IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff/Respondent, vs. RODNEY CARLTON HARRELL, Defendant/Appellant.	)	Supreme Court No. 48839-2021 Kootenai County District Court Case No. CR28-20-7596

OPENING BRIEF OF APPELLANT

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

HONORABLE LAMONT C. BERECZ
District Judge

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II. STATEMENT OF THE CASE

Paul Stonecypher was driving his truck on Interstate 90 in Kootenai County. State Trooper Seth Green pulled him over for equipment violations and for displaying a temporary license that appeared to have been altered. R 21-22. After he contacted the vehicle's occupants, Corporal Green believed that Mr. Stonecypher and his two passengers, Tabitha Mosca and Appellant Rodney Harrell, showed signs of recent drug use, and he suspected that the vehicle contained controlled substances. *Id.* Corporal Green called for a drug dog, the dog alerted, and officers searched the truck finding marijuana, methamphetamine, and paraphernalia. *Id.*

Mr. Harrell was charged with Trafficking in Methamphetamine (I.C. § 37-2732B(A)(4)(A)), Trafficking in Marijuana, (I.C. § 37-2732B(A)(1)(A)), and Possession of Drug Paraphernalia (I.C. § 37-2734A(1)). R 1031. The persistent violator enhancement was also charged. R 1032-1033.

Mr. Stonecypher pleaded guilty to possession of a methamphetamine, preserving his right to challenge the district court's order denying his and Mr. Harrell's joint motion to suppress. That appeal was retained by the Supreme Court. *State v. Stonecypher*, No. 48561-2021.

Mr. Harrell went to trial, arguing that he did not possess the marijuana, methamphetamine, and paraphernalia found in the back of Mr. Stonecypher's truck. He was found guilty by the jury. R 1177. The court imposed a life sentence with ten years fixed for Count I, a concurrent term of five years fixed for Count II, and 354 days in jail on Count III, concurrent with Counts I and II. R 1215. A timely

Notice of Appeal was filed. R 1219.

The convictions should be vacated because: 1) the evidence found in the search of the truck should have been suppressed; 2) Mr. Harrell was deprived of his state constitutional right to ten peremptory challenges by the Supreme Court's October 8, 2020 Order reducing the number to three; 3) that same order deprived Mr. Harrell of an interest protected by the Fourteenth Amendment to the United States Constitution without due process.

III. ISSUES PRESENTED ON APPEAL

A. Whether the district court erred in denying the Appellant's Motion to Suppress.

B. Whether the district court erred in denying the Appellant's objection to the reduction of preemptory challenges.

C. Whether the Supreme Court's reduction in the number of peremptory challenges violated the due process clause of the Fourteenth Amendment. And whether that deprivation was a fundamental error.

IV. ARGUMENT

A. *The Court Erred by Denying the Motion to Suppress Because the Officer Unlawfully Extended the Scope of the Traffic Stop to Permit the Drug Dog to Arrive and Conduct a Free-Air Sniff.*

1. Pertinent Facts

Mr. Harrell filed a Motion to Suppress evidence. R 118-119. He argued that Corporal Green unlawfully extended the scope of the traffic stop in order to permit Deputy Lyons to arrive and conduct a K-9 exterior search of the truck. He also

argued that the K-9's alert could not be distinguished from a dog's natural, innate behavior. Thus, the determination that an alert took place was based upon a subjective determination by the handler, which is not reasonable under either the state or federal constitutions. R 126-134.

In its written response, the state argued that the Trooper had a reasonable articulable suspicion to continue the detention to conduct a drug investigation, based upon his observations of the three occupants, and a torch lighter found in the ash tray. R 162. It also argued "that a drug dog's alert [establishes] probable cause to search a car and its contents." R 162.

Trooper Green testified that he is part of a drug interdiction team for the Idaho State Police, and has training and experience related to investigating drug use and trafficking. T 56-58 (p. 15, l. 5 – p. 24, l. 18).[1] But, he is not a Drug Recognition Expert. T 73 (p. 84, l. 24-25).

He testified that, in his training and experience, I-90 is commonly used by people trafficking drugs between the west coast and Montana and further east. T 59 (p. 25, l. 1-17).

At 5:47 p.m. on May 24, 2020, Trooper Green saw a "jacked up" truck driving eastbound on I-90, and initiated a traffic stop because the tires extended past the fender flares, there were no mud flaps, and the temporary license appeared to have been altered. T 59 (p. 27, l. 19 – p. 28, l. 25). Upon activating his lights, Trooper

[1] The Trial Transcripts are in single page format. The pre-trial motions are transcribed in a four-page to a page format. In the latter case, Mr. Harrell will cite to the Transcript page and then indicate the specific page and line in parentheses.

Green saw "multiple arms and things moving around" inside the cab of the truck, which came to a stop "fairly quickly." T 60 (p. 29, l. 1-14). There were three occupants sitting on the front bench seat of the truck – Mr. Stonecypher was the driver, Ms. Mosca was sitting in the middle, and Mr. Harrell was sitting by the passenger-side window – and there were two dogs sitting on the back bench seat. T 60 (p. 29, 1. 15 – p. 32, l. 13). At about 5:50 p.m., after identifying the three occupants and while remaining outside the passenger window, Trooper Green called the information into dispatch in order to conduct a driver's check and warrants check on all three. T 60-61 (p. 32, l. 21 – p. 33, l. 18). Additionally, Trooper Green called for a drug dog. T 65 (p. 50, l. 12-19).

While awaiting returns from dispatch, Trooper Green spoke with the occupants and learned that Ms. Mosca and Mr. Harrell were returning to Montana after visiting Mr. Harrell's uncle, who was sick with Covid-19, in Northern California; Mr. Stonecypher is a friend of Mr. Harrell's uncle and he agreed to give them a ride back to Montana. T 61 (p. 33, l. 15 – p. 34, l. 7). Mr. Stonecypher told Trooper Green that the temporary license was in the same condition as when he bought the truck, two months prior. T 61 (p. 34, l. 22 – p. 35, l. 22). The trooper saw a torch lighter sitting in the center ashtray and a walkie-talkie near Mr. Harrell, both of which he associated with drug trafficking. T 61-63 (p. 36, l. 14 – p. 41, l. 25). Next to the torch lighter was a bandana "holding something that was rolled up inside." T 61 (p. 36, l. 18-20). He also noticed that Mr. Harrell had some rough-looking tattoos spelling "White Boy," and "Riverside," which he associated with

prison work. T 61 (p. 36, l. 1-14).

Trooper Green believed that Mr. Stonecypher showed "signs of possible recent drug use," due to having "sunken cheek bones, flaccid facial muscles, glassy eyes, droopy eyelids, [and because he] was speaking slowly" and had slouched shoulders. T 61-62 (p. 36, l. 21-24; p. 37, l. 19-20). He believed it was "highly possible" that Mr. Stonecypher was under the influence of a controlled substance. T 62 (p. 38, l. 16-19). Ms. Mosca "had glassy eyes, flaccid facial muscles, was speaking very quickly," and was "unable to sit still," which Trooper Green also attributed to being under the influence of a controlled substance. T 62 (p. 38, l. 20 – p. 39, 1. 10; p. 39, 1. 22 – p. 40, 1. 1). He further believed that Mr. Harrell may have been under the influence, observing "flaccid facial muscles, glassy eyes, and he was actually visibly sweating on a day that was very cool." T 62 (p. 39, l. 11-21). According to the trooper, Mr. Harrell's carotid artery was pulsating off and on during the encounter, which he believed was either a sign of "being either incredibly anxious and nervous," or under the influence of a controlled substance. "It would coincide with both." T 62-63 (p. 40, l. 7 – p. 41, l. 2).

At 5:55 p.m., dispatch informed Trooper Green that Mr. Stonecypher's license was valid, and that none of the occupants had any outstanding warrants. (Evidence that dispatch reported a "drug history" and "cautions" associated with Mr. Harrell was admitted, but not for the truth of the matter asserted.) T 64 (p. 45, l. 11 – p. 46, l. 18).

Trooper Green admitted that he abandoned the original purpose of the traffic

stop at the point he received the returns from dispatch and began conducting a drug investigation. T 73 (p. 81, l. 24 – p. 82, l. 7).

> Q. Now, at one point the State was asking you about your shifted focus to a drug investigation.
> A. Yes.
> Q. And you'd indicated that that was about the time that you had informed them that you had seen signs of drug use?
> A. It was right after I finished getting my returns.
> Q. So approximately at the time you told them that a drug dog was on its way?
> A. Again, it was right after I finished getting my returns.
> Q. So at that point this was really you were there to do a drug investigation, correct?
> A. At that point I believe I had enough reasonable articulable suspicion to do that, yes.

Id.

A backup officer as well as K-9 Deuce and handler Deputy Rich Lyons arrived at about 6:05 p.m., and the drug dog eventually alerted on the vehicle. T 65 (p. 51, l. 19 – p. 52, l. 3). Officers searched the vehicle and found the controlled substances Mr. Harrell was charged with possessing, as well as other controlled substances attributed to the other occupants, two handguns, and a large amount of cash. T 66-67 (p. 60, l. 9 – p. 64, l. 9).

At the conclusion of the suppression hearing, Mr. Harrell argued that Trooper Green did not have a reasonable articulable suspicion to justify detaining the driver or passengers for a drug investigation, upon abandoning the original purpose of the stop. T 84 (p. 128, l. 6 – p. 129, l. 20). The state argued that the extension of the stop was justified because the trooper had the reasonable articulable suspicion necessary to allow him to continue the detention until the drug

dog arrived. T 86 (p. 133 l. 23 – p. 136, l. 7).

The district court orally pronounced its ruling denying the motions to suppress, finding in relevant part that although Trooper Green abandoned the original purpose of the stop, he had reasonable suspicion that the occupants were engaged in drug use and/or trafficking, which justified their further warrantless detention. The court stated:

> [L]et me try and list what we've got or what Trooper Green had at the time dispatch came back eight minutes into the encounter.
>
> He's got, as he testified, again in an uncontradicted fashion, furtive gestures, and I can't remember the adjective that he used, but I think it was a ton of furtive gestures or something that -- more than just the usual amount of furtive gestures. That's while the vehicle's still moving and as he's approaching. Then he's got the appearance of the three different people. He's got the torch lighter. He's – he's got their appearance and also their mannerisms and their answers to his questions, so when dispatch comes back about eight minutes into it, he's got reasonable cause to investigate some sort of drug crime[.]

T 88 (p. 142, l. 9-24).

The evidence obtained during the search of the truck was introduced against Mr. Harrell at trial. *See* State's Exhibit 1 (A, B, C, J, and Q) and 3.

2. Legal Standards and Standard of Review

The Fourth Amendment to the United States Constitution guarantees citizens the right to be free from unreasonable searches and seizures. Its purpose is "to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order to 'safeguard the privacy and security of individuals against arbitrary invasions.'" *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979) (quoting *Marshall v. Barlow's, Inc.*, 436 U.S.

307, 312 (1978)). If evidence is not seized either pursuant to a valid warrant or pursuant to a recognized exception to the warrant requirement, the evidence discovered as a result of the illegal search or seizure must be excluded as the "fruit of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471 (1963).

When reviewing a decision on a motion to suppress, Idaho appellate courts "accept[] the trial court's findings of fact that are supported by substantial evidence, but freely review[] the application of constitutional principles to the facts as found." *State v. McNeely*, 162 Idaho 413, 414–15 (2017) (citation omitted).

3. Why Relief Should be Granted

The district court erred when it denied the motion to suppress. Corporal Green did not have a reasonable articulable suspicion that an occupant of the vehicle was engaged in drug related crimes at the point Corporal Green abandoned the original purpose of the traffic stop. That extension of the stop violated the occupants' Fourth Amendment right to be free from unreasonable searches and seizures.

Officers may lawfully seize a driver and passengers of a vehicle while pursuing the mission of a valid traffic stop. *Arizona v. Johnson*, 555 U.S. 323 (2009). Officers may also abandon the purpose of a traffic stop and begin a new investigation into alleged crimes, *if* information gathered through the traffic stop reveals a reasonable, articulable suspicion of additional criminal activity. *See e.g.*, *State v. Danney*, 153 Idaho 405, 409-10 (2012). A reviewing court must determine whether, under the totality of the circumstances, an officer had an objectively

reasonable suspicion of criminal wrongdoing to justify a further detention. *United States v. Arvizu*, 534 U.S. 266 (2002).

Corporal Green testified that at the point he began his drug investigation, he was relying upon the following information to justify his further detention:

> Because of the numerous signs being exhibited by their persons, um, the current drug signs, and then of course the torch lighter, the route they were taking, uh, the not -- the story that didn't quite make sense, especially with three people actively trying to go see somebody with COVID, um, and then of course the walkie, um, they're using a truck that gets -- appeared to get a lot lower mileage -- he said seventeen miles to the gallon for a long country trip -- um, along with the -- there was numerous other things. That's – that's the basis of it.

T 66 (p. 55, l. 6-16). Accepting that testimony as true, the information in his possession did not justify the further detention.

First, Corporal Green provided no testimony as to how vehicle fuel efficiency relates to drug trafficking. No doubt, drug traffickers drive a variety of vehicles. If anything, it is more logical to assume drug traffickers on "a long country trip" would use a fuel-efficient vehicle, so to lower expenses and increase profits.

As to the "furtive gestures" by Ms. Mosca, the trooper described them as "multiple arms and things being moved around." T 60 (p. 29, l. 12-14). He does not testify, however, that Ms. Mosca appeared to be hiding something. It is the fact that a passenger is attempting to remove something from the officer's view that makes a "furtive gesture" suspicious, but there is no testimony to that effect here. Moreover, a review of the traffic stop video does not show any furtive gestures during the time the trooper described. He testified that the furtive gestures occurred "definitely

before I even stopped them. It was not as I was walking up to the vehicle." T 69 (p. 67, l. 2-4). These gestures do not appear on his Dash Cam Video. (*See* Video from 18:46:44 to 18:47:23.)

Next, it is well-established that nervousness should be given little weight when determining whether an officer has reasonable suspicion to detain a vehicle's occupant(s). *See State v. Neal*, 159 Idaho 919, 924 (Ct. App. 2016); *State v. Kelly*, 160 Idaho 761, 763 (Ct. App. 2016). Additionally, the testimony that I-90 is a known drug route should hold no weight. *See Kelly*, 160 Idaho at 763-64. Interstate 90 is the longest transcontinental freeway in the United States, with its western terminus in Seattle, and its eastern terminus in Boston.[2] To the extent that Corporal Green has learned through his training and experience that some people drive down I-90 with drugs in their car, this fact does not provide an objectively reasonable basis to suspect that a vehicle pulled over on I-90 likely contains drugs. He and his fellow officers have likely pulled over many vehicles on I-90 that did not contain drugs. Thus, the fact that the stop occurred on I-90 should be irrelevant to the court's consideration in this case. *See Kelly*, 160 Idaho at 763 (recognizing that travelling on I-84 "cannot give rise to reasonable suspicion to search a vehicle as it would subject thousands of innocent travelers to an invasion of their privacy for no more of a reason than the use of the road").

Further, the fact that the vehicle contained a torch lighter is of little relevance. While Trooper Green testified that he has only ever seen a torch lighter

[2] *See* https://en.wikipedia.org/wiki/Interstate_90 (last visited 12/6/21).

when it was used in conjunction with drug activity on the street, that may simply be because Trooper Green's job revolves around drug interdiction. T 58 (p. 22, l. 17-19). "To a man who has only a hammer, everything begins to look like a nail."[3] He admitted on cross-examination that torch lighters are often used to light cigars and are commonly sold at cigar shops. T 68 (p. 64, l. 21-24). And the United States Traffic Safety Administration states:

> Torch lighters create a thin, needle-like flame that is hotter (reaching 2,500 F) and more intense than those from common lighters. Torch lighters are often used for pipes and cigars, and maintain a consistent stream of air-propelled fire regardless of the angle at which it is held."[4]

As torch lighters have a common legal purpose, the presence of one in the truck does not add much to the reasonable suspicion calculus. (The fact that Mr. Harrell was seen lighting a cigarette with a common lighter is not suspicious or surprising since torch lighters are not used for that purpose.) T 68-69 (p. 64, 1. 25–65, l. 1-6). It does not mean the torch lighter was being used for purposes other than the lighting of cigars and pipes.

Corporal Green also testified that he saw a walkie-talkie which he associated with drug trafficking. T 63 (p.41, l. 20–p.42, l. 14). Again, this fact has little probative value because Mr. Harrell picked up the walkie-talkie, shook it, and told Trooper Green that it didn't work. T 69 (p. 66, 1. 16-19). While Trooper Green claimed he "had no way to prove that it wasn't working," T 69 (p. 66, l. 3-19.), he

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[3] Quotation ascribed to Abraham Maslow, perhaps paraphrased from a similar remark in Maslow, Abraham, The Psychology of Science, p. 15 (1966).
[4] https://www.tsa.gov/travel/security-screening/whatcanibring/items/torch-lighters (last visited 12.08.2021).

also did not have any evidence that it was operative. The presence of a working walkie-talkie adds little to the mix, and a non-working walkie-talkie adds less.

While the trooper's belief that the three individuals may have been under the influence of drugs adds some to the reasonable suspicion calculus, the trooper also testified that he is not a Drug Recognition Expert, and that he cannot tell the difference between a person being under the influence of illegal drugs, and a person under the influence of legally prescribed drugs. T 74 (p. 86, l. 3-15). "[A]s far as my ability goes, it might be from prescription medications." T 74 (p.86 14-15). This, at a minimum, lessens the impact of his observations of their physical characteristics.

Finally, the Court of Appeals has held that a "pulsating carotid artery" is of "limited significance in establishing the presence of reasonable suspicion," even when combined with nervousness, lack of eye contact, and trembling. *State v. Kelley*, 160 Idaho at 763 (Ct. App. 2016).

This Court must review the totality of the circumstances to determine whether the trooper had a reasonable, articulable suspicion of criminal activity in order to justify his drug investigation, and not just each individual factor separately. Here, however, the totality of the objective facts known to Corporal Green at the time he began his drug investigation did not provide him with the reasonable suspicion necessary to justify the drug investigation. Thus, the district court erred in denying the motion to suppress.

B. *The Court Erred by Reducing and Overruling the Objection to the Reduction in the Number of Peremptory Challenges.*

1. Pertinent Facts

Mr. Harrell filed an Objection to Reduction of Peremptory Challenges to Prospective Jurors "on the grounds that Art. I §§ 7 and 13 of the Idaho Constitution provide a guarantee of adequate preemptory challenges in jury selection." R 385. The state did not file a response. *See* T 102 (p. 198, l. 20-21). It did note at the hearing that the Supreme Court's October 8, 2020 Order reduced the number of peremptory challenges from ten to three. T 102 (p. 199, l. 10-14). The court ruled that it would comply with the Supreme Court's order. *Id.* (p. 200, l. 25). In addition, it found that peremptory challenges were not based upon the United States Constitution and that Mr. Harrell had not shown prejudice from the reduction in the number of peremptory challenges. T 103 (p. 201, l. 6-22; p. 202, l. 3-8).

At the conclusion of voir dire, Mr. Harrell did not pass the panel for cause so "to preserve the objection that we had." T 197 (p. 68, 1. 16-20). The court confirmed that Mr. Harrell was referring to his "earlier objections to the jury were in your motions in limine as to the reduction of peremptory challenges." T 198 (p. 69, 1. 11-14). The court then noted that Mr. Harrell was "preserving [his] objections earlier to the reduction of preemptory challenges as well as any way in which the Supreme Court's orders have affected the paneling of the jury." T 199 (p. 70, l. 18-23).

2. Legal Standards and Standard of Review

Idaho Code § 19-2016 provides:

NUMBER OF PEREMPTORY CHALLENGES. If the offense charged is

> punishable with death or with imprisonment in the state prison for life, the defendant is entitled to ten (10) and the state to ten (10) peremptory challenges. On a trial for any other offense the defendant is entitled to six (6) and the state six (6) peremptory challenges.

Idaho Code § 37-2732B(c) provides that:

> The maximum number of years of imprisonment for trafficking in methamphetamine and/or amphetamine by manufacturing shall be life[.]

The persistent violator allegation extended the maximum penalty for the trafficking in marijuana charge from fifteen years to life. I.C. § 19-2514.

Idaho Constitutional Article 1, § 3 provides:

> STATE INSEPARABLE PART OF UNION. The state of Idaho is an inseparable part of the American Union, and the Constitution of the United States is the supreme law of the land.

Idaho Constitution Article 1, § 7 provides, in relevant part:

> RIGHT TO TRIAL BY JURY. The right of trial by jury shall remain inviolate[.]

Idaho Constitution Article 1, § 13 provides in relevant part:

> GUARANTIES IN CRIMINAL ACTIONS AND DUE PROCESS OF LAW. In all criminal prosecutions, the party accused shall have the right to a speedy and public trial . . . . No person shall be . . . deprived of life, liberty, or property without due process of law.

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]

Questions of constitutional interpretation are reviewed de novo. *State v. Dunlap*, 155 Idaho 345, 377 (2013) (citing, *State v. Draper*, 151 Idaho 576, 598 (2011).

3. Relief Should be Granted under Article I, §§ 7 and 13 of the Idaho Constitution.

a. *Under the Idaho Constitution, there are heightened protections for the right to a jury trial and the jury selection process*

Article I, § 7 of the Idaho Constitution also protects the constitutional right to a jury and states that this right, "shall remain inviolate." Similarly, the "due process requirements of the Idaho Constitution require 'a trial by a fair and impartial jury.'" *State v. Lankford*, 162 Idaho 477, 485 (2017) (quoting *State v. Nadlman*, 63 Idaho 153, 118 P.2d 58, 62 (1941)). The right to a jury includes the right to a fair and unbiased jury. *See, e.g., State v. Hall*, 163 Idaho 744, 816 (2018). "'As this Court has noted many times, the right to a fair trial before an impartial jury is fundamental to both the U.S. Constitution and the Idaho Constitution.'" *State v. Johnson*, 162 Idaho 412, 418 (2017) (quoting *Lankford*, 162 Idaho at 485). In Opinions dating back nearly a century, the Idaho Supreme Court has held that Article I, § 7 of the Idaho Constitution has an independent existence and provides heightened protection from its federal counterpart when it comes to the right to a jury trial. *See, e.g., Nadlman*, 118 P.2d at 61-62. The language of Article I, § 7 dictating that the right to a jury trial "shall remain inviolate," has been held to preserve the right to jury trial as it existed, "in Idaho Territory when our state came into existence." *Id.*; *see also State v. Straub*, 153 Idaho 882, 886 (2012). The language selected by the framers was no accident. "Our forefathers wisely provided in Article I, § 7 of the Idaho Constitution: 'The right to trial by jury shall remain inviolate…' They so provided because they recognized that the jury system is the

single most important guardian of the people's right to be protected from oppressive and overreaching government." *David Steed & Assoc. v. Young*, 115 Idaho 247, 248 (1988) (overruled on other grounds by *Idaho First Nat'l Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266 (1991)).

As with the Idaho constitutional right to a jury trial, the test for heightened due process protection under Article I, § 13 also calls for an examination of the procedural protections in place for a criminal defendant at the time our constitution was adopted. The Idaho Supreme Court has held that, "the Idaho due process clause is not necessarily the same as that of the federal constitution." *Cootz v. State*, 117 Idaho 38, 40 (1989). There is reason to believe that our framers intended independent and potentially broader protections under the Idaho constitutional provision for due process:

> When the proposed art. 1, § 13 was amended to insert the due process clause, the objection was made that the same language existed in the fourteenth amendment to the Constitution of the United States. Despite this objection, the section containing the due process clause was adopted. Proceedings and Debates of the Constitutional Convention of Idaho (1889) 287, 1595. While this does not establish by itself that the scope of our due process clause is different than that of the federal constitution, it does indicate that the drafters of our constitution believed that the federal due process clause did not make it unnecessary for our constitution to guarantee due process of law.

Id.

Accordingly, Idaho courts will separately examine whether our due process clause provides heightened protections based upon the nature of the due process right asserted. These standards are consistent with the most recent proclamation from the Idaho Supreme Court on the analysis for heightened protection under the

Idaho Constitution. The understanding of the framers is generally "'examined in light of the practices at common law and *the statutes of Idaho when our constitution was adopted and approved* by the citizens of Idaho." *State v. Clarke*, 165 Idaho 393, 397 (2019) (emphasis added) (quoting *State v. Creech*, 105 Idaho 362, 392 (1983)). There is a good reason the law of Idaho's territorial statutes has such primacy in interpreting the intent of the framers: "'Because many of the delegates to the Constitutional Convention were outstanding lawyers in their day, we generally presume that they knew and acted on such prior and contemporaneous interpretations of the constitutional words they used.'" *Id.* (quoting *Paulson v. Minidoka County Sch. Dist. No. 331*, 93 Idaho 469, 472 n.3 (1970)).

Beyond merely being practitioners in the law of Idaho as a territory, and therefore informed by the territorial statutes when crafting our state constitution, approximately 20 percent, or one out of every five, of the delegates named to the constitutional convention were actually legislators within the territory.[5] As such, many delegates not only had an understanding of the territorial laws as a backdrop to their legal practice, but also actually formulated these laws and had framework of understanding when crafting the Idaho Constitution.

[5] The delegates to the Idaho Constitutional Convention who also served in the territorial legislature appear to be Isaac Coston and Edgar Wilson representing Ada County; James Beatty and Patrick McMahon representing Alturas County; George Ainslie and Fred Campbell representing Boise County; Robert Larimer and T.F. Nelson representing Idaho County; A.S. Chaney representing Latah County; J.W. Poe representing Nez Perce County; John Lewis representing Oneida County; J.L. Crutcher representing Owyhee County; Alexander Mayhew representing Shoshone County; and E.S. Jewell representing Washington County.

In Idaho, the right to examine prospective jurors for cause has its roots in the laws governing the territory of Idaho, prior to the adoption of the Idaho Constitution. *United States v. Alexander*, among other issues, discussed the trial court disallowing a question posed by counsel to a prospective juror during voir dire. 2 Idaho 354, 17 P. 746, 749 (1888). The *Alexander* Court held this was error, and further held that the right to challenge a juror for cause carries with it the corresponding right to inquire of a juror as to the potential basis for challenge.

> *The right to challenge for cause carries with it the right to examine for cause,* or have the court do so. While the court should control the examination, and may restrict it to statutory grounds, yet the right of a party to know whether a juror is qualified and competent is a substantial right that cannot, under our law, be denied.

Id. (emphasis added). The Criminal Practice Act of the 1864 Laws of the Territory of Idaho likewise contained provisions permitting the individual attorneys as parties to the action to question prospective jurors personally in aid to any objection they may have had to that juror being seated on a criminal case. *See* 1864 Criminal Practice Act, Laws of the Territory of Idaho, First Session, §§ 343-350.

Therefore, at the time our Idaho Constitution was adopted, the right of a party to question prospective jurors was "a substantial right that cannot, under our law, be denied." *Alexander*, 17 P. at 749. This right was further integrated into the process guaranteed by statute in order to ensure a fair trial in a fair tribunal pursuant to both Article I, § 7 and the due process protections of Article I, § 13. Given this, both the right to a jury trial and the process of jury selection have heightened protections under the Idaho Constitution.

b. *The right to a jury trial and to due process under the Idaho Constitution includes the right to an adequate number of peremptory challenges, and the October 8, 2020, order reducing those challenges violates these Idaho State Constitutional protections.*

"The right of peremptory challenges in state court is determined by state law." *Rivera v. Illinois*, 556 U.S. 148, 152 (2009). In Idaho, peremptory challenges are a component of the right to a jury trial protected by the highest of all state laws—Article I, §§ 7 and 13 of the Idaho Constitution.

As discussed, any analysis of whether the Idaho Constitution provides heightened protection incorporates an examination of the deliberations and words of the framers at the time of the constitution's adoption, along with a review of the contemporaneous law of the Territorial Statutes at that time. However, the protections afforded by the Territorial Statutes on the right to a jury trial under the Idaho Constitution must be given special consideration. Repeatedly, Idaho cases have held that the right to a jury trial was intended to be preserved as it existed both under common law **and** the territorial statutes of the time:

> In *State v. Bennion*, we noted this Court "long and often has stated that Article 1, § 7 preserves the right to jury trial as it existed at the common law **and under the territorial statutes when the Idaho Constitution was adopted**." This standard "embodies the common sense notion that, by employing the phrase 'shall remain inviolate,' the Framers must have intended to perpetuate the right as it existed in 1890." In *Idaho Dept. of Law Enforcement v. Free*, this Court reiterated the principles embodied in *Bennion*.

Kirkland v. Blaine Cty. Med. Ctr., 134 Idaho 464, 467 (2000) (emphasis added).

As noted by *Kirkland*, the *Bennion* Court recognized the long-standing interpretation of this provision of the Idaho Constitution as preserving those rights

associated with jury trials as it existed in both statutory and common law when the Idaho Constitution was adopted. The Court in *Bennion* also made clear that this standard applies in **criminal** contexts, as well as civil:

> This Court long and often has stated that Article 1, § 7 *preserves the right to jury trial as it existed at the common law and under the territorial statutes* when the Idaho Constitution was adopted. *This standard of construction holds sway in the criminal as well as civil context.* Most jurisdictions interpret their analogous constitutional provisions in an analogous way. The standard embodies the common sense notion that, by employing the phrase "shall remain inviolate," the Framers must have intended to perpetuate the right as it existed in 1890.

State v. Bennion, 112 Idaho 32, 37, 730 P.2d 952, 957 (1986) (emphasis added).

The provision of our constitution that the right to a jury trial "shall remain inviolate" has long been interpreted to secure the jury trial rights as existed at the time of the adoption of the Idaho Constitution in 1890. *See, e.g., State v. Key*, 149 Idaho 691, 697-702 (Ct. App. 2010); *Kirkland*, 134 Idaho at 467; *Idaho Dept. of Law Enforcement v. Free*, 126 Idaho 422, 426-427 (1994); *People v. Burnham*, 35 Idaho 522, 207 P. 589, 590 (1922); *Christensen v. Hollingsworth*, 6 Idaho 87, 53 P. 211, 212 (1898). Inclusion of the statutory procedures for jury trials as part of the constitutional guarantee to the right to a jury trial also has a long history in Idaho jurisprudence. *See, e.g., Key*, 149 Idaho at 697-702; *Burnham*, 207 P. at 490; *Russell v. Alt*, 12 Idaho 789, 88 P. 416, 417-418 (1907) (relying on the limitations contained in the territorial statutes on the appointment of a "referee" to conduct fact finding in interpreting Article I, § 7 of the Idaho constitution).

Bearing that in mind, peremptory challenges for criminal jury trials were an established part of Idaho law at the time of the adoption of the Idaho Constitution,

as Idaho's territorial statutes provided for these challenges. Within the Criminal Practice Act of the Idaho territorial statutes, Idaho law recognized two types of challenges to a potential juror: a challenge for cause or a peremptory challenge. *See* 1864 Criminal Practice Act, Laws of the Territory of Idaho, First Session, §332. While both parties were permitted to exercise peremptory challenges, these statutes actually afforded greater protection to defendants than to the state in granting peremptory challenges. *Id.* at §§ 334, 335. For a defendant in a case where the death penalty or life imprisonment may be imposed, the case here, the territorial statutes provided the defendant with twenty peremptory challenges, while the state only had five. *Id.* at 335. For all other criminal cases, the defendant had ten peremptory challenges, and the state had three. *Id.*

The right of peremptory challenge for a criminal defendant also has long roots in the common law as well. Regarding the historical basis of the right of peremptory challenges for a criminal defendant, the United States Supreme Court has said:

> The peremptory challenge has very old credentials. In all trials for felonies at common law, the defendant was allowed to challenge peremptorily 35 jurors, and the prosecutor originally had a right to challenge any number of jurors without cause, a right which was said to tend to 'infinite delayes and danger.' Coke on Littleton 156 (14th ed. 1791). Thus The Ordinance for Inquests, 33 Edw. 1, Stat. 4 (1305), provided that if 'they that sue for the King will challenge any * * * Jurors, they shall assign * * * a Cause certain.' So persistent was the view that a proper jury trial required peremptories on both sides, however, that the statute was construed to allow the prosecution to direct any juror after examination to 'stand aside' until the entire panel was gone over and the defendant had exercised his challenges; only if there was a deficiency of jurors in the box at that point did the Crown have to show cause in respect to jurors recalled to make up the required number. Peremptories on both sides became the settled law of England,

> continuing in the above form until after the separation of the Colonies.
>
> This common law provided the starting point for peremptories in this country. In the federal system, Congress early took a part of the subject in hand in establishing that the defendant was entitled to 35 peremptories in trials for treason and 20 in trials for other felonies specified in the 1790 Act as punishable by death, 1 Stat. 119 (1790). In regard to trials for other offenses without the 1790 statute, both the defendant and the Government were thought to have a right of peremptory challenge, although the source of this right was not wholly clear. In 1865, the Government was given by statute five peremptory challenges in capital and treason cases, the defendant being entitled to 20, and two in other cases where the right of the defendant to challenge then existed, he being entitled to 10. 13 Stat. 500 (1865). Subsequent enactments increased the number of challenges the Government could exercise, the Government now having an equal number with the defendant in capital cases, and six in cases where the crime is punishable by more than one year's imprisonment, the defendant or defendants having ten.
>
> The course in the States apparently paralleled that in the federal system. The defendant's right of challenge was early conferred by statute, the number often corresponding to the English practice, the prosecution was thought to have retained the Crown's common-law right to stand aside, and by 1870, most, if not all, States had enacted statutes conferring on the prosecution a substantial number of peremptory challenges, the number generally being at least half, but often equal to, the number had by the defendant.

Swain v. Alabama, 380 U.S. 202, 212–17, (1965) (overruled on other grounds by *Batson v. Kentucky,* 476 U.S. 79 (1986)). According to Justice Burger's dissent in *Batson*, the peremptory challenge has been in use "for nearly as long as juries have existed." 476 U.S. at 119 (J. Burger, *dissenting*); *see also* Comment, "The Right of Peremptory Challenge," 24 University of Chicago Law Review 751, 752 n.3 (1957) (while there was no right to peremptory challenge recognized at common law in civil cases, the right to peremptory challenge was recognized for defendants in criminal cases and, "in *Gray v. Regina*, 11 Cl. & Fin. 427 (M.L. 1843), it was settled that at common law the right to peremptory challenges existed in all cases of felony and

was not restricted to trials of crimes punishable by death.").

Accordingly, the common law of England—another primary source of interpretation of the Idaho State Constitution—recognized the right of a criminal defendant as early as the 14th Century and it appears its historical pedigree stretches nearly as far back into history as the concept of a jury trial itself.

In the Idaho Supreme Court emergency order of October 8, 2020, the Court reduced the number of peremptory challenges that a criminal defendant may exercise in a case where the state is seeking a death sentence to ten peremptory challenges, in a felony case to three, and in a misdemeanor to only two. *See* In Re Jury Trials, Amended Order; entered by the Idaho Supreme Court on October 8, 2020 (hereinafter, Amended Order). This reduces the number of peremptory challenges in a non-death penalty felony case to one-half of what was allowed under I.C.R. 24(d) and is approximately one-third of the number of peremptory challenges that were protected by the territorial statutes of Idaho.

As explored above, the special language that the right to a jury trial "shall remain inviolate" under our Idaho Constitution has been interpreted to provide heightened protection for the right to a jury trial under Article I, § 17. This provision has been held to incorporate those rights relating to a jury trial "*as it existed at the common law and under the territorial statutes when the Idaho Constitution was adopted*." *Bennion*, 112 Idaho at 37 (emphasis added). The right to peremptory challenges for a criminal defendant were a part of the territorial statutes at this time. In fact, this right was so important to those who drafted the

territorial statutes—many of whom also framed our constitution—that they provided criminal defendants facing the loss of life or liberty with more than double the number of peremptory challenges for any criminal case, and four times as many challenges where life imprisonment or the defendant's life itself was at stake. In light of this, restricting Mr. Harrell to **three** peremptory challenges at trial violates his Idaho constitutional rights under Article I, § 7, and the due process guarantees of Article I, § 13.

4. Conclusion

The trial court erred when it did not sustain Mr. Harrell's objection to the restriction on the number of preemptory challenges. As explained below, the court's reduction of the number of preemptory challenges is structural error. Alternatively, since there was an objected-to error, the State now bears the burden of proving the error harmless beyond a reasonable doubt. *State v. Perry*, 150 Idaho 209, 222 (2010).

C. *The Reduction in the Number of Peremptory Challenges Violated Mr. Harrell's Fourteenth Amendment Right to Due Process.*

1. Mr. Harrell Possessed a Constitutionally Protected Interest in the Full Number of Peremptory Challenges Provided by Idaho Statutes and Constitution.

"No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend 14, sec. 1. Idaho Code § 19-2601 provides that, when "the offense charged is punishable with death or with imprisonment in the state prison for life, the defendant is entitled to ten (10) and the state to ten (10) peremptory challenges." That statute creates a Fourteenth Amendment interest

which cannot be taken away without due process of law. As explained below, the October 8 restrictions on the number of peremptory strikes violated the Fourteenth Amendment because it deprived Mr. Harrell of a protected interest without due process.

A state statute can create a constitutionally protected liberty interest which the state court may not eliminate by judicial fiat. For example, in *Hicks v. Oklahoma*,447 U.S. 343 (1980), a jury sentenced Hicks to a mandatory forty-year prison term under a provision of the Oklahoma habitual offender statute. After Hicks' conviction, the Oklahoma Court of Criminal Appeals held the statute unconstitutional. Hicks then attempted to set aside his sentence. Despite the unconstitutionality of the statute, the Court of Criminal Appeals concluded that Hicks' sentence fell within the permissible range of punishment for his conviction and refused to order resentencing. The Supreme Court vacated Hicks' sentence and remanded, finding that because the state had provided a statutory right to have criminal sentences imposed by the discretion of a jury, the defendant's entitlement to such a jury sentence constituted a "liberty" interest protected by the Fourteenth Amendment. *Id.* at 346. In finding a due process violation, the Court rejected the state's argument that "all that is involved in this case is the denial of a procedural right of exclusively state concern." 447 U.S. at 346.

After *Hicks*, the U.S. Supreme Court found that a state-created procedural protection creates interests protected by the Fourteenth Amendment's due process clause in *Logan v. Zimmerman Brush Co.* 455 U.S. 422 (1982). In *Logan*, the Illinois

Supreme Court construed a state statute which required a fact-finding conference within 120 days of the filing of an employment discrimination charge. The Illinois Court summarily rejected Logan's federal due process and equal protection arguments. The United States Supreme Court found that Logan's state created right to use established adjudicatory procedures to redress discrimination was a protected property interest under the Fourteenth Amendment. 455 U.S. at 431.

Property interests are not created by the Constitution. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577(1972). "Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law[.]" *Id.; see also Goldberg v. Kelly*, 397 U.S. 254 (1970) (person receiving welfare benefits under statutory and administrative standards has an interest in continued receipt that is safeguarded by procedural due process). Even state prison regulations may create liberty interests which are protected by due process clause. *Sandin v. Conner*, 515 U.S. 472, 484 (1995) following *Wolff v. McDonnell,* 418 U.S. 539, 557 (1974) ("Good time" credits created by a state statute created a Fourteenth Amendment liberty interest.). *See also, Bd. of Pardons v. Allen*, 482 U.S. 369, 381 (1987) (State statute providing that the parole board "shall" release a prisoner on parole, subject to certain restrictions, created due process liberty interest).

Here, Article 1, § 3 and I.C. § 19-2016 gave Mr. Harrell a Fourteenth Amendment protected interest in having ten peremptory challenges available to him when facing the possibility of life imprisonment. The Idaho Supreme Court

could not take his procedural entitlement to those protections away from him by administrative decree. To the contrary, Mr. Harrell was entitled to the minimal due process required before any deprivation of a Fourteenth Amendment, i.e., notice of the contemplated action and an opportunity to be heard. *Fridenstine v. Idaho Dep't of Admin.,* 133 Idaho 188, 190–91 (1999); citing *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532 (1985). *See also, State v. Kling*, 150 Idaho 188, 193 (Ct. App. 2010) ("Due process ordinarily requires, at a minimum, notice of the contemplated deprivation and a meaningful opportunity to be heard."), *citing McGloon v. Gwynn*, 140 Idaho 727, 729 (2004); *Rudd v. Rudd*, 105 Idaho 112, 115 (1983).

Mr. Harrell's Fourteenth Amendment interest in ten peremptory challenges – whether labelled liberty or property—was taken from him without any process being afforded to him. He was deprived of that right, guaranteed by both the Idaho Constitution and state statute by this Court's Administrative Order, which was issued without any notice to him and with no opportunity for him to be heard. The total absence of process prior to the deprivation violated the due process clause of the Fourteenth Amendment. The district court was not required to follow the Supreme Court's Administrative Order because of Article 1, § 3: "The state of Idaho is an inseparable part of the American Union, and the Constitution of the United States is the supreme law of the land." Under that section, a district court may (indeed must) disobey an Administrative Order of the Supreme Court when the issuance of that order violates the Federal Constitution.

2. This Issue May be Raised for the First Time on Appeal.

Mr. Harrell's counsel did not raise the Fourteenth Amendment issue in the trial court. However, the Court should consider it under the fundamental error doctrine. "[I]n order to obtain relief under the fundamental error doctrine:

> (1) the defendant must demonstrate that one or more of the defendant's unwaived constitutional rights were violated; (2) the error must be clear or obvious, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision; and (3) the defendant must demonstrate that the error affected the defendant's substantial rights, meaning (in most instances) that it must have affected the outcome of the trial proceedings.

State v. Miller, 165 Idaho 115, 119, 443 P.3d 129, 133 (2019), *quoting State v. Perry*, 150 Idaho 209, 226 (2010).

First, Mr. Harrell has demonstrated that his Fourteenth Amendment right to due process of law was violated in Section (C)(1)(*infra* p. 24-27), immediately above.

Second, the error is both clear and obvious. Again, as shown immediately above. There is no need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision. To the contrary, the record shows it was not a tactical decision because it shows that trial counsel objected to the reduction in the number of peremptory challenges on state constitutional grounds. *See* Section B above (*infra*, p. 12-24). Counsel also declined to pass the jury panel for cause because he was concerned that action might somehow waive his objections to the reduction in peremptory challenges. This shows the failure to raise a federal constitutional claim challenging the same action was not a tactical decision by trial counsel.

Third, this is one of those unusual cases where the appellant need not demonstrate the constitutional error affected the outcome of the trial. Where the error in question is a constitutional violation that affects the base structure of the trial to the point that the trial cannot serve its function as a vehicle for the determination of guilt or innocence, the appellate court shall vacate and remand. *State v. Perry*, 150 Idaho 227-28.

This Court should find that the reduction in the number of peremptory challenges is structural error. In *Arizona v. Fulminante*, 499 U.S. 279 (1991), the Supreme Court stated a constitutional deprivation was a structural error when it affected the framework within which the trial proceeds, rather than simply an error in the trial process itself. *Id*, at 310. *See e.g., Gideon v. Wainwright*, 372 U.S. 335 (1963) (total deprivation of the right to counsel at trial); *Tumey v. Ohio*, 273 U.S. 510 (1927) (trial before a not impartial judge); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (unlawful exclusion of members of the defendant's race from a grand jury); *McKaskle v. Wiggins*, 465 U.S. 168, 177-178, n. 8 (1984) (the right to self-representation at trial); *Waller v. Georgia*, 467 U.S. 39, 49, n. 9 (1984) (right to public trial); *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (defective reasonable doubt instruction). Like those errors, the right to the full number of peremptory challenges guaranteed by the state constitution and statutes is of undeniable value but the effect of the deprivation of that right defies analysis by harmless-error standards because it affects "the framework within which the trial proceeds, and are not simply an error in the trial process itself." *Perry*, 150 Idaho at 222, quoting

Fulminante, 499 U.S. at 309-10.

3. Conclusion

The Court should vacate the convictions and remand for a new trial where Mr. Harrell is allowed ten peremptory challenges.

V. CONCLUSION

Mr. Harrell asks the Court to vacate the judgment and sentence and remand the case for a new trial.

Respectfully submitted this 24th day of January 2022.

/s/ Dennis Benjamin
Dennis Benjamin
Attorney for Rodney Harrell

CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email address(es): Idaho State

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Dated and certified this 24th day of January 2022.

/s/Dennis Benjamin
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