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State v. Cox Appellant's Brief Dckt. 46219

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

STATE OF IDAHO,	)	
	)	**NO. 46219-2018**
Plaintiff-Respondent,	)	
	)	**ADA COUNTY NO. CR01-18-881**
v.	)	
	)	
SPENCER EDWARD COX,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

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

HONORABLE STEVEN J. HIPPLER
District Judge

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases

Additional Authorities

STATEMENT OF THE CASE

Nature of the Case

Spencer Cox appeals, contending the district court erred when it denied his motion to suppress the evidence found in his car. Specifically, he asserts that the officers facilitated Geno's warrantless entry into, and sniff of, the interior of his car by leaving his car door open after they had nonverbally asked it be opened. As such, he contends the dog sniff in this case amounted to an impermissible warrantless search under the Fourth Amendment.

He also asserts that the district court erred by not addressing his argument that the Idaho Constitution should provide greater protections in this context because of the goals that Idaho's exclusionary rule promotes. For example, greater protections would promote the goal of judicial integrity because the analysis used on under the federal constitution is contrary to several fundamental points, including that it is based on an analysis of the officer's subjective intentions.

Under either constitution, this Court should reverse the order denying Mr. Cox's motion to suppress the evidence found as a result of that improper sniff and remand this case for further proceedings.

Statement of the Facts and Course of Proceedings

On the night in question, Officer Green was checking license plates of cars in a hotel parking lot when he saw a Cadillac pull in and the driver did not immediately get out of the car. (Tr., p.10, Ls.1-4.)[1] Officer Green continued with his patrols, returning to the parking lot every

[1] While the transcripts in this case are provided in two independently bound and paginated volumes, all citations to "Tr." in this brief refer to the volume containing the transcripts of the motion to suppress hearing held on May 2, 2018, and the change of plea hearing held on May 21, 2018.

hour or so. (Tr., p.10, Ls.5-11.) Each time he returned, he made note of the Cadillac, which had moved parking spots during each intervening period. (Tr., p.10, Ls.5-11.) The third time he saw the Cadillac, Officer Green noted it was not fully in its parking space and was still running. (Tr., p.10, Ls.8-15.) Officer Green watched the Cadillac for approximately fifteen minutes before "my curiosity got the better of me." (Tr., p.12, Ls.9-14.) He testified this was a high-traffic area for narcotics, and that the hotel did not want people sleeping in their parking lot. (Tr., p.11, Ls.2-4, p.14, Ls.1-13.) As such, he approached the car to investigate potential disorderly conduct charges for loitering. (Tr., p.12, Ls.12-13, p.13, Ls.11-19, p.31, Ls.4-10.) Other officers arrived around the same time per Officer Green's request for backup. (Tr., p.12, L.23 - p.13, L.1, p.35, L.24 - p.36, L.2.)

Officer Green, who was wearing the traditional police uniform, was able to see a person, later identified as Mr. Cox, sleeping in the front seat of the Cadillac. (Tr., p.12, Ls.12-14, p.17, Ls.7-17; Exhibit 1 (the video from Officer Green's body camera).) He could also see a knife between Mr. Cox's legs and a bat sitting hear his hand. (Tr., p.14, Ls.18-23.) Officer Green knocked on the car's window. (Tr., p.15, Ls.8-9.) Mr. Cox initially started to wake slowly, but quickly became alert. (Tr., p.15, Ls.8-11.) Though Officer Green testified he recalled verbally asking Mr. Cox to open the car door (Tr., p.18, Ls.11-12), the district court found, after reviewing the body camera videos, that the officer misremembered that point. (R., p.70 n.2; *see generally* Exhibit 1.) The district court also found that Mr. Cox physically opened the door. (R., p.70 n.2.)

As Mr. Cox opened the door, Officer Green stepped into the negative space between the open door and the body of the car. (*See* Exhibit 1, ~1:25.) Mr. Cox was talking fast, and kept moving his hands around despite the officer's instructions to keep his hands on the steering

wheel. (Tr., p.15, Ls.11-14, p.16, Ls.13-15.) Officer Green testified, at that point, he suspected Mr. Cox was under the influence of a stimulant. (Tr., p.15, Ls.18-24.)

Because Officer Green did not have a good angle from which to secure the bat, he asked Mr. Cox to get out of the car. (Tr., p.19, L.24 - p.20, L.2.) He kept his hand on Mr. Cox's arm in order to control Mr. Cox's movement as he got out of the car. (Tr., p.28, Ls.3-5.) Officer Green performed a pat search of Mr. Cox, then released Mr. Cox's arm. (Tr., p.28, Ls.6-8.) However, because Mr. Cox refused to consent to additional searches of his pockets, Officer Green told Mr. Cox to keep his hands on his head, and Mr. Cox complied. (Tr., p.20, Ls.5-13.) Officer Green escorted Mr. Cox, with his hands on his head, over to his police vehicle in order to gather information from him. (Tr., p.20, Ls.13-16; Exhibit 1, ~4:33.) Mr. Cox did not try to shut his car's door or ask the officer to shut it. (Tr., p.20, L.20 - p.21, L.4.) Instead, he asked why he was being detained and to talk to a lawyer. (Tr., p.30, Ls.5-8; Exhibit 1, ~4:33.)

As Officer Green led Mr. Cox away from the car, Officer Marshall Plaisted got his drug dog, Geno, out of his car. (Tr., p.40, Ls.4-8.) Mr. Cox's car was still running and the heater fans were blowing as Officer Plaisted brought Geno toward the car. (Tr., p.40, Ls.15-25.) Officer Plaisted admitted there are no official policies or procedures regarding whether to shut an open car door before conducting a dog sniff. (Tr., p.41, Ls.18-21.) However, he explained his own practice is to "play it as it lies," by which he meant, if the officers opened the door, then he closes it again, but if the occupant of the car opened the door, then he leaves it open, unless the occupant requests it be closed. (Tr., p.41, L.22 - p.42, L.3, p.42, Ls.24-25.) Officer Plaisted admitted it does not matter to him, as the dog handler, whether or not the doors are open or closed. (Tr., p.42, Ls.4-11; *see also* Tr., p.25, Ls.2-22 (Officer Green testifying that whether the door is open or closed should not affect the dog's ability to detect an odor, if one is present).) In

this case, Officer Plaisted decided to leave the door open while Geno sniffed the car. (*See* Exhibit 2, ~5:40.)

Officer Plaisted testified that Geno's behavior started to change as he started "rounding the car door. (Tr., p.47, Ls.7-8; *see* Exhibit 2, ~5:45 (showing the officer approaching the open door from the front of the car).) Geno then went into the negative space between the open door and the body of the car, sniffed at the pockets on the inside of the door, and sat down. (Tr., p.47, Ls.16-18.) Officer Plaisted tried to get Geno to leave that area and move further along the car, but Geno turned back and sniffed at the floorboards inside the body of the car. (Exhibit 2, ~6:08; R., p.71 (the district court finding that Officer Plaisted will try to direct Geno away from a particular position in order to verify whether he is actually alerting).) The prosecutor argued, "if anything, its nose may have pierced the threshold a little bit, but comes around, its feet appear to be on the ground, the pavement." (Tr., p.57, Ls.6-9.) Geno verified the alert by sitting again after sniffing the floorboards. (Tr., p.52, Ls.2-9 (Officer Plaisted describing this as two alerts); *compare* R., p.73 (the district court finding "Geno persisted in his alert").)

The officers searched the pocket on the inside of the driver's door and found a bag containing a crystal substance which presumptively tested positive for methamphetamine, and Mr. Cox was charged with possession of a controlled substance.[2] (R., pp.25-26, 72.) Mr. Cox moved to suppress the evidence found in the car, asserting the evidence had been seized in violation of both the federal and state constitutions. (R., p.38.) He argued that, by not shutting the door, the officers had facilitated Geno's sniff of the interior of his car, which meant the sniff

[2] Mr. Cox was also charged with resisting the officers for trying to run when they formally placed him under arrest. (R., p.26.) That charge was ultimately dismissed pursuant to the subsequent plea agreement. (*See* Tr., p.66, L.12.)

was an unreasonable, warrantless search under the Fourth Amendment. (R., p.41; Tr., p.59, L.25 - p.26, L.5.) Trial counsel also specifically argued that the evidence should be suppressed under the Idaho Constitution because "Article I, Section 17 in the Idaho Constitution has stronger safeguards against this type of intrusion. The exclusionary rule exi[s]ted long before *Mapp v. Ohio*. And, additionally, *State v. Thompson* from 1988 noted the uniqueness of our state in which citizens more jealously guard privacy rights." (Tr., p.62, Ls.11-17 (referencing *Mapp v. Ohio*, 367 U.S. 643 (1961), and *State v. Thompson*, 114 Idaho 746 (1988)).)

The district court did not address the state constitutional issue in its order on the motion to suppress. (*See generally* R., pp.69-76.) It did, however, conclude there was no violation under the Fourth Amendment because it determined Geno only acted instinctively in following the odor and, "at no point did Geno actually get into the vehicle." (R., pp.72-73.) It acknowledged Mr. Cox's assertion that Officer Green had effectively prevented him from closing the door himself, and noted that Idaho has not addressed the situation where, as here, the occupant does not actually have an opportunity to close the door himself. (R., pp.74, 75.) However, it concluded he still could have tried to close it with his foot or asked that it be closed. (R., p.75.) As such, it concluded that, because Mr. Cox "voluntarily opened the door for officers," and the officers had not expressly ordered him to do so, the officers did not facilitate Geno's sniff of the interior of the car. (R., pp.70 n.2, 74-75.) Accordingly, it denied Mr. Cox's motion. (R., p.76.)

Mr. Cox entered a conditional guilty plea, reserving his right to appeal the district court's decision on his motion to suppress. (Tr., p.66, Ls.11-22; R., pp.83-85.) Thereafter, the district court imposed a unified sentence of seven years, with two years fixed. (R., pp.92-94.) Mr. Cox filed a notice of appeal timely from that judgment. (R., pp.98-99.)

ISSUES

I. Whether the officers facilitated Geno's entry into the car, such that the dog sniff of the interior was warrantless search in violation of the Fourth Amendment, by not shutting the car door, which had been opened in response to their knock.

II. Alternatively, whether Article I, Section 17 of the Idaho Constitution provides greater protections against warrantless entries into, and thus, unreasonable searches of, the protected interiors of cars by drug dogs.

ARGUMENT

I.

The Officers Facilitated Geno's Entry Into The Car, Such That The Dog Sniff Of The Interior Was Warrantless Search In Violation Of The Fourth Amendment, By Not Shutting The Car Door, Which Had Been Opened In Response To Their Knock

A. Standard Of Review

When reviewing the decision to deny a motion to suppress, the appellate courts conduct a bifurcated review: they defer to the factual findings of the district court which are not clearly erroneous, but freely review the district court's legal conclusions. *State v. Liechty*, 152 Idaho 163, 166 (Ct. App. 2011). A factual finding is clearly erroneous when it is not supported by substantial and competent evidence. *Lovitt v. Robideaux*, 139 Idaho 322, 325 (2003).

B. The District Court Made Two Clearly Erroneous Factual Findings: That Geno Did Not "Get In The Car" And That Officer Green Did Not "Ask" For Mr. Cox To Open The Door

Two of the district court's factual findings are not supported by substantial and competent evidence, and so, should be set aside. First, the district court made the factual finding that "[a]t no point did Geno actually get into the vehicle." (R., p.72.) That finding is clearly erroneous because, while it is true that Geno's paws always remained on the pavement, the facts show he still entered (got into) the car in two respects.

Notably, the video from Officer Plaisted's body camera shows Geno putting his nose across the threshold of the car in order to sniff the floorboards on the driver side of the car before verifying the alert. (Exhibit 2, ~6:08; *see* Tr., p.57, Ls.6-9 (the prosecutor acknowledging, "if anything, its nose may have pierced the threshold a little bit").) As the Idaho Supreme Court has made clear, "[i]t was not necessary for the officer's entire body to cross the threshold in order to

constitute an entry under the Fourth Amendment."[3] *State v. Maland*, 140 Idaho 817, 822 (2004). Rather, any physical invasion, "'even a fraction of an inch is too much.'" *Id.* (quoting *Kyllo v. United States*, 533 U.S. 27, 37 (2001)). Thus, the conclusion that Geno did not "get into" the car was not supported by substantial and competent evidence because the record actually shows he stuck his nose into the passenger compartment. By doing so, he "entered" the car for Fourth Amendment purposes even though his paws did not leave the ground.

Additionally, when the door of a car is standing open, the negative space between the door and the body of the car is, in some respects, still "inside" the car. *See Liechty*, 152 Idaho at 169 (holding that, when an officer stood in that negative space, he had seized the car because he was preventing it from being driven away); *compare State v. Metzger*, 144 Idaho 397, 401-02 (Ct. App. 2007) (holding that there was no Fourth Amendment violation when an officer, "standing outside the vehicle" was able to see the VIN inscribed on the doorjamb while the car door was opened). For example, items in the pockets on the open door are still considered to be in the car. Officers also stand in that space during tense situations because it affords protections similar to being in the car. Thus, the district courts finding that Geno did not "get in" the car was also clearly erroneous because the video shows him enter the negative space between the open door and the body of the car prior to an alert. (Exhibit 2, ~5:45.)

[3] While *Maland* was articulating this rule in the context of an entry into the home, the legal principle is equally applicable to cars. *See United States v. Jones*, 565 U.S. 400 (2012) (holding that officers impermissibly trespassed against a car by attaching a GPS device to its exterior as it sat in a public parking lot); *New York v. Class*, 475 U.S. 106, 116 (1986) (holding that, by reaching into a car to move papers obstructing the VIN number, the officer had conducted a search under the Fourth Amendment, though it was ultimately a reasonable search because of the unique nature of VIN numbers and the statutes addressing them); *Liechty*, 152 Idaho at 169 (holding an officer seized a person by opening the car door and standing in the negative space between that door and the body of the car).

The second clearly erroneous factual finding the district court made was that Mr. Cox "voluntarily opened the door for officers" because Officer Green had not asked him to open it or leave it open. (R., p.70 n.2, 75.) That conclusion that Officer Green did not ask him to open the door is not supported by substantial and competent evidence because the evidence shows that, while Officer Green did not *verbally* ask Mr. Cox to open the door, he actually did make a *nonverbal* request by knocking on the window. *See State v. Zubizreta*, 122 Idaho 823, 827 (Ct. App. 1992) (explaining the occupant of a car "voluntarily *complied with the request* to roll down the window," when the officer knocked on it) (emphasis added); *Hadley v. Williams*, 368 F.3d 747, 750 (7th Cir. 2004) (noting that, when officers knock at the door, "few people will refuse to open the door to police"); *cf. State v. Stanfield*, 158 Idaho 327, 333 (2015) ("Any declaration, affirmation, omission, *or nonverbal conduct* made for the purpose of establishing some fact, qualifies as a statement.") (emphasis added). As such, the district court's factual finding – that Mr. Cox opened the door of his own violation because Officer Green did not ask him to do so – is clearly erroneous.

C. The Officers Facilitated Geno's Entry Into, And Thus, Sniff Of, The Interior Of The Car By Leaving The Door Open

Dog sniffs are allowed on the exterior of a car because such sniffs do not involve opening the car or intruding on the privacy interests therein. *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000) (applying the rationales from *United States v. Place*, 462 U.S. 696, 707 (1983)); *cf. Illinois v. Caballes*, 543 U.S. 405, 409-10 (2005) (holding the dog sniff in that case was not the same as the sensory-enhancing equipment in *Kyllo*, 533 U.S. 27, because the sniff does not reveal anything about what is inside the container that is not already illegal). In other words, it is

specifically because there is no intrusion into the interior of the car during a dog sniff that there is no violation of the Fourth Amendment when the dog sniffs the exterior of the car. *See id.*

As a result, when the dog sniffs the interior of the car, there is a physical intrusion into the property and an invasion of the person's reasonable expectation of privacy. *See Payton v. New York*, 445 U.S. 573, 589-590 (1980) (holding a search occurs at the moment the officer crosses the threshold of the home); *accord United States v. Jones*, 565 U.S. 400, 406 n.3 (2012) (applying that same rationale to a car: "by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred"). As such, if the officer facilitates the dog's entry into, and sniff of, the interior of the car, that sniff constitutes an impermissible search under the Fourth Amendment. *State v. Naranjo*, 159 Idaho 258, 260-61 (Ct. App. 2015) (ultimately holding that, because the dog's act of sticking its nose through the car's open window was instinctual, it was not facilitated by the officers, and so, there was no Fourth Amendment violation in that case).

An officer does not need a nefarious intent to "facilitate" the dog sniff because to "facilitate" simply means "to make easier." MERRIAM-WEBSTER'S DICTIONARY AND THESAURUS, 288 (2007). Thus, an officer facilitated a search of a car by moving items to more easily read the obscured VIN number. *New York v. Class*, 475 U.S. 106, 116 (1986) (explaining the VIN is placed so it can be read from outside the car, so as to "facilitate" its usefulness in achieving the applicable governmental interests); *cf. Arizona v. Hicks*, 480 U.S. 321, 325 (1987) (holding that moving items in a person's house, even a few inches, in order to make it easier to read the serial number on another item is still an intrusion into the person's privacy, and thus, a search under the Fourth Amendment). In the context of Mr. Cox's case, then, the question is

whether the officers facilitated the interior sniff by making it easier for the dog to enter and sniff the interior of the car.

Several courts have concluded that the question of whether the officer facilitated the interior sniff turns on whether the officer or the car's occupant physically opened the door. *E.g.*, *United States v. Lyons*, 486 F.3d 367, 373-74 (8th Cir. 2007); *United States v. Winningham*, 140 F.3d 1328, 1331 (10th Cir. 1998); *see Naranjo*, 159 Idaho at 260-61. However, as the Idaho Court of Appeals has pointed out, there is no practical difference between the situation where the officer opens the door himself and the situation where the occupant opens it at the officer's request because, in either case, the previously-unviewable interior is exposed to the public to the same extent. *State v. Irwin*, 143 Idaho 102, 105-06 (Ct. App. 2006). Thus, the question of who physically opened the door is "constitutionally irrelevant." *Id*. at 106.

Rather, the constitutional analysis in the dog sniff context turns on whether the officers are examining something which the owner has already intended to expose to public perception. *See Untied States v. Place*, 462 U.S. 696, 707 (1983). That is important because "the person who answers the knock and stays within the house is not voluntarily exposing himself 'to public view, speech, hearing, and touch as if he is standing completely outside his house.'" *United States v. Berkowitz*, 927 F.2d 1376, 1388 (7th Cir. 1991) (quoting *United States v. Santana*, 427 U.S. 38, 42 (1976)) (alterations omitted). The same is true of a person in a car – when the person responds to the officer's knock by opening the door or window, but stays in the car, he has not voluntarily exposed himself or the interior of the car to public touch and examination as if he were already standing outside the car with the door open.[4] *See Irwin*, 143 Idaho at 105-06.

[4] Given the nature of cars, the occupant does expose some parts of the interior to public view by driving in public. *State v. Smith*, 152 Idaho 115, 120 (Ct. App. 2011) (search of the car was

Thus, the distinction in this context is more appropriately framed as "between a person who *for no reason* voluntarily decides to stand in his open doorway, and a person who merely answers a knock on his door." *Berkowitz*, 927 F.2d at 1388 (distinguishing *Santana*, wherein the person was already standing in the threshold of the house with the door open when the officers arrived, and thus, already "in public" for purposes of hot pursuit) (emphasis added); *accord McClish v. Nugent*, 483 F.3d 1231, 1245 (11th Cir. 2007); *United States v. McCraw*, 920 F.2d 224, 228-29 (4th Cir. 1990); *Goldberg v. Junion*, 208 F.Supp.3d 977, 987 (S.D. Ind. 2016); *United States v. Xiong*, 60 F.Supp.2d 903, 909 (E.D. Wisc. 1999). As discussed in Section I(B), *supra*, Officer Green nonverbally asked Mr. Cox to open the door by knocking on it. Therefore, regardless of who physically opened the door, Officer Green caused the interior to be exposed to public view, and therefore, made it easier for Geno to enter and sniff the inside of the car.[5]

This is not to say that Officer Green acted impermissibly by approaching and knocking on the window of a closed car. *See, e.g.*, *Zubizreta*, 122 Idaho at 827 (holding officers can approach and knock on a car window as part of a consensual encounter). This distinction simply accounts for the cause-and-effect relationship between an officer's action of knocking on a closed door and the citizen-occupant's reaction in terms of what the citizen actually intended to expose to public perception. In fact, even *Zubizareta* recognized this distinction, describing that

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justified because the officer was able to see the paraphernalia in the car in plain view). That does not, however, legitimize all intrusions into or against the car. *See Jones*, 565 U.S. at 406 n.3.

[5] Likewise, the officers' solution of waiting to see if Mr. Cox tried to close the door or ask for it to be closed has no impact on the critical analysis under *Edmond*. *See Irwin*, 143 Idaho at 105-06. In fact, such a rule would authorize arbitrary enforcement at the officer's discretion, as not all officers may share their practice of honoring such requests. (*See* Tr., p.6, Ls.13-21 (trial counsel asserting that such scenarios have occurred since the decision in *Naranjo*). The United States Supreme Court has made it clear that rules which allow that sort of arbitrary invasion of privacy at the officer's unbridled discretion are impermissible under the Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648, 654, 661 (1979).

situation as the occupant "voluntarily *compl*[*ying*] *with the request* to roll down the window," as opposed to voluntarily opening the window on his own, independent initiative. *Id*. (emphasis added).

This is the concept that Officer Plaisted's explanation of "playing it as it lies" does not account for. Mr. Cox had not, on his own initiative, exposed the interior of his car to the world – he was sitting in it with the doors and windows shut. As such, to play it as it lies, the officers would have had to run the dog around the car with the doors and windows shut. *See Edmond*, 531 U.S. at 40 (sniff of car's exterior is okay because it does not reveal anything not already exposed to public scrutiny); *Hicks*, 480 U.S. at 325 (moving an item, even a few inches, to expose what was not already exposed, is an impermissible search).

However, under Officer Plaisted's practice, the officers can change that result by knocking on the car door and requesting the occupant step out of the car. (*See* Tr., p.46, Ls.7-10 (Officer Plaisted testifying they do not conduct dog sniffs with people in the car).) Suddenly, as a result of those two actions by the officers (reasonable though they might be), the canine officer now "finds" the previously-closed car lying with the door open. As such, the better golf metaphor in this scenario is that the officers were playing a drop – they were hitting the ball from a similar, but easier-to-address lie. However, by switching to that easier lie, they facilitated a better shot.

As such, by not shutting the car door when that door had only been opened in response to their knock, the officers made it easier for Geno to enter and sniff, instinctively or not, the inside of the car. Therefore, they facilitated the sniff of the interior of the car, which means that sniff was a warrantless search of the car under the Fourth Amendment. That search was not justified

by any of the well-established exceptions the warrant requirement,[6] and so, that warrantless search was unreasonable, and violated the Fourth Amendment.

II.

Alternatively, Article I, Section 17 Of The Idaho Constitution Provides Greater Protections Against Warrantless Entries Into, And Thus, Unreasonable Searches Of, The Protected Interiors Of Cars By Drug Dogs

A. Standard Of Review

While Article I, Section 17 of the Idaho Constitution is similar to the Fourth Amendment of the United States Constitution in both language and purpose, that does not mean Idaho has to interpret it the same way its federal counterpart has been interpreted. *State v. Donato*, 135 Idaho 469, 471 (2001); *accord State v. Thompson*, 114 Idaho 746, 748 (1988). State constitutions may provide more protections than exist under the federal Constitution. *Id*. (quoting *State v. Newman*, 108 Idaho 5, 10 n.6 (1985)). Questions of constitutional interpretation are questions of law which this Court reviews freely. *Leavitt v. Craven*, 154 Idaho 661, 665 (2012).

[6] It is the State's burden to prove that one of the exceptions to the warrant requirement applies. *Mincey v. Arizona*, 437 U.S. 385, 390 (1978). The only exception it mentioned was the automobile exception, but that was in regard to the officer's own search of the car, which the State argued was justified by Geno's alert provided; it did not argue that exception as a justification for Geno's initial entry. (*See* R., pp.45-47.) Therefore, Geno's warrantless entry should be presumed to be unreasonable. *See Mincey*, 437 U.S. at 390 (holding warrantless searches are "*per se* unreasonable").

B. Because Of The Goals Of Idaho's Exclusionary Rule, The Idaho Constitution Should Stand As A Bulwark Against The Flawed Analysis Used To Justify Warrantless Entries Into Cars Under The Fourth Amendment

1. Since the district court failed to address Mr. Cox's argument under the Idaho Constitution, this case should be remanded for appropriate fact finding and an actual determination on that issue, and this Court should provide guidance for that remand

Mr. Cox specifically argued that "Article I, Section 17 in the Idaho Constitution has stronger safeguards against this type of intrusion. The exclusionary rule exi[s]ted long before *Mapp v. Ohio*. And, additionally, *State v. Thompson* from 1988 noted the uniqueness of our state in which citizens more jealously guard privacy rights." (Tr., p.62, Ls.11-17.) The district court did not address that argument in its order on his motion. (*See generally* R., pp.69-76.) As such, this Court should vacate that order and remand this case so the district court can make any necessary findings of fact related to that issue and render a decision on it in the first instance. *See State v. Fuller*, 138 Idaho 60, 63-64 (2002) (explaining that, where the district court failed to address the defendant's alternative basis for suppression, "[t]hat issue will have to be resolved on remand").[7]

When remanding a case for the district court to consider an issue in the first instance, the appellate courts will occasionally give guidance on questions of law that are likely to arise during the remand, so as to promote judicial efficiency. *E.g.*, *State v. Robinett*, 141 Idaho 110, 113 (2005). This should only be done in regard to issues "that have a practical effect on this appeal," in order to avoid issuing impermissible advisory opinions. *North Idaho Building*

[7] Even if this Court does not remand this case for the district court to decide this issue in the first instance, it should still reverse the order denying the motion to suppress under the Idaho Constitution for the reasons discussed *infra*, as that issue presents a question of law and was preserved below.

Contractors Ass'n v. City of Hayden, 164 Idaho 530, ___, 432 P.3d 976, 986 (2018) (choosing to provide guidance because the issues to be addressed "are necessary to resolution of this case in future proceedings") (emphasis omitted).

The question of whether the Idaho Constitution provides greater protections than its federal counterpart is likely to arise on remand, as evidenced by the district court's question to trial counsel about whether there was any case law in Idaho saying the Idaho Constitution provides greater protections in this regard. (Tr., p.62, L.24 - p.63, L.10.) The district court also noted the related question – whether the officer should be required to close the door when the occupant has no realistic opportunity to close it himself – is an issue of first impression in Idaho. (R., pp.73-74.) Since these unresolved questions of law will be the central focus of the analysis on remand in this case, this Court should give guidance on those legal questions.

2. The goals of Idaho's exclusionary rule reveal the Idaho Constitution should provide greater protections in this context, so as to protect against unjustified, warrantless entries into cars particularly since the analysis under the federal Constitution is fundamentally flawed

The Idaho Constitution has been found to be more protective than its federal counterpart in several respects. *See, e.g., State v. Henderson*, 114 Idaho 293, 299-300 (1988) (recognizing heightened protections particularly in the context of seizing cars). Notably, the Idaho Constitution recognizes there are other reasons to suppress evidence than just to deter police misconduct. *State v. Guzman*, 122 Idaho 981, 992 (1992). Specifically, Idaho's exclusionary rule is also designed to provide an effective remedy to a person who was subjected to an unreasonable search or seizure, to provide thoroughness in the warrant-issuing process, to avoid the secondary constitutional violation which occurs when the courts consider evidence obtained through illegal means, and to preserve judicial integrity. *Id.*

Because of these additional goals, suppression may be proper even when the officer does not act unreasonably. *See State v. Pettit*, 162 Idaho 849, 854-55 (Ct. App. 2017), *rev. denied*. In *Pettit*, the officer made a reasonable mistake of law when he pulled over a car. *Id*. Despite the reasonableness of his actions, the Court of Appeals still held the evidence found as a result of that unlawful stop should be suppressed under Idaho's exclusionary rule, noting that "even a minimal intrusion upon an individual's privacy may amount to an unreasonable government search or seizure." *Id*.

The rationales behind the decision in *Pettit* are also applicable here. Here, too, the officers' actions may have been reasonable, and so, there would be no misconduct to correct. Nevertheless, as in *Pettit*, there was still an unreasonable warrantless intrusion into Mr. Cox's privacy because, absent the State proving the existence of such an exception, warrantless entries are "*per se* unreasonable." *Mincey v. Arizona*, 437 U.S. 385, 390 (1978). As discussed in Section I(B), Geno actually entered the car before giving a verified alert. The State did not make any arguments in the district court about what exception would have justified that warrantless entry into the protected interior of the car. (*See generally* R., pp.43-48.) As such, Geno's entry into the car was presumptively unreasonable. *Mincey*, 437 U.S. at 390. Therefore, Mr. Cox, like the defendant in *Pettit*, should be afforded an effective remedy for the unreasonable search of his property despite the fact that the officers' actions did not amount to misconduct.

The Idaho Constitution should also provide additional protections in this context in order to protect judicial integrity. That is because the analysis used in the federal context appears to run contrary to several fundamental legal principles. First and foremost, it turns on an evaluation of the officer's subjective intentions – if the officer did not intend for the dog to enter the car (if the dog entered the car on its own instinct), then the dog's warrantless entry will be excused.

See, e.g., *Naranjo*, 159 Idaho at 260-61; *United States v. Sharp*, 689 F.3d 616, 620 (6th Cir. 2012); *United States v. Pierce*, 622 F.3d 209, 214-15 (3d Cir. 2010); *Lyons*, 486 F.3d at 373-74; *see also Winningham*, 140 F.3d at 1331 (refusing to excuse the warrantless entry because the officer intended for the dog to be able to enter the van).[8] Of course, the subjective intent of the officer is usually irrelevant to Fourth Amendment analyses. *Whren v. United States*, 517 U.S. 806, 813 (1996); *see State v. Lee*, 162 Idaho 642, 652 (2017). The Idaho Supreme Court has previously held, upon finding the analysis under the federal constitution on a particular question was flawed, "art 1, § 17 will stand as a bulwark" against the resulting, unjustified intrusions into daily life in Idaho and provide the proper extent of the protections which Idaho's citizens retained for themselves. *Thompson*, 114 Idaho at 751. Because the federal analysis in this context is based on an improper consideration of the officer's subjective intentions, the Idaho Constitution should stand as a bulwark in this context too.

That the Idaho Constitution should serve as a bulwark against such warrantless entries is also demonstrated by the fact that the federal analysis does not account for the documented concern that trained animals will only appear to act instinctively, when, in fact, they are actually reacting to subconscious (or worse, subtle) cues from their handlers. Matthew Slaughter, *Supreme Court's Treatment of Drug Detection Dogs Doesn't Pass the Sniff Test*, 19 New Crim. L.Rev. 279, 299 (2016) (explaining this is known as the "Clever Hans effect," and detailing the research underlying the concerns it raises in trained animals); Jane Bambauer, *Defending the Dog*, 91 Or. L. Rev. 1203, 1207 (2013) (warning against the possibility that further research

[8] It does not appear from the opinions in those cases that the subjective nature of the analysis was brought to the courts' attention. *See generally Naranjo*, 159 Idaho 258; *Sharp*, 689 F.3d 616; *Lyons*, 486 F.3d 367; *Winningham*, 140 F.3d 1328.

could validate the initial experiments showing the Clever Hans effect exists in regard to drug dogs, and thereby, undermine the justification for using drug dogs entirely). These concerns needs to be accounted for because these cases do not involve a horse trained to amaze by "solving" math problems, as Clever Hans did. *See* Slaughter, *supra*. Rather, they involve officers using dogs to make otherwise-unjustified intrusions into a person's constitutionally-protected privacy in the hopes of discovering incriminating evidence that might otherwise go undetected. *See Florida v. Jardines*, 569 U.S. 1, 9 (2013). As such, the Idaho Constitution should account for those concerns and protect against cued entries masquerading as instinctive behavior.

The need for an Idaho Constitution bulwark is further highlighted by the fact that there is no reason to risk such warrantless intrusions in the first place. Both officers admitted that they will be able to effectively pursue the government's legitimate interest in drug interdiction even if they are required to close car doors before deploying drug dogs. (*See* Tr., p.25, Ls.2-22 (Officer Green testifying that whether the door is opened or closed should not affect the dog's ability to detect an odor, if one is present); Tr., p.42, Ls.4-11 (Officer Plaisted testifying it does not matter to him as the handler whether the door is opened or closed when he deploys his dog).) "The constitutionality of particular law enforcement conduct 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" *State v. Cerino*, 141 Idaho 736, 737-38 (Ct. App. 2005) (quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)). Since there is no legitimate government interest actually served by leaving the door open, the Idaho Constitution should stand as a bulwark against the unnecessary risk of an unintentional, but still unjustified, warrantless intrusions into the protected interior of a car.

Likewise, Idaho should not risk such unnecessary, warrantless entries based on whether the occupant tries to shut the door or asks the door be closed because that would authorize arbitrary invasions of privacy at the unbridled discretion of the officers. For example, since the police department has not established any polices in this regard (Tr., p.41, Ls.18-21; R., pp.73-74 (the district court noting Idaho's courts have not spoken on that issue either)), other officers, unlike Officer Green, could choose to simply ignore an occupant's request to shut the door. (Tr., p.6, Ls.13-21 (defense counsel arguing that such scenarios have played out in other cases since the decision in *Naranjo*); *compare* Tr., p.24, Ls.18-20 (Officer Green testifying that, when he hears such requests, he honors them).) Rules which give that sort of unbridled discretion to officers should not pass muster under the federal constitution, *Prouse*, 440 U.S. at 654, 661, and so, it definitely should not pass muster under the Idaho Constitution. *Thompson*, 114 Idaho at 751.

Moreover, there may be situations where the occupant does not have a realistic opportunity to actually close the door. The district court acknowledged such a situation may have existed in this case. (R., p.75 (though noting Mr. Cox might have tried to close the door with his foot); *see* Exhibit 1, ~4:33 (showing Mr. Cox either had his arm controlled by Officer Green, or was ordered to keep his hands on his head as he got out of his car and was led away from it). In such cases, whether or not to shut the door is left entirely to the officer's discretion. Thus, this Court should answer that question of first impression (*see* R., pp.73-74) in favor of requiring officers to close the door, so as not to authorize an impermissibly arbitrary rule.

Furthermore, focusing on whether the occupant requests the officers close the door also does not make the situation less arbitrary. For example, that practice would not account for the situation where the officer does not hear the request to shut the door. (*See* Exhibit 1, ~4:33

(showing Officer Green as focused on addressing Mr. Cox's attempts to exercise his constitutional right to counsel).) That practice also does not account for the situation where the canine officer arrives partway through the encounter. In that situation, the canine officer could being a dog sniff without knowing that the occupant had requested the door be closed, but the primary officer had not yet been able to close it. As such, Officer Plaisted's practice endorses a system where officers have unbridled discretion in such circumstances. The Idaho Constitution should stand as a bulwark against this sort of arbitrary, warrantless intrusions. *Thompson*, 114 Idaho at 751.

Finally, the Idaho Constitution should afford this greater protection because essentially every case that involves a dog sniff of a car will involve the door being opened at the officer's request, since the officers can order the occupants to get out of a car as a matter of course. *See State v. Parkinson*, 135 Idaho 357, 363 (Ct. App. 2000) (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 111 n.6 (1977)). In fact, Officer Plaisted testified that is what actually happens: "we never deploy our dog to sniff the exterior of cars when there's occupants inside the vehicle" because it presents a safety concern. (Tr., p.46, Ls.7-10.) This means drug dogs would be able, under Officer Plaisted's practice, to warrantlessly enter the otherwise-protected interiors of cars and search for evidence of drug possession without any particularized suspicion of drug use.[9] The Idaho Constitution has actually already been found to provide more protection in that regard,[10] as it prohibits stopping cars at a DUI roadblock because there is no particularized

[9] Because it relied on the dog sniff, the district court did not make determination below as to whether the officers in this case actually had reasonable suspicion of any criminal activity, much less whether there was reasonable suspicion of drug possession, as opposed to just loitering and driving under the influence of a stimulant. (*See generally* R., pp.69-76.)

[10] The *Henderson* Court indicated the United States Supreme Court had not spoken on the issue of DUI roadblocks. *Henderson*, 114 Idaho at 299. However, the Supreme Court has since held

suspicion to justify the initial seizure. *Henderson*, 114 Idaho at 299-300. Those same concerns about the lack of particularized suspicion justify greater protections under the Idaho Constitution in terms of having officers shut the door to a car before conducting a dog sniff.

For all those reasons, the district court's order denying suppression should be reversed under the Idaho Constitution, since the other goals of Idaho's exclusionary rule, such as providing a remedy for the unreasonable warrantless entry and preserving judicial integrity, weigh in favor of suppressing the fruits of the objectively-unreasonable warrantless entry that actually occurred in this case.

CONCLUSION

Mr. Cox respectfully requests this Court reverse the order denying his motion to suppress under either the federal or state constitution and remand this case for further proceedings.

DATED this 14th day of March, 2019.

/s/ Brian R. Dickson
BRIAN R. DICKSON
Deputy State Appellate Public Defender

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that a roadblock where all cars were stopped briefly and the same requests made of each driver are permissible under the Fourteenth Amendment. *Illinois v. Lidster*, 540 U.S. 419, 427-28 (2004); *see also Prouse*, 440 U.S. at 657, 663 (suggesting such roadblocks might be permissible). As such, the Idaho Constitution provides more protections than its federal counterpart in that context.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of March, 2019, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

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/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

BRD/eas