

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

STATE OF IDAHO, )  
 ) No. 47334-2019  
 Plaintiff-Respondent, )  
 ) Adams County Case No.  
 v. ) CR-2017-19666  
 )  
 RICHARD MITCHELL HEATH, )  
 )  
 Defendant-Appellant. )  
 \_\_\_\_\_ )

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

**APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF ADAMS**

\_\_\_\_\_  
**HONORABLE D. DUFF McKEE**  
**District Judge**  
\_\_\_\_\_

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## STATEMENT OF THE CASE

### Nature of the Case

Richard Mitchell Heath appeals from the district court's order affirming the magistrate court's denial of his motion to return seized property – a marijuana bong and pipe allegedly used for religious sacramental purposes.

### Statement of Facts and Course of Proceedings

According to the magistrate court, the facts underlying Heath's convictions are as follows:

On August 21, 2017, Sergeant Green pulled over a motor vehicle traveling northbound on Highway 95 in Council, Idaho. Mr. Heath was the passenger. Sergeant Green informed the driver and Mr. Heath of the reason for the stop, which was that the vehicle was traveling 9 miles per hour over the posted speed limit.

During the stop, Sergeant Green indicated that he detected an odor of alcohol coming from the vehicle, which both occupants denied. Sergeant Green ran background checks on both occupants and issued a warning for speed, which concluded the original reason for the stop. Sergeant Green then began asking questions of both vehicle occupants regarding the odor of marijuana, and Mr. Heath ended up admitting after several minutes that he had marijuana, which he handed over to Sergeant Green, and also handed over the pipe and the bong.

(R., pp.57-58.)

The state charged Heath with possession of a controlled substance (marijuana) and possession of drug paraphernalia. (R., pp.8-9.) The magistrate court also explained the ensuing proceedings (with bracketed citations to the record):

Heath filed a Motion to Dismiss this case on January 31, 2018 [R., pp.16-19], as well as a Motion for Return of Property on March 13, 2018 [R., pp.31-33], which this Court also treated as a Motion to Suppress Evidence pursuant to Idaho Criminal Rule 41(1). The Court granted Mr. Heath's Motion to Suppress Evidence at a hearing on June 21, 2018, and both charges were dismissed [R., pp.35-39].<sup>1</sup>

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<sup>1</sup> According to the magistrate court, Heath's suppression motion was granted because "Sergeant Green had extended the stop beyond its original purpose." (R., p.58.)

Mr. Heath followed the March 13, 2018 Motion for Return of Property [R., pp.31-33] with a Supplemental Motion for Return of Property, filed on July 16, 2018 [R., pp.40-43]. Supplemental motions for the return of property were filed on August 29, 2018, and October 29, 2018 [R., pp.45-52] and contained further legal argument in support of Mr. Heath's request for the return of two items of property, namely an elk antler pipe, hereinafter "pipe," and an elk antler bong, hereinafter "bong." The Motion for Return of Property initially went to hearing on August 21, 2018. [R., p.44]. Mr. Heath represented himself . . . . The Court indicated that it would take the matter under advisement and issue a written decision. [Id.] However, when Mr. Heath filed supplemental pleadings on August 29, 2018, the Court scheduled one more hearing on the matter for November 15, 2018. [R., pp.53-55.]

On November 15, 2018, the Court again took up Mr. Heath's Motion for Return of Property. [R., pp.53-55.] Mr. Heath represented himself . . . . The Court heard testimony from Adams County Sheriff's Sergeant Christopher Green and from Mr. Heath. Both parties presented their arguments to the Court. [Id.]

(R., pp.56-57.)

The magistrate court entered an Order Denying Defendant's Motion for Return of Property and Order to Preserve Evidence (R., pp.56-62), and Heath appealed to the district court (R., pp.63-67). After the parties submitted briefs (R., pp.90-104 (Appellant's opening brief), 105-111 (Respondent's brief), 120-141 (reply brief), 144-166 (amended reply brief), 167-189 (amended reply brief 2)), the district court entered a Memorandum Decision affirming the magistrate court's order denying Heath's motion to return property (R., pp.192-197). Heath filed a timely notice of appeal. (R., pp.198-203.)

## ISSUES

Heath states the issues on appeal as:

- A) Did the Magistrate Court (hereinafter “Magistrate”) err when it denied Thumbs’ Motion to Return Property under Idaho Criminal Rule 41(f)?
- B) Where is the Constitutional Amendment (similar to the 18<sup>th</sup> Amendment) delegating such powers to the United States government, pursuant to the 10<sup>th</sup> Amendment, to enable the federal prohibition of Cannabis?
- C) Where does the “State Board of Pharmacy” derive legislative authority?
- D) How can Cannabis be listed as a “controlled substance” under Idaho Code Section 37-2705(d)(19) when it CANNOT pass the “Schedule I tests” of Idaho Code Section 37-2704?
- E) Even if Cannabis could pass the tests for a Schedule I substance AND if the State Board of Pharmacy had legislative authority, how could its scope of authority apply to a Natural Herb given to Mankind by our Creator (Genesis 1:29)?
- F) Why is this unlawful prohibition of the religious use of Natural Herbs permitted when it is expressly forbidden by Idaho Code section 73-401, et seq?
- G) How can the State of Idaho, and its subdivision, Adams County, violate Article XXI, section 19 of the Idaho State Constitution?
- H) How can “*State v. Fluewelling*” be a controlling “precedent” when it does NOT address any of the issues and arguments presented in this case?
- I) Why is the Adams County Sheriff s Office, and others, allowed to commit fraud, extortion, highway robbery, and *sacrilegium*, under color of law, thus victimizing the Society they are supposed to protect, due “to an unlawful listing of a God-given Herb?
- J) Why is this unlawful prohibition allowed to pose a serious threat to all Life on Earth when there is NO compelling governmental interest?
- K) Why doesn’t the Supreme Court of Idaho exercise its jurisdiction to nullify the invalid listing of Cannabis under Idaho Code section 37-2705(d)(19) since said listing violates that statute’s definition (I.C. 37-2704), an overriding statute (I.C. 73-401 et seq.), and the Idaho State Constitution (Art. XXI, sect. 19)?

(Appellant’s brief, pp.6-7.)

The state rephrases the issues as:

Has Heath failed to show that the district court erred in affirming the magistrate court's denial of his motion to return property?



## ARGUMENT

### Heath Has Failed To Show That The District Court Erred In Affirming The Magistrate Court's Denial Of His Motion To Return Property

#### A. Introduction

Heath argues that the district court erred by affirming the magistrate court's order denying his Motion to Return Property – the antler pipe and antler bong – for a variety of reasons. In the main, Heath argues that a plain reading of I.C.R. 41(f) requires the return of the property despite their status as contraband, that the laws making it illegal to possess marijuana and marijuana paraphernalia are invalid, and that his “religious” use of marijuana as a sacrament is protected by the Idaho Constitution. Heath's arguments fail.

#### B. Standard of Review

On review of a decision rendered by a district court in its intermediate appellate capacity, the reviewing court “directly review[s] the district court's decision.” State v. DeWitt, 145 Idaho 709, 711, 184 P.3d 215, 217 (Ct. App. 2008) (citing Losser v. Bradstreet, 145 Idaho 670, 183 P.3d 758 (2005)). The appellate court “reviews the magistrate record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings.” State v. Tregeagle, 161 Idaho 763, 765, 391 P.3d 21, 23 (Ct. App. 2017). Whether the district court erred is based on whether the magistrate's findings are supported and the magistrate's legal conclusions follow therefrom. State v. Pettit, 162 Idaho 849, 851, 406 P.3d 370, 372 (Ct. App. 2017).

C. The District Court Correctly Affirmed The Magistrate Court's Denial Of Heath's Motion To Return Property

In its Memorandum Decision, the district court explained that the magistrate's Order Denying Defendant's Motion for Return of Property and Order to Preserve Evidence was a "detailed and articulate written order addressing all the salient points necessary to a resolution of this case." (R., p.194.) The district court affirmed the magistrate court's determinations, summarizing them as (1) the statutes making the "contraband" illegal controlled over I.C.R. 41(f)'s plain language, (2) despite "the accepted medical uses that have been recognized for marijuana across the US[,] the court is bound by the statutory classification that marijuana is a schedule 1 controlled substance," and (3) as addressed in State v. Fluewelling, 150 Idaho 576, 249 P.3d 375 (2011), "the Idaho Constitution does not protect against prosecution for conduct that violates a neutral criminal statute of general applicability, such as possession of marijuana or related drug paraphernalia, simply because such conduct may be engaged in for religious purposes." (R., pp.194-195.)

For its response to Heath's arguments, the state relies upon, and incorporates as if fully set forth herein, the district court's Memorandum Decision (R., pp.192-197), which is attached to this brief as Appendix A, and the magistrate court's Order Denying Defendant's Motion for Return of Property and Order to Preserve Evidence (R., pp.56-62), which is attached to this brief as Appendix B. In addition to the court's analysis and conclusions, the state makes the following arguments in support of the district court's opinion.

1. Contraband Is Not Returnable Property

In addition to the lower courts' determination that the statutes that make possession of marijuana and possession of marijuana paraphernalia illegal prevail over the fact that I.C.R. 41(f)

does not make any exception for the return of property that is contraband,<sup>2</sup> the common sense principle that contraband is not subject to return is explained in 79 C.J.S. Searches § 285, to wit:

The mere fact that an item is suppressed as evidence because it was illegally seized does not, in itself, necessarily entitle an aggrieved person to its return. [Footnote citation to *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967).] Seized property that is contraband need not be returned. [Footnote citation to *United States v. Brown*, 185 F.Supp.3d 79 (2016).] Contraband is illegal to possess and therefore not susceptible of ownership so as to warrant its return, [footnote citation to *State v. Greenetrack, Inc.*, 154 So.3d 940 (Ala. 2014)] even if illegally seized, [footnote citation to *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967)] even if no longer needed as evidence, [footnote omitted] and even if a criminal defendant is acquitted or the charges are dropped. [Footnote omitted.] This is so, at least, in instances involving contraband per se – objects which are intrinsically inherently unlawful and the possession of which, without more, constitutes a crime. [Footnotes omitted.]

79 C.J.S. Searches § 285; see United States v. Brown, 185 S.Supp.3d 79, 82 (D.D.C 2016) (“The D.C. Circuit has expressed the ‘general rule [ ] that seized property, other than contraband, should be returned to its rightful owner once the criminal proceedings have terminated.’”).

Although there does not appear to be any Idaho law on this specific issue, like the authorities cited above, this Court should take the common sense position that contraband, such as the antler pipe and bong here, is not subject to return after the conclusion of a criminal proceeding, even if seized illegally.

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<sup>2</sup> Idaho Criminal Rule 41(f) reads:

**Motion to Return Property.** A person aggrieved by an unlawful search and seizure of property may move for the property’s return. The motion must be filed in the criminal action if one is pending, but if no action is pending then a civil proceeding may be filed in the county where the property is seized or located. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant and it is not admissible in evidence at any hearing or trial. A motion for return of property made or heard after a complaint, indictment or information is filed, must also be treated as a motion to suppress under Rule 12.

2. Delegation Of Authority To The Idaho Board Of Pharmacy

Heath challenges the listing of marijuana under I.C. § 37-2705(d)(19) as a controlled substance because it was not “enacted by due process of law.” (Appellant’s brief, p.9.) He appears to argue that the Idaho Legislature improperly delegated its lawmaking authority to the Idaho Board of Pharmacy in classifying marijuana as a controlled substance. (Id.) However, it was the Idaho Legislature – not the Board of Pharmacy – that adopted the Uniform Controlled Substances Act (“CSA”) in 1971, choosing to classify marijuana as a Schedule I controlled substance. State v. Groce, 133 Idaho 144, 149, 983 P.2d 217, 222 (Ct. App. 1999); see I.C. § 37-2705(d)(19); 1971 Idaho Sess. Laws, ch. 215, pp. 939-969.

Through Idaho Code § 37-2702(a)-(d),<sup>3</sup> the Idaho Legislature delegated to the Board of Pharmacy the responsibility of adding, deleting, and rescheduling controlled substances, with

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<sup>3</sup> Idaho Code § 37-2702(a)-(d) reads:

a) The board shall administer the regulatory provisions of this act and may add substances to or delete or reschedule all substances enumerated in the schedules in section 37-2705, 37-2707, 37-2709, 37-2711, or 37-2713, Idaho Code, pursuant to the procedures of chapter 52, title 67, Idaho Code. In making a determination regarding a substance, the board shall consider the following:

- (1) The actual or relative potential for abuse;
- (2) The scientific evidence of its pharmacological effect, if known;
- (3) The state of current scientific knowledge regarding the substance;
- (4) The history and current pattern of abuse;
- (5) The scope, duration, and significance of abuse;
- (6) The risk to the public health;
- (7) The potential of the substance to produce psychic or physiological dependence liability; and
- (8) Whether the substance is an immediate precursor of a substance already controlled under this article.

(b) After considering the factors enumerated in subsection (a) of this section, the board shall make findings with respect thereto and issue a rule controlling the substance if it finds the substance has a potential for abuse.

general parameters for decision-making and procedures. In Employers Resources Management Co. v. Kealey, 2020 WL 1178665, \*5 (March 2020), the Idaho Supreme Court explained:

[I]n *State v. Kellogg*, a defendant was charged with selling a prescription drug without legal authority. 98 Idaho 541, 542, 568 P.2d 514, 515 (1977). At the time, the governing state law for defining prescription drugs conditioned that status on federal law and regulations issued by the Idaho Board of Pharmacy. *Id.* at 542-13, 568 P.2d at 515-16. The defendant in *Kellogg* argued that the legislature failed to specify the criteria for defining prescription drugs, and thereby improperly delegated its legislative authority to the Board of Pharmacy and the federal government. *Id.* at 542-44, 568 P.2d at 515-17. The district court agreed, holding that “the statutory procedure by which a drug is classified as a prescription drug constitutes an unconstitutional delegation of legislative authority in violation of Idaho Constitution Art. 2, s 1, and Art. 3, s 1.” *Id.* at 542, 568 P.2d at 515. This Court reversed and remanded, holding that the legislature properly designated the agency to effectuate its statutory policy and delineated the limits of the agency’s powers in determining the prescription status of different drugs. *Id.* at 544-45, 568 P.2d at 517-18. In addition, the Court noted that to require the legislature to evaluate the need for prescription status for every new drug would have been an “impossible” task for the House and Senate. *Id.* at 544, 568 P.2d at 517. Accordingly, we concluded that “[d]elegation of the drug-by-drug evaluation is a necessary and proper exercise of legislative authority.” *Id.*

As recently explained by the Idaho Supreme Court, Kellogg held that the legislature’s delegation of authority to the Board of Pharmacy to conduct a “drug-by-drug evaluation” of each

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(c) If the board designates a substance as an immediate precursor, substances which are precursors of the controlled precursor shall not be subject to control solely because they are precursors of the controlled precursor.

(d) If any substance is designated, rescheduled, or deleted as a controlled substance under federal law and notice thereof is given to the board, the board shall similarly control the substance under this act by promulgating a temporary rule or proposing a statutory amendment, or both, within thirty (30) days from publication in the Federal Register of a final order designating a substance as a controlled substance or rescheduling or deleting a substance, unless within that thirty (30) day period, the board objects to inclusion, rescheduling, or deletion. In that case, the board shall publish the reasons for objection and afford all interested parties an opportunity to be heard. At the conclusion of the hearing, the board shall publish its decision, which shall be final unless altered by statute. Upon publication of objection to inclusion, rescheduling, or deletion under this act by the board, control under this act is stayed until the board publishes its decision.

drug's prescription status was a "necessary and proper exercise of legislative authority." Similarly, here, the legislature's delegation of authority to the Board of Pharmacy to add, delete, and reschedule controlled substances, with its list of limitations and requirements, clearly falls within the "necessary and proper exercise of legislative authority." See I.C. § 37-2702(a)-(d). Accordingly, Heath's argument should be rejected.

### 3. Cannabis As A Schedule 1 Controlled Substance

Heath contends that, due to the accepted medical use of marijuana in most states, it cannot be classified as a schedule 1 controlled substance, which requires a finding that the substance has "no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision." (Appellant's brief, p.10; I.C. § 37-2704(b).) However, the same argument was rejected in State v. Rainier, 159 Idaho 142, 145, 357 P.3d 867, 870 (Ct. App. 2015), which explained:

Thus, Rainier contends, by being classified as a schedule I controlled substance, pursuant to section 37-2704, marijuana is automatically classified as "highly addictive *and* having no medicinal properties accepted in the United States *or* as too dangerous for use in treatment under medical supervision." He contends that such a classification is untenable given the current state of science and law in regard to marijuana in this country. He first lists the states in which cannabis is currently accepted for medical use and argues it cannot therefore be said that marijuana "has no accepted medical use in the United States." As to the alternative requirement of section 37-2704(b), he contends "the current classification would need rest upon the absurd notion that the combined populations of these states, some 140 million people (not to mention the populations of other nations where cannabis is available for medicinal and recreational purposes), are being subjected to something that the legislature or the board of pharmacy can legitimately call a treatment too dangerous to be used even under medical supervision." Because marijuana does not meet these conditions, Idaho's Uniform Controlled Substances Act has therefore, Rainier surmises, become "absurd" as it applies to cannabis.

....

Rainier's point that the legal landscape in regard to marijuana is changing in much of the country is indisputable. This fact, however, does not give this Court carte blanche to reclassify or ignore marijuana within Idaho's statutory scheme. This is a cause better directed to the board referenced in the Uniform Controlled

Substances Act (which pursuant to section 37-2702 may consider rescheduling a substance according to enumerated considerations) and/or our legislature. Thus, the district court did not err by denying Rainier's motion to dismiss in this regard.

Contrary to Heath's argument, the changing tide of public opinion "does not give this Court carte blanche to reclassify or ignore marijuana within Idaho's statutory scheme." Id. Heath's argument should be rejected.

#### 4. Religious Freedom

The district court rejected Heath's various arguments that the failure to return his property violated several sections of the Idaho Constitution and I.C. § 73-403. (See Appellant's brief, p.9 (re: Art. III, secs.1, 12), p.15 (re: Art. I, secs. 1, 4, 13, 17; Art. II, sec. 1; Art. III, sec. 1; Art XX, sec. 1; Art. XXI, sec.19), p.17 (re: Art. XXI, sec. 19).) The district court opined that the issues have been squarely addressed in State v. Fluewelling, 150 Idaho 576, 249 P.3d 375 (2011), "which held that the Idaho Constitution does not protect against prosecution for conduct that violates a neutral criminal statute of general applicability, such as possession of marijuana or related drug paraphernalia, simply because such conduct may be engaged in for religious purposes." (R., p.195.) Heath does not agree that the laws criminalizing marijuana possession (I.C. § 37-2732(c)(3)) and possession of drug paraphernalia (I.C. § 37-2734A(1)) are neutral. However, he fails to show in what way either statute is not "a neutral criminal statute of general applicability." See Fluewelling, 150 Idaho at 579, 249 P.3d at 378. As in Fluewelling, "[t]he statute[s] under which [Heath] was convicted [are] of general application and [they] do[] not proscribe any conduct because [they are] engaged in for religious reasons or because of the religious belief [they] portray[]. [They are] entirely neutral with respect to religion."<sup>4</sup> Id. Heath's argument, based on the Idaho Constitution, has no merit and should be rejected.

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<sup>4</sup> Idaho Code § 37-2732(c)(3) reads in relevant part:

Heath's argument that his rights under the Free Exercise of Religion Protected Act, I.C. § 73-402 ("FERPA"), were violated has been waived because he admittedly failed to present that issue to the magistrate court. (See R., p.102 ("The Magistrate did not mention the other 'precedents' cited by the prosecution, . . . probably because their entire argument was based on FERPA (Idaho Code Section 73-401 et seq.) which was not invoked by [Heath] because a statute is subordinate to the constitution."); Appellant's brief, pp.12, 14.) A review of Heath's magistrate court filings shows that he made no mention of FERPA (or I.C. § 73-402) until he filed his notice of appeal. (See R., p.65.)

It is well-settled that issues not raised before the trial court will not be considered for the first time on appeal. State v. Martin, 119 Idaho 577, 579, 808 P.2d 1322, 1324 (1991); State v. Adams, 138 Idaho 624, 628, 67 P.3d 103, 107 (Ct. App. 2003). Because the "FERPA" issue presented on appeal was not presented to the trial court, Heath has waived that issue.

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c) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this chapter.

. . . .

(3) Any person who violates this subsection and has in his possession a controlled substance which is a nonnarcotic drug classified in schedule I except lysergic acid diethylamide, or a controlled substance classified in schedules III, IV, V and VI is guilty of a misdemeanor . . . .

Idaho Code § 37-2734A(1) reads:

It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance.



5. Other Issues

Heath argues that “[t]he federal prohibition of Cannabis is also unconstitutional” (Appellant’s brief, pp.6, 8-9), which is totally irrelevant to this state law proceeding. Heath makes several other arguments that are either irrelevant to the issue presented on appeal or specious, including: (1) the state “cannot regulate or control the action of our Natural Creator” (id., pp.7, 10), (2) the Adams County Sheriff’s Office (and others) are allowed to commit fraud, extortion, highway robbery (etc.) (id., pp.7, 17-18), and (3) there is no compelling governmental interest to allow the prohibition of marijuana “to pose a serious threat to all Life on Earth” (id., pp.7, 18). Heath’s other issues should be rejected.

CONCLUSION

The state respectfully requests that this Court affirm the district court’s decision affirming the magistrate court’s denial of Heath’s Motion to Return Property.

DATED this 14th day of May, 2020.

/s/ John C. McKinney  
JOHN C. McKINNEY  
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 14th day of May, 2020, served a true and correct paper copy of the foregoing BRIEF OF RESPONDENT by placing the copy in the United States mail, postage prepaid, addressed to:

RICHARD MITCHELL HEATH  
P. O. BOX 234  
POLLOCK, ID 83547

/s/ John C. McKinney  
JOHN C. McKINNEY  
Deputy Attorney General

JCM/dd

# APPENDIX A

FILED

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4:02pm  
Sherry Ward  
SHERRY WARD, CLERK

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADAMS  
MAGISTRATE DIVISION

STATE OF IDAHO, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 RICHARD THUMBS M HEATH, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

CASE NO. CR-2017-0019666

**ORDER DENYING DEFENDANT'S  
MOTION FOR RETURN OF  
PROPERTY and ORDER TO  
PRESERVE EVIDENCE**

On August 21, 2017, the Defendant was charged with two misdemeanor offense, Possession of Controlled Substance and Possession of Drug Paraphernalia. Mr. Heath filed a Motion to Dismiss this case on January 31, 2018, as well as a Motion for Return of Property on March 13, 2018, which this Court also treated as a Motion to Suppress Evidence pursuant to Idaho Criminal Rule 41(f). The Court granted Mr. Heath's Motion to Suppress Evidence at a hearing on June 21, 2018, and both charges were dismissed.

Mr. Heath followed the March 13, 2018 Motion for Return of Property, with a Supplemental Motion for Return of Property, filed on July 16, 2018. Supplemental motions for the return of property were filed on August 29, 2018, and October 29, 2018 and contained further legal argument in support of Mr. Heath's request for the return of two items of property, namely an elk antler pipe, hereinafter "pipe," and an elk antler

bong, hereinafter "bong." The Motion for Return of Property initially went to hearing on August 21, 2018. Mr. Heath represented himself and the State of Idaho was represented by Council City Attorney Bert Osborn. The Court indicated that it would take the matter under advisement and issue a written decision. However, when Mr. Heath filed supplemental pleadings on August 29, 2018, the Court scheduled one more hearing on the matter for November 15, 2018.

On November 15, 2018, the Court again took up Mr. Heath's Motion for Return of Property. Mr. Heath represented himself. The State was represented by Council City Attorney Matthew Faulks. The Court heard testimony from Adams County Sheriff's Sergeant Christopher Green and from Mr. Heath. Both parties presented their arguments to the Court.

#### **FINDINGS OF FACT**

The facts are not in dispute. On August 21, 2017, Sergeant Green pulled over a motor vehicle traveling northbound on Highway 95 in Council, Idaho. Mr. Heath was the passenger. Sergeant Green informed the driver and Mr. Heath of the reason for the stop, which was that the vehicle was traveling 9 miles per hour over the posted speed limit.

During the stop, Sergeant Green indicated that he detected an odor of alcohol coming from the vehicle, which both occupants denied. Sergeant Green ran background checks on both occupants and issued a warning for speed, which concluded the original reason for the stop. Sergeant Green then began asking questions of both vehicle occupants regarding the odor of marijuana, and Mr. Heath ended up admitting after several minutes that he had marijuana, which he handed over to Sergeant Green, and also handed over the pipe and the bong. Mr. Heath was issued a citation charging him with

**Possession of a Controlled Substance and Possession of Drug Paraphernalia. As set forth in the procedural history above, the Court granted Mr. Heath's Motion to Suppress as the Court found that Sergeant Green had extended the stop beyond its original purpose.**

**On November 15, 2018, Mr. Heath called Sergeant Christopher Green of the Adams County Sheriff's Office as a witness. Sergeant Green testified that he seized both the pipe and the bong because, based upon his training and experience, they had what appeared to be marijuana residue inside them and they smelled like marijuana. Mr. Heath, during his testimony and argument, admitted that the pipe and the bong were used for smoking marijuana.**

### **CONCLUSIONS OF LAW**

**The only issue before the Court, because the charges against Mr. Heath have been dismissed, is whether Mr. Heath is entitled to have his pipe and bong returned to him.**

**Idaho Code Section 37-2734A states as follows:**

**It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance.**

**Idaho Code Section 37-2705(d)(19) classifies marihuana (sic) as a controlled substance.**

**Applying these two statutes to the case at hand, clearly the pipe and bong fall under the definition of paraphernalia, which makes their possession unlawful in the State of Idaho.**

**Idaho Criminal Rule 41(f) states as follows:**

**ORDER DENYING MOTION FOR RETURN OF PROPERTY- 3**

A person aggrieved by an unlawful search and seizure of property may move for the property's return. The motion must be filed in the criminal action if one is pending, but if no action is pending then a civil proceeding may be filed in the county where the property is seized or located. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant and it is not admissible in evidence at any hearing or trial. A motion for return of property made or heard after a complaint, indictment or information is filed, must also be treated as a motion to suppress under Rule 12.

The Court is troubled by the overly broad language of Rule 41(f). The statute does not set forth any guidance for how a motion for return of property "must" also be treated as a motion to suppress evidence. Additionally, if it grants the motion, the court "must" return the property to the movant.

The Court interprets Rule 41(f) as follows. The Rule can be read to create two separate motions, one to suppress evidence and the second to return property. With regard to the Motion to Suppress Evidence, that motion was previously granted and the charges against Mr. Heath were dismissed on June 21, 2018. The Motion for the Return of Property is currently before the Court.

In his various pleadings arguing that his property should be returned to him, Mr. Heath has made several arguments that merit discussion. First, Mr. Heath argues that Idaho Criminal Rule 41(f), by its plain language, directs the Court to return his property to him if he prevails on his Motion for Return of Property. The Court finds this argument compelling. The Rule's plain language indicates that "if [the Court] grants the motion, the Court must return the property to the movant." The Rule does not differentiate between property that is contraband versus property that is not contraband. However, the Court concludes that because the pipe and bong are illegal pursuant to Idaho Code 37-2734A, neither item will be returned to Mr. Heath. Black Letter law establishes that

**ORDER DENYING MOTION FOR RETURN OF PROPERTY- 4**

**Statutes take precedence over rules and when there is a potential conflict between a Statute and a Rule, as is the case here, the Statute takes precedence over the Rule.**

**Second, Mr. Heath argues that marijuana is improperly classified as a controlled substance according to Idaho Code Section 37-2704: which states as follows:**

**The board shall place a substance in schedule I if it finds that the substance:**

- (a) Has high potential for abuse; and**
- (b) Has no accepted medical use in treatment in the Unites States or lacks accepted safety for use in treatment under medical supervision.**

**Mr. Heath argues that Idaho legalized CBD oil (which is a marijuana derivative) in 2018 and that in fact marijuana products do have accepted medical uses across the United States. The Court also notes that several states, including Colorado and Washington, have completely decriminalized marijuana. The Court would note, then, that there is an internal conflict between Idaho Code 37-2704 and 37-2705, Schedule I because Marijuana and/or its derivatives have accepted medical uses across the United States. However, at the end of the day, Marijuana is still classified as a Schedule I controlled substance and is illegal in the State of Idaho.**

**Third, Mr. Heath makes reference to several sections of the Idaho State Constitution that he argues allow him to use marijuana in the free exercise of his religion. The Idaho Supreme Court has squarely addressed this issue in State v. Fluewelling, 150 Idaho 576, 249 P.3d 375 (2011). The Court held that Article I, Section 4 of the Idaho Constitution does not protect against prosecution for conduct that violates a neutral criminal statute of general applicability, such as possession of marijuana, simply because such conduct may be engage in for religious purposes.**

**ORDER DENYING MOTION FOR RETURN OF PROPERTY- 5**

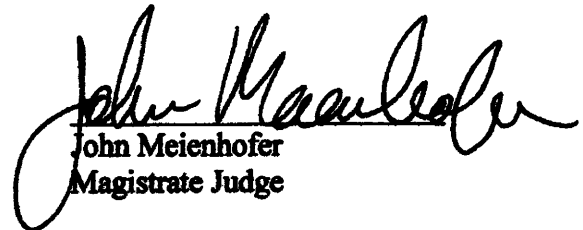
For the foregoing reasons, the Court does not find persuasive any argument presented by Mr. Heath for the return of his property.

Therefore, for the aforementioned reasons:

**ORDER**

**IT IS HEREBY ORDERED** that Defendant's Motion for Return of Property is **DENIED**. The Court, however, does Order that the pipe and bong be preserved by the Adams County Sheriff's Office until Mr. Heath has exhausted all of his rights of appeal.

Dated this 29<sup>th</sup> day of November, 2018.

  
John Meienhofer  
Magistrate Judge



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Order was forwarded to the following persons on this \_\_\_\_\_ day of \_\_\_\_\_, 2017: Signed: 12/4/2018 10:10 AM

**BERT OSBORN  
MATTHEW FAULKS  
City of Council Prosecuting Attorney's Office  
Adams County Courthouse  
201 Industrial Ave.  
Council, ID 83612**

**Richard M. Thumbs Heath  
P.O. Box 234  
Pollock, Idaho 83547**

**Adams County Sheriff's Office  
201 Industrial Avenue  
Council, Idaho 83612**

  
\_\_\_\_\_  
Deputy Clerk

**ORDER DENYING MOTION FOR RETURN OF PROPERTY- 7**

# APPENDIX B

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADAMS

STATE OF IDAHO.

Plaintiff/Respondent,

v.

RICHARD M. HEATH

Defendant/Appellant.

Case No. CR-2017-0019666

Memorandum Decision

This case is before the court on appeal from an order entered by the magistrate below after dismissal of the case in chief denying appellant's motion for return of property. The appellant, Richard M. Heath, appears *pro se*. The state appears by counsel, Adams County prosecuting attorney Chris Boyd. The issues have been fully briefed, and the matter is submitted without argument pursuant the order governing proceedings entered herein.

For reasons stated, the orders of the magistrate are affirmed in all respects

Facts and Procedural History

Although some details are not agreed to, the essential facts are not in dispute. In August of 2017, appellant was a passenger in a vehicle with his brother when two county sheriff's deputies stopped them for speeding. After the point in time when the magistrate

concluded the speeding inquiry was ended, and also having concluded that nothing in that inquiry gave rise to any cause or articulable suspicion to continue the investigation in any new topics, the deputies began an inquiry into whether the brothers had any drugs on them. Eventually, the appellant admitted that he had some marijuana, and produced some marijuana and two devices that appeared to be bong or pipes. The deputy issued citations for two misdemeanors, possession of marijuana and possession of drug paraphernalia, and seized the marijuana and devices.

The case moved along at the speed of a small glacier. The appellant, appearing *pro se*, filed a motion to dismiss in January of 2018. The appellant filed a motion for return of property in March of 2018. The court treated this as a motion to suppress and held a hearing in June of 2018. At this hearing, the magistrate ruled that the authorities had no basis to extend the traffic inquiry, and therefore no probable cause for the seizure of property. Appellant's admissions together with the marijuana and related devices were suppressed. Upon this ruling the court then granted the motion to dismiss, and both misdemeanor charges were dismissed. The state did not appeal the ruling on suppression or the dismissal of charges.

Appellant pressed his motion for return of property with supplemental motions filed in July, August, and October of 2018. The court held a further hearing in November of 2018. Following this hearing, the court entered a detailed order on November 29, 2018 denying the motion for return of evidence.

In essence, the magistrate concluded that, while the rule mandated return of all property seized upon the granting of a motion to suppress without making any exception for contraband, the statutes made possession of drug paraphernalia illegal. The magistrate





