PSI) from the presentence materials after it concluded part of the Utah PSI was not reliable. The State's arguments in response to that issue are unremarkable and require no further reply here.

Statement of the Facts and Course of Proceedings

Mr. Lancaster articulated the relevant facts and proceedings in the Appellant's Brief. They are not repeated here, but are incorporated by reference.

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. *Sutterfield* Should Not Be Considered Controlling In This Analysis

The portion of the Idaho Supreme Court's decision in *Sutterfield* in which it discussed whether a violation of I.C. § 19-608 also violates the Idaho Constitution is manifestly wrong, unjust, or unwise for two reasons – it was ruling on an issue which was not argued by the parties; and its evaluation of that question relied on an abrogated analysis. None of the State's responses to those points are meritorious. In fact, several of its responses in that regard are merely conclusory assertions which are not supported by either analysis or citation to authority. This Court should reject those responses. *See State v. Zichko*, 129 Idaho 259, 263 (1996) (explaining that when a party does not support its position on an issue with either argument or authority, it waives that issue).

As an initial matter, however, the State offers no response to Mr. Lancaster's argument that *Sutterfield* is distinguishable because the requirement for announcing the basis for the arrest serves a separate constitutional principle – to allow the arrestee to be able to knowingly and intelligently invoke his right to remain silent – that was not at issue with regard to the citizen's arrest requirements at issue in *Sutterfield*. (*See* App. Br., p.21; *see generally* Resp. Br.) As such, the State has waived that issue. *Zichko*, 129 Idaho at 263. On that basis alone, *Sutterfield* should not be held to control the analysis in this case.

The State's first response to Mr. Lancaster's argument is simply to "dispute[] Lancaster's claim" that the parties in *Sutterfield* did not argue the issue of whether a violation of I.C. § 19-

608 was also of constitutional dimension. (Resp. Br., p.10.) However, the State does not offer any explanation for why it believes that the parties argued that issue in *Sutterfield*, nor does it cite to any portion of *Sutterfield* which would support its assertion to that end. (*See generally* R.) Rather, it simply proceeds to address Mr. Lancaster's remaining arguments assuming his point in that regard to be true. (*See* Resp. Br., p.10.) As such, this Court should refuse to consider its cursory assertion that the parties actually argued this issue in *Sutterfield*. *Zichko*, 129 Idaho at 263.

Even if this Court were to consider the State's contrary assertion, the plain language of *Sutterfield* reveals it to be unfounded. While the State-appellant may have raised certain arguments in that regard, *see Sutterfield*, 484 P.3d 839, ___, slip opinion p.10, the defendant-respondent conceded that was not a proper basis to affirm the district court's decision in that case. *Id*. at slip opinion, pp.11-12. Rather, the defendant-respondent maintained the position he had taken in the district court, with which the district court had agreed – that the arrest was properly assessed as an arrest by an officer for a misdemeanor completed outside his presence, and thus, a violation of his rights as set forth in *Clarke*. *Id*.; *accord id*. at slip opinion pp.3-4 (summarizing the district court's decision). And even if the violation of the statute itself had been the basis of the district court's decision to grant relief, the defendant-respondent's concession would have meant that, at most, he was arguing to affirm the district court's decision based on the concept of "right result, wrong theory." *See id*. at slip opinion pp.15-16 (Stegner, J., dissenting).

Either way, because of the defendant-respondent's concession, the question of whether the violation of the statute itself should justify suppression was not argued by "the parties" even though the State-appellant had discussed it. *Compare State v. Hoskins*, 165 Idaho 217, 221-26

(2019) (holding that the State-respondent's concession of an issue, which the defendant-appellant had argued in his initial brief,[1] resolved that particular issue on appeal and it reversed the district court's decision without discussing the merits of the conceded issue at all); *see also Reclaim Idaho v. Denney*, ___ Idaho ___, 497 P.3d 160, 172 n.6 (2021) (identifying a potential issue with regard to whether federal or common law standing rules should apply, but refusing to rule on that issue because the party whose argument it was addressing had not argued for application of the common law standing rules (*i.e.*, effectively conceded the federal standing rules applied)); *State v. Bodenbach*, 165 Idaho 577, 581 n.1 & 589-90 (2019) (explaining that the defendant-appellant's concession that his statement to officers was voluntary meant the analysis on appeal "is limited to" whether that statement was knowing and intelligent). Therefore, the State's conclusory assertion that "the parties" actually argued that issue in *Sutterfield* is simply mistaken.

The State's second argument on this issue is another cursory assertion – that, despite citing several cases, such as *Reclaim Idaho*, which talk about why a court should not rule on unargued issues, Mr. Lancaster did not cite any authority for the proposition that an opinion ruling on an issue not argued by the parties was of questionable value. (Resp. Br., p.10.) The State has obviously missed the point of Mr. Lancaster's discussion of those cases in his Appellant's Brief. They *are* the precedent which explain precisely why it would be unjust and unwise for a court to rule on an issue which was not actually argued by the parties. (*See* App. Br., pp.13-18.) For example, *Reclaim Idaho* made it clear that ruling on such an issue would transgress the appellate court's function in the process. *See Reclaim Idaho*, 497 P.3d at 172 n.6

[1] *See State v. Hoskins*, 2018 Ida.App. LEXIS 40, 2018 WL 4169337, slip opinion p.3 (Ct. App. 2018) (discussing the defendant-appellant's arguments in that case in more detail than the Supreme Court did on review), *rev. granted*.

("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."); *cf. State v. Hawkins*, 155 Idaho 69, 74 (2013) (explaining that, if an opinion discusses an issue which is not necessary to resolve the issue actually argued by the parties, such a discussion is considered *dictum* and not controlling precedent). Therefore, those cases *are* the precedent which explain why an opinion ruling on such an issue would be of questionable precedential value. As such, the State's cursory assertion in that regard is specious.

Finally, the State cursorily contends that *Sutterfield*'s evaluation of that unargued question was not manifestly wrong because it "did not employ the abrogated part of *Green* when it held that I.C. § 19-608 did not establish a constitutional standard." (*See* Resp. Br., p.11.) It did not identify what other part of the *Green* decision it believes *Sutterfield* might have been relying on. (*See generally* Resp. Br., pp.10-11.) Rather, it appears to contend that the portion of *Green* upon which *Sutterfield* relied had not actually been called into doubt by *Clarke*. (*See generally* Resp. Br., pp.10-11.) A full reading of *Green* and *Clarke* reveals the State's argument in that regard is meritless.

The rule, according to *Green* was that only statutes with pre-constitution counterparts could be considered to also be of constitutional dimension:

> Because the constitutional guarantee against unreasonable seizure of the person includes an arrest, the Idaho Constitution incorporated the principles regarding arrest in the Idaho statutory and common law in 1890 when the commission was adopted.

State v. Green, 158 Idaho 884, 888 (2015), *abrogated by Clarke*, 165 Idaho at 397. It then applied that rule to the statute at issue in that case:

> 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.

Id. at 888-89. It also used that rule to distinguish the cases cited by the defendant:

> each statute directly at issue in [the cases cited by the defendant] has a historical, pre-constitution source of the currently codified principles. Therefore, suppression in each of those cases was justified by a direct violation of principles inherent in the Idaho Constitution. There is no historical counterpart to Idaho Code section 49-1407 that was present at the time the Idaho Constitution was adopted. Therefore, it cannot be said that the principles in that section limiting certain warrantless misdemeanor arrests to specific circumstances are constitutional in nature. Likewise, a violation of that statute is not a constitutional violation. Because there was no pre-constitution counterpart to Section 49-1407, a violation of this section is merely statutory in nature. And, because there was no constitutional violation in this case, suppression was inappropriate.

Id. at 892. Therefore, *Green*'s analysis is inexorably tied to the rule it had identified.

However, *Clarke* made it clear that the rule which *Green* was using was not correct:

> Recently, in *Green*, this Court interpreted Idaho Code sections 19-603(6) and (7) and explained their relationship to Article I, Section 17 of the Idaho Constitution: '[b]ecause 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.' As a corollary, *Green* held '[b]ecause the constitutional guarantee against unreasonable seizure of the person includes an arrest, the Idaho Constitution incorporated the principles regarding arrest in the Idaho statutory and common law in 1890 when the constitution was adopted.'
>
> However, we conclude that this statement in *Green* is overbroad. *Green* should stand for the principle that preexisting statutes and the common law may be used to help inform our interpretation of the Idaho Constitution, but they are not the embodiment of, nor are they incorporated within, the Constitution.

Clarke, 165 Idaho at 397 (quoting *Green*, 158 Idaho at 888-89) (emphasis omitted). By abrogating the rule *Green* was using, *Clarke* necessarily also abrogated the analysis which *Green* conducted based on that improper rule. *See id.*

Nevertheless, *Sutterfield* compare its facts to *Green* and held that, for the same reasons a violation of the statute in *Green* was not of constitutional dimension, the violation of the statute in *Sutterfield* was not of constitutional dimension:

> Similar to the facts in *Green*, where the failure to fully comply with a statutory requirement did not rise to level of a constitutional violation, the failure to fully comply with the statutory notice requirements here does not rise to the level of a constitutional violation, either.

Sutterfield, at slip opinion p.12. In so doing, it was necessarily relying on the analysis which *Green* used to justify that conclusion. However, since the only analysis in *Green* was abrogated by *Clarke*, *Sutterfield* was, contrary to the State's apparent assertion, improperly relying on the abrogated portion of *Green*. In other words, *Sutterfield* was manifestly wrong because it relied on *Green*'s abrogated analysis rather than conduct the proper analysis under *Clarke* of whether the Framers would have considered a violation of the territorial statute to also violate the state constitution. *See generally id*. at slip opinion pp.11-12.

Whether it might have been logical for *Sutterfield* to rely on *Green* in this regard does not, as the State cursorily asserts (Resp. Br., p.11), support an alternative reading of *Sutterfield*'s plain language. Since *Sutterfield* did not articulate any other analysis to justify its conclusion, such as a *Clarke*-style analysis, there simply is not any other way to read the plain language of that portion of the opinion except that it was relying on *Green* and its abrogated analysis. Rather, the fact that its comparison to *Green* may not have been logical only reaffirms why that portion of *Sutterfield* is of questionable precedential value. (*See* App. Br., p.17 n.12.) Regardless, the actual analysis under *Clarke*'s rule (discussed in Section I(B), *infra* and in the Appellant's Brief) reveals that, if *Sutterfield* were essentially trying to apply the *Clarke*-approved analysis by its comparison to *Green*, its conclusion would still be manifestly wrong.

Since none of the State's cursory assertions actually demonstrate that the portion of *Sutterfield* which discussed whether a violation of I.C. §19-608 was also of constitutional dimension was not manifestly wrong, unjust, or unwise, this Court should refuse to look to that portion of the *Sutterfield* opinion as controlling precedent in Mr. Lancaster's case.

B. Under A Proper *Clarke* Analysis, The Framers Would Have Considered A Violation Of I.C. 19-608's Territorial Counterpart To Also Violate The Idaho Constitution's Protection Against Unreasonable Seizures

As *Clarke* made clear, the proper analysis in cases such as this is to determine whether the violation of a statute also constitutes a violation of the Idaho Constitution focuses on whether the Framers would have intended the Constitution to apply in light of the conditions at the time. *Clarke*, 165 Idaho at 397. When that analysis is actually conducted on I.C. § 19-608, it reveals that the Framers would have considered that a violation of I.C. § 19-608's territorial counterpart would also have violated the Idaho Constitution's protection against unreasonable seizures. (*See* App. Br., pp.18-26.)

The State makes three main arguments against this point – that the district court's analysis on that question was correct; that I.C. § 19-608's purpose is only to define when the arrestee may resist, and that indicates the failure to comply with it is not of constitutional dimension; and that I.C. § 19-608 should not apply to *de facto* arrests. (Resp. Br., pp.6-9.) The latter two of those arguments were not preserved for appeal, and all are flawed on their merits.

1. In cursorily adopting the district court's analysis, the State did not address any of Mr. Lancaster's arguments as to why the district court's analysis was flawed

Mr. Lancaster made several arguments explaining how the district court's analysis of whether a violation of I.C. § 19-608 was of constitutional dimension, such that suppression was a proper remedy for a violation of that statute. For example, he explained that the district court's

analysis was incompatible with *Clarke* because it expressly, but improperly, focused on whether there was unanimity in the decisions of the other states rather than on what the Framers of the Idaho Constitution would have intended. (App. Br., pp.28-30.) He also argued that the district court's analysis focused mostly on cases from other states in which *no violation* of the relevant state statute had been found, and that it failed to appreciate the fact that, in cases where *a violation was actually found*, several other states concluded suppression was an appropriate remedy, and still others acknowledged the potential that suppression could be a proper remedy in the appropriate case. (App. Br., pp.30-32.)

The State's response was to simply adopt the district court's analysis in that regard, cursorily asserting it was correct. (*See* Resp. Br., pp.6-7.) It did not address any of Mr. Lancaster's arguments about why the district court's analysis was flawed when it did so. (*See generally* Resp. Br.) Since the State offered no argument or authority on those issues, it has waived them. *Zichko*, 129 Idaho at 263. In other words, the State's reliance on the district court's analysis is flawed for the same reason the district court's analysis was flawed.

Furthermore, some of the State's own subsequent analysis actually contradicts one of the points on which it asserted the district court's analysis was correct. Specifically, the State asserted that the district court correctly concluded that "the English common law did not make announcement requirements such as found in I.C. § 19-608 a prerequisite to a valid arrest." (Resp. Br., p.7.) However, on the very next page of its brief, the State quoted an Idaho Supreme Court case for precisely the opposite premise: "The common law, quoting Blackstone, was: 'The officer must give notice to the party of his authority to bring himself within the protection of the law; unless indeed the party already knows it.'" (Resp. Br., p.8 (quoting *People v. Nash*, 1 Idaho 206, 214 (1868).) Thus, the State's own analysis indicates that the common law *did*, in

fact, generally require the officer to announce his office and purpose before making an arrest.[2] As such, the State's own analysis reinforces the conclusion that its cursory assertion – that the district court's analysis was correct – is actually erroneous.

For any of these reasons, this Court should reject the State's cursory reliance on the district court's reasoning.

2. That I.C. § 19-608 serves the purpose of promoting peaceful arrest does not, *ipso facto*, mean it does not define when the officer was acting unlawfully

a. The State's argument in this regard was not preserved

The Supreme Court has recently and repeatedly made it clear that it will not consider an argument which was not preserved for appeal. *State v. Wilson*, ___ Idaho ___, 495 P.3d 1030, 1034-35 (2021); *State v. Wolfe*, 165 Idaho 338, 341-42 (2019); *Hoskins*, 165 Idaho at 226; *State v. Gonzalez*, 165 Idaho 95, 98-99 (2019); *State v. Cohagan*, 162 Idaho 717, 721 (2017); *State v. Garcia-Rodriguez*, 162 Idaho 271, 275 (2017). Generally, preservation requires that both the issue and the party's position on the issue be presented to the district court. *Wilson*, 495 P.3d at 1034-35. The only exception is when the issue was argued implicitly to, or decided by the district court. *Id*. at 1035.

In *Wilson*, for example, the State argued in the district court that the initial portion of the encounter in that case did not need to be supported by reasonable suspicion, as it was either a consensual encounter or a welfare check, and that reasonable suspicion developed prior to the

[2] Out of candor, Mr. Lancaster acknowledges that it is not actually clear whether *Nash* was based on a violation of I.C. § 19-608 or I.C. § 19-611's territorial counterpart. *See generally Nash*, 1 Idaho at 214 (simply referring to "the statute"). That is because it appears that the defendant in that case was resisting the sheriff's attempt to enter her house to arrest a third party, not his attempt to arrest the defendant herself. *See id.* at 213-14. However, the common law principle quoted by the State is stated in general terms which would be equally applicable to either section, as they both required announcement of office and purpose before acting. (*See* R., p.50 (copy of the territorial statutes).)

point it evolved into a detention. *Id*. at 1033. The district court disagreed and found the initial detention was not supported by reasonable suspicion. *Id.* On appeal, the State tried to argue that the district court's determination that there was no reasonable suspicion was erroneous. *Id*. at 1034. The Supreme Court held that argument was not preserved for appeal, even under the exception to the general rule, because it contradicted the position the State had taken below. *Id*. at 1034-35.

Like its argument in *Wilson*, the State's only argument below in Mr. Lancaster's case was that I.C. § 19-608 did not apply until some later point in the encounter (after the interrogation), and so there was no violation for not adhering to the statute at the earlier point, as contended by Mr. Lancaster. (*See* R., pp.107-09; *see generally* R., pp.99-109.)[3] Indeed, the district court specifically noted that the State did not present any alternative argument on the question of whether suppression would be an appropriate remedy if there were a violation of I.C. § 19-608. (R., p.175.) Nevertheless, much like it did in *Wilson*, the State has taken a new position in that regard on appeal – that the officer's failure to comply with the statute should not result in suppression of the evidence discovered as a result. (*See* Resp. Br., pp.7-9, 11-12.) This Court should refuse to consider that new argument for the same reasons the Supreme Court refused to consider the State's new argument in *Wilson*.

Moreover, the exception to the general preservation rule is not applicable here. That is because the State specifically framed this argument as a rationale in addition to those upon which the district court based its decision. (*See* Resp. Br., pp.7-9.) In doing so, it has effectively conceded that this argument was not decided by the district court.

[3] The motion to suppress was submitted to the district court without a hearing. (*See* R., p.174.) As a result, the State's written objection constitutes the sum total of its arguments in the district court.

b. The State's argument ignores the plain language of the statute

As the Idaho Supreme Court has made clear, when the language of a statute is unambiguous, the courts must give effect to the plain language of the statute. *Verska v. St. Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 895 (2011). As such, this Court should reject the State's argument – that I.C. § 19-608 should be read only as defining when the defendant can resist an officer – because it runs contrary to the plain language of the statute.

Specifically, the plain language of I.C. § 19-608 speaks in terms of the duties that are upon the arresting officer:

> 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 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.

I.C. § 19-608. Moreover, the name of the chapter in which that section appears is "Arrest, by Whom and How Made," and the name of the specific section is "Information to person arrested." *Id.*; *see also Gordon v. United States Bank Nat'l Ass'n*, 166 Idaho 105, 118 (2019) ("[W]e find that the title of a statutory section may be consulted for context when the statute is otherwise unambiguous."). The same was true of its territorial counterpart. (*See* R., pp.48, 50 (reproduction of the relevant territorial code section (Sec. 134)[4] and its name, "Officer to state

[4] Mr. Lancaster acknowledges that, below and in his Appellant's Brief, he specifically drew the court's attention to Section 138 of the territorial statute. (R., p.89, App. Br., p.19.) However, a closer reading of the territorial statute actually indicates that Section 138 was only applicable when a private person was effecting a warrantless arrest, whereas Section 134 specifically applied to a police officer doing the same thing. (*See* R., p.50.) Ultimately though, since the language and name of the two sections are otherwise essentially the same, that distinction does not change the analysis. *See also Ada Cnty. Highway Dist. v. Brooke View, Inc.*, 162 Idaho 138, 142 n.2 (2017) (explaining a party may properly cite to new statutory support for a position on appeal, so long as the substantive issue and his position on that issue remain the same). Indeed, the modern version of the statute consolidated the two sections by referring to "the person"

authority, bystanders").) Therefore, the plain language of the statute is clearly focused on what the person effecting the arrest is required do. Accordingly, the effect of the plain language of the statute is define when that person's actions are and are not lawful. As such, the State's proposed reading of I.C. § 19-608 as only defining what *the arrestee* could lawfully do, runs contrary to the plain language of the statute.

Indeed, the State's reading of I.C. § 19-608 to that effect would make I.C. § 19-608 redundant to I.C. § 18-705. *See, e.g., State v. Amstad*, 164 Idaho 403, 405 (2018) (reiterating that "the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant") (internal quotation omitted). Unlike I.C. § 19-608, the plain language of I.C. § 18-705 speaks specifically about when the arrestee's resistance is and is not lawful. *See* I.C. § 18-705 (defining "Resisting and obstructing officers" as, *inter alia*, resisting "any public officer, in the discharge, or attempt to discharge, of any duty of his office . . ."). Therefore, if I.C. § 19-608 had no meaning beyond defining when a person could resist the officer, it would have no purpose separate from I.C. § 18-705. That further reveals why the State's limited reading of I.C. § 19-608 is improper.

Indeed, the lawfulness of the resistance is dependent on the lawfulness of the officer's actions. *See, e.g., State v. Bishop*, 146 Idaho 804, 817 (2009) (explaining the arrestee may non-violently resist an unlawful attempt to arrest because the term "duty" in I.C. § 18-705 does not encompass unlawful conduct). Therefore, it is, in fact, by defining whether the officer's actions were lawful that I.C. § 19-608 is able to serve the purpose of fostering peaceful arrests. *See, e.g., People v. Marendi*, 213 N.Y. 600, 609-10 (N.Y. 1915).

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rather than designating between an officer and a private person. *See* I.C. § 19-608. Nevertheless, Mr. Lancaster apologizes for any confusion that particular citation caused.

Moreover, as the Idaho Supreme Court's decision in *State v. Rauch*, indicates, the mere fact that I.C. § 19-608 serves that purpose does not mean the Framers still would not have considered a violation of that statute to also be of constitutional dimension. *See State v. Rauch*, 99 Idaho 586, 589 (1978). The *Rauch* Court specifically acknowledged that I.C. § 19-611 was also intended, *inter alia*, to foster peaceful arrests by "the prevention of situations which are conducive to violent confrontations between the occupant and individuals who enter his home without proper notice."[5] *Rauch*, 99 Idaho at 589 (internal quotation omitted). Nevertheless, the Supreme Court still concluded that the officer's failure to comply with that statute's requirements made the entry into the house, and thus, the resulting arrest, and that the fruits of that unlawful conduct should be suppressed. *See id.* at 591-93. As such, the State's belief that such a statutory purpose forecloses suppression as a remedy for the failure to comply with that statute is simply unfounded.

Since I.C. § 19-608 appears in the same chapter as I.C. § 19-611 and serves a similar purpose, the Framers would have read them *in pari materia*, meaning they would have considered a violation of I.C. § 19-608's territorial counterpart to be a violation of the Idaho Constitution's protection against unreasonable seizures for the same reason a violation of I.C. § 19-611 was. The State tries to avoid that comparison by making the cursory assertion that the knock-and-announce rule embodied in I.C. § 19-611 is different because it "is a requirement of the Fourth Amendment because it was well established in the common law of search and seizure," and the announcement requirement was not. (Resp. Br., p.11.) Again, its cursory assertion does not hold up under scrutiny. *See also Zichko*, 129 Idaho at 263.

[5] The *Rauch* Court also observed that that I.C. § 19-611 served other purposes besides just promoting peaceful arrests. *See Rauch*, 99 Idaho at 589.

The first part of the State's argument is belied by the State's own recognition that the requirement that officers announce the authority for them to arrest a person *was* embodied in the common law. (*See* Resp. Br., p.8 (quoting *Nash*, 1 Idaho at 214).) There is, therefore, no meaningful basis to distinguish I.C. §§ 19-608 and -611 on the basis that one was the product of common law and the other's nearly-identical requirement was not. Rather, both appear to be codifications of that particular principle in different, but related, contexts.

To the second part of the State's argument, its contention that the Fourth Amendment also protects in the knock-and-announce context is a red herring. The proper analysis on this issue is focused on whether the Framers would have considered the Idaho Constitution as requiring suppression. *See Clarke*, 165 Idaho at 397. The interpretation of the Idaho Constitution is not dependent on the interpretation of the United States Constitution. *See, e.g.*, *State v. Donato*, 135 Idaho 469, 472 (2001). Indeed, the United States Supreme Court has specifically recognized that "States are free to regulate such arrests however they desire" and that adoption of additional restrictions or regulations on arrests would indicate that the State has different values than those embodied by the federal Constitution, such as, *inter alia*, "that the State places a higher premium on privacy than the Fourth Amendment requires." *Virginia v. Moore*, 553 U.S. 164, 174 & 176 (2008).[6] That certainly suggests that the states could determine that suppression of evidence for violation of such restrictions or regulations was appropriate

[6] The specific question in *Moore* was whether an officer's failure to follow a state's restriction on arresting for certain offenses required suppression under the Fourth Amendment of the federal Constitution. *Moore*, 553 U.S. at 168. The Court concluded that the fact that one state adopted a particular restriction could not define the scope of the Fourth Amendment for all the states. *Id.* at 176 ("[W]hile States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment's protections."). It proceeded to conclude that the arrest in that case was reasonable under the Fourth Amendment. *See generally id*.

under their own state constitutions. *See id.* at 170 (noting that no challenge had been raised in that case under Virginia's constitution).

That is, essentially, what I.C. § 19-608 territorial counterpart and its sister statutes did – embodied Idaho's values with regard to when and how a person's liberty could be limited by an arrest – and the Framers, knowing those values were embodied in Idaho law, would have intended Idaho's Constitution to also protect those values. *Compare, e.g., Rauch*, 99 Idaho 589-93 (effectively finding such a connection between the state constitution and I.C § 19-611). Therefore, whether or not the federal Constitution was also interpreted to protect those same principles should not change the conclusion that the Framers would have considered the Idaho Constitution to protect them.[7] Indeed, several other state courts did conclude suppression was appropriate, or recognized that it could be appropriate, for the actual violation of similar statutes.[8] (*See* App. Br., pp.31-32.) As such, there is no reason to believe Idaho's Framers would not have considered a similar outcome to be appropriate, especially since they intended suppression to be a broad remedy for various reasons, including "deter[ring] the police from acting unlawfully in obtaining evidence." *State v. Guzman*, 122 Idaho 981, 993 (1992).

[7] Mr. Lancaster would note that the United States Supreme Court has recognized some "rare exceptions" to the general rule that an arrest is reasonable if there was probable cause. *See, e.g., Whren v. United States*, 517 U.S. 806, 817-18 (1996); *accord Atwater v. City of Lago Vista*, 532 U.S. 318, 325 (2001). One of those exceptions is the unannounced entry into the home. *Whren*, 517 U.S. at 818 (citing *Wilson v. Arkansas*, 514 U.S. 927, 929 (1995)). Thus, it may be that, if squarely presented with the issue, the United States Supreme Court would conclude that the unannounced seizure of the person was also an exception to the general rule for reasons similar to those discussed in *Wilson*.

[8] The State does not mention these decisions from the other states at all, much less discuss how they affect the analysis under *Clarke* or the propriety of the district court's analysis in that regard. (*See generally* Resp. Br.; *compare* App. Br., pp.30-32.) As such, it has waived that issue as well. *Zichko*, 129 Idaho at 263. That also reaffirms why the State's cursory reliance on the district court's analysis (*see* Section I(B)(2), *supra*) is misplaced.

3. I.C. § 19-608 applies to *de facto* arrests

a. The State's argument in this regard is not preserved for appeal

The State did not make any argument in the district court as to whether I.C. § 19-608 should apply to *de facto* arrests. (*See generally* R., pp.99-109.) As such, this Court should refuse to consider the State's new arguments in that regard on appeal because they were not preserved. *See, e.g., Wilson*, 495 P.3d at 1034-35.

Moreover, the exception to the general preservation rule – that an issue is preserved if it was argued to or decided by the district court, *see id*. at 1035 – is not applicable here because, as the State conceded, "the district court declined to address the question." (Resp. Br., p.9.) Specifically, while the district court did articulate some concern that suppression for a violation of I.C. § 19-608 was potentially inconsistent with the case law regarding *de facto* arrests (R., p.190), it also noted that, because I.C. § 19-608 predated the concept of *de facto* arrest, "the Court doubts the concept of *de facto* arrest should come to bear in applying section 19-608. But the Court need not resolve this issue; either way, [Mr.] Lancaster was arrested before he confessed." (R., p.176 n.4 (emphasis added).) Therefore, the general exception does not apply in this regard either. *See Wilson*, 495 P.3d at 1035.

b. There is no basis to distinguish between *de facto* and "formal" arrests under I.C. § 19-608

As with its argument about the purpose of the statute, the State argument that I.C. § 19-608 does not apply to *de facto* arrests (Resp. Br., p.9) is contrary to the plain language of the statute. The statute only speaks in terms the person "making the arrest." I.C. § 19-608. There is no distinction in the statutory language between so-called "formal" and "*de facto*" arrests. *See generally id*. Indeed, the district court opined that, because the concept of *de facto* arrests only

developed after this statute was adopted, that meant it should not affect the application of the statute. (R., p.176 n.4.) In other words, the State's argument on appeal would require this Court to read the word "formal" into the statute, thereby giving it a narrower meaning than the plain language gives. Since the State's argument contravenes the plain language of the statute, this Court should reject that argument. *Verska*, 151 Idaho at 895.

As the Idaho Supreme Court has made clear, "It is the duty of those who enforce the law to follow it, and ignorance thereof can no more excuse the conduct of officers and judges than it would excuse the conduct of a defendant. If anything, a higher duty of compliance rests on those whose responsibility it is to enforce the law than on the general populace." *State v. Cohagan*, 162 Idaho 717, 726 (2017)) (internal quotation and alterations omitted). The State specifically acknowledged that "An arrest involves restraining a person's liberty and transporting them against their will, possibly by force." (Resp. Br., p.13 (citing I.C. §§ 19-601, -602).) Officer Orton repeatedly told Mr. Lancaster that it was his intent to have Mr. Lancaster transported to the police station, where everything would be explained to him. (*See generally* Defense Exhibit B.) Similarly, Officer Lane explained to Officer Wilson that it was their intent to have her to transport Mr. Lancaster to the police station to talk with the detective. (*See* Defense Exhibit D, ~4:27.) Mr. Lancaster was also handcuffed for the majority of the encounter. (*See generally* Defense Exhibit B.) Therefore, even if this were classified as a *de facto* arrest, the officers should have known that an arrest was being effectuated, and that I.C. § 19-608, which defines what an officer must do when effecting an arrest, needed to be complied with.

In other words, a *de facto* arrest is not some retroactive recasting of events, as the State appears to believe. Rather, it is a recognition that, from the objective viewpoint, an arrest was, in effect, occurring at a particular point in time, usually where officers are putting a person in

handcuffs or in a police vehicle. *See, e.g.*, *State v. Buti*, 131 Idaho 793, 797-98 (1998); *State v. DuValt*, 131 Idaho 550, 554 (1998), *State v. Pannell*, 127 Idaho 420, 423-25 (1995); *State v. Johns*, 112 Idaho 873, 878 (1987). Since the reasonable officer should also be objectively aware that an arrest is, in effect, happening as such times, *see Cohagan*, 162 Idaho at 726, there is no reason to not require them to comply with I.C. § 19-608 at such times. To hold otherwise would essentially allow the officer's subjective intent to dictate whether an arrest was happening, which of course, is improper. *Cf. State v. Lee*, 162 Idaho 642, 649 (2017) (explaining that the determination of whether an arrest was going to occur, such that a search could be justified as incident to the arrest, could not be based on the officer's subjective intent, except to the extent he actually communicated that intent to the person). As such, there is no basis to apply the statute differently to "formal" and *de facto* arrests. *See also Miller v. United States*, 357 U.S. 301, 309 (1958) ("The burden of making an express announcement is certainly slight. A few more words by the officers would have satisfied the requirement in this case.").

Finally, enforcing the plain language of the statute in that regard will not lead, as the district court appears to have believed, that this will result in suppression of all evidence in every case involving a *de facto* arrest. (*See* R., p.190.) That is because the district court overlooked the fact that there are several exceptions to the exclusionary rule. *See generally Stuart v. State*, 136 Idaho 490, 495-99 (2001) (discussing and adopting three exceptions to the exclusionary rule). Thus, in appropriate cases, the failure to comply with I.C. § 19-608 could be too attenuated from the discovery of evidence to justify its suppression, or that the evidence would have been inevitably discovered or discovered based on an independent source, and thus, not be subject to suppression. *See id.* As such, the district court's concern in that regard simply overstates the matter.

For any and all these reasons, if this Court does consider the merits of the State's new argument on appeal, it should still reject that argument on its merits.

II.

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

The State's responses concerning the district court's failure to strike the Utah PSI from the presentence materials are not remarkable. As such, no further reply is necessary in regard to that issue. Accordingly, Mr. Lancaster simply refers the Court back to pages 33-36 of his Appellant's Brief.

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 1st day of February, 2022.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of February, 2022, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF to be served as follows:

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/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

BRD/eas