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

STATE OF IDAHO,	)	
	)	**No. 48839-2021**
Plaintiff-Respondent,	)	
	)	**Kootenai County Case No.**
v.	)	**CR28-20-7596**
	)	
RODNEY CARLTON HARRELL,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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

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STATEMENT OF THE CASE

Nature Of The Case

Rodney Carlton Harrell appeals from his judgment of conviction for trafficking in methamphetamine, trafficking in marijuana, and possession of drug paraphernalia.

Statement Of The Facts And Course Of The Proceedings

Corporal Green stopped a truck for having what appeared to be an altered Oregon temporary license and because it lacked required fender flares and adequate mudflaps. (Hearings Tr., p. 27, L. 16 – p. 28, L. 25; p. 34, L. 22 – p. 35, L. 9; p. 59, L. 20 – p. 60, L. 10.[1]) The Corporal "observed furtive movement coming from the vehicle's occupants" as it pulled over. (Hearings Tr., p. 29, Ls. 1-20; p. 66, L. 23 – p. 67, L. 4.) Corporal Green contacted the truck's driver, Paul Stonecypher,[2] who was licensed out of California. (Hearings Tr., p. 29, L. 21 – p. 30, L. 6; p. 35, Ls. 10-12.) The other two occupants of the truck were Tabitha Mosca and Harrell. (Hearings Tr., p. 30, L. 10 – p. 31, L. 10.)

Harrell had "White Boy" and "Riverside" tattooed on his face, which Corporal Green recognized as prison gang tattoos. (Hearings Tr., p. 36, Ls. 1-14.) The gangs associated with such tattoos tended to be violent and involved in drug trafficking. (Hearings Tr., p. 36, Ls. 8-14; p. 37, Ls. 9-13; p. 52, Ls. 14-19.) Dispatch reported Harrell

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[1] Citations to the "Hearings Tr." include the July 29, 2020, hearing on the motion to suppress that are sequentially page-numbered. Citations to the "Trial Tr." are to the separately paginated trial transcript, which includes the hearing on the motion for a new trial and the sentencing.

[2] Stonecypher's appeal is currently pending in Docket No. 48561-2021, with oral argument scheduled for April 13, 2022. It addresses one of the issues (denial of the suppression motion) raised in this appeal.

had a "drug history and cautions" about officer safety due to violence. (Hearings Tr., p. 46, Ls. 16-18.)

Stonecypher had "sunken cheek bones, flaccid facial muscles, glassy eyes, droopy eyelids, was speaking slowly," and had "very slouched" shoulders. (Hearings Tr., p. 36, Ls. 21-24.) Mosca had "glassy eyes, flaccid facial muscles, was speaking very quickly," and "had a lot of head movement and hand movement, going back and forth, appearing unable to sit still." (Hearings Tr., p. 38, L. 20 – p. 39, L. 1.) Harrell had "flaccid facial muscles, glassy eyes, and he was actually visibly sweating on a day that was very cool." (Hearings Tr., p. 39, Ls. 11-17.) Corporal Green, by training and experience, associated these physical characteristics with drug use. (Hearings Tr., p. 37, L. 15 – p. 38, L. 19; p. 39, Ls. 1-10; p. 39, L. 18 – p. 41, L. 16; p. 55, L. 20 – p. 56, L. 6.)

Harrell also showed a pulsating carotid artery when questioned about drugs, which is a sign of deep stress. (Hearings Tr., p. 40, Ls. 7-22.) All three occupants "appeared incredibly alarmed" and had "massive changes in behavior" when Corporal Green asked about drugs in the vehicle. (Hearings Tr., p. 46, L. 20 – p. 47, L. 13; p. 83, Ls. 19-22.)

Corporal Green also saw a single walkie-talkie in the cab, which he associated with drug trafficking because they are used to communicate with other vehicles being used as a follow car or to arrange drop sites for controlled substances. (Hearings Tr., p. 41, L. 17 – p. 42, L. 14.)

Harrell and Mosca told Corporal Green they had traveled from Montana to Northern California to visit an uncle with Covid, met Stonecypher there, and Stonecypher volunteered to drive them back to Montana. (Hearings Tr., p. 33, L. 19 – p. 35, L. 18.) This story "didn't quite make sense" because it seemed odd that they would go to see

someone with Covid but not know how he was doing after visiting, and to get a ride home in the manner they described. (Hearings Tr., p. 24, Ls. 1-16; p. 26, L. 5 – p. 27, L. 15; p. 33, L. 19 – p. 35, L. 22; p. 55, Ls. 8-11; p. 80, Ls. 11-15.)

Corporal Green also observed a torch lighter in the cabin of the truck, and next to it a bandana rolled up around something. (Hearings Tr., p. 36, Ls. 14-20.) In his training and experience, this type of lighter is generally used for "harder drugs" such as to "cook the methamphetamine at a high temperature to be able to smoke it or cook it down into liquid to where you can inject it." (Hearings Tr., p. 21, Ls. 16-20; p. 22, Ls. 5-19; p. 36, Ls. 14-18; p. 49, L. 4 – p. 50, L. 11.)

Corporal Green called in a drug dog, which alerted on the truck. (Hearings Tr., p. 102, L. 10 – p. 104, L. 16.) A search of the truck uncovered controlled substances and firearms. (Hearings Tr., p. 56, L. 9 – p. 58, L. 9.)

The state charged Harrell with one count of trafficking in methamphetamine, one count of trafficking in marijuana, one count of possession of drug paraphernalia, and a repeat offender enhancement. (R., pp. 106-08, 1031-33, 1081-83.) He moved to suppress evidence found as a result of the traffic stop, which he claimed was unlawfully extended in order to have a drug detection dog respond and which resulted in an unlawful search. (R., pp. 118-19, 126-34.) The state responded, contending the officer lawfully extended the traffic stop when he called in the drug dog based on reasonable suspicion of drug use or possession and that the search of the vehicle was lawful because the alert by the drug detection dog provided probable cause. (R., pp. 156-63.)

The district court denied the motion to suppress. (R., p. 191.) The district court determined that the initial stop was not being challenged. (Hearings Tr., p. 138, Ls. 20-

22.) As part of the traffic stop, Corporal Green obtained identification from the three occupants of the vehicle, including Harrell, who was a passenger. (Hearings Tr., p. 138, L. 22 – p. 139, L. 4.) Early in the encounter, the Corporal saw a "torch lighter" in the car, a type of lighter frequently associated with drug use. (Hearings Tr., p. 139, Ls. 5-8; p. 140, L. 5 – p. 141, L. 6.) All three of the occupants of the vehicle seemed overly nervous and showed "physical manifestations of drug use." (Hearings Tr., p. 139, L. 8 – p. 140, L. 5.) The Corporal observed the occupants making "furtive gestures" as the vehicle pulled over. (Hearings Tr., p. 142, Ls. 13-20.) The Corporal also found answers to his questions about the nature of the trip to be suspicious. (Hearings Tr., p. 142, Ls. 20-22.) Based on these factors Corporal Green had reasonable suspicion of drug-related crimes at the time he called for backup and a drug dog. (Hearings Tr., p. 142, L. 22 – p. 144, L. 19.) The district court also concluded that the dog alert provided probable cause to search the vehicle. (Hearings Tr., p. 146, L. 21 – p. 147, L. 25.)

Prior to trial, Harrell objected to the reduction in peremptory challenges "imposed by the Supreme Court Order issued on September 16, 2020." (R., pp. 385-94; Hearing Tr., p. 198, L. 14 – p. 199, L. 21.) The district court ultimately followed the order of the Idaho Supreme Court and allowed three peremptory challenges per side. (Hearings Tr., p. 199, L. 22 – p. 202, L. 25; Trial Tr., p. 14, Ls. 7-15; p. 68, L. 22 – p. 73, L. 7.)

The jury convicted on the substantive counts following a trial. (R., pp. 1077-80, 1092-1142, 1177-78.) After the verdict Harrell pled guilty to the enhancement. (Trial Tr., p. 506, L. 3 – p. 510, L. 19.) Harrell timely appealed from the judgment of conviction. (R., pp. 1215-17, 1219-23.)

ISSUES

Harrell states the issues on appeal as:

> 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.

(Appellant's brief, p. 4.)

The state rephrases the issues as:

I. Has Harrell failed to show error in the denial of his motion to suppress because Corporal Green had reasonable suspicion to expand the traffic stop to investigate possible drug-related crimes?

II. Has Harrell failed to demonstrate that his constitutional rights were violated when he was allowed to make three peremptory challenges?

ARGUMENT

I.
Harrell Has Failed To Show Error In The Determination That Corporal Green Had Reasonable Suspicion To Expand The Traffic Stop To Investigate Possible Drug-Related Crimes

A. Introduction

The district court determined that Corporal Green had reasonable suspicion of drug-related crimes that justified expanding the traffic stop into a drug investigation. (Hearings Tr., p. 137, L. 25 – p. 146, L. 20.) Harrell asserts the district court erred, arguing that Corporal Green's testimony about the truck's gas mileage is not relevant to reasonable suspicion; that his testimony about furtive movements did not include testimony that the occupants of the truck in fact hid anything; that nervousness, the presence of a torch lighter, and a walkie-talkie should be given little weight; and the fact that the occupants of the truck were apparently under the influence only adds "some" to reasonable suspicion, concluding that "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." (Appellant's brief, pp. 9-12.) Harrell's attempt to downplay each of the factors showing reasonable suspicion fails to show error by the district court.

B. Standard Of Review

"When reviewing a motion to suppress, this Court defers to the trial court's findings of fact unless the findings are clearly erroneous" but will "undertake a free review of the trial court's determination as to whether constitutional requirements have been satisfied in light of the facts found." State v. Hankey, 134 Idaho 844, 846, 11 P.3d 40, 42 (2000).

C. The District Court Correctly Concluded Corporal Green Had Reasonable Suspicion Of Drug-Related Criminal Activity

Investigatory detentions "are permissible when justified by an officer's reasonable articulable suspicion that a person has committed, or is about to commit, a crime." State v. Bishop, 146 Idaho 804, 811, 203 P.3d 1203, 1210 (2009). "The reasonable suspicion standard applicable to justify an investigative stop is considerably different than the probable cause required for an arrest." State v. Bonner, 167 Idaho 88, 94, 467 P.3d 452, 458 (2020). To determine if reasonable suspicion justifies a detention, courts "must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." United States v. Arvizu, 534 U.S. 266, 273 (2002). The reasonable suspicion standard "is not a particularly high or onerous standard to meet. The officer must simply be acting on more than a mere hunch or inchoate and unparticularized suspicion." State v. Danney, 153 Idaho 405, 410, 283 P.3d 722, 727 (2012) (quotation marks omitted).

A traffic stop "remains a reasonable seizure while the officer diligently pursues the purpose of the stop, to which that reasonable suspicion is related." State v. Linze, 161 Idaho 605, 609, 389 P.3d 150, 154 (2016). A traffic stop may be expanded to investigate other crimes upon reasonable suspicion of those crimes. State v. Warren, ___ Idaho ___, ___, 499 P.3d 423, 428-29 (2021). Abandonment of the purpose of the original stop to investigate a different potential crime is justified if "some new reasonable suspicion or probable cause arises to justify the seizure's new purpose." State v. Pylican, 167 Idaho 745, 751, 477 P.3d 180, 186 (2020) (quotation marks omitted). "The purpose of a stop is not permanently fixed" such that "during the course of the detention there may evolve suspicion of criminality different from that which initially prompted the stop." State v.

Sheldon, 139 Idaho 980, 984, 88 P.3d 1220, 1224 (Ct. App. 2003). See also State v. Perez-Jungo, 156 Idaho 609, 614, 329 P.3d 391, 396 (Ct. App. 2014) ("a detention initiated for one investigative purpose may disclose suspicious circumstances that justify expanding the investigation to other possible crimes").

The district court correctly concluded that Corporal Green's abandonment of the traffic investigation to pursue a drug-crime investigation was constitutional because based on reasonable suspicion arising from the officer's observations of furtive movement, a torch lighter he associated with illegal drug use, extreme nervousness brought on by the mention of drugs, suspicious travel arrangements, and "physical manifestations of drug use." (Hearings Tr., p. 139, L. 5 – p. 143, L. 6.) The inferences from the totality of circumstances observed by the officer led to reasonable suspicion that the occupants of the truck were involved in drug-related criminal activity.

In arguing otherwise Harrell contends that several of the factors could be explained by innocent conduct or were otherwise entitled to little weight. For example, he points out that the fuel efficiency of the truck is not itself directly indicative of criminal activity. However, the context of the testimony was that Stonecypher claimed he agreed to drive Harrell and Mosca, people he had just met, from California to Montana in a car he had just recently purchased in a different state. That the trip was more expensive than other transportation, including a more efficient car, added some suspicion. Overall, Harrell does not challenge the finding that Harrell's claim he traveled with Mosca to California from Montana to visit a sick relative, arranged a trip back with a stranger, and then left before knowing if the relative would recover from the illness was suspicious. See State v. Randall,

169 Idaho 358, 496 P.3d 844, 850 (2021) (suspicious travel plans can contribute to reasonable suspicion).

Harrell's challenge to the evidence of furtive movements is likewise meritless. That Corporal Green could not see whether Mosca or the others were in fact hiding things does not show a lack of reasonable suspicion. Given the height of the truck and the bench seat (State's Exhibit 2), it would have been impossible to see *exactly* what they were doing. Reasonable suspicion is based on rational inferences drawn from the known facts. Bishop, 146 Idaho at 811, 203 P.3d at 1210. That the occupants of the truck were hiding something is a rational inference from their *furtive* movements.

Harrell next challenges the nervousness of the occupants, the presence of a torch lighter and walkie-talkie, and the signs the occupants of the truck were apparently under the influence because there are, in his estimation, innocent explanation for those things. Although "conduct might be innocently explained, the Supreme Court of the United States has 'consistently recognized that reasonable suspicion need not rule out the possibility of innocent conduct.'" Pylican, 167 Idaho at 752, 477 P.3d at 187 (quoting Navarette v. California, 572 U.S. 393, 403 (2014)). Indeed, "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." State v. Gonzales, 165 Idaho 667, 674, 450 P.3d 315, 322 (2019). Although it is *conceivable* that in the absence of drug-related criminal activity *all three* occupants of a truck could show physical signs of drug use; that their furtive movements were not an effort to conceal something; that they had a single walkie-talkie without its mate being in a follow car; that they could have a torch lighter for unknown, non-obvious licit purposes; that *all three* could be exceptionally

and unusually nervous at the mention of drugs by the officer; and the story about visiting a sick relative in California could be true despite its deficiencies and discrepancies, the odds of innocence are not so overwhelming that Corporal Green's suspicion of drug-related criminal activity was unreasonable and amounted to no more than in inchoate hunch.

The district court found that the totality of circumstances confronting Corporal Green included furtive movements, the presence a walkie-talkie he associated in his training and experience with drug trafficking, the presence of a torch lighter he associated in his training and experience with drug use, a suspicious story of travel from California to Montana, three occupants of the truck all becoming exceptionally nervous when the officer inquired about drugs, and all three occupants apparently being under the influence of or users of drugs. These circumstances rendered the Corporal's suspicions reasonable. Harrell has failed to show error in the denial of his motion to suppress.

II.
Harrell's Constitutional Rights Were Not Violated When He Was Allowed To Make Three Peremptory Challenges

A. Introduction

Pursuant to Idaho Supreme Court order addressing the exigencies of the Covid-19 pandemic,[3] the district court granted Harrell three peremptory challenges. (Hearings Tr., p. 199, L. 22 – p. 202, L. 25; Trial Tr., p. 14, Ls. 7-15; p. 68, L. 22 – p. 73, L. 7.) In doing so, the district court overruled Harrell's objection that the Idaho Constitution entitled him

[3] Amended Order (October 8, 2020). The order to "allow the resumption of jury trials while fostering public safety and mitigating against the spread and the continuing rise of COVID-19 cases" reads, in relevant part: "Peremptory challenges allotted to each side, being procedural mechanisms and not substantive rights, shall be modified as follows: … Pursuant to I.C.R. 24(d), in all other felonies, each party, regardless of the number of defendants, is entitled to three peremptory challenges …."

to an "adequate" number of peremptory challenges. (R., pp. 385-94.) Harrell argues first that the reduction of peremptory challenges from ten to three violated the Idaho Constitution's guarantee of a jury and, second, that restricting the number of challenges was fundamental error under the Fourteenth Amendment's due process clause. (Appellant's brief, pp. 13-30.) Review of applicable standards shows no error.

B. Standard Of Review

"Constitutional questions are reviewed de novo." State v. Dunlap, 155 Idaho 345, 377, 313 P.3d 1, 33 (2013). Interpretation of a Court rule "begin[s] with the plain, ordinary meaning of the rule's language" but such interpretation "may be tempered by the rule's purpose." State v. Cox, 169 Idaho 14, ___, 490 P.3d 14, 16 (2021). "The rules of construction applicable to contracts and written documents apply to the interpretation of court orders." Sun Valley Ranches, Inc. v. Prairie Power Co-op., Inc., 124 Idaho 125, 131, 856 P.2d 1292, 1298 (Ct. App. 1993).

C. Harrell Was Not Constitutionally Entitled To More Than Three Peremptory Challenges

1. Harrell Did Not Have A Right To A Specific Number Of Peremptory Challenges Under The Idaho Constitution

"The inherent power of this Court to make rules governing procedure in all the courts of Idaho, including the formulation of rules of criminal practice and procedure, has long been recognized." State v. Castro, 145 Idaho 173, 175, 177 P.3d 387, 389 (2008) (citing I.C. § 1-212 (1941)). "'It is well established that the Idaho Supreme Court is uniquely empowered with certain inherent powers. The Court has the inherent power to make rules governing the procedure in all of Idaho's courts.'" State v. Weigle, 165 Idaho

482, 486, 447 P.3d 930, 934 (2019) (quoting Talbot v. Ames Constr., 127 Idaho 648, 651, 904 P.2d 560, 563 (1995)). The "general guidelines" for distinguishing between substantive rights and procedural rules are that substantive law "prescribes norms for societal conduct and punishments for violations thereof. It thus *creates, defines, and regulates primary rights*" while "practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated." State v. Abdullah, 158 Idaho 386, 483, 348 P.3d 1, 98 (2015) (italics original, quotation marks omitted).

The Idaho Supreme Court order in question stated peremptory challenges were "procedural mechanisms and not substantive rights." (Amended Order, pp. 2-3.) The number of peremptory challenges available to the parties was therefore subject to the Court's rule-making constitutional authority. Harrell did not have a constitutional right to a specific number of peremptory challenges.

In arguing otherwise, Harrell contends that the right to peremptory challenges was established in statute and at common law when the Idaho Constituent was adopted, and is therefore of constitutional significance. (Appellant's brief, pp. 15-31.) While it is generally true that the practice of allowing peremptory challenges was well established when the Idaho Constitution was adopted,[4] Harrell has set forth no authority suggesting that the *number* of peremptory challenges was so established as to be constitutionally

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[4] The state does not, by this recognition, concede that there is a constitutional right to peremptory challenges. See Ross v. Oklahoma, 487 U.S. 81, 89 (1988) ("peremptory challenges are a creature of statute and are not required by the Constitution"). Because Harrel was granted peremptory challenges and it is only the *number* of challenges he claims was unconstitutional, the question of whether there is a constitutional right to *any* peremptory challenges is not an issue before this Court.

adopted. As Harrell points out (Appellant's brief, pp. 20-21) in 1864 the number of peremptory challenges for a defendant facing a potential life sentence was set at 20. Laws of the Territory of Idaho, Criminal Practice Act § 335 (1864). By 1887, prior to the 1890 adoption of the Idaho Constitution, that number had been reduced to ten. The Revised Statutes of Idaho Territory, Title VII, Ch. 1, § 7829, p. 818 (1887). It would not appear that the Idaho Founders would have perceived any particular number of peremptory challenges to be required by the constitutional grants of the right to a jury and due process. Harrell has failed to show that a particular number of peremptory challenges, whether 20, ten, three, or some other number is constitutionally required.

Even if the number of peremptory challenges was not subject to the Court's rule-making authority, Harrell has failed to show reversible error. To show reversible error, a party complaining of erroneous denial of peremptory challenges must demonstrate three things. Cox, 169 Idaho at ___, 490 P.3d at 19. First, "that it exhausted its remaining peremptory challenges and an objectionable juror was empaneled as a result." Id. Second, that the record discloses "which juror (or jurors) would have been struck but for the trial court's alleged error." Id. "Finally, to preserve such an error for appeal, a party must object to the composition of [the] jury before it is sworn." Id. Harrell makes no attempt to meet this standard, instead erroneously arguing it is the state's burden to show harmless error. (Appellant's brief, p. 24.) Because Harrell has neither cited nor attempted to apply the correct legal standard, his claim of reversible error necessarily fails.

2. Harrell Has Not Shown That Following The Supreme Court Rule On Peremptory Challenges Was Fundamental Error

Harrell also asserts that granting him less than ten peremptory challenges violated his due process rights under the 14th Amendment, on the theory that he was entitled to notice and a hearing before his statutory right to ten peremptory challenges could be denied. (Appellant's brief, pp. 24-27.) He asserts that this unpreserved claim is fundamental error. (Appellant's brief, pp. 29-30.) To demonstrate fundamental error Harrell must show four elements: (1) "that one or more of the defendant's unwaived constitutional rights were violated;" (2) that the error was "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) "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. Alvarado, ___, Idaho ___, 481 P.3d 737, 744 (2021). Harrell has shown none of these elements.

First, he has failed to show that his constitutional due process right to notice and a hearing under the Fourteenth Amendment was violated. "[U]nlike the right to an impartial jury guaranteed by the Sixth Amendment, peremptory challenges are not of federal constitutional dimension." United States v. Martinez-Salazar, 528 U.S. 304, 311 (2000). "Because peremptory challenges are a creature of statute and are not required by the Constitution, it is for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise." Ross v. Oklahoma, 487 U.S. 81, 89 (1988) (citations omitted). "If a defendant is tried before a qualified jury composed of individuals not challengeable for cause, the loss of a peremptory challenge due to a state court's good-faith error is not a matter of federal constitutional concern." Rivera v. Illinois,

556 U.S. 148, 157 (2009) (erroneous denial of peremptory on *Batson* grounds). "Because peremptory challenges are within the States' province to grant or withhold, *the mistaken denial of a state-provided peremptory challenge does not, without more, violate the Federal Constitution*." Id. at 158 (emphasis added). Because the Supreme Court of the United States has specifically rejected the claim that erroneous denial of a statutory right to peremptory challenges implicates the Fourteenth Amendment, Harrell's claim to the contrary is meritless.

Second, the error is not clear on the record. Initially, as set forth above, the Supreme Court of the United States has rejected the claim that denial of peremptory challenges implicates the Fourteenth Amendment. Even if Rivera is not controlling here, Harrell has fallen far short of showing "clear" constitutional error. In addition, as set forth above, the *number* of peremptory challenges is a procedural, not a substantive, right, and therefore subject to amendment by the Idaho Supreme Court. It is not "clear" that every prospective criminal defendant is entitled to notice and a hearing before the Court changes its procedures.

Third, Harrell has not attempted to show that the alleged failure to give him notice and an opportunity to be heard before reducing the number of peremptory challenges from ten to three (the due process violation he alleges) affected the outcome of the trial proceedings. Rather, Harrell claims that granting less than ten peremptory challenges is structural error akin to denial of counsel or trial before a biased tribunal. (Appellant's brief, p. 29.) His argument is meritless.

"Structural error is a 'defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" State v. Payne, 146 Idaho

548, 569, 199 P.3d 123, 144 (2008) (quoting Arizona v. Fulminante, 499 U.S. 279, 310 (1991)). As shown above, Harrell had no "structural" right to ten peremptory challenges. Moreover, this court has clearly stated that to show reversible error, a party complaining of an erroneous denial of a peremptory challenge must demonstrate that "an objectionable juror was empaneled as a result." Cox, 169 Idaho at ___, 490 P.3d at 19. Thus, rather than structural error, any error in denial of a peremptory challenge is prejudicial only if it is shown to have undermined the fairness of the jury that heard the case. Harrell has made no attempt to show that he was tried by a jury containing a biased or otherwise objectionable juror. The contention that this Court must assume a biased jury on less than ten peremptory challenges is directly contrary to applicable precedent.

Peremptory challenges are a procedural mechanism designed to achieve the substantive right of an impartial and unbiased jury. As a procedural mechanism, the number of peremptory challenges is the prerogative of the Idaho Supreme Court. Harrell has shown no constitutional right to a specific number of peremptory challenges. Nor has he claimed that his substantive right of a fair jury was thus compromised. He has therefore failed to show error in the district court's decision to abide by the Supreme Court's COVID emergency order.

CONCLUSION

The state respectfully requests this Court to affirm the district court's judgment.

DATED this 14th day of March, 2022.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 14th day of March, 2022, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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KKJ/dd