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

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

REPLY 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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A. *The Court Erred by Denying the Motion to Suppress Because the Officer Unlawfully Extended the Scope of the Traffic Stop.*

The state argues that the district court correctly concluded Corporal Green possessed reasonable suspicion of a drug crime based upon the officer's observation of furtive movement, the presence of a torch lighter, "extreme nervousness" brought on by the mention of drugs, suspicious travel arrangements, and physical manifestations of drug use. State's Brief ("SB"), p. 8. In doing so, it exaggerates the weight of the evidence before the trial court.

First, the officer did not testify to "extreme nervousness" at any time during the hearing. T 66-71 (p. 56-74) [1]. Nor did the trial court make such a finding. T 87 (p. 139) (court discussing nervousness). To the contrary, the video of the traffic stop does not show Mr. Harrell to be nervous. State's Pre-Trial Exhibit 1. In any case, 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).

Second, the court did not mention what the state calls "suspicious travel arrangements" in its oral ruling. T 87 (p. 139, l. 5 - p. 143, l. 6). And, Officer Green

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, as in the Opening Brief, Mr. Harrell will cite to the Transcript page and then indicate the specific page and line in parentheses.

did not testify that he thought the travel arrangements were suspicious at the preliminary hearing. T 4-28. While Corporal Green testified that he thought it was "odd" that Mr. Harrell didn't know if his uncle "was gonna make it or not" T 61 (p. 34, l. 20-21), the officer did not seem to consider the possibility that the uncle's condition was not settled when Mr. Harrell started his return trip.

While the state claims Mr. "Harrell's challenge to the evidence of furtive movements is . . . meritless," (SB, p. 9), it fails to address Mr. Harrell's argument that "a review of the traffic stop video does not show any furtive gestures during the time the trooper described." Opening Brief, p. 9. The dash cam video shows there were no furtive gestures during the time described by Officer Green. (*See* State's Pre-Trial Exhibit 1 from 18:46:44 to 18:47:23.)

But even if there had been gestures, the officer did not say Ms. Mosca appeared to be hiding drug related evidence or doing anything suspicious. Indeed, the state concedes that "it would have been impossible to see *exactly* what they were doing." SB, p. 9 (emphasis original). Thus, it was impossible for the officer or the court to conclude that some general type of movement was "furtive," *i.e.*, "attempting to avoid notice or attention, typically because of guilt or a belief that discovery would lead to trouble; secretive" if the officer could not see what Ms. Mosca was doing. No rational inference that the occupants were hiding contraband can be drawn from Officer Green's purported observations.

Finally, the state argues that "innocent acts, when considered together, may be suspicious enough to justify an investigative detention *if an officer points to*

articulable facts that the individual is engaged in criminal activity." SB, p. 9, *quoting State v. Gonzales*, 165 Idaho 667, 674 (2019) (emphasis added). It is the italicized portion of the quote which is missing here. There were insufficient articulable facts to indicate that the occupants were engaged in criminal activity.

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

1. There is a State Constitutional Right to Ten Peremptory Challenges.

The state asserts that Mr. "Harrell has set forth no authority suggesting that the *number* of peremptory challenges was so established as to be constitutionally adopted." SB, p. 12 (emphasis added). That is incorrect.

In the Opening Brief, Mr. Harrell noted that Article I, § 7 of the state constitution provides that, "The right of trial by jury shall remain inviolate[.]" This Court has held that "[t]he right to trial by jury, guaranteed by Article I, § 7 of our constitution, is the right as it was known in Idaho Territory at the time our state constitution was written and adopted." *State v. Nadlman*, 63 Idaho 153, 118 P.2d 58, 61 (1941). "The rule is well established that the guaranty of right of trial by jury secures that right as it existed under the common law *and territorial statutes in force* at the date of the adoption of our Constitution." *State v. Miles*, 43 Idaho 46, 248 P. 442, 442 (1926) (emphasis added); *accord State v. Bennion*, 112 Idaho 32, 37 (1986). As the state concedes, in 1887, prior to the 1890 adoption of the state constitution, ten peremptory challenges were given in a capital or life sentence case. SB, p. 13, citing The Revised Statutes of Idaho Territory, Title VII, Ch. 1, § 7829, p.

818 (1887). Thus, the state constitutional right to a jury trial includes the right to ten peremptory challenges whenever the defendant is facing a death sentence or life imprisonment. Mr. Harrell faced a life sentence due to the persistent violator allegation. *State v. Cox*, 169 Idaho 14, 17 (2021). Consequently, the reduction of peremptory challenges in this case from ten to three violated Article I, § 7.

The state next claims that reduction was permissible because the Court has the inherent power to make rules governing procedure.[2] SB, p. 11. Procedures, in turn, "pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated." *Id.*, *quoting State v. Abdullah*, 158 Idaho 386, 483 (2015). Thus, the state's argument goes, this Court may abrogate Mr. Harrell's constitutional right to ten peremptory challenges as guaranteed by Article I, § 7 because it is a mere "procedural" right. *Id.*

However, the Court may not abrogate a procedural right which is granted by the state constitution. If it could, the Court could also suspend the rights guaranteed in Article I, § 8 (that no person shall be held to answer for any felony except upon indictment by grand jury or information after commitment by a magistrate) if it decided that charging by Prosecutor's Complaint was a better procedure.[3] Likewise – according to the state – the Court could dispense with Article

2 Though unacknowledged by the state, any such inherent power must be part of the general power of the Judicial Department established in Article V, § 2 of the state constitution. ("The courts shall constitute a unified and integrated judicial system for administration and supervision by the Supreme Court.") *See* I.C. § 1-212.
3 In Washington state, for example, a criminal prosecution may proceed upon an Information filed by the prosecuting attorney without a finding of probable cause for

I, § 7's requirement that a jury be unanimous in a criminal case because jury unanimity is not a "substantive" right, as defined by the state. SB, p. 12. ("[S]ubstantive law "prescribes norms for societal conduct and punishments for violations thereof.") And – again, according to the state – the Court could dispense with the procedural requirement that probable cause must be "shown by affidavit, particularly describing the place to be searched and the person or thing to be seized" required by Article I, § 13. Per the state's argument, the affidavit requirement is a matter of procedure not substance.

But the state's argument is incorrect. The Court's ability to create rules of procedure is limited by the state constitution's grant of specific procedural rights. Otherwise, the Court is turned into a Super Constitutional Convention, able to amend any court procedure required by the state constitution. This power would be in direct contravention with the state constitutional provisions on how it may be amended. *See* Article XX, § 1 ("Any amendment or amendments to this Constitution may be proposed by either branch of the legislature" and submitted "to the electors of the state[.]"), § 3 (procedure to call constitutional convention), and § 4 (procedure to ratify new constitution). Article XX does not give the Judicial Department a role in the amendment of the state constitution. Thus, the Court cannot abrogate procedural rights guaranteed by the state constitution.

Unsurprisingly, none of the cases cited by the state involve a case where the

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the charge by a court. Washington Criminal Rule 2.1(a).

Court has attempted to amend a state constitutional right. In *State v. Castro*, 145 Idaho 173, 175 (2008), the Court merely observed that it had the right to promulgate rules governing procedure. The question was whether the old or new version of the applicable court rule should be applied. In *State v. Weigle*, 165 Idaho 482, 486 (2019), the question was whether trial courts were bound to apply a statute (I.C. § 19-2203) which limited what a jury may be provided while in deliberation. This Court held the statute was a nullity because it was procedural in nature. *Weigle*, 165 Idaho at 487. And in *State v. Abdullah*, 158 Idaho 386 (2015) the question presented was which of two rules (I.C. § 19–4907(a) or I.C.R. 57(b)) governed post-conviction discovery procedure. *Abdullah*, 158 Idaho at 483–84.

In short, the state has offered no authority to support the position that the Court has the inherent authority to abrogate constitutionally guaranteed procedures.

2. The Error Preservation Requirement in *State v. Cox*, 169 Idaho 14 (2021) Should Not be Applied to this Case Which was Tried Prior to the Issuance of *Cox*.

The voir dire in this case took place on March 8, 2021. *Cox* was issued on June 30, 2021, three and one-half months later. The *Cox* Court overruled *Nightengale v. Timmel*, 151 Idaho 347, 354 (2011), which required a party in a civil case to demonstrate that a biased juror was empaneled as a result of the district court's limitation of his available challenges in order to prove prejudicial error. Instead, the Court will remand for a new trial if the following special preservation of error rule is met.

> To demonstrate error from the denial of a peremptory challenge, we no longer require that a party prove a biased juror was empaneled. Rather, we hold that a party complaining of an erroneous denial of a peremptory challenge must demonstrate that it exhausted its remaining peremptory challenges and an objectionable juror was empaneled as a result. Further, guided by the authorities discussed above, we hold that the record must disclose which juror (or jurors) would have been struck but for the trial court's alleged error. Finally, to preserve such an error for appeal, a party must object to the composition of jury before it is sworn.

State v. Cox, 169 Idaho at 19.

Cox did not full preserve the issue under the new rule. Notwithstanding, this Court vacated the conviction and remanded for a new trial.

> Though Cox has not met the requirements we announce today to preserve the error, he did not have the benefit of this decision to guide his objection. Further, the district court's failure to ask Cox if he passed the jury for cause deprived him of a clear opportunity to object to the jury as empaneled. Therefore, in the interest of justice, remand for a new trial is appropriate.

State v. Cox, 169 Idaho at 19. The same result should obtain here. Mr. Harrell was deprived of his right to ten peremptory challenges, he used all three he had available and, even though *Cox* had not yet been decided, he declined to pass the jury for cause because he had been deprived of those seven challenges. R 1079. The interests of justice demand reversal here too.

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.

Mr. Harrell argued that his statutory (I.C § 19-2601) and state constitutional rights (Article I, § 7) to ten peremptory challenges created an interest protected by

the due process clause of the Fourteenth Amendment. The state responds that a violation of a non-constitutional based right to peremptory challenges does not violate the Sixth Amendment right to an impartial jury unless a biased juror was seated. SB, p. 14. But Mr. Harrell's argument here is not about the Sixth Amendment's guarantee of an impartial jury, it is about the deprivation of a constitutionally protected interest without due process of law. Consequently, the state's reliance upon *Rivera v. Illinois*, 556 U.S. 148 (2009) is misplaced.

In *Rivera*, the state trial court refused to permit the defendant to use one of his peremptory challenges to strike a Hispanic venireperson. It found that the defendant's use of that peremptory was in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), which holds that parties are constitutionally prohibited from exercising peremptory challenges to exclude jurors on the basis of race, ethnicity, or sex. *Rivera v. Illinois*, *supra*. (There is no indication in the opinion that the defendant was not permitted to use his full complement of peremptory challenges on other potential jurors). While the state Supreme Court found there was no *Batson* violation, it found the error was harmless. The United States Supreme Court accepted review "to resolve an apparent conflict among state high courts over whether the erroneous denial of a peremptory challenge requires automatic reversal of a defendant's conviction as a matter of federal law." *Rivera v. Illinois*, 556 U.S. at 156.

The *Rivera* Court held that the erroneous denial of a peremptory challenge did not require automatic reversal of a conviction because the Sixth Amendment

does not require peremptory challenges and "[t]he trial judge's refusal to excuse juror Gomez did not deprive Rivera of his constitutional right to a fair trial before an impartial jury." *Id.*, at 158. Because the Sixth Amendment protects the right to an impartial jury and there was no contention that the jury was not impartial there was no Sixth Amendment violation.[4]

Rivera did state that "errors of state law do not *automatically* become violations of due process" and that "the mistaken denial of a state-provided peremptory challenge does not, *without more*, violate the Federal Constitution." *Rivera v. Illinois*, 556 U.S. at 158, 160 (emphasis added). But, at the same time, it acknowledged that a state created right can be subject to federal due process protections when deprivation of that right violates "the fundamental elements of fairness in a criminal trial." *Rivera v. Illinois*, 556 U.S. at 158, *quoting Spencer v. Texas*, 385 U.S. 554, 563–564 (1967). *Cf. Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (although "the Constitution does not require States to grant appeals as of right to criminal defendants," States that provide such appeals "must comport with the demands of the Due Process and Equal Protection Clauses"). And the *Rivera* Court found that the fundamental elements of fairness were not violated under the facts of that case because the state trial court was attempting to apply Supreme Court

4 The U.S. Supreme Court noted that the remedy for a violation of a state based right to peremptory challenges was within the discretion of the individual state. 566 U.S., at 157. This Court under *Cox* would have reversed, providing that the defendant had exhausted his remaining peremptory challenges, an objectionable juror was empaneled as a result, and there was an objection to the composition of jury before it was sworn.

precedent regarding the improper use of peremptory challenges. Thus, it was inappropriate "[t]o hold that a one-time, good-faith misapplication of *Batson* violates due process [because it] would likely discourage trial courts and prosecutors from policing a criminal defendant's discriminatory use of peremptory challenges." *Id*, at 160.

Here, by contrast, the Court's October 8, 2020 Order deprived Mr. Harrell of seven peremptory challenges, while the defendant in *Rivera* got to use all of his peremptory challenges just not on one specific member of the venire. The trial court here was not engaged in the good-faith attempt to enforce the non-discrimination provisions of *Batson*. It was enforcing this Court's improper restriction on a state statutory and constitutional right. In addition, that improper restriction was not limited to a single instance in a particular case like *Rivera*. It applied to all jury trials after October 8, not just this one.[5] Thus, the United States Supreme Court's rejection of the Fourteenth Amendment argument in *Rivera* does not control this case.

2. Mr. Harrell may Raise This Issue for the First Time on Appeal.

In addition to the existence of an unwaived federal constitutional error, the other requirements of *State v. Miller*, 165 Idaho 115 (2019), are present here. Mr. Harrell relies upon his argument above and in the Opening Brief as to why the

5 Only a very few of those cases, however, will be eligible for relief once acquittals, mistrials, and convictions where no appeal was filed are excluded.

deprivation of his state constitutional and statutory right created a protected interest under the Fourteenth Amendment. Opening Brief, p. 24-27. Mr. Harrell relies upon his argument in his Opening Brief at pages 28-29 as to the remaining *Miller* requirements.

III. CONCLUSION

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

Respectfully submitted this 31st day of March 2022.

/s/ Dennis Benjamin
Dennis Benjamin
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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 31st day of March 2022.

/s/Dennis Benjamin
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