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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO **Plaintiff,** **V.** **BRYAN C. KOHBERGER,** **Defendant.**	**CASE NUMBER CR29-22-0002805** **MOTION TO DISMISS INDICTMENT ON GROUNDS OF ERROR IN GRAND JURY INSTRUCTIONS OR IN THE ALTERNATIVE REMAND FOR PRELIMINARY HEARING**

COMES NOW, Bryan C. Kohberger, by and through their attorney, Jay Weston Logsdon, Chief Deputy Litigation, and hereby moves this honorable Court for an Order either dismissing the Indictment in this matter or to treat it as a Presentment and remand for a preliminary hearing before a magistrate. This Motion is made on the grounds that the Grand Jury was misled as to the standard of proof required for an indictment.

ISSUES

I. The Idaho Constitution Art. I Sec. 8 and I.C. § 19-1107 set the standard of proof for a Grand Jury at beyond a reasonable doubt based on the plain language of the statute.

   a. The legislative history of I.C. § 19-1107 also supports a beyond a reasonable doubt standard.

   b. The Idaho Supreme Court cannot adjust the standard of proof as it is a substantive right.

II. The failure to properly instruct a Grand Jury as to the standard of proof is grounds for dismissal of the Indictment.

   a. The Grand Jury was erroneously instructed with the standard required for a Presentment, thus this Court could treat the Indictment as a Presentment.

ARGUMENT

I. <u>The Idaho Constitution Art. I Sec. 8 and I.C. § 19-1107 set the standard of proof for a Grand Jury at beyond a reasonable doubt.</u>

Pursuant to I.C. § 19-1107:

> The grand jury ought to find an indictment when all the evidence before them, taken together, if unexplained or uncontradicted, would, in their judgment, warrant a conviction by a trial jury.

This statute was in existence at the time the Idaho Constitution was adopted. Idaho Rev. Stat. (R.S.) § 7636 (1887), *previously* Criminal Practice § 208 (1864). "When construing the Idaho Constitution, 'the primary object is to determine the intent of the framers.'" *State v. Clarke*, 165 Idaho 393, 397 (2019). "Provisions of the Idaho Constitution must be construed in light of the law prior to their adoption." *State v. Green*, 158 Idaho 884, 887 (2015). Even Idaho's Constitution reflects this view. Idaho Const. art. XXI, § 2 ("All laws now in force in the territory of Idaho which are not repugnant to this Constitution shall remain in force…")

In *Clarke*, our Supreme Court found a statute in force at the time our Constitution was ratified to be controlling in its interpretation of Article I, § 17. *Clarke*, 165 Idaho 393.

In *State v. Matthews*, 129 Idaho 865 (1997), our Court considered the issue of whether search warrants needed to be signed in order to be valid. The Court found that warrants do need to be signed, or else a search pursuant to such a warrant will violate Art. I § 17 of our Constitution. The Court arrived at this conclusion despite the fact that Art. I § 17 is completely silent regarding whether a warrant needs a signature. The reason the Court was able to find a constitutional violation in this case was by acknowledging that the statutes which require a signature (I.C. §§ 19-4401, 4406, 4407), "predate the Constitution of the State of Idaho." *Id.*, at 869. Because these statutes, which require a signature on warrants, predated the Idaho Constitution, they "create a substantive right" which "existed prior to the adoption of this State's Constitution." *Id.*

In *State v. Rauch*, 99 Idaho 586 (1978), our Supreme Court found a defendant was entitled to constitutional relief for a violation of I.C. § 19-611 (knock and announce) after finding the rights contained in that statute were long standing at common law and "deeply rooted in our heritage." *Rauch*, at 593. The *Rauch* Court was able to trace this deeply rooted heritage all the way back to 1603.

Thus, whatever this language means, it must color this Court's interpretation of Art. I Sec. 8. That section states:

> No person shall be held to answer for any felony or criminal offense of any grade, unless on presentment or indictment of a grand jury or on information of the public prosecutor, after a commitment by a magistrate, except in cases of impeachment, in cases cognizable by probate courts or by justices of the peace, and in cases arising in the militia when in actual service in time of war or public danger; provided, that a grand jury may be summoned upon the order of the district court in the manner provided by law, and provided further, that after a charge has been ignored by a grand jury, no person shall be held to answer, or for trial therefor, upon information of public prosecutor.

If it were not clear from the text of Art. I Sec. 8, the Framers general intent behind the section was to ensure that either a grand jury or magistrate stood between the prosecutor and the accused. *See*, PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO 1889, vol. I, 260-79 (I.W. Hart ed., 1912) (hereinafter "PROCEEDINGS AND DEBATES"). Thus, it stands to reason that the standard of proof in effect at the time of the adoption of the section was incorporated into it. It would be rather ineffective to create a buffer between the government and citizens that the government could change willy-nilly.

However, that does not provide much information as to what standard "would warrant a conviction by a trial jury" actually means.

> The interpretation of a statute "must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written." *State v. Schwartz*, 139 Idaho 360, 362, 79 P.3d 719, 721 (2003) (citations omitted). "We have consistently held that where statutory language is unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature." *City of Sun Valley v. Sun Valley Co.,* 123 Idaho 665, 667, 851 P.2d 961, 963 (1993).

Verska v. St. Alphonus Regional Medical Center, 151 Idaho 889, 893 (2011). The plain text of the I.C. § 19-1107 sets a standard of proof that would "warrant" a conviction at trial. The justification for a conviction at trial is and was proof "beyond a reasonable doubt." I.C. § 19-2104 (2022); Idaho Rev. Stat. (R.S.) § 7858 (1887).

If that were not enough, I.C. § 19-1107 is one of many laws that were adopted in 1863-64 copied verbatim from laws adopted in 1851 in the state of California. *See State v. Edmonson*, 113 Idaho 230, 244, 259 (1987) (BISTLINE, J., dissenting). The Idaho Supreme Court has held:

> This court has consistently held that "[a] statute which is adopted from another jurisdiction will be presumed to be adopted with the prior construction placed upon it by the courts of such other jurisdiction."

Odenwalt v. Zaring, 102 Idaho 1, 5 (1981) (*citing Nixon v. Triber*, 100 Idaho 198, 200 (1979); *State v. Miles*, 97 Idaho 396 (1976); *Doggett v. Electronics Corp. of America*, 93 Idaho 26 (1969)). In *People v. Tinder & Smith*, 19 Cal. 539, 541 (1862), the defendants were indicted for murder and arrested. They applied for bail, but were denied. *Id.* On a habeas petition challenging the denial of bail, the California court took time to discuss the legal standard required for the finding of an indictment. *Id.*, at 543. The court found:

> Formerly an indictment was regarded as a mere accusation, which the grand jury ought to find if probable evidence were adduced in its support. "But great authorities," says Chitty, "have taken a more merciful view of the subject, and considering the ignominy, the dangers of perjury, the anxiety of delay, and the misery of a prison, have argued that the grand inquest ought, as far as the evidence before them goes, to be convinced of the guilt of the defendant. What was, therefore, anciently said respecting petit treason, may be applied to all other offenses, that since it is preferred in the absence of the prisoner, it ought to be supported by substantial testimonies." (1 Crim. Law, 318. [1826]) The more merciful view of the subject thus referred to is secured by statute in this State. Our Criminal Practice Act declares that the grand jury "shall receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence," (Sec. 210) and though not bound to hear evidence for the defendant, "that it is their duty to weight all the evidence submitted to them, and when they have reason to believe that other evidence within their reach will explain away the charge, they should order such evidence to be produced," (Sec. 211) and that they "ought to find an indictment when all the evidence before them, taken together, is such as in their judgment would, if unexplained or uncontradicted, warrant a conviction by the trial jury," (Sec. 212) and of course ought not to find an indictment when the evidence taken together, if unexplained or un-contradicted, would not warrant such conviction. The indictment is then something more than a mere accusation based upon probable cause; it is an accusation based upon legal testimony, of a direct and positive character, and is the concurring judgment of at least twelve of the grand jurors, selected to inquire into all public offenses committed or triable within their county, that upon the evidence presented to them the defendant is guilty.

Id. (footnote omitted). Thus, the only case on point from the time this statute was adopted clearly states that the standard for finding an indictment is higher than the probable cause standard. In addition, other jurisdictions and legal treatises have recognized that the plain language amounts to more than probable cause. *See, Bache Halsey Stuart Shields, Inc. v. Tracy Collins Bank & Trust Co.*, 558

F.Supp. 1042 (D. Utah 1983); *State v. Lawler*, 221 Wis. 423, 267 N.W. 65 (Wis. 1936); Y. Kamisar, W. LaFave, & J. Israel, MODERN CRIMINAL PROCEDURE, 1025-26 n.9 (5th ed. 1980).

The Defense does not, by all this, intend to bury the lede, but merely show that under the usual approach to statutory interpretation, there is no reasonable doubt as to what a grand jury should be instructed. That said- the Defense recognizes that the whole of modern jurisprudence on this issue is against it, as well as at least one founding father of this state.

a. The legislative history of I.C. § 19-1107 also supports a beyond a reasonable doubt standard.

The history of this formulation shows that the abandonment of the standard and the retreat to common law probable cause has no basis in law. To begin, the formulation first appears in 1850 in THE CODE OF CRIMINAL PROCEDURE OF THE STATE OF NEW-YORK. This is best known as the NEW YORK FIELD CODE OF CRIMINAL PROCEDURE (hereinafter "FIELD CODE") (available at https://www.google.com/books/edition/New_York_Field_Codes_1850_1865/skTQc3ktyI0C?hl=en&gbpv=0). The Idaho Supreme Court and the United States Supreme Court have acknowledge this state has retained language from the FIELD CODE in its procedural statutes. *See, Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 390 n. 23 (1979); *Cowles Pub. Co. v. Magistrate Court of the First Dist. of State, County of Kootenai*, 118 Idaho 753, 757 (1990).

To understand why the FIELD CODE broke with the common law, it helps to have some knowledge of the history of grand juries and the considerable concern about them occurring in the latter half of the 19th century. In England, the original criminal proceedings circa 978 began with a group of twelve that went on to evolve into the Grand Jury. George Edwards, THE GRAND JURY CONSIDERED FROM A HISTORICAL, POLITICAL AND LEGAL STANDPOINT, AND THE LAW AND PRACTICE RELATING THERETO, 2-6 (1906) (hereinafter "GRAND JURY"). The alternative arrived with the Norman Conquest, in which the accuser could raise the Hue and Cry and, if successful,

force the accused to choose between a guilty plea or trial by combat. *Id.* at 6, 12-13. The Assize of Clarendon established for the first time in English history the ability to break the law and be prosecuted by the government in 1166. *Id.* at 7. Even then, for a prosecution raised in court, the twelve had to agree they suspected the accused. *Id.* The Grand Jury as a shield against a government run amok first came about in 1681 in the cases of Stephen Colledge and the Earl of Shaftesbury for high treason. Brent Tomer, *Ring Around the Grand Jury: Informing Jurors of the Capital Consequences of Aggravating Factors*, 17 CAP. DEF. J. 61, 65 (2004); *see also* John Langbein, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL, 45 (2003) ("For the years 1660-1800 Beattie found that the Surrey grand juries dismissed 11.5 percent of the bills of indictments for property offenses punishable by death and 17.3 percent of those brought for noncapital property offenses, 14.9 percent for murder, 27.4 percent for infanticide, 25.8 percent for wounding, 44.4 percent for rape." [footnote omitted]).

At the time of this country's founding, colonialists had knowledge of this history and experience with the power of Grand Juries to prevent government abuses, as well as experience with what is known as a preliminary hearing. More importantly, the colonies had experience with something that never took hold in England: local public prosecutors. *See*, Joan E. Jacoby, *The American Prosecutor in Historical Context*, THE PROSECUTOR (1997) (*available at* http://www.mcaa-mn.org/docs/2005/AmericanProsecutorHistoricalContext52705.pdf). While the development of the magistrate's power to dismiss felonies after a preliminary hearing in England is mostly lost, in America, a number of historical writings shed light on what was known to those that adopted the Constitution.

> There are, however, a few known exceptions to English procedure. In Massachusetts the examination procedures seem to have permitted witnesses to be questioned in the presence of the accused. The early New Haven colony departed further from the English model than most colonies. Here the justice, or more often the justices, were formally permitted to dismiss charges when they became convinced of the accused's innocence. In Virginia County, courts initially appear to have examined arrested suspects to determine whether the accused should be tried before the general court. In 1705, a new institution, the examining court, was introduced. After a preliminary

> hearing before a justice of the peace, the case was sent to a special examining court where the accused was again questioned by several justices of the peace. Here the accused was entitled to require the sheriff to summon witnesses on his behalf. Either the accused was released or the case went to the grand jury and eventually to a trial jury. Starke's handbook indicated that this new institution enlarged the means of "coming at the Truth of a supposed Fact" and gave the accused "a third opportunity of Acquittal." Such protections, designed for the "Liberty and Quiet of the Subject," were "not to be boasted in any other Part of the British Dominions."

Barbara J. Shapiro, BEYOND REASONABLE DOUBT AND PROBABLE CAUSE (1991) (*available at* http://publishing.cdlib.org/ucpressebooks/view?docId=ft409nb30v;brand=ucpress) (*citing* Joseph H. Smith, COLONIAL JUSTICE IN WESTERN MASSACHUSETTS, 1639-1672, 145 (1961); William Nelson, AMERICANIZATION OF THE COMMON LAW, 106-107 (1975); Gail Marcus, *Due Execution of the Generall Rules of Righteousnesse': Criminal Proceedings in New Haven Town and Colony, 1638-1658*, in SAINTS AND REVOLUTIONARIES: ESSAYS IN AMERICAN HISTORY, 103, 108 (David Hall ed., 1984); Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, AMERICAN JOURNAL OF LEGAL HISTORY 28, 330 (1982); Hugh F. Rankin, CRIMINAL TRIAL PROCEEDINGS, 78-79 (1965); Richard Starke, OFFICE AND AUTHORITY OF THE JUSTICE OF THE PEACE, 114-115 (1774)).

In spite of their experience with the discretion of the public prosecutor and the protections afforded by preliminary hearings, it was the Grand Jury that the colonists looked to for protection from government abuse. For example, a Grand Jury refused to indict Peter Zenger for seditious libel against the Royal Governor of New York. Roger Fairfax, *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 722 (2008). The royal government would later charge him by information. Robert D. Rucker, *The Right to Ignore the Law: Constitutional Entitlement Versus Judicial Interpretation*, 33 VAL. U. L. REV. 449, 452-53 (1999). After 1776 every state except New Jersey provided a right to a Grand Jury in its Constitution, and every state adopted a statute securing the right. Tomer, 17 CAP. DEF. J. at 67. Thus it is not unsurprising that James Madison included the Grand Jury Clause in the Fifth Amendment, nor is it surprising that the Amendment met no opposition. Akhil Amar, *The Bill of Rights as a Constitution*, 100 YALE L. J. 1131, 1184-85 (1991);

Tomer, 17 CAP. DEF. J. at 67. In fact, the amendment was so popular that Hamilton devoted a Federalist Paper to arguing against it citing essentially the same reason- the need for growth in the law- that the Supreme Court much later found convincing in *Hurtado v. California*, 110 U.S. 516 (1884). THE FEDERALIST NO. 83 (Alexander Hamilton). The Clause prevented the federal government from making an end-run around the Grand Jury when seeking a criminal charge.

But all was not well with grand juries by 1850. Jeremy Bentham strongly argued in Britain that the entire jury system should be abolished. Jeremy Bentham, 1 RATIONALE OF JUDICIAL EVIDENCE 524 (1827); Jeremy Bentham, 2 THE WORKS OF JEREMY BENTHAM 139-40 (John Bowring ed., 1843). American jurists and lawyers were becoming all too aware that grand juries would indict whatever they were told or wanted to indict. Thus, it is unsurprising that the Field Commission wrote in their Code:

> In approaching the subject of the powers and duties of the grand jury, the Commissioners have felt much embarrassment, and have, therefore, devoted to it, the patient and laborious consideration which it demanded. The value of this institution is at the present day variously regarded. By some, it is deemed of the highest importance, as furnishing, by reason of its secrecy, a most valuable aid in the efficient detection and punishment of crime; while, by others, it has been regarded, by reason of that very secrecy, as subversive of the rights, and destructive of the liberty of the citizen.

FIELD CODE at 115.

With this background, it is easy to see why the Field Commission chose to implement new rules for grand juries. FIELD CODE at 124-25. The authors decided that a grand jury should not admit hearsay, that it should be required to look into exculpatory evidence if it comes across any in its investigation, that its decisions should be challengeable, and:

> As a concluding rule on this subject, the grand jury should be distinctly informed by the law, that they ought to find an indictment, when all the evidence, taken to together, is such, as in their judgment would warrant a conviction by the trial jury.

Id. at 125.[1]

This attempt to save the grand jury was adopted by California in its Criminal Practice Act of 1851. *See*, Theodore Hittell, THE GENERAL LAWS OF THE STATE OF CALIFORNIA, FROM 1850 TO 1864, INCLUSIVE, vol. I, 277 (1865) (available at https://www.google.com/books/edition/The_General_Laws_of_the_State_of_Califor/f9o3AAAAIAAJ?hl=en&gbpv=0). Then, as noted above, the Idaho territory copied these laws verbatim, and maintains them all to this day.

In 1862, the California Supreme Court recognized the import of the language of the FIELD CODE. *See, People v. Tinder & Smith*, *supra.* Twenty years later, in *Hurtado v. California*, 110 U.S. 516 (1884), the Supreme Court, likely incorrectly, ruled that the grand jury requirement in the Fifth Amendment did not apply to the states, evidently convinced that the common law way of running grand juries was not worth preserving. Thus 1889, the founders of our Constitution got into an argument about the necessity of a grand jury. PROCEEDINGS AND DEBATES, at 260. It is somewhat evident from the debate that not all parties were fully aware of the controlling law on the issues. One member was apparently not aware *Hurtado* had been decided. *Id.* at 263. More to the point, William Claggett of Shoshone County told the assembly that:

> "...all the grand jury is entitled to do, to say there is probable cause to believe the man is guilty..."

Id. at 266. While it is true that Mr. Claggett was an accomplished criminal defense attorney, it seems clear that he had little experience with the FIELD CODE. *See*, Dennis Colson, IDAHO'S CONSTITUTION, 9 (Special Legis. Ed. 2003) (listing the states and territories Mr. Claggett practiced). His statements to the assembly show he did not know a presentment from an information.

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[1] For additional discussion of the differences between a common law grand jury and that of the FIELD CODE, see *State v. Lawler*, 221 Wis. 423, 267 N.W. 65 (Wis. 1936). It also worth noting that by 1906, Edwards already is apparently unaware that the FIELD CODE birthed the standard and claims it was California Circuit Justice Field. GRAND JURY at 105 (*citing Charge to Grand jury*, 30 Fed. Cas. 992). It is quite clear that he is incorrect, as Justice Field gave this instruction in 1872.

PROCEEDINGS AND DEBATES, at 266. This should be somewhat unsurprising, as California was the first state to adopt the FIELD CODE, largely because Dudley Field (father of the code)'s brother was in the Californian legislature and later was the fifth justice named to its supreme court in 1859. Timothy Sandefur, *Happy Birthday, Stephen J. Field!*, PACIFIC LEGAL FOUNDATION (Nov. 4, 2010) (available at https://pacificlegal.org/happy-birthday-stephen-j-field/). Perhaps also unsurprising- Justice Field authored *People v. Tinder & Smith.*[2]

Regardless of whether Mr. Claggett was aware of the laws of the state he was founding in 1889, the practice of prosecutors in the aftermath showed what is clear from the statutory language- the standard for the grand jury is beyond a reasonable doubt. It appears the first Idaho case to mention this was *Gasper v. District Court*, 74 Idaho 388 (1953). In *Gasper*, a defendant was indicted by a grand jury. The defendant filed various motions to set aside the indictment. The Court found that defendant failed to raise any valid challenges to the indictment. *Id.*, at 390-392. After concluding that defendant failed to raise any valid challenges, the Court quoted an instruction that the grand jury should not find an indictment unless "you are satisfied beyond a reasonable doubt from the evidence from the government presents that the defendant is guilty." *Id.* The Court then said in *dicta* that the instruction "is more favorable to one accused before a grand jury than would be a charge embodying the statute." *Id.* The Court then quoted I.C. § 19-1107, and again said in *dicta*, "[t]he charge as given calls for a greater degree of proof to justify an indictment than the statute requires." *Id.* No further analysis is provided by the Court as to why the two standards would be different; nor does the Court even attempt to identify what the proper standard would be. *Id.*

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[2] It is worth noting that *Tinder* was overruled by *Cummiskey v. Superior Court*, 3 Cal.4th 1018, 839 P.2d 1059 (Cal.1992). That case provides a compelling but highly inaccurate account of *Tinder* and its holding at page 1065-66, as well as pointing out that various other states have refused to honor the statutory language. *Michael v. State,* 805 P.2d 371, 374 (Alaska 1991) (providing no statutory interpretation); *State v. Nordquist,* 309 N.W.2d 109, 117 (N.D.1981) (finding that the word "warrant" does not mean "make certain" and then coming to the conclusion the statute provides no standard at all); *State v. Walley,* 1 Or.App. 189, 460 P.2d 370, 371 (1969) (providing no statutory interpretation). The fact that none of these cases, nor any that counsel can find regarding the FIELD CODE version of the grand jury, actually mentions or considers the FIELD CODE and what its authors openly expressed was their intent, speaks volumes as to the correctness of their interpretations.

The next Idaho case to mention the distinction was *State v. Bullis*, 93 Idaho 749 (1970). In *Bullis*, a defendant was charged via grand jury indictment. The defendant alleged that the grand jury had received hearsay evidence in violation of I.C. § 19-1105. *Id.*, at 753. However, the Court disposed of this argument because: "Appellant has presented no record on appeal of what evidence was before the grand jury." *Id.* Despite disposing of this argument, the Court then made the following comment in *dicta*:

> I.C. § 19-1102 only requires that the grand jury find 'that there is a reasonable ground for believing that a particular individual named or described (in the presentment) has committed (a certain public offense.)'"

Id. No further explanation or citation was given for this statement. The obvious and glaring error in this statement is that the Court did not quote the standard required for finding an indictment, it quoted the statute defining the standard required for the finding of a presentment. Again, no further analysis was provided by the Court as to why it would be quoting the standard used for a presentment, when an indictment was at issue in the case. One possible explanation is that neither party brought to the Court's attention that Idaho actually has two separate statutes defining the standards for indictments vs. presentments; since that question was not presented as an issue on appeal.

Finally, the distinction was again mentioned in *State v. Edmonson*, 113 Idaho 230 (1987). In *Edmonson*, the defendant challenged the grand jury indictment as a violation of his Equal Protection Rights. The Court quickly disposed of this argument by stating that "Edmonson's failure to request a preliminary hearing is dispositive of this case." *Id.*, at 234. However the Court then continued by taking a more in-depth look at the Equal Protection argument. While doing so, the Court made the following comment in *dicta*, "[t]he purpose of both grand jury proceedings and a preliminary hearing is to determine probable cause." *Id.* No explanation or citation was given for this statement. Several pages down, the Court again commented in *dicta* that "[t]he purpose of a grand jury

proceeding is to determine whether sufficient probable cause exists to bind the defendant over for trial." *Id.*, at 236. Again, no explanation or citation was given for this statement. Several pages after this, the Court briefly discussed the issue of prosecutorial misconduct. During this discussion, and again in *dicta*, the Court made the following comment:

> [W]e note that the prosecutor directed the grand jury that it should not indict unless all the elements of an alleged crime are proven beyond a reasonable doubt. This is a much higher standard than is required by Idaho law.

Id., at 268. Again, no explanation or citation was given for this comment. One feasible explanation for why the Court in *Edmonson* was of the belief that only probable cause was required for the finding of an indictment is that by the time *Edmonson* was decided, Idaho had now adopted Criminal Rule 6 which provided that an indictment could be found if there was "probable cause" to believe the accused had committed the crime. The Court did not explicitly cite this rule, but the rule was in effect at the time of *Edmonson.*

This brings us to our next issue.

a. <u>The Idaho Supreme Court cannot adjust the standard of proof as it is a substantive right.</u>

Despite the fact that I.C. § 19-1107 explicitly sets the standard of proof required for an indictment, approximately one hundred years after Idaho codified the standard to be applied our Supreme Court adopted I.C.R. 6.5(a). I.C.R. 6.5(a) states the grand jury ought to find an indictment when there is "probable cause" to believe defendant committed the offense. It is therefore necessary to determine what standard governs; the statute or the criminal rule.

"[T]his Court's rule making power goes to *procedural*, as opposed to *substantive*, rules." *State v. Beam,* 121 Idaho 862, 863 (1992) (emphasis in original). Thus, if a statute speaks towards a substantive right, it will prevail over a contrary criminal rule; but, if a statute speaks only towards a procedural rule, the criminal rule will prevail. *See*, *State v. Currington*, 108 Idaho 539, 541 (1985).

> Although a clear line of demarcation cannot always be delineated between what is substantive and what is procedural, the following general guidelines provide a useful framework for analysis. Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated.

Beam, at 862-64 (*quoting Currington*, at 541 (*quoting State v. Smith,* 84 Wash.2d 498, 501, 527 P.2d 674, 676-77 (1974)).

The standard of proof required for the finding of an indictment is not a procedural right. This standard of proof does not concern the "forms of process, writs, pleadings and motions." I.C. § 1-213. It does not deal with the "manner of service" or "time for appearance." *Id.* Nor is it a matter of "practice and procedure in all actions and proceedings." *Id.* The grand jury statutes set out the substantive rights of every citizen that must be followed before any citizen can be held to answer on a felony charge. This is a substantive right in that it grants every citizen of Idaho the right to not be held to answer on a felony charge unless the standard set out in I.C. §§ 19-1102; 1007 has been met. Were this only a matter of procedure, every citizen of this state would be subject to detention to answer for a felony charge based upon the whims of the Supreme Court.

Standards of proof are considered substantive in every context except apparently in dealing with conflict of laws. The Idaho Supreme Court has found it is a procedural issue and the standard of the forum state applies. *Carroll v. MBNA America Bank*, 148 Idaho 261, 267 (2009) (*citing* RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 133, 135). The United States Supreme Court, meanwhile, vehemently disagrees. *See, e.g., Medtronic, Inc. v. Mirowski Family Ventures, LLC,* 571 U.S. 191 (2014); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942). In 1942, the Court found that the standard of proof is part of the *substance* of a claim "and cannot be considered a mere incident of a form of procedure." *Garrett*, 317 U.S. at 249. The Court has followed that holding in various cases thereafter. *See, Raleigh v. Illinois Dept. of Revenue,* 530 U.S. 15, 20–21, 120 S.Ct. 1951, 147 L.Ed.2d 13

(2000); *Director, Office of Workers' Compensation Programs v. Greenwich Collieries,* 512 U.S. 267, 271, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994).

However, we deal here with criminal law. Counsel can find no case that permits the courts to determine the standard in a criminal matter. Most recently, the United States Supreme Court considered standards regarding defenses in a criminal action, and never once indicated it was not for Congress to set the standard because it is a power belonging to the judiciary. *See, Ruan v. United States*, 142 S.Ct. 2370 (2022). It appears from the authorities that courts set the standard of proof by rule only in situations that are themselves creatures of procedure, like the standard to create a class in a class action (*Binder v. Rainbow Medical Inc.*, 831 So.2d 254 (Fl. Dist. Ct. App. 2002) or the standard to show a past conviction is admissible under the evidentiary rules (*State v. Rendon,* 148 Ariz. 524, 715 P.2d 777 (Ariz. Ct. App. 1986)).

If that were not enough, several important constitutional provisions should be kept in mind when considering whether this standard is substantive. First, our constitution provides that "[a]ll laws now in force in the territory of Idaho…shall remain in force until they…be altered or repealed by the legislature." Idaho Const. Art. XXI, § 2. Second, "[t]he legislature shall pass all necessary laws to carry into effect the provisions of this Constitution." Idaho Const. Art. XXI, § 5. Finally, the right to have a grand jury make either a presentment or indictment finding prior to being held for trial is an Idaho constitutional right. Idaho Const. Art. I, § 8.

These provisions have important implications in this case. First, because I.C. §§ 19-1102; 1107 were in in force at the time our constitution was adopted, they "shall remain in force until they…be altered or repealed by the legislature." Not simply until the judiciary decides to alter them, but until the legislature amends or repeals these statutes.

Second, because the legislature was charged with passing all laws necessary to carry into effect the provisions of our constitution, and because the right to a grand jury presentment or

indictment is most certainly a constitutional right, it necessarily follows that it is the legislature who has the authority to pass laws that will breathe life into that constitutional right. To simply say that a person has a right to a grand jury determination means very little unless we define what a grand jury determination even means. If our constitution simply provided for the right to a grand jury, but no law set out what that meant, or what findings were necessary, the right conferred in Art. I, § 8 would be meaningless. This is why Art. XXI, § 15 leaves it to the legislature to pass laws defining what is meant by this constitutional right. It is not the judiciary that is given the power to "carry into effect" our constitutional rights, it is the legislature.

Third, because the right to a grand jury is preserved in our Constitution, and because at the time our Constitution was adopted §§ 19-1102; 1107 defined what these rights meant, Art. I, § 8 "must be construed in light of the law prior to [its] adoption." *Green*, at 887, 354 P.3d at 449; *see also*, *State v. Clarke*, 165 Idaho 393, 446 P.3d 451 (2019); *State v. Matthews*, 129 Idaho 865, 934 P.2d 931 (1997). What this means is that I.C. §§ 19-1102; 1007 are actually much more than mere substantive statutory rights, they are actually incorporated into, and part of, our substantive constitutional rights to a grand jury.

II. The failure to properly instruct a Grand Jury as to the standard of proof is grounds for dismissal of the Indictment.

Having shown that the jury was provided with the wrong standard of proof, the next question is, what is the remedy? The FIELD CODE adopted a somewhat complex interplay of statutes permitting a defendant to challenge an indictment that Idaho maintains for the most part. I.C. § 19-1601 provides:

> GROUNDS FOR SETTING ASIDE INDICTMENT. The Indictment must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases:
>
> 1. When it is not found, endorsed and presented as prescribed in this code.

> 2. When the names of the witnesses examined before the grand jury, or whose depositions may have been read before them, are not inserted at the foot of the indictment, or endorsed thereon.
>
> 3. When a person is permitted to be present during the session of the grand jury, and when the charge embraced in the indictment is under consideration, except as provided in chapter 11 of this title.
>
> 4. When the defendant has not been held to answer before the finding of the indictment, on any ground which would have been good ground for challenge, either to the panel or to any individual grand juror.

I.C. § 19-2408, provides in pertinent part:

> A motion in arrest of judgment is an application on the part of the defendant that no judgment be rendered on a plea or verdict of guilty, or on a verdict against the defendant on a plea of a former conviction or acquittal. It may be founded on any of the defects in the indictment that are grounds of demurrer, unless the objection to the indictment has been waived by a failure to demur, and must be made before or at the time the defendant is called for judgment.

Neither of these statutes was intended to create a mechanism for challenging the instructions given to the jury. The Court of Appeals of New York found as much, but concluded that defendants could still move to quash a warrant where the proceedings intrude on their constitutional rights. *See, People v. Glen,* 66 N.E. 112, 114-15 (N.Y. 1903). The Court then found that a showing that an instruction was prejudicial may require an indictment to be quashed. *Id.*

Idaho's Supreme Court had adopted this holding. *See*, *Gasper*, 74 Idaho at 396.

So what prejudice results from telling a jury the wrong standard? Typically, courts give the jury a standard and it is expect to follow it even where attorneys may misstate that standard in their arguments. *See*, *Glen*, 66 N.E. at 115 (finding no prejudice from defective instruction in part because jury previously told proper standard). Unfortunately, that did not happen here. Where a jury has been misled as to the standard to the defendant's detriment, courts find fundamental error, because the error goes to the foundation of the case and takes away an essential right. *See*, *State v. Erickson*, 148 Idaho 679, 685 (Ct.App.2010) (*citing State v. Raudebaugh*, 124 Idaho 758, 769 (1993)). Because the grand jury in this matter was only informed of the improper standard, it was fundamental error,

necessarily depriving Mr. Kohberger of an essential right. Fundamental error necessitates reversal, or in this case, dismissal of the indictment. *Sullivan v. Louisiana,* 508 U.S. 275, 280 (1993).

a. The Grand Jury was erroneously instructed with the standard required for a Presentment, thus this Court could treat the Indictment as a Presentment.

There is one final wrinkle in this error that is worth considering. As mentioned above, there is in Idaho a thing called a presentment. It does not appear from the authorities in Idaho that this thing is well understood, however, in the words of one Justice, it is the only sort of accusation any grand jury in Idaho has ever produced. *Edmonson*, 113 Idaho at 242 (BISTLINE, J., dissenting).

For the information of the Court and the bar, a presentment is what our United States Supreme Court would call a "term of art." *U.S. v. Hansen*, --- S.Ct. ----, 2023 WL 4138994, at *5-*8 (2023). Thus, although it never receives definition in the code, it has a definition that comes to us from the FIELD CODE. The Field Commission explains:

> The Commissioners have … proposed two modes of proceeding, upon the action of the grand jury; first, that where the defendant has bee held to answer the charge, and in no other case, the grand jury may, if they believe him guilty, find an indictment against him; second, that if, upon investigation of a charge against him, whether originated by themselves or presented by another, they believes his is guilty of a public offense, they must proceed by presentment. The presentment is an informal statement by the grand jury, representing that a public offense has been committed which is triable within the county and that there is reasonable ground for believing the defendant has committed it. *Sec.* 256, 257. Upon the former, he is of course to be held for trial; but upon the latter, he is only to be held for examination before a magistrate, in the same manner as if and information had been given to the magistrate in the first instance, and with the same opportunity for explanation or defence. [sic]
>
> These provisions, though new in practice, are in principle no innovations. In the criminal code recently adopted in Virginia, a similar provision is contained. *Laws of Virginia*, 1848, *page* 145, sec. 16. And it may be safely asserted, that the principle contained in them is in consonance with the common law itself. In a late case in Pennsylvania, the office of a grand jury was stated by judge King, to be confined to the examination of such cases as were presented by the attorney general, after previous binding over by a committing magistrate. This doctrine was held, in a case where a communication had been received from the grand jury, stating that charges had been made by one of their number, to the effect that one or more members of a

> public trust had been guilty of converting to their own use public money, and asking that witnesses should be furnished to them to enable them to examine the charge.
>
> ...
>
> The spirit of the rule... is embodied and carried out in the provisions proposed by the Commissioners, continuing in the grand jury, all their powers in respect to the investigation of charges of crime. It is proposed to guard against hasty and ill advised accusations, by giving to the defendant, upon presentment by the grand jury, (where he has not been already held to answer,) [sic] the same opportunity of answering or explaining the charge, as if he had been proceeded against by an information before a magistrate; while, on the other hand, he is to be committed or bailed, upon the presentment, in precisely the same manner as upon an indictment. In this manner the rights of the defendant are protected, and the demands of public justice are abundantly answered.

FIELD CODE at 119-120. Note, the presentment originates within the grand jury, requires a lower standard of proof, and requires a preliminary hearing because of it.[3]

i. A Presentment permits the Defendant to a request a Preliminary Hearing.

Pursuant to I.C. § 19-1207, a magistrate is to proceed on a presentment as if it were an information. At first glance, this likely appears to undo much of what has come before. After all, if a presentment is an information, then it already has had a preliminary hearing.

However, history being what it is, things are not so simple. In 1887 when the Revised Statutes were adopted, an information was the same as a complaint. *See* Revised Stat. (R.S.) Sec. 7380, 7381, 7509-32 (1887). *See also State v. Stafford*, 26 Idaho 381, 143 P. 528, 530 (1914) ("An information or a complaint is a paper charging a defendant with a particular offense, and it matters not whether it is called an information or a complaint.") Once arrested on an information, a defendant had a preliminary hearing, referred to at that time as an "examination." *See* Revised Stat. (R.S.) Sec. 7525, 7570. It was not until the code was revised (certainly not for the first time) in 1969 that the terms became truly separate. *See*, S.L. 1969, ch. 79, § 1. Additionally, even in 1887, the word

[3] For a discussion of how presentments and indictments operated in the common law, see GRAND JURY, at 130. In most jurisdiction, the presentment formed a basis for an indictment, and was not a charging document to which a defendant would enter a plea.

"complaint" was solely used in the code when discussing misdemeanors, while an information or complaint referred to a felony, at least in magistrate court. *Compare*, Revised Stat. (R.S.) Sec. 7531 *with* Revised Stat. (R.S.) Sec. 8280 (1887).

Thus, the question becomes- did the legislature change Chapter 5 and leave Chapter 12 alone to purposefully turn a presentment into an indictment? The answer is clearly no. Although the purpose of the individual bill seems lost to posterity, the 1966 court modernization plan and the 1969 court reforms are still extant. In 1966, the legislature wanted a modern court system. Part of that plan was to do away with justices of the peace, police courts, and probate courts and have a two-tier trial court system. According to the Committee on Court Study, the intention was:

> District Courts and Magistrates
>
> The third major area of concern of the committee on courts and the advisory committee was to provide for a two-level system of courts in Idaho. This is the heart of the preliminary report. It encompasses proposals that some may consider a radical break with tradition. However, the committee on courts and the advisory committee feel that this is a logical step that must be taken to put into effect the clearly expressed wishes of Idaho voters when they adopted a constitutional amendment in 1962 to provide for a "unified and integrated judicial system".
>
> The proposals contained in this section of the preliminary report have been prepared in separate sections for easier study. This section includes proposals to abolish the present probate, justice of the peace and police courts; to create a system of district court magistrates appointed by district judges, to define more clearly the duties and authority in administrative matters of the senior district judge; to re-enact provisions for a small claims department of the magistrates division; and to change the method of paying for the costs of jury trials in the district court from the county to the state.

COMMITTEE ON COURT STUDY, 39TH IDAHO LEG., COURT MODERNIZATION IN IDAHO (RESEARCH PUB. N. 10), at 66 (1966). That plan never mentions the intention to make it clear that complaints and informations are separate, but it does mention that the Colorado system does so. *Id.* at 7.

In 1969, much of the court reform recommended was made into law. *See, generally*, IDAHO SESSION LAWS 1969, at 1459-60. Although the purpose of bill 79 is not in the session laws, its title in the index is "Complaint, definition, contents, transmission, delivery" as well as "Complaint,

Examination of person lodging". *Id.* at 1461. Additionally, the legislature amended much of Chapter 8 via S.L. 1969, Ch. 467, to create the modern preliminary hearing (replete with new references to the complaint). No laws were passed affecting functioning of the grand jury.

Since 1969, the legislature made various adjustments to criminal procedure. However, not one law pertaining to a presentment has been passed since 1919. *See* Idaho C.S. 1919 §§ 8802 – 08.

For these reasons, it is clear that I.C. § 19-1207 still intends for a presentment to be treated as we would now treat a complaint containing a felony. Thus, if this Court sees fit, it could simply remand the matter to the magistrate for the necessary preliminary hearing, rather than going through a dismissal and having to determine whether the matter may be resubmitted to the grand jury. I.C. §§ 19-1603 & 1604.

CONCLUSION

Over 150 years ago, Idaho joined the state of California in adopting the FIELD CODE, thereby adopting reforms to the grand jury system intended to restore to that system its function as a bulwark for freedom. The strange history that follows in this state, just as every other state with the same statutory scheme, is both tragic and unconstitutional. No court had the power to decide that the legislature had made it too hard for grand juries to do their work and change the sufficiency of evidence required to indict. Mr. Kohberger is asking this Court to recognize the long string of error that lead us here, and give back the people of this state the protections they are owed.

The indictment in this matter should be dismissed, or remanded for a preliminary hearing.

DATED this 24 day of July, 2023.

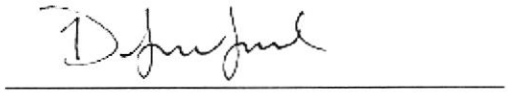
ANNE C. TAYLOR, PUBLIC DEFENDER
KOOTENAI COUNTY PUBLIC DEFENDER

BY: Jay Logsdon
JAY WESTON LOGSDON
CHIEF DEPUTY LITIGATION

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served as indicated below on the ___25____ day of July, 2023 addressed to:

Latah County Prosecuting Attorney –via iCourt: paservice@latahcountyid.gov



Under Seal with the Court:

Attachments attached to Motion to Dismiss Indictment on Grounds of Error in Grand Jury Instructions or in the Alternative Remand for Preliminary Hearing