

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

<b>STATE OF IDAHO,</b>	)	
	)	
<b>Plaintiff-Appellant,</b>	)	<b>NO. 47331-2019</b>
	)	
<b>v.</b>	)	<b>ADA COUNTY NO. CR01-18-55773</b>
	)	
<b>DALE ALLEN SUTTERFIELD,</b>	)	<b>RESPONDENT’S BRIEF</b>
	)	
<b>Defendant-Respondent.</b>	)	
_____	)	

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**BRIEF OF RESPONDENT**  
\_\_\_\_\_

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

\_\_\_\_\_  
**HONORABLE LYNN G. NORTON**  
**District Judge**  
\_\_\_\_\_

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## STATEMENT OF THE CASE

### Nature of the Case

A police officer arrested Dale Sutterfield for a misdemeanor committed outside the officer's presence. The officer did not have a warrant, and the private citizen who reported the offense was not present for officer's interactions with Mr. Sutterfield, including the arrest. In fact, the citizen never tried to detain Mr. Sutterfield or expressed an intent to arrest until the officer proposed it. Moreover, no one told Mr. Sutterfield of the citizen's intent and authority to conduct the arrest. And, although the citizen signed a citizen's arrest form (filled out by the officer), no one gave or showed these forms to Mr. Sutterfield. Accordingly, Mr. Sutterfield moved to suppress the evidence from a search incident to his warrantless arrest. After reviewing the totality of the circumstances, the district court found that this was an arrest by an officer, not a private citizen. The district court granted Mr. Sutterfield's motion to suppress.

The State appealed. The State argues the district court erred by granting Mr. Sutterfield's motion because the arrest was constitutional.

Mr. Sutterfield submits the district court properly granted his motion because his arrest violated Article I, Section 17 of the Idaho Constitution. He asserts an arrest is not "constitutional" if an officer uses the pretense of a citizen's arrest to work-around the Idaho Constitution. As found by the district court, this was a warrantless arrest by an officer for a completed misdemeanor. The State did not meet its burden to prove the private citizen arrested Mr. Sutterfield, and therefore this Court should affirm the district court's decision and order suppressing the evidence found on Mr. Sutterfield during the search incident to his unconstitutional arrest.

## Statement of Facts and Course of Proceedings

In the early evening in November 2018, Mr. Sutterfield went into the Mister BBQ restaurant in Garden City to order food and ask about possible work. (R., p.108.) One of the employees, Anthony Randolph, noticed Mr. Sutterfield fidgeting around the order counter while Mr. Randolph and another employee prepared his food. (R., p.108.) Mr. Randolph gave Mr. Sutterfield his food,<sup>1</sup> and Mr. Sutterfield left the restaurant. (R., p.108.) Mr. Sutterfield went to a nearby laundromat in the same business complex as Mister BBQ. (R., p.108.)

After Mr. Sutterfield left, the Mister BBQ employees noticed that their business cell phone was gone from its spot on the counter. (R., pp.108–9.) Mr. Sutterfield was the last customer in the restaurant before the phone went missing.<sup>2</sup> (R., p.109.) Mr. Randolph and another employee went to the laundromat to confront Mr. Sutterfield. (R., p.109.) Eventually, Mr. Sutterfield admitted that he took the phone and gave it back to Mr. Randolph. (R., p.109.) He told Mr. Randolph that he was going to use it to call his family. (R., p.109.) Mr. Sutterfield had taken the battery and SIM card out of the phone, but, once the employees reassembled it, it worked again. (R., p.111.) After they got the phone back, Mr. Randolph and the other employee left the laundromat. (R., p.109.) Mr. Randolph never tried to restrain or arrest Mr. Sutterfield. (R., p.109.) He also never told Mr. Sutterfield that he was under arrest, that he would be arrested, or that he needed to stay in the area until the police arrived. (R., p.109.)

After this exchange, Mr. Randolph felt unsafe because he thought Mr. Sutterfield might have a weapon and he kept reaching around his waist and fidgeting. (R., p.109.) From the

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<sup>1</sup> Mr. Randolph gave Mr. Sutterfield some extra food, too. (R., p.108.) It was Thanksgiving, and Mr. Sutterfield was “going through a rough time.” (Tr., p.15, Ls.9–16.) Mr. Randolph told Mr. Sutterfield to check back later for odd jobs around the restaurant or dishwashing. (Tr., p.15, Ls.17–23, p.17, Ls.2–5.)

<sup>2</sup> At some point, Mr. Sutterfield returned to the restaurant for silverware and left again. (R., p.109.)

parking lot by the laundromat, Mr. Randolph called 911 and told dispatch about the phone and his concerns about Mr. Sutterfield. (R., p.109.) Officer Barghoorn with the Garden City Police Department arrived at the Mister BBQ about three minutes later. (R., p.109.)

Officer Barghoorn went immediately over to Mr. Sutterfield, who was inside the laundromat. (R., pp.109–10.) Officer Barghoorn did not speak with Mr. Randolph first. (R., p.110.) Officer Barghoorn patted Mr. Sutterfield down for weapons, found none, and handcuffed him. (R., p.110.) After *Miranda* warnings, Mr. Sutterfield admitted to taking the phone to call his family. (R., p.110.) Two backup officers stayed with Mr. Sutterfield, and Officer Barghoorn went to talk to Mr. Randolph. (R., p.110.)

Mr. Randolph told Officer Barghoorn what had happened, and Officer Barghoorn asked Mr. Randolph and the other employee what they wanted him to do: cite Mr. Sutterfield for theft, trespass him, or arrest him with a citizen's arrest. (R., p.110.) Officer Barghoorn explained that he could not arrest Mr. Sutterfield because the crime did not occur in the officer's presence. (R., p.111.) Mr. Randolph said that he wanted Mr. Sutterfield arrested. (R., p.110.) Officer Barghoorn filled out an affidavit and a citizen's arrest form, and he had Mr. Randolph sign them. (R., p.110; State's Exs. 2–3.) Mr. Randolph gave the signed forms to Officer Barghoorn and returned to work inside Mister BBQ. (R., pp.110–11; *see* State's Exs. 2–3.) Mr. Randolph never went back over to Mr. Sutterfield. (R., p.111.) Officer Barghoorn secured the forms in his patrol car or elsewhere. (R., p.111.) He did not give, read, or show them to Mr. Sutterfield. (R., p.111.)

Officer Barghoorn returned to Mr. Sutterfield. (R., p.111.) He told him, "You are under arrest for petit theft." (R., p.111.) Officer Barghoorn did not tell him that was making a citizen's arrest or acting as an agent for Mr. Randolph. (R., p.111.) Officer Barghoorn began to search Mr. Sutterfield incident to arrest. (R., p.111.) During the search, Mr. Sutterfield asked if "they"

were pressing charges, and Officer Barghoorn said “yep.” (R., p.111.) Officer Barghoorn found methamphetamine in a baggie in Mr. Sutterfield’s pocket. (R., p.111.) Consequently, Officer Barghoorn arrested Mr. Sutterfield for felony possession of a controlled substance. (R., p.111.)

In December 2018, the State charged Mr. Sutterfield with possession of a controlled substance, a felony, for the methamphetamine and petit theft, a misdemeanor, for the cell phone. (R., pp.31–32.) Mr. Sutterfield pled not guilty. (R., pp.50–51.)

Mr. Sutterfield moved to suppress the methamphetamine obtained after his arrest. (R., pp.72–79.) He argued his arrest violated Article 1, Section 17 of the Idaho Constitution because Officer Barghoorn arrested him for a misdemeanor committed outside the officer’s presence. (R., pp.74–77.) He also argued Mr. Randolph did not make a lawful citizen’s arrest for the misdemeanor. (R., p.77.) To this end, he contended neither Officer Sutterfield nor Mr. Randolph complied with Idaho’s statutory requirements for a citizen’s arrest. (R., p.77.)

The State opposed the motion. (R., pp.83–89.) The State argued there was probable cause to arrest Mr. Sutterfield for petit theft and the crime occurred in Mr. Randolph’s presence, so he was authorized by statute to make a citizen’s arrest. (R., pp.85–87.) In addition, the State asserted the Idaho statutes allowed Mr. Randolph to “summon assistance” for the arrest, and Officer Barghoorn acted as Mr. Randolph’s agent in arresting Mr. Sutterfield. (R., pp.87–88.) Lastly, the State argued Officer Barghoorn discovered the methamphetamine during a lawful search incident to the arrest. (R., pp.88–89.)

Mr. Sutterfield replied. (R., pp.91–93) He again argued Mr. Randolph did not effectuate a citizen’s arrest. (R., pp.91–93.) Mr. Sutterfield highlighted that Idaho’s notice requirements—to be informed by the person making the arrest of the intent to arrest, the cause of the arrest, and the



authority for the arrest—were not done. (R., pp.92–93.) He contended this was an arrest by a police officer, not a citizen or his agent. (R., pp.91–93.)

On August 14, 2019, the district court held a hearing on the motion. (*See generally* Tr.) Mr. Randolph and Officer Barghoorn testified. (Tr., p.11, L.21–p.34, L.8 (Mr. Randolph), p.35, L.1–p.53, L.21 (Officer Barghoorn).) The district court also admitted Officer Barghoorn’s bodycam video and the affidavit and citizen’s arrest form. (Tr., p.9, Ls.14–16, p.47, L.24; State’s Exs.2–3; *see also* Aug. R., State’s Ex. 1 (bodycam video).) After argument by the parties, the district court took the matter under advisement. (Tr., p.54, L.11–p.63, L.21.)

The next day, August 15, the district court issued a written memorandum decision and order suppressing the evidence. (R., pp.108–18.) The district court provided detailed factual findings, set forth above, based on Mr. Randolph’s and Officer Barghoorn’s testimony and the bodycam video. (R., pp.108–12.) In these findings, the district court found that Mr. Sutterfield committed the misdemeanor offense of petit theft by taking the cell phone and removing the battery and SIM card. (R., pp.109–10.) The district court also found that this was “a completed misdemeanor” by the time Officer Barghoorn arrived on the scene. (R., p.110.)

At the start of its legal analysis, the district court recognized the parties’ stipulation that Mr. Sutterfield’s arrest “was a warrantless arrest and seizure.” (R., p.111.) The district court also acknowledged that the State “does not dispute” that Officer Barghoorn did not have the authority to arrest Mr. Sutterfield because the misdemeanor was committed outside the officer’s presence. (R., p.113.) “Thus,” the district court stated, “the issue then is whether there was a valid citizen’s arrest that supported the officer’s search of Sutterfield’s person which led to the discovery of the methamphetamine.” (R., p.113.)

The district court held that there was not a valid citizen's arrest. (R., pp.114–18.) The district court found no facts to show that Mr. Randolph was making the arrest or having Officer Barghoorn act as his agent. (R., pp.114–18.) First, the district court found that neither Mr. Randolph nor Officer Barghoorn gave Mr. Sutterfield notice, as required by Idaho law, of Mr. Randolph's intent to arrest and his authority to arrest. (R., p.114.) The district court also found that Mr. Sutterfield was never shown the citizen's arrest forms filled out by Officer Barghoorn and signed by Mr. Randolph. (R., p.114.) Further, the district court recognized that Mr. Randolph could have "delivered" Mr. Sutterfield to Officer Barghoorn, but that was not done either. (R., p.144.) Instead, Officer Barghoorn "handcuffed, *Mirandized*, and detained Sutterfield even before talking with Randolph or receiving [the citizen arrest forms] from Randolph." (R., p.114.)

Next, the district court distinguished the instant facts from case law relied on by the State to justify Officer Barghoorn's warrantless arrest. (R., pp.114–17.) The district court found that it was not "impracticable" to comply with Idaho's notice requirements because Mr. Sutterfield was immediately restrained upon Officer Barghoorn's arrival. (R., pp.114–15.) The district court also found, "Sutterfield was not attempting to resist officers or resisting officers, as evidenced by" the testimony and Officer Barghoorn's bodycam video. (R., p.115.) In sum, the district court determined that there was no reason for Mr. Randolph or Officer Barghoorn to fail to notify Mr. Sutterfield of Mr. Randolph's alleged intent, cause, and authority to arrest. (R., p.115.)

Lastly, in discussing prior case law, the district court recognized that Mr. Randolph's "only act to effectuate the citizen's arrest was to sign his name to an affidavit and a citizen's arrest form." (R., p.116.) Mr. Randolph "did not physically confront Sutterfield about the

citizen's arrest, in [Mister] BBQ, at the laundromat, in the parking lot, or at the jail." (R., p.116)

The district court concluded:

While Officer Barghoorn informed Sutterfield that he was being arrested for petit theft, Officer Barghoorn never indicated in any way to Sutterfield that it was a citizen's arrest made at the direction and request of Randolph. While Mr. Randolph's personal presence was not necessary, Officer Barghoorn was still required to provide notice of the authority of the arrest as a citizen's arrest and that Officer Barghoorn was assisting with the arrest and transport of the defendant under that authority. Could Barghoorn have shown the citizen's arrest form to Sutterfield or read it to Sutterfield to provide sufficient notice? Maybe—but that clearly did not happen in this case. Based upon all evidence presented at the hearing, the State has failed to show by a preponderance of the evidence that Sutterfield was provided adequate notice to effect a valid citizen's arrest under the plain-language of Idaho Code § 19-606. *Therefore, the evidence before this Court is that Sutterfield's arrest was an arrest by an officer.*<sup>3</sup> Since the arrest was for a completed misdemeanor that did not occur in the officer's presence, it was not a lawful arrest as required by Section 17 of Article I of the Idaho Constitution.

(R., p.117 (emphasis added).) Because the arrest was unlawful, Officer Barghoorn's search "was not incident to a valid arrest." (R., p.118.) Therefore, the district court granted Mr. Sutterfield's motion and suppressed the methamphetamine as the "fruit" of the unlawful arrest. (R., p.118.)

Also on August 15, 2019, shortly after the district court's decision, Mr. Sutterfield pled guilty to petit theft. (R., pp.121–22.) The district court dismissed the charge of possession of a controlled substance. (R., pp.121–22.) The district court sentenced Mr. Sutterfield to 146 days in jail, with 146 days of credit for time served, and released him. (R., pp.121, 123.) On August 28, 2019, the State filed a notice of appeal. (R., pp.124–26.)

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<sup>3</sup> In a footnote, the district court stated:

Even if this Court found that Barghoorn's response to Sutterfield's question of "So they are pressing charges?" was sufficient notice of a citizen's arrest, the search of the pockets had been completed immediately before Sutterfield asked the question. So sufficient statutory notice to effect the arrest was not completed until the search had already taken place so the search was prior to the citizen's arrest under this theory as well.

(R., p.118 n.5.)

## ISSUE

The State frames the issue on appeal as:

Did the district court err in suppressing the evidence of methamphetamine possession found incident to arrest because the arrest and search incident thereto were constitutional?

Mr. Sutterfield rephrases the issue as:

Did the district court properly grant Mr. Sutterfield's motion to suppress evidence obtained after a police officer arrested him for a completed misdemeanor without a warrant?

## ARGUMENT

### The District Court Properly Granted Mr. Sutterfield's Motion To Suppress Evidence Obtained After A Police Officer Arrested Him For A Completed Misdemeanor Without A Warrant

#### A. Introduction

The Court should affirm the district court's order granting Mr. Sutterfield's suppression motion because Officer Barghoorn arrested Mr. Sutterfield for a completed misdemeanor without a warrant, contrary to the Court's recent decision in *State v. Clarke*, 165 Idaho 393 (2019). Aware of *Clarke*, Officer Barghoorn tried to sidestep the Court's decision by offering to do a citizen's arrest for Mr. Randolph. However, as correctly found by the district court, none of the facts showed any action or intent to engage in a citizen's arrest, and none of Idaho's statutory requirements demonstrated a citizen's arrest was actually taking place. On appeal, the State argues Officer Barghoorn's arrest was constitutional because he was acting as Mr. Randolph's agent. Mr. Sutterfield respectfully disagrees—Officer Barghoorn's desire to conduct a citizen's arrest to avoid the implications of *Clarke* does not make it a citizen's arrest. The district court properly ruled this was an arrest by an officer. Therefore, Mr. Sutterfield respectfully requests this Court affirm the district court's decision.

#### B. Standard Of Review

In reviewing an order denying a motion to suppress evidence, this Court applies a bifurcated standard of review. *State v. Purdum*, 147 Idaho 206, 207 (2009). This Court will accept the trial court's findings of fact unless they are clearly erroneous but will freely review the trial court's application of constitutional principles to the facts found. *Id.*

*State v. Lee*, 162 Idaho 642, 646–47 (2017).

C. The Court Should Affirm The District Court’s Order Granting Mr. Sutterfield Motion To Suppress Because No Evidence Showed The Police Officer Was Acting As The Citizen’s Agent To Allow The Officer’s Warrantless Arrest For A Completed Misdemeanor

Article I, Section 17 of the Idaho Constitution states:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue without probable cause shown by affidavit, particularly describing the place to be searched and the person or thing to be seized.

IDAHO CONST. art. I, § 17. “In some instances,” this Court has “construed Article I, section 17, to provide greater protection than is provided by the United States Supreme Court’s construction of the Fourth Amendment.” *State v. Koivu*, 152 Idaho 511, 519 (2012); *see also* U.S. CONST. amend IV. The Court provides “greater protection to Idaho citizens based on the uniqueness of our state, our Constitution, and our long-standing jurisprudence.” *Id.* (quoting *State v. Donato*, 135 Idaho 469, 472 (2001)).

The Court provided greater protection to Idaho citizens in *Clarke*. In *Clarke*, the Court held Article I, Section 17 prohibited an officer from making a warrantless arrest for a completed misdemeanor. 165 Idaho at 399. In reaching this landmark decision, the Court considered the common law practices and statutes before the adoption of the Idaho Constitution in 1890. *Id.* at 397–400. The Court relied on pre-1890 case law and statutes because that historical common law could best determine the framers’ intent for the rights guaranteed by Article I, Section 17. *Id.* at 397. After reviewing the common law, the Court concluded “the framers of the Idaho Constitution understood that Article I, section 17 prohibited warrantless arrests for completed misdemeanors.” *Id.* at 399. Although the Court was “fully mindful of the significance of this conclusion,” the Court recognized that even “extremely powerful policy considerations . . . must yield” to the constitutional rights afforded to all Idaho citizens. *Id.* at 400.

Here, there is no dispute that Officer Barghoorn did not have an arrest warrant. (R., p.113.) There is also no dispute that Officer Barghoorn arrested Mr. Sutterfield for a misdemeanor offense, petit theft, committed outside his presence. (R., p.113.) As such, the State had the burden to justify Officer Barghoorn’s warrantless arrest of Mr. Sutterfield. *See, e.g., State v. Wolfe*, 165 Idaho 338, 341 (2019). The State did not meet its burden.

1. Idaho’s Codification of Common Law on Citizen’s Arrest

Similar to the Court’s analysis in *Clarke*, the district court correctly examined Idaho’s statutory requirements on a citizen’s arrest to determine Mr. Sutterfield was arrested by an officer, not a citizen. The district court’s focus on Idaho’s statutes was appropriate because these statutes are rooted in the common law and were in effect before the adoption of the Idaho Constitution. The right for a citizen to arrest arose “in England during the medieval period,” and, “[a]t early common law, little or no distinction was made between arrests performed by a private citizen and those performed by a peace officer . . . .” Ira P. Robbins, *Vilifying the Vigilante: A Narrowed Scope of Citizen’s Arrest*, 25 CORNELL J.L. & PUB. POL’Y 557, 563 (2016) (footnotes omitted). With the rise in state police forces, and the legislative and court’s focus on outlining their authority, the development of the citizen’s arrest doctrine fell behind. *Id.* at 564–65. As such, many states, including Idaho, codified the common law on citizen’s arrest “in an attempt to provide more clarity to its citizens.” *Id.* at 564–65, 569–72.

Idaho derived its codification of the citizen’s arrest doctrine from California. *Id.* at 569 & n.73. Almost identical to California law, I.C. § 19-601 states: “An arrest is taking a person into custody in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person.” I.C. § 19-601; *see* CAL. PENAL CODE § 834. Idaho Code § 19-604 allows a private person “to arrest another” . . . “[f]or a public offense committed or attempted in his

presence.” I.C. § 19-604(1). California’s statute is the same. CAL. PENAL CODE § 837. Similarly, Idaho and California both require notice to the arrestee:

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; *see* CAL. PENAL CODE § 841. This notice requirement had a specific purpose in the common law: “Because every man was privileged to resist unlawful attempts to restrict his freedom, the common law required notice to be given that an apprehension represented a citizen’s arrest. An arrester was obliged to make known his intent and the cause of the arrest.” *The Law of Citizen’s Arrest*, 65 COLUM. L. REV. 502, 507 (1965) (footnote omitted). In addition, both Idaho and California allow the private citizen to “orally summon as many persons as he deems necessary to aid him” in the arrest. I.C. § 19-606; CAL. PENAL CODE § 839. Finally, the private citizen “must, without unnecessary delay, take the person arrested before a magistrate, or deliver him to a peace officer.” I.C. § 19-614; CAL. PENAL CODE § 847(a). Idaho’s statutes were all in effect in 1887 and, relevant here, these statutes have not changed since 1887. *See* Revised Statutes of the Territory of Idaho, Pt. 4 (Penal), Pt. 2 (Of Criminal Procedure) Title III, Ch. V, §§ 7538, 7541, 7543, 7545, 7551 (1887). Because Idaho codified its citizen’s arrest authority before the adoption of the Idaho Constitution, these statutes shed light on the framer’s understanding of the requisite actions for a party to make an arrest.

## 2. Use of Idaho Arrest Statutes to Identify Citizen’s Arrest

Since these statutes codified the common law, it was proper to the district court to consider them to determine whether Officer Barghoorn assisted Mr. Randolph with a citizen’s arrest. Idaho appellate courts have done the same. For example, in *State v. Lagasse*, the Idaho



Court of Appeals had to determine whether a security guard conducted a citizen's arrest of the defendant for petit theft. 135 Idaho 637, 640 (Ct. App. 2001). The Court of Appeals examined the Idaho's arrest statutes to make that decision. *Id.* The Court of Appeals also examined whether the security guard took "some action or intent evidencing custody." *Id.*; *see also State v. Hobson*, 95 Idaho 920, 923 (1974) ("Under I.C. § 19-601 an arrest is a custodial taking, seizure or detention, and we believe that there must be some action or intent evidencing police custody before an arrest occurs."). The Court of Appeals held the security guard's action of "physically detaining" the defendant "and placing him in handcuffs" showed that intent to place the defendant in custody. *Id.* After evaluating the arrest statutes and the security guard's actions,<sup>4</sup> the Court of Appeals concluded the security guard "effectuated a lawful citizen's arrest" of the defendant. *Id.* Likewise, in *Sima v. Skapps Payless Drug Center, Inc.*, the Idaho Supreme Court examined Idaho's arrest statutes to determine whether a citizen validly arrested the defendant and, after holding as much, held the citizen's search incident to arrest was reasonable. 82 Idaho 387, 391–92 (1960). As another example, in *State v. Moore*, the Court of Appeals upheld the district court's determination of citizen's arrest by examining Idaho's arrest statutes. 129 Idaho 776, 779–80 (Ct. App. 1996). The Court of Appeals concluded the citizens "effectuated a valid citizen's arrest in compliance with I.C. § 19-604." *Id.* at 780. Relatedly, in *State v. Sutherland*, 130 Idaho 472 (Ct. App. 1997), the Court of Appeals examined Idaho's arrest statutes and

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<sup>4</sup> The Court of Appeals rejected the defendant's argument that the security guard did not follow I.C. § 19-608's notice requirements. The statute does not require notice when the arrestee is "pursued immediately" after commission of the offense, I.C. § 19-608, and the Court of Appeals determined the security guard arrested the defendant in immediate pursuit. *Lagasse*, 135 Idaho 640. Here, the State has not argued Officer Barghoorn or Mr. Randolph had no statutory duty to provide notice due to an immediate pursuit. (*See also R.*, p.114 ("There was no evidence presented that the officers arrived while Sutterfield was engaged in the theft of the phone, attempting to take the phone, or while anyone was in pursuit of Sutterfield."), p.115 (discussing that the immediate pursuit exception to notice requirement did not apply).)

California<sup>5</sup> case law to distinguish between an officer's arrest and officer's assistance with a citizen's arrest. *Id.* at 474–75. The Court of Appeals agreed that “a police officer can act as an agent of a citizen who summons assistance in aid of making a citizen's arrest.” *Id.* at 475; *see* I.C. § 19-606 (citizen can summon assistance). However, in upholding the citizen's arrest with officer assistance, the Court of Appeals considered the citizen's compliance with the statutes, such as directing the office to arrest and providing notice to the arrestee. 130 Idaho at 475–76. As shown by *Lagasse*, *Sima*, *Moore*, and *Sutherland*, Idaho appellate courts have consistently and repeatedly examined Idaho's arrest statutes to determine whether a private citizen or an officer made the arrest.

The appellate courts' use of the arrest statutes to identify a citizen's arrest illustrates a critical distinction for the Court's analysis. The State contends the statutes are not relevant because the Court has held a statutory violation does not warrant suppression of the evidence. (App. Br., pp.8–9.) *State v. Green*, 158 Idaho 884, 889, 892 (2015) (suppression “inappropriate” when violation is “statutory in nature”). So, according to the State, even if Officer Barghoorn and Mr. Randolph violated Mr. Sutterfield's statutory arrest rights, Mr. Sutterfield could not seek suppression of the evidence. (App. Br., pp.8–9.) The State has oversimplified the issue. Officer Barghoorn's and Mr. Randolph's violation of Mr. Sutterfield's statutory rights is *not* why the evidence must be suppressed. The evidence must be suppressed because Officer Barghoorn conducted a warrantless arrest for a completed misdemeanor. The statutes are only relevant inasmuch as they guide the Court's determination of whether the citizen or the officer conducted the arrest.

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<sup>5</sup> The *Sutherland* Court also considered an Alaska case, which had adopted California's approach. *See Sutherland*, 130 Idaho at 474–75 (discussing *Moxie v. State*, 662 P.2d 990 (Alaska Ct. App. 1983)).

Put another way, the Court’s analysis on the legality of Mr. Sutterfield’s arrest is two-fold. First, the Court uses the statutes and case law to determine who arrested Mr. Sutterfield. Second, with that determination made, the Court decides whether that arrest, by that arresting party, was constitutional. Here, as discussed next in Part C.3, the statutes and case law show Officer Barghoorn, not Mr. Randolph, arrested Mr. Sutterfield. Then, with that determination as Officer Barghoorn as the arresting party, *Clarke* establishes that the arrest was not constitutional. *See* 165 Idaho at 399.

As a final note, the State’s position leaves the Court with little guidance to identify the arresting party—besides the officer’s stated intent and the State’s post-hoc evaluation.<sup>6</sup> This critical distinction (between identifying the arresting party and the constitutionality of the arrest) gives meaning to *Clarke*. Without it, an officer could simply claim that he was making a citizen’s arrest and the arrest would be constitutional. And, on the citizen’s end, any citizen that reports a crime could be held responsible for making a citizen’s arrest, even if that citizen did not intend to arrest. Thus, any realization of *Clarke*’s constitutional protections would be tied to the officer’s representations and the post-hoc justification for the arrest. This would greatly diminish *Clarke*’s aim to preserve the constitutional right of Idaho citizens to be free from warrantless arrests for completed misdemeanors. As required by the statutes and case law, the citizen must express an intent to arrest, take some action to arrest, act without delay, and provide notice. Those

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<sup>6</sup> Mr. Sutterfield notes that the State does not propose any test or guidelines for the Court to identify the arresting party, other than the fact that the citizen agreed to the officer’s option to arrest and signed the form. (App. Br., p.10 (“The facts show that the officer effectuated a citizen’s arrest based on a citizen’s oral and written request.”).) Thus, no matter the officer’s and citizen’s other conduct at the scene or their intentions, if the citizen at some point requests an arrest and signs the form, that would be sufficient, as a matter of law, to create a citizen’s arrest. This completely upends *Clarke*’s constitutional protections.

requirements adequately protect these constitutional rights. Therefore, the Court should reject the State's position.

### 3. Application of Idaho's Arrest Statutes to Officer Barghoorn's Actions

Considering the arrest statutes and case law, the totality of the circumstances show Officer Barghoorn arrested Mr. Sutterfield. None of statutory procedures were followed to indicate Mr. Randolph conducted the arrest personally or through Officer Barghoorn as his agent.

As found by the district court, Mr. Randolph did not take Mr. Sutterfield into custody (I.C. § 19-601), provide Mr. Sutterfield notice (I.C. § 19-608), orally summon aid for the arrest (I.C. § 19-606), or deliver Mr. Sutterfield to a police officer or magistrate (I.C. § 19-614).

Instead:

When Randolph and the other employee confronted Sutterfield at the laundromat about stealing the phone, the[y] did not detain Sutterfield, ask him to stay until police arrived, or inform Sutterfield that they were placing him under arrest for the petit theft. While Randolph could summons a police officer to aid him in making the arrest pursuant to Idaho Code § 19-606, the police officer could only assist Randolph in making the arrest and Randolph was still statutorily required to . . . follow the notice requirements of Idaho Code § 19-608. While Barghoorn could assist with filling out Exhibits 2 and 3, and Randolph could sign them, the forms were never shown to Sutterfield and Randolph never told Sutterfield that he was arresting him, the basis, or that it was a citizen's arrest as the authority to make the arrest. While Randolph could have delivered Sutterfield to a peace officer under Idaho Code § 19-614, that did not occur. The officer handcuffed, *Mirandized*, and detained Sutterfield even before talking with Randolph or receiving Exhibits 2 and 3 from Randolph. It was not Randolph that informed Sutterfield of the basis for the arrest—either orally or in writing. Then, when Barghoorn told Sutterfield of his arrest for petit theft, Barghoorn did not provide the written notice of the citizen's arrest or orally inform Sutterfield of the citizen's arrest and Randolph was not present.

(R., p.114.) The district court also stated:

Here, the Court finds no evidence that Randolph informed Sutterfield of the intention to arrest, cause of the arrest, or authority for the arrest. While Officer

Barghoorn informed Sutterfield that he was being arrested for petit theft, Officer Barghoorn never indicated in any way to Sutterfield that it was a citizen's arrest made at the direction and request of Anthony Randolph. While Mr. Randolph's personal presence was not necessary, Officer Barghoorn was still required to provide notice of the authority of the arrest as a citizen's arrest and that Officer Barghoorn was assisting with the arrest and transport of the defendant under that authority. Could Barghoorn have shown the citizen's arrest form to Sutterfield or read it to Sutterfield to provide sufficient notice? Maybe—but that clearly did not happen in this case. Based upon all evidence presented at the hearing, the State has failed to show by a preponderance of the evidence that Sutterfield was provided adequate notice to effect a valid citizen's arrest under the plain-language of Idaho Code § 19-606. Therefore, the evidence before this Court is that Sutterfield's arrest was an arrest by an officer.

(R., p.117.) In short, the district court found that Mr. Randolph neither engaged in any action nor indicated any intent to arrest of his own volition. Instead, once Officer Barghoorn posed the option of arresting Mr. Sutterfield, Mr. Randolph agreed and signed the form later filled out by Officer Barghoorn.

Relied on by the district court, *Sutherland*, 130 Idaho 472, is instructive to show a proper citizen's arrest. (See R., pp.116–17.) In *Sutherland*, two women, Goma and Sutherland, got into a fight at a bar. 130 Idaho at 473. Goma asked the bartender to call the police. *Id.* at 475. When the officers arrived, Goma asked for Sutherland be arrested for battery, and she told the officer that Sutherland might have a weapon in her purse. *Id.* The officer “approached Sutherland, who was standing several feet away from Goma, and informed her that Goma wanted her placed under citizen's arrest.” *Id.* Later, the officer told Sutherland again that “she was being detained because Goma intended to make a citizen's arrest for the alleged battery.” *Id.* The officer took Sutherland to the police department. *Id.* Goma went as well. *Id.* “Before Sutherland was booked, Goma filled out a citizen's arrest form, signed it and informed Sutherland that she was placing her under citizen's arrest for battery.” *Id.* Based on those facts, the Court of Appeals held Goma effected a citizen's arrest of Sutherland with police assistance. *Id.* at 475–76. Unlike the

facts here, Goma told the police upon arrival that she wanted to Sutherland arrested, the officer told Sutherland twice about the citizen's arrest, Goma filled out the arrest form herself, Goma went to the police station, and Goma told Sutherland about the citizen's arrest. *Id.* In fact, the Court of Appeals recognized, "At the police station, Goma completed the necessary documentation for the citizen's arrest, and followed the requirements set forth in I.C. [§] 19-608." *Id.* at 476. Mr. Randolph did not engage in similar conduct or express an intent to arrest, besides signing the arrest form upon Officer Barghoorn's prompt. Mr. Randolph did not immediately tell Officer Barghoorn about wanting to arrest Mr. Sutterfield, Officer Barghoorn did not tell Mr. Sutterfield about the citizen's arrest, Mr. Randolph did not fill out the arrest form, Mr. Randolph did not go the police station, and Mr. Randolph did not tell Mr. Sutterfield about the citizen's arrest.

The State focuses solely on Mr. Sutterfield's lack of notice to challenge the district court's determination of Officer Barghoorn's arrest. (App. Br., pp.7–10.) As discussed above, it was appropriate for the district court to consider Mr. Sutterfield's lack of notice, as that is one of the statutory requirements to identify the arresting party. *See also Helgeson v. Powell*, 54 Idaho 667, 34 P.2d 957, 962 (1934) (holding that two officers' attempt to arrest of the defendant was "unlawful" because the officers did not provide him notice under I.C. § 19-608). Setting that aside, the State is incorrect that the district court only examined the lack of notice. The district court's extensive analysis, (R., pp.113–18), considered multiple factors from the arrest statutes and case law. The district court recognized: (1) Mr. Randolph and the other employee did not engage in any action to detain or arrest Mr. Sutterfield before Officer Barghoorn's arrival (I.C. § 19-601); (2) Mr. Randolph did not summon Officer Barghoorn to aid him in the arrest (I.C. § 19-606); and (3) Mr. Randolph did not deliver Mr. Sutterfield to Officer Barghoorn

(I.C. § 19-614). (R., pp.114, 116–17.) Thus, the district court considered far more than Mr. Sutterfield’s lack of notice to determine Officer Barghoorn arrested him.

The State also maintains “a hypothetical” demonstrates the “flaw in the district court’s reasoning.” (App. Br., p.8.) In this hypothetical, Officer Barghoorn responded to Mr. Randolph’s call to dispatch and immediately arrested Mr. Sutterfield (which he essentially did). (App. Br., p.8.) Then, hypothetically, Officer Barghoorn told Mr. Sutterfield that he was conducting a citizen’s arrest “based on the call to dispatch.” (App. Br., p.8.) The State asserts this could not be a proper citizen’s arrest:

Certainly the district court would not have accepted the argument that the officer’s representations alone showed the arrest to be a citizen’s arrest or transformed the officer’s arrest into a citizen’s arrest.

(App. Br., p.8.) Mr. Sutterfield agrees. The district court, of course, would not have to accept Officer Barghoorn’s representation that he conducted a citizen’s arrest to make it such.<sup>7</sup> That would eviscerate *Clarke*. Yet, the State misses the mark on its next logical jump:

It makes no more logical sense to conclude that the officer’s failure to inform Sutterfield that the arrest was a citizen’s arrest alone showed the arrest was not a citizen’s arrest or transformed the citizen’s arrest into an officer arrest. What information Sutterfield was told did not change the underlying facts nor the underlying authority for the arrest.

(App. Br., p.8.) The problem with the State’s reasoning is it conflates the arresting party with the legality of the arrest. If Officer Barghoorn arrived at the scene and immediately arrested Mr. Sutterfield, as in the hypothetical, without informing him that the arrest was a citizen’s arrest, there would be no question that the arrest was by Officer Barghoorn. Officer Barghoorn took physical custody of Mr. Sutterfield. However, if the purported arresting party changes to a

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<sup>7</sup> Conversely, if Mr. Randolph physically took Mr. Sutterfield into custody, gave him notice of the arrest, and delivered him to Officer Barghoorn, the district court would not have to accept any representation that this was an arrest by an officer. *State v. Howard*, 155 Idaho 666, 673 (Ct. App. 2013) (trial court has power to assess credibility and resolve factual conflicts).

citizen, so does the importance of the statutory requirements.<sup>8</sup> If Officer Barghoorn arrived at the scene and immediately arrested Mr. Sutterfield, without informing him that the arrest was a citizen's arrest, but perhaps Mr. Randolph had told dispatch that he wanted to arrest Mr. Sutterfield, the lack of notice matters. That statutory requirement informs the Court's analysis to determine who actually arrested Mr. Sutterfield. The failure to give notice in that scenario establishes that the arrest was by Officer Barghoorn, not Mr. Randolph, despite Mr. Randolph's stated intention to dispatch. *Sima*, 82 Idaho at 391–92; *Lagasse*, 135 Idaho at 640; *Sutherland*, 130 Idaho at 474–76; *Moore*, 129 Idaho at 779–80. Contrary to the State's assertion, it does make “more logical sense” to determine that an officer's failure to inform the defendant of a citizen's arrest shows that the arrest was not a citizen's arrest. (App. Br., p.8.) It also makes “more logical sense” to determine that a citizen's failure to inform the defendant of a citizen's arrest shows that the arrest was not a citizen's arrest. (App. Br., p.8.) Mr. Sutterfield's knowledge—and when, how, and where he obtained that knowledge—changes the hypothetical and “the underlying authority for the arrest.” (App. Br., p.8.) Once again, the State's hypothetical has oversimplified the issue.

Ultimately, Mr. Sutterfield agrees with the State's assertion that “the compliance or non-compliance with the notice requirements of I.C. § 19-608” is not grounds for suppression. (App. Br., p.8.) The district court recognized this as well. (R., pp.113, 117–18.) The problem for the State is that the non-compliance with I.C. § 19-608, along with other facts, proves Mr. Randolph did not arrest Mr. Sutterfield. As found by the district court, there was no evidence that Mr. Randolph did any action or expressed any intent to arrest Mr. Sutterfield *before* Officer

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<sup>8</sup> In the end, the lack of notice does not really matter when an officer is indisputably the arresting party because that statutory violation would not provide for suppression of the evidence. *See* Part C.2. Certainly, as is the case here, there could be other issues with the legality of the arrest once the officer is identified as the arresting party.



Barghoorn offered the citizen's arrest option, and there is no evidence that Mr. Randolph did some action *during or after* Officer Barghoorn's arrest (like giving Mr. Sutterfield notice) to evidence an intent to arrest. *See Lagasse*, 135 Idaho at 640 ("Furthermore, by physically detaining Lagasse and placing him in handcuffs, the security guard took action that evidenced his intent to place Lagasse in custody."). Without any notice to Mr. Sutterfield, Mr. Randolph's signature on the citizen's arrest form shows nothing more than his approval of Officer Barghoorn's arrest. In other words, the district court aptly assessed that Officer Barghoorn's attempt to avoid the implications of *Clarke* with a citizen's arrest form did not make it a citizen's arrest. "Therefore," as properly ruled by the district court, "the evidence . . . is that Sutterfield's arrest was an arrest by an officer." (R., p.117.) Accordingly, Officer Barghoorn arrested Mr. Sutterfield without a warrant for a completed misdemeanor, in violation of *Clarke*. The Court should affirm the district court's decision and order suppressing the evidence from the search incident to Mr. Sutterfield's unconstitutional arrest.

#### CONCLUSION

Mr. Sutterfield respectfully requests this Court affirm the district court's order granting his motion to suppress.

DATED this 11<sup>th</sup> day of August, 2020.

/s/ Jenny C. Swinford  
JENNY C. SWINFORD  
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11<sup>th</sup> day of August, 2020, I caused a true and correct copy of the foregoing RESPONDENT'S BRIEF to be served as follows:

KENNETH K. JORGENSEN  
DEPUTY ATTORNEY GENERAL  
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/s/ Evan A. Smith  
EVAN A. SMITH  
Administrative Assistant

JCS/eas