STATE OF IDAHO)
County of KOOTENAI)ss
FILED 8/13/2020
AT 11:20 O'clock A. M
CLERK, DISTRICT COURT
Deputy

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

STATE OF IDAHO, *Plaintiff,*
vs.
SHIREE LYNN WELCH, *Defendant.*

Case No. **CR28-20-3146**

MEMORANDUM DECISION AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS

STATE OF IDAHO)
County of KOOTENAI)ss
FILED 8/13/2020
AT 11:20 O'clock A M
CLERK, DISTRICT COURT
Deputy

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

STATE OF IDAHO, *Plaintiff,*
vs.
JACOB TAYLOR RANIER, *Defendant.*

Case No. **CR28-20-7600**

MEMORANDUM DECISION AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS

Defendants SHIREE LYNN WELCH's and JACOB TAYLOR RANIER'S Motions to Dismiss are **DENIED**.
Tristan Poorman (Welch) and Rebecca Perez (Ranier), Dep. Prosecuting Attorney, lawyers for the Plaintiff.
Benjamin Onosko Coeur d'Alene, lawyer for Defendant Welch and Ranier.

****

I. FACTUAL BACKGROUND.

On June 30, 2020, an Information was filed in *State v. Shiree Lynn Welch* (*Welch*), Kootenai County Case No. CR28-20-3146, charging her with one count of felony Failure to

STATE OF IDAHO)
County of KOOTENAI)ss
FILED_____
AT_____ O'clock ____M
CLERK, DISTRICT COURT

_____
Deputy

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

STATE OF IDAHO,
Plaintiff,
vs.
SHIREE LYNN WELCH,
Defendant.

Case No. **CR28-20-3146**

MEMORANDUM DECISION AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS

STATE OF IDAHO)
County of KOOTENAI)ss
FILED_____
AT_____ O'clock ____M
CLERK, DISTRICT COURT

_____
Deputy

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

STATE OF IDAHO,
Plaintiff,
vs.
JACOB TAYLOR RANIER,
Defendant.

Case No. **CR28-20-7600**

MEMORANDUM DECISION AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS

Defendants SHIREE LYNN WELCH's and JACOB TAYLOR RANIER'S Motions to Dismiss are **DENIED**.
Tristan Poorman (Welch) and Rebecca Perez (Ranier), Dep. Prosecuting Attorney, lawyers for the Plaintiff.
Benjamin Onosko Coeur d'Alene, lawyer for Defendant Welch and Ranier.

****

I. FACTUAL BACKGROUND.

On June 30, 2020, an Information was filed in *State v. Shiree Lynn Welch* (*Welch*), Kootenai County Case No. CR28-20-3146, charging her with one count of felony Failure to

Notify of Address Change, I.C. § 18-8309. On July 2, 2020, an Information was filed in *State v. Jacob Taylor Ranier* (*Ranier*), Kootenai County Case No. CR28-20-7600, charging him with one count of felony Aggravated Battery, I.C. § 18-903, 18-907(1)(a), one count of felony Injury to Child, § 18-1501(1),and one count of misdemeanor Possession of Marijuana, I.C. § 37-2732(c)(3). To give Ranier some context, following a heated argument, Ranier was chasing the mother of his child, each were driving separate cars. Ranier's child was in the vehicle being driven by the mother. While the mother was stopped at an intersection, Ranier drove into the back of the mother's stopped car, causing extensive damage to her car, and causing the mother to be examined by a firefighter and a paramedic, given a neck brace, placed on a gurney and taken away by ambulance.

On July 15, 2020, counsel for Welch filed her Motion to Dismiss (which contains briefing) in her case, and on that same date, counsel for Ranier (the same attorney in both cases) filed a Motion to Dismiss (also containing briefing) in his case. In that motion in both cases, counsel for defendants claims:

> COMES NOW, Jacob Rainier [Shiree Welch], by and through their attorney, Benjamin Onosko, Deputy Public Defender, and hereby moves this Court for an Order Dismissing the above entitled action for the reason that Defendant was not afforded his statutory and constitutional right to a true preliminary hearing.

Mot. to Dismiss 1. Counsel for defendants argues that a Zoom preliminary hearing violates defendants' statutory right under Idaho Code § 19-808 which states, "The witness for the prosecution must be examined under oath in the presence of the defendant, and may be cross-examined in his behalf". *Id.* at 2. Counsel for defendants also argues that a Zoom preliminary hearing violates defendants' right to confront witnesses under Article 1 Section 8 of the Idaho Constitution, even though counsel for defendants acknowledges that, "Idaho has never decided whether the constitutional right to confront witnesses applies to its

preliminary hearings. *See State v. Davis*, 152 Idaho 652, 655 (Ct. App. 2011)." *Id.* at 6.

The brief filed by defendants in each case is identical, save for the caption and save for the claim in *Ranier* that "At that [June 23, 2020] hearing, Mr. Rainier requested the Court hold her preliminary hearing in person. That request was denied." *Id.* at 2. Welch's preliminary hearing was held on June 26, 2020. *Id.* On August 5, 2020, counsel for plaintiff in *Ranier* (Rebecca Perez) filed State's Brief in Opposition to Motion to Dismiss, and on August 6, 2020, counsel for plaintiff in Welch (Tristan Poorman) filed State's Brief in Opposition to Defendant's Motion to Dismiss. Counsel for defendant did not file any reply brief in either case.

Oral argument on the motions to dismiss was held in *Welch* on August 11, 2020, and in *Ranier* on August 12, 2020. At oral argument in *Welch*, the only additional issue raised by counsel for Welch was the argument that the device used by Welch to participate in her June 26, 2020, Zoom preliminary hearing did not have its video on or did not have the capacity to have video. The Court notes that no objection as to this issue was made by counsel for Welch at that June 26, 2020, Zoom preliminary hearing, even though it was clear from the record that the situation existed. What is not clear from the transcript of that hearing is whether the situation was, 1) the Magistrate Judge could not see Welch but Welch could see the Magistrate Judge, her attorney, the plaintiff's attorney and the two witnesses (where Welch's device had no camera), or 2) Welch could not see the witnesses but could hear them (where Welch's device had neither the ability to receive video or to transmit video). The transcript shows the following:

> THE COURT: This is CR28-20-3146. Mr. Onosko is present for the defense. And is Ms. Welch present?
> MR. ONOSKO: Yes, Judge.
> THE COURT: Is she the 6851 number?
> MR. ONOSKO: Yes.

THE DEFENDANT: Yes.
THE COURT: Ms. Welch, do you have a video capability?
THE DEFENDANT: I do not.
THE COURT: I thought everybody had video capability. All right. Any preliminary matters, Mr. Onosko?
MR. ONOSKO: No, your Honor.
THE COURT: Any preliminary matters, Mr. Mortensen?
MR. MORTENSEN: No, your Honor.

Welch June 26, 2020, Prelim. Hr'g Tr. 3, Ll. 5-21. What is clear is that at no point did counsel for Welch object to the Zoom preliminary hearing, or object to the fact that at least the Court could not see Welch (who did not testify). Also, at the time of the preliminary hearing in *Welch*, bailiffs in Kootenai County have devices available for anyone who asks, to be able to participate in Zoom with both audio and video.

At the August 11, 2020, oral argument in *Welch* before this Court, counsel for Welch repeatedly stated that it was not his duty to object to the process, that it was error by the magistrate judge and the case must be dismissed. That is certainly not what the Idaho Supreme Court held in *State v. Ruddell*, 97 Idaho 436, 546 P.2d 391 (1976). "While the power to correct error and supply deficiency is left to the sound discretion of the judge, it is stated in *Pac. Finance Corp. of Cal. v. LaMonte*, [64 Idaho 438, 133 P.2d 921 (1943)] supra, that correction must be made in the court where the error occurred." 97 Idaho at 438, 546 P.2d at 393. In other words, it is incumbent upon Onosko, counsel for Welch, to have made the objection to the magistrate, not to the undersigned in a motion to dismiss. This will be discussed in more detail below.

At oral argument in *Ranier* on August 12, 2020, the only additional point raised by counsel for Ranier was that the alleged victim in that case testified dishonestly, and had the testimony been in-person the magistrate would have been more able to fully judge her credibility. After the August 12, 2020, hearing, the Court re-read the transcript from the

June 25, 2020, preliminary hearing. That transcript shows the alleged victim in *Ranier* testified that just prior to Ranier hitting her vehicle in which she was stopped at a stop light, Ranier appeared to be "speeding up." *Ranier* June 25, 2020, Prelim. Hr'g Tr. 15, L. 24 – p. 16, L. 11. On cross-examination by counsel for Ranier, the alleged victim testified there was no braking on Ranier's part. *Id.* 25, L. 22 – 26, L. 2. The alleged victim testified that the skid marks at the scene were caused by her vehicle. *Id.* 26, Ll. 13-18.

Welch and *Ranier* are currently set for jury trials beginning September 21, 2020.

II. STANDARD OF REVIEW.

In neither case does counsel for defendants favor the Court or plaintiff with the rule basis for his motions. The only rule that would apply would by I.C.R. 12(b)(1), "defenses and objections based on defects in the prior proceedings in the prosecution." Given that context, defendant is timely in filing its motion in both cases under I.C.R. 12(d), as Ranier pled not guilty on July 26, 2020, and Welch pled not guilty on July 27, 2020.

This Court finds defendant's motion to dismiss in each case only presents issues of law. Idaho appellate courts freely review the the application of constitutional principles to the facts as found. *State v. Stewart*, 152 Idaho 868, 869, 276 P.3d 740, 741 (Ct. App. 2012) (citing *State v. Atkinson,* 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct.App.1996)). Idaho appellate courts will freely review whether the trial court's determination as to whether constitutional requirements were satisfied in light of the facts. *State v. Whiteley,* 124 Idaho 261, 264, 858 P.2d 800, 803 (Ct. App. 1993).

III. ANALYSIS.

A. DISMISSAL IS NOT THE APPROPRIATE REMEDY AT THIS POINT.

This Court finds that even if this Court were to decide these motions on the merits (that a Zoom preliminary hearing violates a defendant's statutory and constitutional rights),

dismissal at this juncture would be improper. Two cases are instructive. Both of these cases state that if the defendant receives a fair jury trial, then any irregularities at the preliminary hearing are of no consequence.

In *State v. Mitchell*, 104 Idaho 493, 660 P.2d 1336 (1983), the Idaho Supreme Court discussed arguments by the defendant/appellant that some of the evidence heard by the magistrate at the preliminary hearing was inadmissible, and held:

> Nevertheless, in *State v. Watson,* 99 Idaho 694, 587 P.2d 835 (1978), we held that "[w]here an arrest warrant has been issued without a magistrate's finding of probable cause, the illegality of such an arrest ... does not invalidate a conviction which results from a fair trial of the issue of guilt." *Id.* at 697, 587 P.2d at 838. *See also State v. Alger,* 100 Idaho 675, 603 P.2d 1009 (1979); *State v. Lindner,* 100 Idaho 37, 592 P.2d 852 (1979). Similarly, we hold that even if the magistrate erred in relying on evidence at the preliminary hearing that is ultimately determined to be inadmissible, the error is not a ground for vacating a conviction where the appellant received a fair trial and was convicted, and there is sufficient evidence to sustain the conviction. *See also Gerstein v. Pugh,* 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975) (conviction will not be vacated on the ground that defendant was detained without probable cause determination).

104 Idaho at 500, 660 P.2d 1343. In *State v. Pratt*, 125 Idaho 546, 875 P.2d 800 (1993) the Idaho Supreme Court found *Mitchell* to have been well decided, and held.

> Where a defendant receives a fair trial, errors connected with the preliminary hearing will afford no basis for disturbing the judgment of conviction. *State v. Mitchell,* 104 Idaho 493, 660 P.2d 1336, *cert. denied,* 461 U.S. 934, 103 S.Ct. 2101, 77 L.Ed.2d 308 (1983).

125 Idaho at 556, 875 P.2d at 810. As noted above, these cases are scheduled for a jury trial. Thus, even if it were legal error for the magistrate in each case to have proceeded with a preliminary hearing via Zoom, dismissal at this time is not the appropriate remedy. For that reason alone, defendants' motions to dismiss in each case must be denied.

Counsel for defendants in each case cites *State v. Braithwaite*, 2 Idaho 857, 3 Hasb. 119 [27 P. 731] (1891), and *State v. Ruddell*, 97 Idaho 436, 546 P.2d 391 (1976), for

the argument that dismissal is the appropriate remedy when there is an improper preliminary hearing. Mot. to Dismiss 4-5. Counsel for defendant writes, "Because the magistrate did not have the power to disregard Mr. Ranier's [Ms. Welch's] statutory rights, and because Idaho case law indicates the appropriate remedy for not affording a defendant a proper preliminary hearing is dismissal of the Information, Defendant requests the court dismiss this Information." *Id.* at 5. Defendants' argument is not supported by a plain reading of *Braithwaite* and *Ruddell.* Thus, neither case supports defendants' argument that dismissal of each of the present cases is the appropriate remedy. This Court also finds that neither *Braithwaite* nor *Ruddell* are inconsistent with *Mitchell* and *Pratt* which came later. *Braithwaite* concerned a preliminary hearing which apparently did not really take place, and the only proof submitted to the magistrate consisted of two depositions in which no questions were asked of the deponents. "The depositions of John G. Brown and C. Devinney are the only depositions contained in the record, neither of which contains a question put to the witnesses." 3 Hasb. 120. The Idaho Supreme Court in *Braithwaite* held if no evidence is submitted to the magistrate, no preliminary hearing has been held, the district court has no jurisdiction and the judgment of the district court was reversed. 3 Hasb. 122. Even under those circumstances, the Idaho Supreme Court did not dismiss the case. *Id.* Dismissal is also the wrong remedy under *Ruddell.* As mentioned above, at oral argument in *Welch*, defendant's attorney Onosko argued repeatedly that dismissal of the case is the appropriate remedy for the magistrate conducting a Zoom preliminary hearing, even though Onosko did not object to such at the time of the preliminary hearing. It appears Onosko has also ignored the ultimate finding in *Ruddell.* In that case the court reporter would not certify the incredibly poor audio recording of the preliminary hearing. After the preliminary hearing the case went to trial

and Ruddell was convicted of escape from the state penitentiary. On appeal, due to the fact that there was no certified record, there was no basis to review the magistrate's determination of probable cause. 97 Idaho at 439, 546 P.2d at 394. The remedy was not dismissal, as Onosko argued in *Welch*, the remedy was:

> Accordingly, we reverse and remand for further proceedings which shall include a new preliminary hearing and if probable cause is found thereat, a new trial. In the event that the district court determines that the same witness with the same speech difficulties is of critical importance at the preliminary hearing, he shall then order that the proceedings be taken and transcribed by a competent court reporter.

Id. Thus, even if this Court could somehow find that even though Onosko did not object to the Zoom proceeding (in *Welch*), and that it was incumbent upon the magistrate to intuit and discern that three words ("in the presence") found in I.C. § 19-808 prohibit Zoom preliminary hearings (even though the Idaho Supreme Court mandated such unless undue prejudice was shown), the remedy would be remand back to the magistrate, not dismissal.

In the present two cases, this Court notes that there are preliminary hearing transcripts made from the audio recording of the Zoom proceedings which show no difficulties in the Court Reporter's ability to hear exactly what was being said by all participants at the preliminary hearings in *Welch* on June 26, 2020, and in *Ranier* on June 23, 2020.

If the Idaho statue governing preliminary hearings (preliminary examination), I.C. § 19-804, were violated, as discussed in *Ruddell* and *Braithwaite* (interpreting § 7576 of the Revised Statutes of Idaho, predecessor to I.C. § 19-804), then this Court may lack jurisdiction. And if that were the case, *Ruddell, Braithwaite, Mitchell* and *Pratt* each show dismissal would be the inappropriate remedy. But defendants' argument in the present cases is even more unsubstantiated. The defendants in the present cases do not claim

that I.C. § 19-804 regarding the preliminary hearing process was violated, they only claim a different statute, I.C. § 19-808, was violated (an argument discussed immediately below), which states that witnesses for the prosecution must be examined under oath in the presence of the defendant. Because there is no claim that I.C. § 19-804 was violated, dismissal is even more clearly not the appropriate remedy in *Ranier* and *Welch*. Additionally, this Court finds that I.C. § 19-808 was not violated in either of the instant two cases.

Idaho Code § 19-804 provides several required sequential procedures take place in a preliminary hearing. It is no surprise then that there is quite a bit of appellate case law interpreting that statute. Idaho Code § 19-808 on the other hand contains one concept in its one sentence, "The witnesses for the prosecution must be examined under oath in the presence of the defendant and may be cross-examined in his behalf." There are only three appellate cases referencing that statute, none of those three interpret what is meant by the phrase, "in the presence of the defendant." One of those cases, *In re Hollingsworth*, 49 Idaho 455, 289 P. 607 (1930) stated, regarding the magistrate hearing a co-conspirator's testimony:

> This was only a preliminary examination. This court has held, "A preliminary examination is not in any sense a trial but its only purpose is to ascertain whether a crime has been committed and whether there is probable cause for believing that the accused is guilty thereof and should be tried therefor." *State v. Bond*, 12 Idaho, 424, 86 P. 43. In the reception of evidence the committing magistrate is not governed by the technical rules obtaining on a final trial. 16 C. J. p. 325.

49 Idaho at 456, 289 P. at 608. Given the fact that the preliminary hearing in each of the present cases was "not in any sense a trial" and was for the sole purpose of ascertaining whether a crime was committed and whether there is probable cause that the defendant in each case is guilty of that crime, dismissal of the case cannot be the appropriate remedy.

For all the above reasons, this Court finds as a matter of law that even if this Court were to decide these motions on the merits (that a Zoom preliminary hearing violates a defendant's statutory and constitutional rights), dismissal at this juncture is not the proper remedy. For that reason alone, defendants' motions to dismiss in each of the present cases must be denied.

B. WELCH WAIVED ANY CHALLENGE TO THE ZOOM PRELIMINARY HEARING; RANIER PROVIDED NO BASIS FOR A MAGISTRATE JUDGE TO DETERMINE UNDUE PREJUDICE.

Before the magistrate judge, counsel for Ranier requested an in-person preliminary hearing, and made oblique argument about such. However, even at the end of the preliminary hearing, counsel for Ranier failed to make any argument as to why Ranier's rights were prejudiced by a Zoom preliminary hearing.

Counsel for Welch did not bring up the issue with the magistrate judge, either before the hearing started or at the end in argument, nor did counsel for Welch make any objection to the use of a Zoom preliminary hearing or insist on Welch's right to an in-person preliminary hearing. June 26, 2020, Preliminary Hearing Tr. 41, L. 9 - 47, L.12. This constitutes a waiver of any argument that Welch or had her rights prejudiced by a Zoom hearing.

"Defenses and objections based on defects in the information, other than the failure to state a charge or the lack of jurisdiction of the court, must be raised prior to trial. I.C.R. 12(b)(2). As pertains to a preliminary hearing, the trial is the preliminary hearing. Failure to raise the issue waives it. *State v. Segovia,* 93 Idaho 594, 468 P.2d 660 (1970)." *Noel v. State*, 113 Idaho 92, 94, 741 P.2d 728, 730 (Ct. App. 1987). *State v. Perry*, 150 Idaho 209, 245 P.3d 961 (2010) provides some history to this somewhat shifting issue, and it provides a very detailed analysis of this issue:

Generally Idaho's appellate courts will not consider error not preserved for appeal through an objection at trial. *State v. Johnson,* 126 Idaho 892, 896, 894 P.2d 125, 129 (1995). "This limitation on appellate-court authority serves to induce the timely raising of claims and objections, which gives the [trial] court the opportunity to consider and resolve them." *Puckett v. U.S.,* 556 U.S. 129, ——, 129 S.Ct. 1423, 1428, 173 L.Ed.2d 266, 274 (2009). Ordinarily, the trial court is in the best position to determine the relevant facts and to adjudicate the dispute. *Id.* "In the case of an actual or invited procedural error, the [trial] court can often correct or avoid the mistake so that it cannot possibly affect the ultimate outcome." *Id.* Furthermore, requiring a contemporaneous objection prevents the litigant from sandbagging the court, i.e., "remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor." *Id.* However, every defendant has a Fourteenth Amendment right to due process and "[i]t is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.' " *Caperton v. A.T. Massey Coal Co., Inc.,* 556U.S. 868, ——, 129 S.Ct. 2252, 2259, 173 L.Ed.2d 1208, 1217 (2009) (quoting *In re Murchison,* 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942, 946 (1955)). Accordingly, when an error has not been properly preserved for appeal through objection at trial, the appellate court's authority to remedy that error is strictly circumscribed to cases where the error results in the defendant being deprived of his or her Fourteenth Amendment due process right to a fair trial in a fair tribunal. *See State v. Field,* 144 Idaho 559, 571, 165 P.3d 273, 285 (2007).

The U.S. Supreme Court has never held that the U.S. Constitution requires state courts to provide appellate review for instances of unobjected to violations of constitutionally protected rights. Nevertheless we choose to consider the U.S. Supreme Court's application of the statutorily-derived plain error review and how it compares with Idaho's traditional fundamental error review.

The federal courts, like Idaho, follow the procedural principle that an issue raised for the first time on appeal will not be considered on appeal. However, Federal Rule of Criminal Procedure 52(b) provides federal appellate courts with limited power to correct errors even in the absence of a timely objection before the trial court. Federal Rule of Criminal Procedure 52(b) states: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." In applying plain error review the U.S. Supreme Court has recognized the strong societal interest in finality of judgments, and the associated incentive that must be given for defendants to properly object before a trial court, as that body is best suited to deal with potential error at trial, before a verdict has been reached. *See Puckett v. U.S.,* 556 U.S. 129, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009). However, the Court has also recognized that this public policy must be balanced with the sense of fundamental justice inherent in the concept of a fair trial. *See id.*

Based upon this framework the U.S. Supreme Court devised a

three-prong threshold inquiry for determining when appellate courts should reverse on the grounds of unobjected to error. *U.S. v. Olano,* 507 U.S. 725, 732–35, 113 S.Ct. 1770, 1776–78, 123 L.Ed.2d 508, 518–20 (1993). First, the defendant must have had one of his rights violated, a right which he did not waive. *Id.* at 732–33, 113 S.Ct. at 1777, 123 L.Ed.2d at 518–19 ("Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.' " (quoting *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461, 1466 (1938))). Second, the error must be "plain" which "is synonymous with 'clear' or, equivalently, 'obvious.' " *Id.* at 734, 113 S.Ct. at 1777, 123 L.Ed.2d at 519. Third, the error must affect substantial rights, meaning (in most instances) that it must have affected the outcome of the trial court proceedings. *Id.* This third prong is equivalent to the analysis applied in *Chapman* harmless error review, with one important difference. In harmless error review the burden of persuasion is on the State to demonstrate that the constitutional violation did not affect the outcome of the case. In plain error review the burden is upon the defendant to demonstrate that the error *did* affect the outcome. As stated by the U.S. Supreme Court:

> When the defendant has made a timely objection to an error and Rule 52(a) applies, a court of appeals normally engages in a specific analysis of the district court record—a so-called "harmless error" inquiry—to determine whether the error was prejudicial. Rule 52(b) normally requires the same kind of inquiry, with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. In most cases, a court of appeals cannot correct the forfeited error unless the defendant shows that the error was prejudicial. This burden shifting is dictated by a subtle but important difference in language between the two parts of Rule 52: While Rule 52(a) precludes error correction only if the error "does *not* affect substantial rights," ... Rule 52(b) authorizes no remedy unless the error *does* "affec[t] substantial rights."

Id. at 734–35, 113 S.Ct. at 1778, 123 L.Ed.2d at 519–20 (citations omitted). The reason the parenthetical-(in most instances)-was inserted into the third prong above is because the U.S. Supreme Court in *Olano* declined to determine whether unobjected to constitutional violations rising to the level of structural defects will satisfy the "affect substantial rights" prong without a showing of actual affect on the outcome of the case. *Id.* at 735, 113 S.Ct. at 1778, 123 L.Ed.2d at 520. *See also Puckett v. U.S.,* 556U.S. 129, ——, 129 S.Ct. 1423, 1432, 173 L.Ed.2d 266, 278 (2009). Finally, the U.S. Supreme Court in *Olano* held that even where the defendant has met his burden under the three-prong threshold test, an appellate court should still only reverse where the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at

736, 113 S.Ct. at 1779, 123 L.Ed.2d at 521 (alteration in the original) (internal quotation omitted).

Although the Idaho Rules of Criminal Procedure do not contain the equivalent of Rule 52(b), Idaho Rule of Evidence 103(d) does state that nothing under the rules shall preclude an appellate court from " taking notice of plain errors affecting substantial rights." We have long held that instances of unobjected to fundamental error would be subject to review on appeal. *State v. Haggard,* 94 Idaho 249, 251, 486 P.2d 260, 262 (1971) ("In case of fundamental error in a criminal case the Supreme Court may consider the [error] even though no objection had been made at time of trial."). Where the federal courts employ the plain error doctrine, Idaho courts employ the fundamental error doctrine.

Idaho has limited appellate review of unobjected-to error to cases wherein the defendant has alleged the violation of a constitutionally protected right. *State v. Kirkwood,* 111 Idaho 623, 625–26, 726 P.2d 735, 737–38 (1986). We have stated that "where ... the asserted error relates not to infringement upon a constitutional right, but to violation of a rule or statute ... the 'fundamental error' doctrine is not invoked." Id. at 626, 726 P.2d at 738 (quoting *State v. Kelly,* 106 Idaho 268, 277, 678 P.2d 60, 69 (Ct.App.1984)). In other words, contrary to the federal plain error rule, in Idaho a trial error that does not violate one or more of the defendant's constitutionally protected rights is not subject to reversal under the fundamental error doctrine. *See State v. Anderson,* 144 Idaho 743, 749, 170 P.3d 886, 892 (2007).

The State of Idaho shares the same conflicting interests as the federal government when it comes to review of unobjected to error, and we find that the U.S. Supreme Court struck an appropriate balance between these competing interests in their opinion in *Olano.* Idaho's previous articulation of fundamental error failed to provide appellate courts with a structured inquiry likely to lend itself to equal application. Therefore, after careful and considered analysis, we hold that in cases of unobjected to fundamental error: (1) the defendant must demonstrate that one or more of the defendant's unwaived constitutional rights were violated; (2) the error must be clear or obvious, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision; and (3) the defendant must demonstrate that the error affected the defendant's substantial rights, meaning (in most instances) that it must have affected the outcome of the trial proceedings. If there is insufficient evidence in the appellate record to show clear error, the matter would be better handled in post-conviction proceedings. Placing the burden of demonstrating harm on the defendant will encourage the making of timely objections that could result in the error being prevented or the harm being alleviated.

In summary, where an error has occurred at trial and was not followed by a contemporaneous objection, such error shall only be reviewed where the defendant demonstrates to an appellate court that

> one of his unwaived constitutional rights was plainly violated. If the defendant meets this burden then an appellate court shall review the error under the harmless error test, with the defendant bearing the burden of proving there is a reasonable possibility that the error affected the outcome of the trial.
>
> In *Smith v. State,* 94 Idaho 469, 475 n. 13, 491 P.2d 733, 739 n. 13 (1971), we adopted the following definition of fundamental error from the New Mexico Supreme Court:
>
> > Error that is fundamental must be such error as goes to the foundation or basis of a defendant's rights or must go to the foundation of the case or take from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive. Each case will of necessity, under such a rule, stand on its own merits. Out of the facts in each case will arise the law.
>
> Although we have applied other definitions in the past, this is the only definition that has been formally adopted by the Court. *See State v. Knowlton,* 123 Idaho 916, 918, 854 P.2d 259, 261 (1993) (reaffirming that the New Mexico definition of fundamental error was formally adopted by this Court in *Smith*). One problem with New Mexico's definition lies in the phrase "which no court could or ought to permit [the defendant] to waive." *Bingham,* 116 Idaho at 423, 776 P.2d at 432 (quoting *State v. Garcia,* 46 N.M. 302, 128 P.2d 459, 462 (1942)). In Idaho, we permit a defendant to waive a right of constitutional magnitude, so long as the defendant does so knowingly, voluntarily, and intelligently. *See State v. Kirkwood,* 111 Idaho 623, 626, 726 P.2d 735, 738 (1986). Another problem with the New Mexico definition is that it makes fundamental error review an excessively ambiguous process, with only vague standards for appellate courts to follow. We take this opportunity to expressly disavow our definition of "fundamental error" as adopted in *Smith.*

150 Idaho at 224-27, 245 P.3d at 976-79. Because counsel in Welch made no objection, this Court finds that even if Welch could demonstrate that one or more of her unwaived constitutional rights were violated (this opinion holds there is no constitutional right to an in-person preliminary hearing), and even if the error were clear or obvious, Welch has the burden to "demonstrate that the error affected the defendant's substantial rights, meaning (in most instances) that it must have affected the outcome of the trial proceedings." 150 Idaho at 226, 245 P.3d at 977. Welch has failed in that burden.

In *Rainier*, defense counsel objected but provided no real argument as to undue

prejudice. Even if there has not been a waiver in *Ranier*, counsel for Ranier did not make a sufficient record as to how his client was prejudiced by a Zoom preliminary hearing.

Counsel for Ranier requested a transcript of the preliminary hearing be made, and on July 9, 2020, this Court ordered it be prepared. On August 4, 2020, such was lodged with the Clerk of Court. At the preliminary hearing in *Ranier*, the following is all that was said:

> THE COURT (Senior Magistrate Judge Patrick McFadden): And Mr. Onosko, are you ready to proceed?
> MR. ONOSKO: Yes, Your Honor. Although we continue our objection to not having an in-person preliminary hearing on this matter.
> THE COURT: All right. Your objection is noted. I think that was ruled upon by Judge Peterson yesterday.

Ranier, June 25, 2020, Prelim. Hr'g Tr. 3, L. 7-14. No further argument was made by counsel for Ranier at the end of the preliminary hearing when counsel argued to the Court. *Id.* at 43, L 16 – 46, L. 13. Counsel for Ranier did not request preparation of the July 23, 2020, hearing held before Magistrate Judge Clark Peterson two days before. A review of the Court minutes for that hearing show the following:

> MR. ONOSKO: Asking this be left set. We are also requesting to have an in person PH. * * * Asking this to be held in person, he has a statutory right to an in person PH. This would be prejudiced if this would not be in person, it can get difficult and complicated to have that many witnesses via Zoom. There may be evidence that needs to be submitted in this case, trying to play audio via Zoom is quite hard. Video's I have shared during PH thru the Zoom screen sharing app have proved to be very hard to see and hard to hear. This case involves some officer credibility as well.
> JUDGE PETERSON: I appreciate your concerns, don't find there is enough finding here to have an in person PH. Understand we are dealing with public health safety concerns. I am confident that the attorneys can make sure that everyone is prepared with Zoom. The court has done many PH's via Zoom, there haven't been many issues yet. The parties may make an objection at the PH or at the end of it. I will trust everyones professionalism in being prepared for these PH's.

Ranier, June 23, 2020, Court minutes. Other than a passing reference to "officer

credibility" counsel for Ranier's objections were based on technical problems which come up from time to time in Zoom hearings (as well as with in-person hearings in the courtroom), all of which can be identified at the time and rectified at the time. Judge Peterson gave counsel for Ranier the opportunity to make additional objection as to how his client was prejudiced at the end of the Zoom preliminary hearing, and counsel for Ranier breathed not a word about any such prejudice. Counsel's muttering the words "officer credibility" gave Judge Peterson no basis to find Ranier was being prejudiced by having a Zoom preliminary hearing. Counsel gave absolutely no argument Magistrate Judge Patrick McFadden at the end of the hearing, and thus gave him no ability to find Ranier's rights had been prejudiced. At the August 12, 2020, oral argument on Ranier's motion to dismiss, as mentioned above, counsel for Ranier claimed that the alleged victim testified dishonestly at the Zoom preliminary hearing, and had the testimony been in-person the magistrate would have been more able to fully judge her credibility. The transcript from the June 25, 2020, preliminary hearing shows the alleged victim in *Ranier* testified that just prior to Ranier hitting her vehicle in which she was stopped at a stop light, Ranier appeared to be "speeding up." *Ranier* June 25, 2020, Prelim. Hr'g Tr. 15, L. 24 – p. 16, L. 11. On cross-examination by counsel for Ranier, the alleged victim testified there was no braking on Ranier's part. *Id.* 25, L. 22 – 26, L. 2. The alleged victim testified that the skid marks at the scene were caused by her vehicle. *Id.* 26, Ll. 13-18. It certainly appears that the skid marks left on the pavement for 50 feet were from the vehicle Ranier was driving. While braking at the last instant may cut against his intent to commit the crime of aggravated battery, it is not an absolute defense to that crime, such as counsel for Ranier argued. Counsel for Ranier argued on August 12, 2020, before this Court at a motion to suppress in *Ranier*, that Ranier could not have had the intent required for

aggravated battery if he were actively braking just before the collision. At that motion to suppress, and as set forth in the preliminary hearing, evidence was presented that Ranier was quite agitated before the accident and was agitated at the scene after the accident.

One needs to look first at I.C. § 18-907 and understand there is no intent in aggravated battery in and of itself. The intent element is found in the subsumed crime of battery, I.C. § 18-903. The harm to the victim need not be the harm intended by the defendant and it is not necessary that the defendant intend that his act cause a bodily injury. *State v. Billings*, 137 Idaho 827, 829-30, 54 P.3d 470, 472-73 (Ct. App. 2002). "A battery becomes an aggravated battery because of the great bodily harm caused, not because of an intent to cause that harm." *State v. Carver*, 155 Idaho 489, 494, 314 P.3d 1717, 1722 (2013). "A battery becomes an aggravated battery if in committing a battery the person causes great bodily harm. I.C. § 18-907(1)(a)." *Id.* A battery can be a willful and unlawful use of force or violence upon the person of another. I.C. § 18-903(a). The intent as to this subsection is "willfully", which means an act that is done with a purpose or willingness to commit the act. *Billings*, 137 Idaho at 830, 54 P.3d at 473. *Id.* "It does not require any intent to violate law, or to injure another, or to acquire any advantage." The defendant must intend a forceful or violent conduct with the other person. *Id.* Under I.C. § 18-903(b) all that is required is proof of intent to touch or strike another person, and under subsection (c), all that is required is an intent to cause bodily harm to a person. *Id.* All that is needed is evidence to infer intent. "Criminal intent may be inferred from the defendant's actions and surrounding circumstances." *Billings*, 137 Idaho at 831, 54 P.3d at 474.

With all that in mind, the apparent fact that Ranier braked hard enough to leave a skid mark for the last 50 feet before hitting his alleged victim's car with quite a bit of force,

is evidence that mitigates against his intent, but does not eliminate his intent. Even with that apparent fact, it may well have appeared to his alleged victim that he was accelerating until very near impact. The fact that the alleged victim was apparently wrong in testifying that it was her car left the skid marks does not necessarily mean she was lying. She testified just prior to impact she had pulled up the handbrake and had her foot on the brake. Ranier hit her car quite hard. The officer's body camera video shown at the motion to suppress shows she was quite visibly shaken up. One wonders if she ever looked at the skid marks at the scene, given her emotional state. All witnesses perceive events differently. None of this necessarily makes Ranier's alleged victim a liar, although credibility is certainly an issue. These issues were addressed by Judge McFadden.

All of this is given for context, because what this Court is being asked to do now in Ranier's case, is second guess why not having an in-person preliminary hearing was, with the benefit of hindsight, unduly prejudicial to Ranier, as opposed to the Zoom preliminary hearing he received. Making this decision in hindsight is even more difficult when counsel for Ranier gave no real reason, evidence or argument to the magistrate as to how undue prejudice existed at the time of the preliminary hearing, or in the hearing preceding such preliminary hearing. This Court finds that Magistrate Judge Patrick McFadden was aware of the potential inconsistency between the alleged victim's testimony as to the skid marks and Officer Roberts' testimony about the skid marks. Judge McFadden took that inconsistency into account, and still found probable cause. His findings were set forth as follows:

> THE COURT: All right. Thank you, Mr. Onosko. I did consider the evidence that's been presented. I've reviewed the Criminal Complaint and the charges that were made therein. I -- and as I've indicated, I am familiar with the requirements of the Court in making a probable cause determination under Idaho Criminal Rule 5.1. The only eyewitness, the only

person that testified today that actually was a participant and saw what was going on was Ms. Varney-Woodard. She testified that it appeared to her to her observation that Mr. Rainier was accelerating at the time of the collision with the rear of her vehicle occurred. It was a rather significant collision, forcing her vehicle into the vehicle in the front of it. She did observe swerving by Mr. Rainier, wherein his vehicle swerved around another vehicle that was behind her and collided into her vehicle.

The testimony from Officer Roberts is concerning because his testimony is that the skid marks or brake marks, whatever you want to call them, were from Mr. Rainier's vehicle, and that would lead the Court to conclude that Mr. Rainier was attempting to brake, but he did not testify today.

The Court is bound simply by a probable cause standard at the preliminary hearing, and I am going to make a finding that the standard of probable cause with that motor vehicle, especially when Ms. Varney-Woodard testifies to the swerving and to the accelerating nature of Mr. Rainier's vehicle, that probable cause has in fact been established for the two counts set forth in the Amended Criminal Complaint.

I am going to order that Mr. Rainier be bound over to answer to those two counts in the felony case and appear for arraignment in that matter. I certainly think there is evidence to be presented that certainly could cast this case with a lot of reasonable doubt, but at least at the preliminary hearing from the testimony that I've considered I believe that probable cause has been established, so that will be the order of the Court.

Ranier, June 25, 2020, Prelim. Hr'g Tr. 46, L. 14 – 48, L. 4. Even with the benefit of hindsight, there is no evidence submitted by Ranier that he was unduly prejudiced by having a Zoom preliminary hearing as opposed to an in-person preliminary hearing.

Finally, after the June 25, 2020, preliminary hearing with Judge McFadden, Judge Peterson made the following record with Onosko, counsel for Ranier (again, per the court minutes:

JUDGE PETERSON: Court entered order following motion that an appearance shall be remote and of course we are addressing in large part the previously entered supreme court order of April 22nd that says all other court proceedings are to be held remotely participants utilizing remote technology and teleconferences and video conferences. Individuals are not supposed to be entering courthouse complex or court room and in fact per paragraph 14 individuals who enter courthouse or courtroom in violation are to be denied admittance and further maybe subject to contempt of court proceedings and can even be dealt With in a summary fashion if witnessed by a judge. It was brought to my attention

today Mr. Onosko that after court indicating the hearing shall be a remote hearing that you had both yourself and your witnesses present before Judge McFadden today my understanding is Judge McFadden addressed that the matter had been ruled on previously by the court and the court indicated at conclusion of court hearing you had right to re-raise any objection you did have. I just wanted to indicate to you that I am very concerned that you would come in personally to a courtroom after that matter had been ruled on. That you would bring citizens as witnesses were brought as well. One of the grave concerns and reasons for these orders is protection of not just parties or legal rights of defendants but safety and health of citizens who can be compelled against their will to come as witnesses in matter either by subpoena or other things. I am very concerned that you would not comply with that order and I just want to put you on notice that further behavior like that could be considered contempt of court and I wouldn't want anyone to be in a circumstance where we have t have contempt actions relating to attorneys. It is not appropriate to have persons come into the court complex to be in the hallway these are remote hearings and they are remote for a reason it protects members of the public who are witnesses as well and I am not sure how it was resolved with you and Judge McFadden today but I can certainly communicate to you that I am very concerned here and wanted to put you on notice that I would expect that if matters like this are ruled on again that the courts decisions not be disregarded and the supreme courts order disregarded and that you just decide you are coming in anyway with your witnesses. I think I have admonished you here and made a clear record and that I hope in the future the behavior does not continue. Thank you for being present you are excused.
MR. ONOSKO: Ms. [Ann] Taylor [Mr.Onosko's boss] informed me there was an area in the court complex where we could appear to do remote hearings if we had defendants or witnesses does your honor know anything about that.
JUDGE PETERSON: For the public yes. You are lawyers you are to have your own matters set up yourself just like when state has witnesses you are to make those arrangements the kiosk's are for the public or those who are so indigent or by accident or whatever cause may arrive and be unequipped to be able to appear they are sort of emergency measures that have been set up as an accommodation by court staff they are not witness kiosks for the use of the public defenders office. If you have witnesses or citizens who need to appear just like the state you have to make arrangements to have those done or raise things by motion in advance. We do have some facilities for use they are very limited. They are also utilized by citizens who are not represented or other circumstances. While yes there are kiosks that is not the way for witnesses to appear in hearings that have been determined to be remote. If you need to utilize those services for your witnesses say you have a witness who is indigent that has no phone or access to other locations which is difficult to believe in today's day and age you can certainly bring a

> motion to request they be permitted to use that kiosk generally it is for pro se persons who show up when they should not have and who have no technology or ability and our only other option would be to turn them away which seems inappropriate the kiosk is available for those circumstances. It is not for use by the public defenders as a facility for that. Does the facility exist yes there is one downstairs, one by courtroom 4 and one at JJC.

Ranier, June 25, 2020, Court minutes. At no point during this hearing did counsel for Ranier make any record as to how his client was prejudiced by a Zoom preliminary hearing that had occurred earlier that day. There is simply no basis in the record for any judge to have determined that Ranier's "rights" were "unduly prejudiced" by the Zoom preliminary hearing as is required by the Idaho Supreme Court's Order of April 22, 2020, page 1, ¶ 5. Below, this Court finds that neither Ranier nor Welch had a "right" to an in-person preliminary hearing.

C. DEFENDANTS' MOTIONS TO DISMISS ARE NOT SUPPORTED BY LAW.

The Court now turns to the merits of defendant's motion, the claim that each defendant has a statutory and constitutional right to an in-person preliminary hearing. The Court finds that each defendant does not have either a statutory or a constitutional right to an in-person preliminary hearing.

The need for a Zoom hearing in both cases is due to the ongoing Covid 19 pandemic in 2020. The ability to have a Zoom hearing is specified in the Idaho Supreme Court's April 22, 2020, Order which mandated that, "All other court proceedings [other than trials on a petition to terminate parental rights and felony sentencing hearings where the possible penalty is life] are presumptively to be held remotely, i.e. with all participants utilizing remote technologies including teleconferencing and video conferencing." Order, April 22, 2020, 1, ¶ 4. The next paragraph of that Order, as counsel for plaintiff in Welch noted, "hearings are to be held remotely absent a finding on the record that the proceeding

must be held in person to prevent undue prejudice." *Id.* at ¶ 5. Welch State's Br. In Opp. to Def.'s Mot. to Dismiss 2. As discussed above, Welch did not even request an in-person hearing, and Ranier did not give any magistrate any evidence upon which to make a finding on the record of undue prejudice, pursuant to that Order. It is clear from that Order that Zoom is the preferred platform. It is undisputed that both preliminary hearings in these two cases took place via Zoom.

1. Defendants Statutory Rights Were Not Violated.

In each motion to dismiss, counsel for defendants argues that a Zoom hearing violated his clients statutory rights pursuant to Idaho Code § 19-808 which states, "The witness for the prosecution must be examined under oath in the presence of the defendant, and may be cross-examined in his behalf". Mot. to Dismiss 2. This Court agrees with counsel for plaintiff in Welch, that there are no Idaho appellate court decisions which interpret what it means to be "in the presence" of another. *Welch,* State's Br. In Opp. to Def.'s Mot. to Dismiss 2. This Court finds counsel for the plaintiff in Welch's argument to be persuasive:

> The Defendant does not argue she was not present on the Zoom video conference where her preliminary hearing occurred. She does not argue she was unable to see and/or hear the State's witnesses. She does not argue her counsel was unable to see and/or hear the State's witnesses. She does not argue that her counsel was unable to cross examine any witnesses. The Defendant only argues that she was unable to physically be in close proximity to the State's witnesses and therefore this matter should be dismissed. This argument relies on the singular definition of "presence" to inherently and exclusively require close physical proximity; however, there is no authority to support this singular definition. Additionally, the Defendant argues various authority with quotes such as "face to face" and "eye to eye", however all of these means of communication are able to be accomplished over a real time video conference, as was conducted in this matter as well. Simply put, the Defendant's well written four page analysis of I.C. §19-808 rests entirely on the mistaken assumption that the phrase "in the presence of" inherently requires close physical proximity, as opposed to the state of

being and/or place, on a real time video conference, present, at the same time as the State, it's witnesses, the Court, and her counsel. The position advanced by the Defendant has no authority to support her position.

Id. at 3. Counsel for plaintiff in *Ranier* argues:

> The defendant here makes the argument that the Idaho Supreme Court's order allowing preliminary hearings to be held through zoom is akin to the United States Supreme Court decision in *Korematsu v. United States*, 323 U.S. 214 (1944) which held that the detainment of Japanese people during World War II was a lawful act. That egregious hyperbole has very little to do with the emergency order issued by the Idaho Supreme Court due to a global pandemic (the order also does not classify individuals according to their race or nationality).
>
> The statute at issue is Idaho Code 19-808 which is quoted in the defendant's brief and states that witnesses must be examined "in the presence of the defendant." Zoom does exactly that. Zoom, an approved method of holding various court hearings, allows individuals to hear and see others, and can put a defendant in the presence of witnesses without any risk to any involved parties. The Idaho Rules require the "presence" of the defendant at various stages of criminal proceedings, including arraignment, plea, and sentencing. I.C.R. 43. However, the Idaho Supreme Court has interpreted "presence" to include online or telephonic presence through zoom or other internet means. That interpretation is implicit in its order of April 22, 2020 when it specifically allowed a telephonic or internet presence for those hearings. The same logic applies to preliminary hearings. The State acknowledges that all involved parties, perhaps even judges at times, might find the logistics of zoom difficult or cumbersome. But those occasional logistical hurdles are felt by all and are an inherent aspect of the Supreme Court's order. The Supreme Court undoubtedly has the authority to issue orders regarding the governing and procedures of courtroom practice. And the plain language of the statute does not require actual physical presence in the same room as witnesses, it simply requires "presence"—which may be through other means than physically occupying the same space.

Ranier, State's Br. In Opp'n to Mot. to Dismiss 2-3 (no page numbering on original). The Court finds counsel for the plaintiff in Welch's argument to be persuasive as well. The Court specifically finds that a Zoom hearing does not violate I.C. §19-808, and the Court finds the defendant in both cases was "in the presence of" witnesses who testified at the preliminary hearing in each case. This Court finds that Zoom is specifically allowed by the Idaho Supreme Court and is stated by that body to be the preferred platform for conducting

all but a few specific hearings, unless undue prejudice can be shown on the record. Undue prejudice was not even raised in Welch's case. In Ranier's case, insufficient argument and no evidence was presented as to how Ranier experienced undue prejudice by a Zoom preliminary hearing.

2. Defendants' Constitutional Rights Were Not Violated.

The entirety of defendant's constitutional argument in each case is as follows:

> Article 1 § 8 of our Constitution provides no defendant shall be held to answer for felony charges unless on presentment or indictment of a grand jury, or, upon information after a commitment by a magistrate. Thus the right to either a grand jury or a preliminary hearing is enshrined in our Constitution. Idaho has never decided whether the constitutional right to confront witnesses applies to its preliminary hearings. See *State v. Davis*, 152 Idaho 652, 655 (Ct. App. 2011).
>
> "When construing the Idaho Constitution, 'the primary object is to determine the intent of the framers.'" *State v. Clarke*, 165 Idaho 393, 397, 446 P.3d 451, 455 (2019). "Provisions of the Idaho Constitution must be construed in light the law prior to their adoption." *State v. Green*, 158 Idaho 884, 887, 354 P.3d 446, 449 (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, 934 P.2d 931 (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, 934 P.2d at 935. 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.* Just as was found in *Matthews*, the fact that § 19-808 existed prior to the Idaho Constitution creates a substantive right for defendants to confront their accusers at a preliminary hearing.
>
> In *State v. Rauch*, 99 Idaho 586, 586 P.2d 671 (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, 586 P.2d at 678. The *Rauch* Court was able to trace this deeply rooted heritage all the way back to 1603. Defendant in this case can trace the history and tradition of being able to confront ones accusers back a full millennium further! See *Coy v. Iowa*, 487 U.S. 1012, 101 5 (1988) (quoting Acts 25:16) ("It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges.")

In this case, I.C. §19-808 must color this Court's interpretation of Art. I, § 8, because this statutory provision was in effect at the time of ratification. As originally enacted, the 1864 Territorial Criminal Practice Act provided:

> The witnesses shall be examined in the presence of the defendant, and may be cross-examined in his behalf.

Criminal Practice 1864, § 150. The procedures for conducting preliminary hearings, including the right to confront ones accusers, was certainly well known to the framers of our Constitution. Section 150 had been in place for nearly three decades prior to the adoption of our Constitution. While the framers felt it unnecessary to lay out the exact procedure for a preliminary hearing in the Constitution itself, they most certainly had something in mind when they provided for preliminary hearings as a permissible means to bind a defendant over to district court. For example, they certainly intended for a probable cause standard to apply despite no probable cause requirement being found directly in our Constitution. The probable cause standard is, and was in 1889, found in our statutes. They almost certainly also intended for a defendant to have the opportunity to confront his accusers, as this standard was also contained in the statutes at the time. Revised Statutes of Idaho § 7572 (1887) ("The witnesses must be examined in the presence of the defendant, and may be cross-examined in his behalf.")

Regardless of any policy considerations this Court may find are furthered by taking away a defendant's right to confront his accusers at a preliminary hearing, even "extremely powerful policy considerations. . . must yield to the requirements of the Idaho Constitution." *Clarke*, at 400, 446 P.3d at 458. Mr. Rainier [Ms. Welch] asks the Court to find that the right to examine witnesses at a preliminary hearing "in the presence of the defendant" is a Constitutional right; and asks this Court to afford him [her] that right.

Mot. to Dismiss 6-8. This Court notes that even Acts 25:16 seems to refer to the actual trial (due to the language "deliver any man up to die") and not to any preliminary hearing. At the time I.C. § 19-808 was enacted, there really was only one way to have witnesses

examined "in the presence" of the accused, and that was with an in-person hearing. That is no longer the case. This Court finds that a Zoom hearing places the witnesses "in the presence" of the accused for purposes of the preliminary hearing. Additionally, the Confrontation Clause does not apply to preliminary hearings, it is a trial right. At the present time, this Court finds the current status of the law in Idaho is there is no constitutional right to confront witnesses at a preliminary hearing. That right exists at trial, but not at a preliminary hearing.

Counsel for the plaintiff in *Ranier* responds with the following argument, also in its entirety:

> The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with witnesses against him." U.S. Const. amend. VI. The right to confrontation is fundamental and applies equally to state prosecutions. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 1067-68 (1965). The Idaho state constitution does not contain a confrontation clause similar to that found in the United States Constitution; therefore, this issue is analyzed solely under the United States Constitution. *State v. Stanfield*, 158 Idaho 327, 332, 347 P.3d 175, 180 (2015); *State v. Sharp*, 101 Idaho 498, 502, 616 P.2d 1034, 1038 (1980). Thus, any analysis of the Confrontation Clause contained in the Sixth Amendment must rely on case law analyzing the right under the United States Constitution.
>
> The Confrontation Clause only "applies to 'witnesses' against the accused—in other words, those who 'bear testimony.'" *Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354, 1364 (2004). The United States Supreme Court has determined that this language restricts the Confrontation Clause to testimonial hearsay. *Davis v. Washington*, 547 U.S. 813, 823-24, 126 S.Ct. 2266 (2006); *Crawford*, 541 U.S. at 51, 124 S.Ct. at 1364. The Confrontation Clause only applies to statements that are "testimonial." *Davis*, 547 U.S. at 823, 126 S.Ct. at 2273; *Crawford*, 541 U.S. at 51, 124 S.Ct. at 1364. The Clause does not bar statements not offered to prove the truth of the matter asserted. *Crawford*, 541 U.S. at 59 n. 9, 124 S.Ct. at 1368—69 n. 9 (citing *Tennessee v. Street*, 471 U.S. 409, 414, 105 S.Ct. 2078, 2081—82 (1985)). If the statement is testimonial, then its admission is permitted only if the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant. *Crawford*, 541 U.S. at 59, 124 S.Ct. at 1368-69; *Hooper*, 145 Idaho at 143, 176 P.3d at 915.
>
> Confrontation has historically been described as a trial right. See

Barber v. Page, 390 U.S. 719, 88 S.Ct. 13 1 8 (1968) (stating that "the right to confrontation is basically a trial right.") *Crawford*, 541 U.S. at 59, 124 S.Ct. at 1354 (finding "testimonial statements of witnesses absent *from trial* have been admitted only where . . . the defendant had a prior opportunity to cross-examine"; *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989 (1987) (finding "the opinions of this Court show that the right to confrontation is a *trial right*, designed to prevent improper restrictions the types of questions that defense counsel may ask during cross-examination"); *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930 (1970) (stating "Our own decisions seem to have recognized at an early date that it is this literal right to confront the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause"); *McCray v. Illinois*, 386 U.S. 300, 87 S.Ct. 1056 (1967) (holding no Confrontation Clause Violation during pre-trial probable cause hearing when law enforcement testified to what a confidential informant told them); *U.S. v. DeLos Santos*, 819 F.2d 94 (5th Cir. 1987) (holding no confrontation rights were violated when defendant and defense counsel were excluded from a pre-trial suppression hearing to protect the identity of a confidential informant).

Idaho has thus far declined to address the issue of confrontation at pretrial evidentiary hearings. But the vast majority of states do not extend confrontation rights to preliminary evidentiary examinations. See *Blevins v. Tihonovich*, 728 P.2d 732 (Colo. 1986); *State v. Sherry*, 667 P.2d 367 (Kan. 1983); *State v. Harris*, 444 S0. 2d 257 (La. Ct. App. 1983); *State v. Morrissey*, 295 N.W. 2d 307 (ND. 1980); *Commonwealth v. Tyler*, 587 A. 2d 326 (Conn. 1991); *State v. Jones*, 259 S.E.2d 120 (SC. 1979); *State v. Padilla*, 329 N.W.2d 263 (Wis. Ct. App. 1982); *Sheriff v. Witzenburg*, 145 P.3d 1002 (Nev. 2006); *Gresham v. Edwards*, 644 S.E.2d 122 (Ga. 2007); *State v. Rhinehart*, 153 P.3d 830 (Utah App. 2006); *People v. Brink*, 31 A.D. 3d 1139 (N.Y.A.D. 2006); *Vanmeter v. State*, 165 S.W.3d 68 (TX. App. 2005); *State v. Lopez*, 314 P.3d 236 (N.M. 2013); *Commonwealth v. Ricker*, 120 A.3d 349 (Pa. Super. 2015); *Wilson v. State*, 655 P.2d 1246 (Wyo. 1982); *Whitman v Superior Court*, 820 P.2d 262 (Ca. 1991); *People v. Blackman*, 414 N.E.2d 246 (Ill. 1980); *Oakes v. Commonwealth*, 320 S.W.3d 50 (Ky. 2010); *State v. Daly*, 775 N.W.2d 47 (Neb. 2009); *State v. Fortun-Cebada*, 241 P.3d 800 (Wa. Ct. App. 2010); *Lewis v. State*, 904 N.E.2d 290 (Ind. App. 2009); *State v. Williams*, 960 A.2d 805 (NJ. 2008)

The clear weight of authority demonstrates confrontation at a pre-trial evidentiary hearing is not a constitutional right. The Idaho Criminal Rules reinforce this conclusion. Rule 5.1 provides for the admission of "written certifications or declarations" to establish the existence, or nonexistence, of medical and/or business facts and records; ownership of property; judgments and convictions; and scientific examinations of evidence by state or federal agencies. *Id.* These exceptions should not, and could not be made during a preliminary hearing if indeed the Confrontation Clause applied. The rules themselves, then, provide the answer—the Confrontation Clause as described in the US

Constitution does not apply during preliminary hearings in the state of Idaho.

To be sure, the rules provide that a defendant is entitled to cross-examine witnesses at a preliminary hearing. Idaho Criminal Rule 5. 1 (4). But the right to cross-examine is not the same as the right to confront witnesses. Cross-examination can be accomplished in a number of ways, including over the phone or through a zoom video call. Case law supports this logical conclusion. See *Goldsby v. United States*, 160 U.S. 70 16 S.Ct. 216 (1895) (finding cross-examination at a preliminary hearing is not required by the Sixth Amendment); *Peterson v. California*, 604 F.3d 1 166 (9th Cir. 2010) (state statute permitting preliminary hearing bindover on hearsay evidence does not violate federal constitution, as *Crawford* does not affect the reasoning of a long line of cases holding that the Sixth Amendment confrontation clause does not apply to preliminary hearings, and due process also does not establish such a right); *State v. Davis*, 152 Idaho 652, 273 P.3d 693 (Ct. App. 2011) (noting "jurisdictions grant the defense a right to cross-examine witnesses presented by the prosecution at the preliminary hearing. This right is based on local law; the Supreme Court has long held that cross-examination at a preliminary hearing is not required by the Confrontation Clause of the Sixth Amendment").

Elevating preliminary hearings to the same level of constitutional significance as a trial contravenes the distinction the United States Supreme Court articulated in *Crawford* between pretrial hearings and trials. The standard at a preliminary hearing is whether probable cause exists to bind a defendant over to district court. It is not the same as proving guilt beyond a reasonable doubt and it should not be afforded the same constitutional protections. The only purpose of the preliminary hearing is to determine the existence of probable cause, it is in no sense a trial or a vehicle for discovery.

Furthermore, it goes without saying that a defendant has neither right, nor recourse, to exercise confrontation, cross-examination, or attendance in front of a grand jury. Confrontation does not apply to grand juries, where the same burden of proof exists, and purpose, as a preliminary hearing. There is no rule or case which specifically states that the Confrontation clause exists for state preliminary hearings, but not for grand juries. Here, logic also indicates that during a pre-trial evidentiary hearing, there is no right for a defendant to physically confront a witness. The defendant has no right to confrontation at a pretrial hearing, and the defendant's motion should be denied.

Ranier, State's Br. In Opp'n to Mot. to Dismiss 3-7. Counsel for the plaintiff in Welch makes the following argument:

Federal courts have consistently held that "the right to confrontation is primarily a trial right." State v. Davis, 152 Idaho 652, 655, 273 P.3d 693, 696 (Ct. App. 2011) (quoting Pennsylvania v. Ritchie, 480 U.S. 39,

52 (1987)) (plurality opinion; emphasis in original). This limited application stems from the phrase "prosecutions" as interpreted by Crawford and its progeny. 541 U.S. at 42- 43; Davis v. Washington, 547 U.S. 813, 821 (2006). As a result, various criminal proceedings are exempt from the clause's mandates: it does not compel pre-trial discovery; nor does it apply at sentencings; nor does it attach at a suppression hearing. Ritchie at 52; State v. Shackelford, 155 Idaho 454, 461, 314 P.3d 136, 143 (2013); United States v. Thompson, 533 F.3d 964, 969 (8th Cir. 2008).

While the Supreme Court has extended the Sixth Amendment piecemeal to hearings that constitute a "critical stage" in the prosecution, it has abstained from making the Confrontation Clause a blanket requirement for preliminary hearings. Gerstein V. Pugh, 420 U.S. 103, 122 (1975). Instead, courts have determined its necessity at this stage On a case-by-case basis. See, e.g., State v. Timmerman, 218 P.3d 590, 593, 2009 UT 58, ¶ 10 (2009) (right to confrontation does not apply to state preliminary hearing); Vanmeter v. State, 165 S.W.3d 68, 74-75 (Tex. App. 2005) (right inapplicable to pretrial suppression hearing); State V. Massengill, 99 N.M. 283, 284, 657 P.2d 139, 140 (Ct. App. 1983) (right does apply to state preliminary examination). In Gerstein, the Court recognized different approaches in making an initial probable cause determination and the "desirability of flexibility and experimentation by the States." 420 U.S. at 123.

Although Idaho's preliminary hearing constitutes a "critical stage" in the prosecution that triggers the right to counsel, no court has held the right to confront adverse witnesses applies at this stage. State v. Waggoner, 124 Idaho 716, 719, 864 P.2d 162, 165 (Ct. App. 1993). State v. Davis did not specifically rule on this issue, yet the language of the court's opinion suggests strong resistance to the notion that the Confrontation Clause applies at a preliminary hearing. 152 Idaho at 655, 273 P.3d at 696. Moreover, the existence of a similarly worded statutory provision does not bestow on confrontation the status of a constitutional right under state law. *Id.* n. 1; I.C. § 19- 808; Idaho Criminal Rule 5.1(b)(4).

The Fourth Amendment does not mandate an adversarial process for finding probable cause. Warren v. Craven, 152 Idaho 327, 330, 271 P.3d 725, 728 (Ct. App. 2012) (discussing Hurtado v. California, 110 U.S. 516 (1884)). For that reason, allowing the prosecution to elect between a grand jury and preliminary hearing is constitutional, not only in Idaho, but in other states with similar constitutional provisions. *Id.* In this state, grand jury proceedings are frequently used as an alternative means of holding the defendant to answer in district court. Preliminary hearings also serve a "limited purpose" in this state despite their adversarial nature. State v. Williams, 103 Idaho 635, 645, 651 P.3d 569, 570 (Ct. App. 1982) (overruled on other grounds); see also Martinez v. State, 90 Idaho 229, 232, 409 P.2d 426, 427 (1965) ("The state is not required to produce all of its evidence at a preliminary examination"). There is simply no clear precedent for extending the Confrontation Clause to Idaho's preliminary

> hearing. Defense counsel overstates the importance of the right of confrontation at this stage, which instead serves to ensure a fair trial. Since the State was not obligated to charge the defendant via information in the first place, it would be incongruous to hold she had a right to confrontation during this phase of the prosecution. In fact, such a finding would essentially prohibit indictment by grand jury in Idaho. More importantly, the defendant was given an opportunity to confront and cross-examine the victim at the hearing.

Welch, State's Br. In Opp'n to Def.'s Mot. to Dismiss 4-5.

This Court is simply unable to fathom how, when under our laws, a person can be bound over via a grand jury (where the defendant has no right to be present with any witness, and where the defendant has no right to cross-examine any witness called by the prosecution), that somehow something magical applies at a preliminary hearing to not only give the defendant the ability and right to be "present" with witnesses not just via Zoom, and the ability and the right to testify not just via Zoom, and the defendant's attorney the ability and the right to cross-examine all witnesses called by the prosectuion not just via Zoom, *but to additionally require defendant to be able to do all those things* ***in the same room together at the same time***. Nothing in our court rules mandate such. Nothing in our appellate case law noted above in the briefing by plaintiff in these two cases mandates such. Nothing in case law from other states noted above by plaintiff in these two cases mandates such. Nothing in our statutes or state or federal constitution mandates such. Nothing in the Idaho Supreme Courts Orders this year during the pandemic mandates such.

At a preliminary hearing (whether by Zoom, or in-person, as in the old days six months ago), the State has the ability to present, "Hearsay in the form of testimony or affidavits, including written certifications or declarations under penalty of perjury, may be admitted to show the following, (1) the existence or nonexistence of business or medical

facts and records, (2) judgments and convictions of courts, (3) ownership of real or personal property, and (4) reports of scientific examinations of evidence by state or federal agencies or officials or by state-certified laboratories, provided the magistrate determines the source of said evidence to be credible." I.C.R. 5.1. If the State has the ability to prove some of its case at a preliminary hearing by affidavit, and there is no right to be present and no right to cross-examine an affidavit, then defendants' claims that they have a right to be present through some other mechanism superior than Zoom, is without basis.

IV. ORDER.

IT IS HEREBY ORDERED that SHIREE LYNN WELCH's Motion to Dismiss is **DENIED**.

IT IS FURTHER ORDERED that JACOB TAYLOR RANIER's Motion to Dismiss is **DENIED**.

DATED this 13th day of August, 2020

JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 13th day of August, 2020 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney - Benjamin Onosko Pdfax@kcgov.us
Dep. Prosecuting Attorney – Rebecca Perez, Kcpaicourts@kcgov.us
Dep. Prosecuting Attorney - Tristan Poorman Kcpaicourts@kcgov.us
Hon. Patrick McFadden
Hon. Clark Peterson

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY
BY: Deputy