Electronically Filed
6/20/2024 4:29 PM
Idaho Supreme Court
Melanie Gagnepain, Clerk of the Court
By: Sara Velasquez, Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 50707-2023**
Plaintiff-Respondent,	)	
	)	**Ada County Case No.**
v.	)	**CR01-22-22589**
	)	
AMANDA JOAN FLETCHER,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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

HONORABLE RONALD J. WILPER
District Judge

RAÚL R. LABRADOR
Attorney General
State of Idaho

JEFF NYE
Deputy Attorney General
Chief, Criminal Law Division

MARK W. OLSON
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534
E-mail: ecf@ag.idaho.gov

ATTORNEYS FOR PLAINTIFF-RESPONDENT

JENNY C. SWINFORD
Deputy State Appellate Public Defender
322 E. Front St., Ste. 570
Boise, Idaho 83702
(208) 334-2712
E-mail: documents@sapd.idaho.gov

ATTORNEY FOR DEFENDANT-APPELLANT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

Nature Of The Case 1

Statement Of The Facts And Course Of The Proceedings 1

ISSUE 4

ARGUMENT 5

Fletcher Has Failed To Show That The District Court Erred By Denying Her Motion To Suppress 5

A. Introduction 5

B. Standard Of Review 6

C. The Search Of Fletcher's Vehicle Was Justified By The Automobile Exception To The Warrant Requirement, And Fletcher Has Failed To Demonstrate That The Idaho Constitution Compels A Different Result 6

1. Exterior Vehicle Drug Dog Sniffs Are Not "Searches" Under The Idaho Constitution 10

2. The Idaho Constitution Does Not Limit The Automobile Exception To The Warrant Requirement 15

D. In The Alternative, The District Court Correctly Concluded That The Officers' Search Of The Vehicle Was Justified By Fletcher's Probation Status And Her IDOC Agreement 23

CONCLUSION 31

CERTIFICATE OF SERVICE 32

TABLE OF AUTHORITIES

CASES **PAGE**

California v. Carney, 471 U.S. 386 (1985) ... 7, 11

Cardwell v. Lewis, 417 U.S. 58 (1974) ... 22

CDA Dairy Queen Inc., v. State Insurance Fund, 154 Idaho 379, 299 P.3d 186 (2013) ... 8

Commonwealth v. Johnston, 530 A.2d 74 (Pa. 1987) ... 14

Dow Chemical Company v. United States, 476 U.S. 227 (1986) ... 13, 14

Gomez v. State, 168 P.3d 1139 (Okla. Crim. App. 2007) ... 19

Greenough v. Farm Bureau Mut. Ins. Co. of Idaho, 142 Idaho 589, 130 P.3d 1127 (2006) ... 23

Illinois v. Caballes, 543 U.S. 405 (2005) ... 7, 13, 15

Katz v. United States, 389 U.S. 347 (1967) ... 6

Kyllo v. United States, 533 U.S. 27 (2001) ... 10, 13, 14

Missouri v. McNeely, 569 U.S. 141 (2013) ... 17

Smith v. Maryland, 442 U.S. 735 (1979) ... 11, 24

South Dakota v. Opperman, 428 U.S. 364 (1976) ... 22

State v. Arregui, 44 Idaho 43, 254 P. 788 (1927) ... 8

State v. Charpentier, 131 Idaho 649, 962 P.2d 1033 (1998) ... 8

State v. Donato, 135 Idaho 469, 20 P.3d 5 (2001) ... 9, 11

State v. Dorff, 171 Idaho 818, 526 P.3d 988 (2022) ... 12

State v. Gawron, 112 Idaho 841, 736 P.2d 1295 (1987) ... 24, 28

State v. Gibson, 141 Idaho 277, 108 P.3d 424 (Ct. App. 2005) ... 7

State v. Gunwall, 720 P.2d 808 (Wash. 1986) ... 9

State v. Guzman, 122 Idaho 981, 842 P.2d 660 (1992) ... 8, 20

State v. Hansen, 167 Idaho 831, 477 P.3d 885 (2020).. 29, 30

State v. Henderson, 114 Idaho 293, 756 P.2d 1057 (1988) 12, 15, 21

State v. Holland, 135 Idaho 159, 15 P.3d 1167 (2000)... 23

State v. Hoskins, 165 Idaho 217, 443 P.3d 231 (2019) .... passim

State v. Irwin, 143 Idaho 102, 137 P.3d 1024 (Ct. App. 2006) 11

State v. Jaskowski, 163 Idaho 257, 409 P.3d 837 (2018) 24

State v. Karst, 170 Idaho 219, 509 P.3d 1148 (2021) 12

State v. Kincaid, 98 Idaho 440, 566 P.2d 763 (1977) 8

State v. Klingler, 143 Idaho 494, 148 P.3d 1240 (2006) 6

State v. Lloyd, 312 P.3d 467 (Nev. 2013) 19

State v. Loman, 153 Idaho 573, 287 P.3d 210 (Ct. App. 2012)... 7

State v. Lovely, 159 Idaho 675, 365 P.3d 431 (Ct. App. 2016)... 7

State v. Mann, 162 Idaho 36, 394 P.3d 79 (2017) 24

State v. Maxim, 165 Idaho 901, 454 P.3d 543 (2019).. passim

State v. Pellicci, 580 A.2d 710 (N.H. 1990) 14

State v. Pieper, 163 Idaho 732, 418 P.3d 1241 (Ct. App. 2018)... 6

State v. Purdum, 147 Idaho 206, 207 P.3d 182 (2008)... 24

State v. Rebo, 168 Idaho 234, 482 P.3d 569 (2020) 24

State v. Riley, 170 Idaho 572, 514 P.3d 982 (2022) 7, 12

State v. Spencer, 139 Idaho 736, 85 P.3d 1135 (Ct. App. 2004) 28

State v. Storm, 898 N.W.2d 140 (Iowa 2017) 17, 18, 19, 20

State v. Tackitt, 67 P.3d 295 (Mont. 2003)... 14

State v. Thompson, 114 Idaho 746, 760 P.2d 1162 (1988) 8, 10, 11

State v. Watts, 142 Idaho 230, 127 P.3d 133 (2005) 22

State v. Werner, 615 A.2d 1010 (R.I. 1992) 19

State v. Wheaton, 121 Idaho 404, 825 P.2d 501 (1992) 9

State v. Wiegand, 645 N.W.2d 125 (Minn. 2002) 15

State v. Witt, 126 A.3d 850 (N.J. 2015) 19, 20

State v. Yeoumans, 144 Idaho 871, 172 P.3d 1146 (Ct. App. 2007) 7

State v. Zwicke, 767 N.W.2d 869 (N.D. 2009) 19

United States v. Knights, 534 U.S. 112 (2001) 6, 30

United States v. Place, 462 U.S. 696 (1983) 13, 14

Wyoming v. Houghton, 526 U.S. 295 (1999) 7

STATUTES

I.C. § 19-4404 16

I.C. § 19-4406 16

RULES

I.C.R. 41(c)(4) 16

CONSTITUTIONAL PROVISIONS

Idaho Const. art. I, §17 .... 2, 8

U.S. Const. amend. IV 2, 6

STATEMENT OF THE CASE

Nature Of The Case

Amanda Joan Fletcher appeals from the judgment of conviction entered upon her conditional guilty pleas to possession of methamphetamine and possession of drug paraphernalia.

Statement Of The Facts And Course Of The Proceedings

Early one morning in summer 2022, a Garden City police officer observed a woman sitting in a vehicle parked at a gas station. (R., p.167.) The officer ran the license plate of the vehicle and noted that it was connected to Amanda Fletcher, who had an active arrest warrant. (R., p.168.) The officer also learned that Fletcher was on probation for possessing a controlled substance – but he was not aware of the specific terms of Fletcher's probation. (Id.; Tr., p.52, Ls.9-13; p.53, L.16–p.54, L.1.[1]) When the woman left the vehicle, the officer was able to positively identify her as Fletcher with the assistance of a photograph of her face and a visible tattoo on her back. (R., p.168.) The officer approached and arrested Fletcher pursuant to the warrant. (Id.)

The officer requested that a drug detection dog and dog handler respond to the scene. (Id.) Fletcher denied the officer's request for consent to search the vehicle; however, the arriving drug dog alerted at the vehicle's driver-side door. (Id.) The officers searched the vehicle and found methamphetamine and drug paraphernalia. (Id.) The state charged Fletcher with possession of methamphetamine, possession of drug paraphernalia, and the persistent violator sentencing enhancement. (R., pp.32-33, 44-45.)

Fletcher filed a motion to suppress the contraband recovered from her car. (R., pp.47-75.) Fletcher argued that even if the automobile exception to the warrant requirement of the Fourth

[1] Citations to pages of the transcript refer to the page numbers of the pdf file containing all of the transcripts from the underlying criminal proceeding.

Amendment justified the search, Article I, § 17 of the Idaho Constitution provided protections beyond that guaranteed by the Fourth Amendment in two relevant respects. She argued: (1) an exterior drug dog sniff of a vehicle constitutes a "search" under the Idaho Constitution, and that, at a minimum, such police action is only permissible if the officer has reasonable articulable suspicion of a drug-related offense; and (2) application of the automobile exception to the Idaho Constitution warrant requirement requires the showing of "some exigency" and a "showing of reasonable impracticability of obtaining a warrant," if the vehicle has been secured. (R., pp.51-74 (bolding omitted).)

In a response brief, the state argued that Fletcher, by virtue of her probationary status and IDOC Agreement of Supervision, had both waived her relevant rights under the United States and Idaho Constitutions, and consented to the officers' search of her vehicle. (R., p.156.) The state also argued that an exterior drug dog sniff of a vehicle does not constitute a search under the Idaho Constitution (and thus does not require the presence of reasonable suspicion or probable cause to conduct), and that the Idaho Constitution does not contain a more limited automobile exception to the warrant requirement than does the Fourth Amendment of the United States Constitution. (R., pp.156-159.)

After a hearing (Tr., p.26, L.2 – p.96, L.11), the district court entered a memorandum decision and order denying Fletcher's motion to suppress. (R., pp.167-227.) The court concluded that the officers' search of Fletcher's vehicle was justified by the consent provision set forth in her probation agreement. (Id.) The court did not reach the issue of whether the automobile exception to the warrant requirement of the Idaho Constitution justified the search. (See id.)

Fletcher entered a conditional guilty plea to possession of methamphetamine and possession of drug paraphernalia, preserving her right to appeal from the district court's order

denying her suppression motion; the state agreed to dismiss the sentencing enhancement. (R., pp.231-243; Tr., p.4, L.3 – p.10, L.20.) The district court imposed a unified seven-year sentence with two years fixed for methamphetamine possession, but suspended the sentence and placed Fletcher on probation for seven years; the court imposed a concurrent jail sentence for misdemeanor paraphernalia. (R., pp.254-259.) The court ran the sentences concurrently with sentences imposed in two other cases. (Id.) Fletcher timely appealed. (R., pp.263-266.)

ISSUE

Fletcher states the issue on appeal as:

Did the district court err when it denied Ms. Fletcher's motion to suppress evidence obtained from a warrantless search of her vehicle?

(Appellant's brief, p.8.)

The state rephrases the issue on appeal as:

Has Fletcher failed to show that the district court erred by denying her motion to suppress?

ARGUMENT

Fletcher Has Failed To Show That The District Court Erred By Denying Her Motion To Suppress

A. Introduction

Fletcher contends that the district court erred in denying her motion to suppress. (Appellant's brief, pp.9-33.) Specifically, she contends that the search was not justified pursuant to either the automobile exception to the warrant requirement, or the terms of her IDOC probation agreement, because, she asserts, a drug dog sniff of the exterior of a vehicle constitutes a search under the Idaho Constitution; and the automobile exception to the warrant requirement of the Idaho Constitution requires a showing that exigent circumstances make obtaining a warrant impractical when the vehicle is secured. (Appellant's brief, pp.14-33.) Fletcher also contends that her IDOC probation agreement did not justify the officers' search in light of the Idaho Supreme Court's holding in State v. Maxim, 165 Idaho 901, 454 P.3d 543 (2019), because the officers did not have specific knowledge of her probation conditions, including that she consented to any searches and waived her constitutional rights pertaining to searches under the Fourth Amendment and Idaho Constitution. (Appellant's brief, pp.10-13.)

However, a review of the record and applicable law refutes Fletcher's assertions and supports the district court's determinations. The Idaho Supreme Court has never found that the Idaho Constitution applies to drug dog sniffs and the automobile exception in the manner advocated for by Fletcher in this case, and Fletcher has failed to demonstrate clear precedent or circumstances unique to Idaho under the applicable standards that would compel such interpretations. In the alternative, the state submits that the search was justified by Fletcher's IDOC probation agreement because either: (1) Fletcher's constitutional waiver deprived her of standing to challenge the officers' search of her vehicle, and Maxim was wrongly decided to the

extent it compels a conclusion to the contrary; or (2) the circumstances of the present case are distinguishable from Maxim because the officer knew that Flecher was on felony probation for a controlled substance offense.

B. Standard Of Review

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, the appellate court accepts the trial court's findings of fact that are supported by substantial evidence, but freely reviews the application of constitutional principles to those facts. State v. Klingler, 143 Idaho 494, 496, 148 P.3d 1240, 1242 (2006). The power to resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court. State v. Pieper, 163 Idaho 732, 734, 418 P.3d 1241, 1243 (Ct. App. 2018).

C. The Search Of Fletcher's Vehicle Was Justified By The Automobile Exception To The Warrant Requirement, And Fletcher Has Failed To Demonstrate That The Idaho Constitution Compels A Different Result

The Fourth Amendment of the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. "The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" United States v. Knights, 534 U.S. 112, 118-119 (2001).

Warrantless searches are "*per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967).

"Under the long-recognized automobile exception, police officers having probable cause to believe that an automobile contains contraband or evidence of a crime may search the automobile without a warrant." State v. Loman, 153 Idaho 573, 575, 287 P.3d 210, 212 (Ct. App. 2012) (citing Wyoming v. Houghton, 526 U.S. 295, 300 (1999) (other citations omitted).) "The two primary justifications for the automobile exception are mobility and a reduced expectation of privacy [in vehicles]." State v. Lovely, 159 Idaho 675, 677, 365 P.3d 431, 433 (Ct. App. 2016) (citing California v. Carney, 471 U.S. 386, 392-393 (1985); State v. Gibson, 141 Idaho 277, 281-282, 108 P.3d 424, 428-429 (Ct. App. 2005)).

It is also well-established under the Fourth Amendment that law enforcement may deploy a drug dog to sniff the exterior of a lawfully stopped vehicle without suspicion of drug activity so long as doing so does not prolong the detention beyond what is necessary to effectuate the purpose of the stop. Illinois v. Caballes, 543 U.S. 405 (2005); State v. Riley, 170 Idaho 572, 579, 514 P.3d 982, 989 (2022) (collecting cases).

Combining these two concepts, "[w]hen a reliable drug-detection dog indicates that a lawfully stopped automobile contains the odor of controlled substances, the officer has probable cause to believe that there are drugs in the automobile and may search it without a warrant." State v. Yeoumans, 144 Idaho 871, 873, 172 P.3d 1146, 1148 (Ct. App. 2007) (quoting Gibson, 141 Idaho at 281, 108 P.3d at 428.

Here, the officers' search of Fletcher's vehicle was justified because the drug dog alerted on the vehicle. On appeal, Fletcher does not dispute that the search was constitutional pursuant to a Fourth Amendment analysis. (See Appellant's brief, p.3. n.1.) Therefore, in order to prevail on appeal, Fletcher must persuade this Court to interpret the Idaho Constitution as compelling a different result.

The Idaho Constitution, like the United States Constitution, and using nearly identical language, protects individuals against unreasonable government searches. Idaho Const. art. I, § 17 ("[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.").

Idaho appellate courts are free to extend greater protections under the state constitution than those granted by the United States Supreme Court under the federal constitution. State v. Thompson, 114 Idaho 746, 748, 760 P.2d 1162, 1164 (1988) (holding that the installation of a "pen register" on suspect's telephone was a search within the meaning of the Idaho Constitution); see also State v. Arregui, 44 Idaho 43, 254 P. 788 (1927) (early adoption of exclusionary rule); State v. Guzman, 122 Idaho 981, 842 P.2d 660 (1992) (declining to adopt "good faith" exception to exclusionary rule).

Although the United States Supreme Court establishes no more than the floor of constitutional protection, the Idaho Supreme Court has found there is "merit in having the same rule of law applicable within the borders of our state, whether an interpretation of the Fourth Amendment or its counterpart – Article I, § 17 of the Idaho Constitution – is involved. Such consistency makes sense to the police and the public." State v. Charpentier, 131 Idaho 649, 653, 962 P.2d 1033, 1037 (1998). Indeed, "when interpreting the Idaho Constitution, this Court will use federal rules and methodology unless clear precedent or circumstances unique to the state of Idaho or its constitution indicates that Idaho's constitution provides greater protection than the analogous federal provision." CDA Dairy Queen Inc., v. State Insurance Fund, 154 Idaho 379, 384, 299 P.3d 186, 191 (2013); see also State v. Kincaid, 98 Idaho 440, 442, 566 P.2d 763, 765 (1977) (defendant had burden to establish existence of constitutional right under United States and Idaho Constitutions).

Several neutral, nonexclusive criteria may be examined when an argument is made for a divergence between federal and state constitutional law. These criteria include: 1) the textual language of the state constitution; 2) significant differences in the text of parallel provisions of the federal and state constitutions; 3) state constitutional and common law history; 4) preexisting state law; 5) differences in structure between the federal and state constitutions; 6) matters of particular state interest or local concern; 7) public attitudes; and 8) state traditions. See, e.g., State v. Wheaton, 121 Idaho 404, 825 P.2d 501 (1992) (Bistline, J., concurring) (citing State v. Gunwall, 720 P.2d 808, 812-813 (Wash. 1986)); see also State v. Donato, 135 Idaho 469, 472, 20 P.3d 5, 8 (2001) (noting that instances, to that point, of the Idaho Supreme Court finding that the Idaho Constitution provided more protections than the United States Constitution in a particular context was because of the "uniqueness of our state, our Constitution, and our long-standing jurisprudence.").

Criminal defendants understandably seek alternative avenues for evidence suppression when they are clearly precluded from such relief under the Fourth Amendment. However, the state submits that a review of the criteria listed above, and of the general Idaho Constitutional jurisprudence, reveals that to compel identification of novel interpretations of the Idaho Constitution, particularly interpretations that diverge from long-established corresponding interpretations of the United States Constitution, requires more than making references to vaguely related situations in which Idaho appellate courts have afforded greater protections under similar provisions of the Idaho Constitution. Likewise, a generally enhanced concern for individual privacy, such as exists in Idaho, does not translate into a conferral of increased privacy protection in every context in which it is asserted. Idaho appellate courts should not reflexively find in favor of any new right or interpretation asserted without a specific and compelling reason.

Here, Fletcher contends that, despite the Idaho Supreme Court never having recognized such, and despite long-established contrary interpretations under the Fourth Amendment, that the Idaho Constitution must be interpreted to: (1) preclude drug dog sniffs of vehicle exteriors absent reasonable suspicion of a drug-related offense; and (2) preclude the automobile exception to the warrant requirement absent showings of some "exigency" and of a reasonable impracticability of obtaining a warrant when the vehicle is secured. (Appellant's brief, pp.13-33.) Fletcher has failed in both respects to demonstrate "clear precedent or circumstances unique to the state of Idaho or its constitution" compelling such interpretations.

1. Exterior Vehicle Drug Dog Sniffs Are Not "Searches" Under The Idaho Constitution

Fletcher supports her argument that the Idaho Constitution precludes drug dog sniffs absent reasonable suspicion with: (1) a comparison with Thompson, 114 Idaho 746, 760 P.2d 1162, in which the Idaho Supreme Court held that police utilization of pen registers constitutes a "search" under the Idaho Constitution; (2) a comparison with Kyllo v. United States, 533 U.S. 27 (2001), in which the United States Supreme Court held that the government's use of a thermal imaging device to detect heat emanating from a home constituted a "search" under the Fourth Amendment; and (3) citations to several other states' supreme court opinions holding that exterior vehicle drug dog sniffs constitute searches under their respective state constitutions. (Appellant's brief, pp.14-25.) However, Fletcher has failed to demonstrate sufficient circumstances unique to Idaho under the applicable criteria that would compel such an interpretation under the Idaho Constitution.

First, the circumstances and rationale surrounding the Idaho Supreme Court's approach to pen registers over 30 years ago is wholly distinct from those related to drug dog sniffs (which have thus unsurprisingly not, in that time period, been addressed by the Idaho appellate court under the Idaho Constitution). The Idaho Supreme Court's holding in Thompson, that the Idaho Constitution

provides enhanced constitutional protections with respect to pen registers was based upon recognition that numbers dialed from one's home or office telephone could "reveal the most intimate details of a person's life"; and that the United States Supreme Court's contrary Fourth Amendment holding, in Smith v. Maryland, 442 U.S. 735 (1979), ignored the "vital role telephonic communication plays in our personal and professional relationships," to the extent that "unfettered official surveillance … will undoubtedly prove disturbing even to those with nothing illicit to hide." Thompson, 114 Idaho at 749-751, 760 P.2d at 1165-1167 (quoting Smith, 442 U.S. at 746-748 (J. Stewart, dissenting), 747-748 (J. Marshall, dissenting).)

Fletcher's attempt to equate pen registers with exterior vehicle drug dog sniffs is unsuccessful for numerous reasons. Unlike surveillance of telephone numbers dialed, drug dog sniffs of the air outside of vehicles in public spaces do not "reveal the most intimate details of a person's life." The former reveals social communications, business activities, and family connections, among any number of other things. The latter reveals only the presence of contraband, and nothing else about the occupants and interior contents of the vehicle

Because of the highly regulated nature of automobiles, and their mobility, individuals have a lesser expectation of privacy in their vehicles than in their homes (where telephone calls primarily originated from at the time of Thompson). State v. Irwin, 143 Idaho 102, 104, 137 P.3d 1024, 1026 (Ct. App. 2006) (citing Carney, 471 U.S. at 391). While vehicles, like telephone communications, no doubt have a very important role in American life, and to life in Idaho, this is not related to the odors that emanate from them. Indeed, there is nothing unique in Idaho about the odors discernable outside vehicles, or Idaho motorist's expectation of privacy in those odors. See Donato, 135 Idaho at 472, 20 P.3d at 8 (holding there is nothing unique about one's expectation of privacy in one's garbage in Idaho that would justify an interpretation different from the Fourth

Amendment. Therefore, the Idaho Supreme Court adopted the United States Supreme Court's holding on the issue.) The expectation of privacy implicated by drug dog sniffs is thus not analogous to the expectation of privacy in telephone numbers dialed.

Drug dog sniffs around a car are not intrusive. This is especially true in light of the Idaho Supreme Court's recent emphasis on protecting Idaho motorists from unreasonable seizures and unlawful trespasses related to the police utilization of drug dogs. The Idaho Supreme Court has held that, under the Fourth Amendment, an officer may not deviate from the lawful purpose of a traffic stop, for even a *de minimus* amount of time, to conduct a drug dog search without reasonable suspicion. See Riley, 170 at 576-580, 514 P.3d at 986-990; State v. Karst, 170 Idaho 219, 222-228, 509 P.3d 1148, 1151-1157 (2021). The Court has also held (without United States Supreme precedent directly controlling its outcome) that a Fourth Amendment search occurs when a drug-sniffing dog trespasses on the exterior of the vehicle, and such a trespass occurs when a police dog places its paws on the driver side door and window. State v. Dorff, 171 Idaho 818, 823-829, 526 P.3d 988, 993-999 (2022). With these protections firmly in place, a drug dog sniff of the air emanating from an individual's vehicle is limited to just that – it does not result in a prolonged detention, unlawful trespass, or any privacy intrusion.

In describing the enhanced personal privacy protections afforded by the Idaho Constitution (and as quoted by Fletcher in her Appellant's brief), and in holding that DUI roadblocks constitute unreasonable seizures under the Idaho Constitution, the Idaho Supreme Court set forth the oft-quoted statement that Idaho citizens are "free to stroll the streets, hike the mountains, and float the rivers of this state without interference from the government." State v. Henderson, 114 Idaho 293, 298, 756 P.2d 1057, 1062 (1988). Drug dog sniffs of the exterior of parked or lawfully stopped vehicles create no such interference with an individual's operation of a motor vehicle and, as noted

above, reveal only the presence of contraband. See United States v. Place, 462 U.S. 696, 707 (1983) ("the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure.").

Fletcher next compares drug dog sniffs to the thermal home imaging found to constitute a Fourth Amendment search in Kyllo v. United States, 533 U.S. 27 (2001). (Appellant's brief, pp.20-22.) A comparison between Fourth Amendment analyses of thermal imaging and drug dog sniffs is of limited usefulness in this case, since neither implicate Idaho-unique jurisprudence or circumstances. However, relevant distinctions between the two police activities are evident. In Caballes itself, the United States Supreme Court observed that its reasoning regarding dog sniffs (not constituting a search) was entirely consistent with its reasoning regarding thermal imaging (constituting a search), because the latter "was capable of detecting lawful activity" such as "at what hour each night the lady of the house takes her daily sauna and bath," whereas the former reveals only contraband. Caballes, 543 U.S. at 409-410. Further, the thermal imaging in Kyllo involved homes, whereas drug dog sniffs involve vehicles (which, as noted above, involve a lesser expectation of privacy).

Related to this latter point, in Kyllo, the United States Supreme Court rejected the government's argument that the thermal imaging deployed did not reveal an individual's "intimate details," and therefore could not constitute a search. Kyllo, 533 U.S. at 37-39. The Court explained, "[i]n the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes," and that thermal imaging was distinguishable from enhanced aerial photography of industrial complexes found to not constitute a search in Dow

Chemical Company v. United States, 476 U.S. 227 (1986), due to the comparative "Fourth Amendment sanctity of the home." Id. at 37.

Opinions from several other state supreme courts cited by Fletcher (Appellant's brief, pp.23-24), holding that drug dog sniffs constitute searches under their respective state constitutions, are likewise of limited usefulness because they can tell us nothing of Idaho-unique circumstances or jurisprudence. In any event, these cases are not persuasive. Two of the holdings involved application of state-specific precedent which appeared to control the outcomes in those cases. State v. Pellicci, 580 A.2d 710, 716 (N.H. 1990) (finding that a drug dog sniff was "certainly" a "search" within the manner the New Hampshire Supreme Court had previously defined searches under its state constitution: "[a] search ordinarily implies a quest by an officer of the law, a prying into hidden places for that which is concealed"); State v. Tackitt, 67 P.3d 295, 299-300 (Mont. 2003) (relying upon Montana Supreme Court precedent that Montana citizens have a reasonable expectation of privacy in areas of their vehicles that are out of plain view, and where the citizens took precautions to conceal such items). Fletcher has identified no such closely related Idaho precedent compelling her requested outcome in this case. A third case cited by Fletcher, Commonwealth v. Johnston, 530 A.2d 74, 78-79 (Pa. 1987), simply expressed disagreement with the United Supreme Court's holding in Place, in which the United States Supreme Court held that a drug dog sniff of seized luggage at an airport did not constitute a search. Mere disagreement is not among the criteria generally utilized by Idaho appellate courts in

determining whether to diverge from corresponding Fourth Amendment jurisprudence in interpreting the Idaho Constitution.[2]

Fletcher has failed to demonstrate that clear precedent or circumstances unique to the state of Idaho or its constitution compels a conclusion that drug dog sniffs constitute searches under the Idaho Constitution. Therefore, the drug dog search utilized in this case was not a search, and the drug dog's alerting on the vehicle justified the officers' search of Fletcher's vehicle.

2. The Idaho Constitution Does Not Limit The Automobile Exception To The Warrant Requirement

Fletcher supports her argument that the automobile exception to the Idaho Constitution warrant requirement only applies where the state makes a showing of exigency and that obtaining a warrant would not be practical by: (1) arguing that advances in technology have rendered warrantless searches minimally more efficient than the process of securing a warrant, therefore negating one of the historical justifications for the traditional automobile exception; (2) arguing that limiting the automobile exception will incentivize law enforcement to gather sufficient evidence in support of probable cause; (3) comparing her requested constitution interpretation to Henderson, 114 Idaho 293, 756 P.2d 1057, in which the Idaho Supreme Court held that DUI roadblocks were precluded under the Idaho Constitution; and (4) citing state supreme court decisions from other jurisdictions with have limited the automobile exception under their

[2] Fletcher also cites State v. Wiegand, 645 N.W.2d 125 (Minn. 2002), for the proposition that while the Court in that case held that a drug dog sniff was not a search requiring probable cause under the Minnesota Constitution, such a sniff *was* an "intrusion into privacy interests" that required reasonable suspicion. (Appellant's brief, p.23.) However, this latter holding was made concurrently under the Minnesota and federal constitutions, was entered prior to the United States Supreme Court's holding in Caballes, and was based upon the Minnesota Supreme Court's analysis of then-competing federal appellate precedent. Wiegand, 645 N.W.2d at 133-135. Therefore, the holding was reached not due to application of any state-specific criteria, but because it was what the Minnesota Supreme Court believed was the proper analysis under the federal constitution at that time.

respective state constitutions. (Appellant's brief, pp.25-32.) However, Fletcher has failed to demonstrate sufficient circumstances unique to Idaho under the applicable criteria that would compel such an interpretation under the Idaho Constitution.

Fletcher highlights advances in technology which, she asserts, have rendered a warrantless search minimally more efficient than securing a warrant, therefore negating one of the historical justifications for the traditional automobile exception as established under the Fourth Amendment. (Appellant's brief, pp.27-28.) As Fletcher notes, several states have limited the automobile exception under their respective constitutions, in part, due to these technological advances. (Id.)

However, a major obstacle to Fletcher's argument regarding the significance and practical impact of technological advances is the lack of evidence in the record regarding these advances, and of their impact on the processes involved in obtaining a search warrant in Idaho. The only evidence presented at the suppression hearing regarding technology and the process of seeking and obtaining search warrants in Idaho was brief testimony from the officer who handled the drug dog (who had not himself personally ever requested a search warrant). (Tr., p.62, L.17 – p.63, L.17.) That officer testified that his department had a process to obtain warrants outside of regular business hours, that he was able to contact an on-call magistrate to obtain a blood draw warrant, and that he did not believe there was anything preventing him from obtaining a search warrant the night of Fletcher's arrest. (Id.) On appeal, Fletcher supplements this testimony with citations to Idaho statutes and rules governing telephonic warrants in Idaho, and which provide that such warrants are permissible (I.C. §§ 19-4404; 19-4406; I.C.R. 41(c)(4)), and general assertions such as that "[l]aw enforcement officers have smartphones and computers to prepare warrant applications and contact magistrate judges and prosecutors," and (quoting from United States Supreme Court caselaw), that "technological developments … enable police officers to secure

warrants more quickly, and do so without undermining the neutral magistrate judge's essential role as a check on police discretion." (Appellant's brief, p.27 (quoting Missouri v. McNeely, 569 U.S. 141, 155 (2013)) (ellipsis as in brief).)

However, without evidence about the state of warrant-obtaining technology in Idaho, and about the current processes involved in obtaining warrants in Idaho generally, this Court should not accept Fletcher's presumptions in order to deviate from long-established federal precedent to create a new interpretation under the Idaho Constitution that could have broad and unpredictable state-wide impacts.

The types of complex considerations needed to address this issue were discussed at length in cases such as State v. Storm, 898 N.W.2d 140 (Iowa 2017), in which the Iowa Supreme Court declined to interpret the Iowa Constitution in a manner similar to that advocated for by Fletcher in the present case. In Storm, the Iowa Supreme Court had access to substantial testimony (including defense expert witness testimony), about the systems and processes utilized in seeking and obtaining Iowa search warrants, and the impact of technology on these systems and processes. Storm, 898 N.W.2d at 142-144. One of the officers testified that it is a "routine occurrence" that he is the only law enforcement officer "dealing with multiple individuals or suspects," that calls for assistance could take thirty to forty minutes to be satisfied, that his internet connection was "slow" at the location of the underlying incident, and that he lacked the equipment to remotely obtain a warrant. Id. at 142-143. It is not difficult to imagine such issues being present throughout other largely rural states, such as Idaho.

The Iowa Supreme Court also considered evidence in the record about the "complexity of the warrant process," and how the criminal justice system may not be best served by constitutional

interpretations that would require, in many cases, at-the-scene warrant development.[3] A testifying officer explained that in order to seek a warrant, he must identify with specificity the item or property to be searched (such as vehicle make, model, VIN, license plate, color, location of the vehicle), determine what items the officer is looking for, provide any attachments if there was outside information received from informants or other officers, confer with county attorneys for counsel and review, and then locate a judge (which may be difficult at certain times of the day). Id. at 143; see also id. at 151 n.5 (collecting cases from numerous jurisdictions describing the complexity of the warrant process). The Iowa officer testified that when seeking a search warrant, he typically returns to the office, types up the search warrant application, makes phone calls, contacts the county attorney, and receives assistance from detectives – a process which takes him 5 or 6 hours. Id. at 143. Needing to complete this process at the patrol vehicle (which would be the case in the typical scenario where the motorist does not, like Fletcher, already have an arrest warrant), would require him to attempt to "watch somebody or what's going on at the scene," and would "take[] away from [him] being able to keep observation around [him]." Id.

The Iowa Supreme Court additionally recognized that the defendant's proposed limitations to the automobile exception to the Iowa Constitution warrant requirement suffered from a lack of

[3] The state acknowledges that some of the specific concerns, as hereafter discussed in this brief, and as expressed by the Iowa Supreme Court (such as warrant delays impacting motorists), would not be as significant a concern under the unique circumstances of this particular case, where Fletcher was arrested pursuant to a warrant prior to the search taking place. However, the state submits, each of these concerns are relevant in a consideration of whether the Idaho Constitution should be interpreted in the manner advocated for by Fletcher. This is particularly true considering, as the state has argued, such an interpretation would create unpredictable, inconsistent, case-by-case outcomes; and because Fletcher did not create an evidentiary record that would assist this Court in trying to evaluate the types of concerns raised in the Iowa case.

workability. Id. at 150, 156. In fact, it observed, five states[4] which had previously so limited their state constitutions' respective automobile exceptions, had subsequently retreated from this limitation because of either this lack of workability, or because of subsequent United States Supreme Court clarification of the exception under the Fourth Amendment. Id. at 150.

The Court expressed its preference for "the clarity of bright-line rules in time-sensitive interactions between citizens and law enforcement," because such rules are "especially beneficial" when officers "have to make … quick decisions as to what the law requires where the stakes are high, involving public safety on one side of the ledger and individual rights on the other." Id. at 156. The traditional Fourth Amendment automobile exception was, the Court noted, "rooted in good policy that balances private interests with the collective good, even as it provides law enforcement with clear and unequivocal guidelines for doing their jobs." Id. at 150. Ultimately, the Court reasoned that an "easy-to-apply automobile exception is preferable to the alternative – a less predictable, case-by-case exigency determination resulting in prolonged roadside seizures awaiting a warrant," and it therefore declined to impose "a case-by-case exigency determination" that would result in "inconsistent outcomes." Id. at 142, 145. Indeed, abandoning the Fourth

[4] The Iowa Supreme Court cited State v. Lloyd, 312 P.3d 467, 473 (Nev. 2013) (recognizing that its separate exigency requirement has produced "confusion, while doing little to enhance the protection of individual privacy interests"); State v. Witt, 126 A.3d 850, 869 (N.J. 2015) ("Clearly, the use of telephonic search warrants has not resolved the difficult problems arising from roadside searches" and "[t]he hope that technology would reduce the perils of roadside stops has not been realized"); State v. Zwicke, 767 N.W.2d 869, 873 (N.D. 2009) (reversing state precedent after the United States Supreme Court, in the interim, made clear that automobile exception requires no distinct showing of exigency); Gomez v. State, 168 P.3d 1139, 1145 (Okla. Crim. App. 2007) (finding that United States Supreme Court precedent regarding the Fourth Amendment automobile exception rested on "sound principles," which, under state law, precluded it from interpreting corresponding portions of the Oklahoma Constitution differently); State v. Werner, 615 A.2d 1010, 1013-1014 (R.I. 1992) (deciding to bring itself "into conformity with Supreme Court precedent and the Fourth Amendment" after the Supreme Court "stabilized" its jurisprudence on the issue, and that it was "preferable to adopt one clear-cut rule to govern automobile searches.").

Amendment approach would likely create a dizzying jumble of case-by-case determinations confounding officers, motorists, and attorneys alike

The Iowa Supreme Court also identified unforeseen consequences that had occurred in states which had limited their state constitution's automobile exceptions. For example, the New Jersey Supreme Court (one of the courts which had overruled its prior decisions applying an exigency requirement to its automobile exception) observed that telephonic warrants resulted in "unacceptably prolonged roadway stops," and that during the warrant application process, officers and motorists could be temporarily stranded on highways, "increasing the risk of serious injury and even death by passing traffic." Id. at 151 (quoting State v. Witt, 126 A.3d 850, 853 (N.J. 2015).) Additionally, the New Jersey Supreme Court noted, the application of roadside warrants resulted in an exponential increase is police-induced consent searches – likely a result of pressure put on motorists to consent to searches in order to avoid delays. Id. at 151-152 (quoting Witt, 126 A.3d at 853).)

Fletcher contends that limiting the automobile exception would incentivize law enforcement to gather sufficient evidence in support of probable cause, equating this dynamic to that described by the Idaho Supreme Court when it concluded that there is no good faith exception to the warrant requirement under the Idaho Constitution in Guzman, 122 Idaho 981, 842 P.2d 660. (Appellant's brief, pp.30-31.) However, it is just as likely that such an interpretation would render search warrant applications less accurate. This was yet another concern identified by the Iowa Supreme Court, which warned that "forcing an officer to draft a search warrant application while multitasking on the side of the road may jeopardize the accuracy of the warrant application and would require motorists to be detained for much longer periods." Storm, 898 N.W.2d at 155.

Next, the Idaho Supreme Court's 1988 determination in Henderson, that DUI roadblocks constitute unreasonable searches and seizures under the Idaho Constitution, does not compel a conclusion that the automobile exception requires a showing of exigency under the Idaho Constitution. While both concepts involve warrant exceptions and vehicles, the similarities end there. Among the factors that troubled the Idaho Supreme Court about roadblocks in Henderson (as contained in the portion of the opinion which provided the quote referenced above about an Idaho citizen's freedom to stroll and hike) is that DUI roadblocks do not require any individualized criminal suspicion to conduct. Henderson, 114 Idaho at 298, 756 P.2d at 1062. Of course, searches conducted pursuant to the automobile exception require probable cause. In Henderson, the Idaho Supreme Court also noted a statement from the then-Boise Chief of Police that, from his general experience, officers on patrol make more DUI arrests than the same number of officers engaged in a roadblock. Id. at 196-297, 756 P.2d at 1060-1061. Thus, the goal of getting drunk drivers off the streets was not furthered by intrusive roadblocks, which delayed and impacted innocent drivers. Id. There is no such patrol equivalent available to officers with respect to the automobile exception, which, again, implicates only vehicles for which officers have specifically developed probable cause, and does not broadly impact innocent motorists like roadblocks do.

Also contributing to the Court's decision in Henderson was that the Idaho Legislature's Joint Subcommittee on DUI had, just four years prior, promulgated a report indicating its aim to *discourage* roadblocks, which, it continued, were "strictly allowable only in certain situations as provided in I.C. § 19-621" (which provides that roadblocks are permitted for the purpose of apprehending persons reasonably believed … to be wanted for violations of the laws of this state.") Id. at 297, 756 P.2d at 1061 (citation omitted). This is exactly the type of Idaho-specific, unique circumstance which supports an interpretation of the Idaho Constitution distinct from a

corresponding interpretation of the United States Constitution. There are no such comparable legislative support for a limitation of the automobile exception.

Finally, even to the extent that advanced technology has made telephonic warrants more feasible, and even to the extent that this continuing dynamic may someday compel a modification to the automobile exception pursuant to the state and federal constitutions, the other historical justification for the automobile exception, the lower expectation of privacy in automobiles, remains unchanged. "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects." Cardwell v. Lewis, 417 U.S. 58, 590 (1974). Unlike a home or office, "a car has little capacity for escaping public scrutiny." Id. This reduced expectation of privacy is further reflected in the fact that "[a]utomobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements." South Dakota v. Opperman, 428 U.S. 364, 367-368 (1976). The automobile exception remains, as the Iowa Supreme Court observed, "rooted in good policy."

As noted above, while the Idaho Supreme Court has, on rare occasion, interpreted the state constitution differently than corresponding provisions of the federal constitution, "[t]here continues to be merit in having the same rule of law applicable within the borders of our state, whether an interpretation of the Fourth Amendment or its counterpart—Article I, § 17 of the Idaho Constitution—is involved. Such consistency make[s] sense to the police and the public." State v. Watts, 142 Idaho 230, 233, 127 P.3d 133, 136 (2005) (quotations and citation omitted). Without a compelling reason to distinguish the Idaho automobile exception from its federal counterpart, and with the lack of evidence in the record and concerns identified in other jurisdiction, this Court should reject Fletcher's argument.

D. In The Alternative, The District Court Correctly Concluded That The Officers' Search Of The Vehicle Was Justified By Fletcher's Probation Status And Her IDOC Agreement

Even if this Court determines that the officers' search of Fletcher's vehicle was unlawful under the Idaho Constitution, it should still affirm the district court's denial of Fletcher's suppression motion because, as the court found, the search was justified by the terms of Fletcher's probation agreement. Specifically, the state contends: (1) Fletcher lacked standing to challenge the search because she waived her constitutional rights related to searches through her probation terms, and Maxim was wrongly decided to the extent it compels a different conclusion; and (2) Maxim is distinguishable from the circumstances of the present case because the officer knew that Fletcher was on felony probation for a controlled substance offense at the time of the alleged illegality of searching the vehicle.

"When there is controlling precedent on questions of Idaho law the rule of stare decisis dictates that we follow it, unless it is manifestly wrong, unless it has proven over time to be unjust or unwise, or unless overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice." Greenough v. Farm Bureau Mut. Ins. Co. of Idaho, 142 Idaho 589, 592, 130 P.3d 1127, 1130 (2006) (quotation marks omitted).

In order to show a violation of the Fourth Amendment's prohibition on unreasonable searches, a defendant must establish three things: "the defendant [1] 'must come forward with evidence sufficient to show there was a Fourth Amendment search, [2] [the defendant] has standing to challenge the search, and [3] the search was illegal." State v. Hoskins, 165 Idaho 217, 220-221, 443 P.3d 231, 234-235 (2019) (quoting State v. Holland, 135 Idaho 159, 162, 15 P.3d 1167, 1170 (2000).)

The Idaho Supreme Court has used the term "standing" (the second required prong set forth in Hoskins) in the context of suppression hearings as "shorthand for the question [of] whether the

moving party had a legitimate expectation of privacy in the area that was searched." State v. Mann, 162 Idaho 36, 39 n.1, 394 P.3d 79, 82 n.1 (2017). The Court has described the proper analysis of determining whether a defendant has established standing as consisting of a two-part inquiry:

> The first [question] is whether the individual, by his conduct, has "exhibited an actual (subjective) expectation of privacy," – whether ... the individual has shown that "he seeks to preserve [something] as private." The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable,'" – whether…the individual's expectation, viewed objectively, is "justifiable" under the circumstances.

State v. Rebo, 168 Idaho 234, 239, 482 P.3d 569, 574 (2020) (quoting Smith v. Maryland, 442 U.S. 735, 740 (1979) (alterations as in Rebo).)

The Idaho Supreme Court has also held (without expressly identifying it as a "standing" issue) that a defendant who has, as a term of his probation agreement, waived his constitutional rights to be free from unreasonable searches, is precluded from challenging the legality of searches. State v. Gawron, 112 Idaho 841, 736 P.2d 1295 (1987). In Gawron, the defendant's probation waiver was deemed to be valid because it rendered the search of his home to be reasonable under the Fourth Amendment. Id. Given the language of Gawron's probation term, the court found no need to apply the traditional reasonableness analysis for probation searches. Id. at 843, 736 P.2d at 1297; see also State v. Purdum, 147 Idaho 206, 209, 207 P.3d 182, 185 (2008) (explaining that, in Gawron, the "reasonableness test ... did not apply because the probationer had 'expressly waived his constitutional right to be free from warrantless searches'"). Instead, the court affirmed the denial of Gawron's motion to suppress because "Gawron simply waived all Fourth Amendment rights relating to searches of his person or property." State v. Jaskowski, 163 Idaho 257, 261, 409 P.3d 837, 841 (2018).

In Maxim, two officers, responding to a report of suspected drug use where children were present, knocked on the door of, and then entered (without invitation), an apartment. Maxim, 165

Idaho at 902-903, 454 P.3d at 544-545. The officers detained two individuals inside, including Maxim, whom they searched and found to be in possession of contraband. Id. at 903, 454 P.3d at 545. After Maxim was arrested, officers discovered he was on probation for grand theft and had outstanding arrest warrants. Id. Maxim moved to suppress the evidence recovered from his person on numerous grounds. Id. In response, the state argued, among other things, that Maxim lacked standing to challenge the search for reasons including that he had waived his Fourth Amendment rights under his terms of probation. Id. at 903-904, 454 P.3d at 545-546.

The Idaho Supreme Court framed the question before it as "what happens when police unconstitutionally enter a home, frisk an individual, arrest him, and, only after all that, discover that the individual has signed a Fourth Amendment waiver as a condition of probation." Id. at 905, 454 P.3d at 547. In a 3-2 decision, the Court vacated the district court's order denying Maxim's motion to suppress. Id. at 904-910, 454 P.3d at 546-552.

The majority opinion disconnected Maxim's probation agreement from concepts of "standing" and "waiver," and instead highlighted "[the] Court's precedent holding that such [probation] waivers represent *consent* to searches and thus implicate the 'reasonableness' component of the analysis," and that its "case law on Fourth Amendment waivers has consistently and correctly viewed them under the rubric of *consent* to searches, and thus, affecting the reasonableness prong of the analysis." Id. at 905-907, 454 P.3d at 547-549 (emphases in original).)

The Court also found that the concept of "standing" concerns a different question than that implicated by a probation waiver – whether the defendant *personally* has a reasonable expectation of privacy in the place searched, such as, for example, whether a third party, and not the defendant, actually owned the property being searched. Id. at 906, 454 P.3d at 548. Here, the Court found,

"[s]urely, a search and seizure of Maxim's person implicates his Fourth Amendment rights. Who else would those rights belong to?" Id.

Having found that Maxim had standing (in that sense), the Court then construed the state's position regarding the probation agreement as arguing that the police action in the case did not qualify as a Fourth Amendment "search." Id. This argument was, in turn, easily rejected, because the officers' entry into Maxim's home certainly constituted a "search." Id.

Then, having found that the officers' action constituted a search (first Hoskins step), and that Maxim possessed standing to challenge that search (second Hoskins step), the Court considered whether the search was reasonable (third Hoskins step). Id. at 905-907, 454 P.3d at 548-549. The Court recognized that warrantless searches, such as the one in the case before it, were presumptively unreasonable, and that the state was required to prove an exception to the warrant requirement in order to overcome that presumption, such as consent. Id. at 907, 454 P.3d at 549. To determine whether the officers' search was reasonable (i.e., whether it was justified by an exception to the warrant requirement), the Court considered Maxim's probation agreement, which (as in the present case) contained distinct provisions that Maxim consented to searches, *and* waived his constitutional rights concerning searches. Id. Despite these two distinct provisions, the Court stated, as noted above, that its precedent viewed probation agreements "under the rubric of *consent* to searches." Id. (emphasis in original).

Considering Maxim's probation terms exclusively under the framework of consent (and under the third Hoskins prong), the Court concluded that "the determinative fact" in the case was that "the officers did not know about Maxim's Fourth Amendment waiver at the time of the alleged unconstitutional conduct." Id. at 908, 454 P.3d at 550. The officers' unreasonable actions in

entering the apartment could not, the Court found, be made retroactively reasonable through the subsequent discovery of Maxim's probation status and associated Fourth Amendment waiver. Id.

In the present case, the probation agreement[5] Fletcher was bound by at the time of the officers' search of her vehicle provided, in relevant part (and identically to the probation agreement in Maxim):

> I consent to the search of my person, residence, vehicle, personal property, and other real property or structures owned or leased by me, or for which I am the controlling authority, conducted by any agent of the IDOC or law enforcement officer. I hereby waive my rights under the Fourth Amendment, and the Idaho Constitution concerning searches.

(R., p.123.)

While probation agreement contracts are often referred to (as was the case in Maxim) as "fourth amendment waivers," the agreements in these two cases actually had two components: consent, and waiver. The state contends that consent and waiver are distinct concepts, which, respectively, are properly considered in different stages of the three-step Hoskins analysis described above. *Consent*, and whether such consent renders a warrantless search reasonable in the circumstances of a particular case, is properly analyzed in the third Hoskins step, which considers whether the search is lawful. A *waiver*, which, if valid, deprives a probationer of a reasonable expectation of privacy, is considered in the second Hoskins step, which considers standing. Fletcher's challenge to the search of her vehicle was precluded, before any analysis of the legality of the search under the third Hoskins step, by the distinct waiver provision of her probation agreement and her corresponding lack of standing.

[5] The district court took judicial notice of the judgment of conviction and terms of probation in Fletcher's prior criminal case, CR01-18-34469. (Tr., p.88, L.12 – p.89, L.23.)

The concept of "standing," as considered under the second Hoskins step, has broader application than simply considering whether someone, as opposed to a third party, has personal rights pertaining to a particular residence or property. As noted above, standing, in a suppression hearing context, is shorthand for the question of whether the moving party had a legitimate expectation of privacy in the area that was searched. There are ways for one to lack such an expectation of privacy besides simply that a third party, rather than the defendant, owns or controls a particular residence or property. One of these ways is waiver. Fletcher could not sign an agreement waiving her rights pertaining to searches under the Fourth Amendment and Idaho Constitution, and still reasonably expect privacy from law enforcement officers searching her vehicle. See Gawron, 112 Idaho at 843, 736 P.2d at 1297; State v. Spencer, 139 Idaho 736, 739, 85 P.3d 1135, 1138 (Ct. App. 2004).

Because Fletcher waived her relevant constitutional rights, she did not have a reasonable expectation of privacy in her vehicle, and she did not have standing to challenge the search. This precluded her challenge to that search prior to any analysis regarding the search's legality. Therefore, this was not, as framed in Maxim, a (purportedly) unlawful police action that was subsequently rendered lawful; instead, the officers' search was lawful and reasonable from the outset because Fletcher, like Gawron, had previously waived her Fourth Amendment rights and Idaho Constitutional rights related to searches.

While the district court recognized that it was bound by the Idaho Supreme Court's opinion in Maxim, it recognized other distinctions between the concepts of consent and waiver which support a proposition that a waiver, unlike consent, need not be known by the officer conducting the search or seizure. (R., pp.177-181.) As the court explained, waiver cannot automatically be

undone. (Id.) Consent is generally revocable.[6] (Id.) Waiver means to give up; to consent means to agree to something. (Id.) Proof of valid consent does not require the same weighty burden to prove as a valid waiver of a constitutional right does. (Id.) While the second Hoskins step (standing) is determined entirely based upon the circumstances of the individual seeking suppression, the third Hoskins step (legality of search) consists primarily of a consideration of the actions of the *officers*. Therefore, it stands to reason that consent, a generally revocable agreement between parties, would require police to be aware of it; and for waiver to not require such.

Fletcher lacked standing to challenge the search of her vehicle because she waived her constitutional rights related to searches through the terms of her probation, and because she thus lacked a reasonable expectation of privacy in her vehicle. Maxim was wrongly decided to the extent to compels a different conclusion

In the alternative, the state argues (as the district court concluded below) (R., pp.212-225), that the circumstances of the present case are distinguishable from that of Maxim. In Maxim, the officers were not aware that Maxim was on probation, or had an arrest warrant, until after they searched and arrested him. Id. at 903, 454 P.3d at 545. In the present case, the officer knew, prior to searching the vehicle, that Fletcher was on felony probation for a controlled substance offense, and that Fletcher had an active arrest warrant. (R., p.168; Tr., p.52, Ls.9-13.)

It is true that while the officer knew that Fletcher was on felony probation for a controlled substance offense, he was not aware of the specific terms of Fletcher's probation. (R., p.53, L.16, p.54, L.1.) However, the Court in Maxim did not specifically condition its holding on an officer being aware of a defendant's probation *terms*. Further, in State v. Hansen, 167 Idaho 831, 477

[6] A probationer, however, may only revoke consent given as part of a probation agreement at a hearing before the court that entered the order granting probation. Hansen, 167 Idaho 831, 837, 477 P.3d 885, 891 (2020).

P.3d 885 (2020), another case involving a probation consent and waiver, the Idaho Supreme Court, distinguishing Maxim, noted that the case before it "[did] not present a situation where an officer conducted a search of a probationer without knowledge *of his probationary status.*" Hansen, 167 Idaho at 835, 477 P.3d at 889 (emphasis added); but see id. ("[W]arrantless searches conducted pursuant to a Fourth Amendment waiver provision in a probation agreement may be rendered reasonable, at least where the officer(s) conducting the search know of the waiver and the search does not exceed the scope of the consent provided for in the probation agreement."). Therefore, it is unclear in light of Maxim and Hansen whether an officer must be aware of a defendant's specific probation terms, or merely her probation status, in order for the consent granted pursuant to a probation agreement to render a search reasonable.

The state submits that, at least in the circumstances of the present case, the officer's knowledge of Fletcher's probation – specifically for a felony controlled substance offense – was sufficient to render his subsequent search constitutionally reasonable. Common sense dictates that the officer would have been aware that Fletcher was most likely subject to terms of probation regarding consent and waiver. This concept is supported by the fact that Maxim and Fletcher, both on felony probation in Ada County, had identically-worded terms of probation. Further, it is unlikely that an officer in a situation such as this will have access to the actual probation agreement – and efforts to obtain such could result in unreasonable delay.

Further, factually, and in terms of reasonableness (which is the touchstone of the Fourth Amendment, Knights, 534 U.S. at 118-119), Maxim presented an extreme situation distinct from both Hansen and the facts of the current case. The officers in Maxim opened the front door of a residence, entered without invitation, and then detained two of the occupants. Maxim, 165 Idaho at 903, 454 P.3d at 545. There is no question that the officers in the present case acted more

reasonably – arresting Fletcher pursuant to a valid arrest warrant; then searching the vehicle upon clear probable cause, and consistently with well-established Fourth Amendment jurisprudence, and not contrary to any currently-existing Idaho Constitutional precedent. The particular harm addressed by the Court in Maxim, and the question presented to it in that case ("what happens when police unconstitutionally enter a home, frisk an individual, arrest him, and, only after all that, discover that the individual has signed a Fourth Amendment waiver as a condition of probation") are not concerns in the present case.

For the foregoing reasons, the state submits that, even if this Court finds that the Idaho Constitution precluded the officers' utilization of the drug dog or of their search of Fletcher's vehicle, the search was still justified by terms of Fletcher's probation agreement, which contained both consent to searches, and an affirmative waiver of relevant constitutional rights.

CONCLUSION

The state respectfully requests this Court affirm the district court's order denying Fletcher's motion to suppress, and to affirm the judgment of conviction.

DATED this 20th day of June, 2024.

/s/ Mark W. Olson
MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 20th day of June, 2024, served a true and correct copy of the foregoing RESPONDENT'S BRIEF to the attorney listed below by means of iCourt File and Serve:

JENNY C. SWINFORD
DEPUTY STATE APPELLATE PUBLIC DEFENDER
documents@sapd.idaho.gov

/s/ Mark W. Olson
MARK W. OLSON
Deputy Attorney General

MWO/dd