6-26-2014

State v. Neal Appellant's Reply Brief Dckt. 41534

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,

Plaintiff-Respondent

v.

NATHAN DAVID NEAL,

Defendant-Appellant

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District for Ada County

Honorable Michael McLaughlin, District Judge presiding
Honorable Kevin Swain, Magistrate Judge presiding

Supreme Court Case No. 41534-2013
Ada County Case No. CR-MD-2012-0017239

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ARGUMENT IN REPLY

A. A Lane Line is a Part of the Lane

1. Statutes

The state dismissively rejects Mr. Neal's argument that the definitions of "sidewalk" and "roadway" are dispositive of whether a line forms part of a lane. Resp't Br., p. 14 ("the statutes on which Neal relies to define 'roadway' are irrelevant and in no way show error by the district court.") But the law is not irrelevant: it undermines the state's entire argument. The state concedes that a fog line is "part of the 'roadway' on which both motorized and some non-motorized vehicles travel." Resp't Br., p. 14. The state also does not dispute that a roadway is a portion of highway "ordinarily used for vehicular travel." Opening Br., p. 8 (citing I.C. § 49-119(19)).

However, nothing in the state's brief explains how a line can be "ordinarily used for vehicular travel," and at the same time *prohibited* from use for vehicular travel. That was the point of citing the definitions of "roadway" and "sidewalk." Contrary to the state's suggestion, Mr. Neal never argued that he was stopped for leaving the roadway. Resp't Br., p. 14 ("Neal, however, was not stopped for leaving the 'roadway.'") Rather, "roadway" and "sidewalk" were cited to establish that a fog line is intended to be used for vehicular travel.

Further, the fog line is on *the far-right side of the road*. As established in the opening brief, the roadway ends where the fog line ends. Thus, if the fog line is used by a vehicle for travel, it may be used only to travel *along* it, because vehicles may not cross

over the fog line onto the shoulder. I.C. § 49-630; *State v. Slater*, 136 Idaho 293, 298 (Ct. App. 2001). Because it is used for vehicular travel, and because one can only travel along the line, the line must be a part of the lane. Otherwise, it would *not* be used for vehicular travel.

Similarly, according to AASHTO Green: A Policy on Geometric Design of Highways and Streets ("AASHTO"),[1] a shoulder "is the portion of the roadway[2] *contiguous with the traveled way*." Something is contiguous if it is "touching or connected throughout in an unbroken sequence <contiguous row houses>." www.merriam-webster.com/dictionary/contiguous. Therefore, because the shoulder touches the line, the line is "the traveled way." The "traveled way" is "the portion of the roadway *for movement of vehicles*, exclusive of shoulders." AASHTO Ch. 4 (emphasis added). Thus, Idaho and federal law are consistent in this regard.

Further, as the state argues, the statutes "make[] no distinction between center lines, dividing lines, fog lines, bicycle lanes, etc." Resp't Br., p. 12. Therefore, as the state clearly agrees, if a driver may drive on a fog line, he may drive on a bicycle line. This point will be discussed in greater depth in section C.2. below.

2. Case Law

Commendably, the state admits that it gave only "a cursory review of [State v.] Atkinson," 128 Idaho 559 (Ct. App. 1996). Resp't Br., p. 13. Unfortunately, the state's analysis reflects the cursory nature of its review. In *Atkinson*, the Court of Appeals specifically stated that the relevant vehicle "swerved back across its lane of travel and

[1] This document is "legally binding upon all citizens and residents of the United States of America" and incorporated by reference in the Code of Federal Regulations. *See*, 23. C.F.R. § 625.4.
[2] AASHTO uses a different definition of "roadway" than does the Idaho Code.

touched the fog line on the extreme right side of the traffic lane." *Id.* at 561 (emphasis added). The court stated that the fog line was on the lane, not next to it.

Therefore, it is obvious what the court conveyed, in the same paragraph (three sentences later), when it employed the language "Although Atkinson's vehicle never entirely left its lane of travel, this weaving pattern" justified the stop. *Id.* "Although" means "in spite of the fact that" www.merriam-webster.com/dictionary/although. Therefore, it makes zero sense to claim, as the state implicitly does, that the stop was justified "in spite of the fact that" Atkinson *left* his lane of travel. If Atkinson had *left* his lane of travel, even partially, the stop would have been justified *because* of that fact, not *in spite of* it. But the Court of Appeals believed that the stop was justified in spite of the fact that the vehicle did not leave its lane of travel when it touched the line. Touching the line therefore does not constitute exiting one's lane of travel. This conclusion is clear from the case law and the statutes in Idaho.

3. The State's "Stop at Will" Standard

Finally, the state avers that two lanes cannot share a line because "certain parts of a vehicle, such as exterior wheel wells and side view mirrors, would extend beyond the painted lane markers *into* an adjacent lane." Resp't Br., p. 11 (emphasis in original).[3] Mr. Neal has argued that the word "automobile" is not a talisman in whose presence the Fourth Amendment fades away and disappears, Opening Br., p. 15, and therefore the Fourth Amendment requires more than brief incidental contact with flakes of paint.

[3] The state also argues that lanes cannot share lines because that result would allow two vehicles to occupy the same space. Resp't Br., pp. 10-11. The state failed to address Mr. Neal's main points on this issue, and therefore the state has offered nothing new to refute.

The state, on the other hand, has not only embraced the proposition that the Fourth Amendment disappears upon a tire's nominal contact with white paint. It has doubled down on this point. According to the state, law enforcement may effect a seizure when a vehicle's tires are fully between the lines, but *its side view mirrors* extend into the invisible plane above the line. The state's argument truly creates a "stop at will" standard, especially for the many Idaho drivers who operate large trucks with commensurately large side view mirrors.[4] Lanes are simply too narrow, and vehicles too wide, to expect that drivers will keep their mirrors from crossing the invisible plane.

For example, Idaho allows vehicles to be 8'6" in width. I.C. § 49-1010. According to AASHTO, lane widths may be as narrow as 9'. AASHTO Ch. 4 (Lane Width). Thus, the state proposes that vehicles may be given a three-inch left-to-right buffer when traveling down the middle of such roads. If a vehicle travels down the middle of the road, and then "veers" three inches and one millimeter to the right, the state believes police may effect a seizure of the driver. The state has no problem with this repugnant conclusion, but surely Idaho's citizens are not so accepting of the state's proposed "stop at will" standard. Statutory interpretation is aimed at ascertaining the legislature's intent, and there is no way that the legislature intended such a result. *Albee v. Judy*, 136 Idaho 226, 230 (2001) ("The objective in interpreting a resolution, statute, or ordinance is to derive the intent of the legislative body that adopted the act.") For that reason, Idaho's legislature included the "as nearly as practicable" language.

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[4] Mr. Neal drove a new Chevrolet Silverado, tr. p. 8, ll. 22-23, and therefore very possibly falls into this category of Idaho drivers. However, there was no evidence in the record to suggest that Mr. Neal's mirrors extended beyond the line, and therefore the issue remains whether touching a line suffices, not whether his vehicle crossed the line with its mirrors.

B. "As Nearly as Practicable"

In his opening brief, Mr. Neal explained that "[t]he challenge for the state is to explain how this language can be given meaning," because effect "must be given to all the words of the statute if possible, so that none will be . . . superfluous[.]" Opening Br., p. 11 (citing *State v. Yzaguirre*, 144 Idaho 471 (2007)). The state did not even attempt to meet the challenge, despite Mr. Neal's argument that if the "language were removed from the statute, the statute would remain substantively identical to the state's interpretation *with* the language." Opening Br., p. 12 (emphasis in original).

The state concedes Mr. Neal's point that "as nearly as practicable" modifies the requirement that a vehicle be driven entirely within its lane. Resp't Br., pp. 14-15 ("There is no question that the 'as nearly as practicable' language modifies the requirement that a vehicle be driven 'entirely within a single lane.'") The state nevertheless continues to maintain that "as nearly as practicable" modifies the general lane maintaining requirement only to the extent that "something prevents [motorists], or makes them incapable, of" maintaining their lane. Resp't Br., p. 15. The state apparently overlooked Mr. Neal's point that the statute *already* allowed vehicles to move from their lanes after drivers first ascertained that the movement could be made with safety, such as when "something prevents" them from or "makes them incapable of" maintaining their lanes. The state's interpretation clearly renders the disputed language superfluous.

The legislature's true intent regarding the word "practicable" is reflected elsewhere in Title 49 of the Idaho Code, and as will be established, the legislature's use of "practicable" is not consistent with the state's proposed interpretation. "The rule that

statutes *in pari materia* are to be construed together means that each legislative act is to be interpreted with other acts relating to the same matter or subject. . . . For the purpose of learning the intention, all statutes relating to the same subject are to be compared, and so far as still in force brought into harmony by interpretation." *State v. Trusdall*, 155 Idaho 965, __ (2014).

For example, Idaho Code § 49-717(1) generally allows any "person operating a bicycle upon a roadway at less than the normal speed of traffic at the time and place and under the conditions then existing [to] ride ***as close as practicable*** *to the right-hand curb or edge of the roadway*[.]" (emphasis added). The state's reasoning would require the conclusion that "as close as practicable" expresses a caveat to the general requirement, by allowing bicyclists to stray from the far right-hand edge only when "something prevents them" from or "makes them incapable of" doing so.

If that is true, then of course it would make *no sense* for the legislature to specifically express an exception for such circumstances, because the exception would be found in the "as close as practicable" language. But that is exactly what the legislature did, stating that the "as close as practicable" requirement was "except [w]hen reasonably necessary to avoid conditions including fixed or moving objects, parked or moving vehicles, bicycles, pedestrians, animals, surface hazards or substandard width lanes that make it unsafe to continue along the right-hand curb or edge." I.C. § 49-717(1)(c) (emphasis added). Likewise, Idaho Code § 49-637 allows vehicles to be moved from lanes after drivers first ascertain that movement can be made with safety.

The clear takeaway is that "as nearly as practicable" (or "as close as practicable") is not merely an exception to a rigid lane-maintaining requirement. Otherwise, the statutes would not have included the specific "exception" language. Instead, "as nearly as practicable" *relaxes* the requirement itself by requiring less than perfection. It is intended to convey that drivers (or cyclists) must be provided some reasonable latitude in their attempts to maintain their lanes (or ride on the far-right edge). Perfection is not and cannot be necessary. Cars do not run on fixed rails. Mr. Neal's "rather innocuous driving pattern" certainly fell within the latitude provided by the legislature. Because the state's contrary argument is inconsistent with the statute's plain language,[5] it is without merit.

C. Boise City Code

1. There was No Evidence that the Driving Occurred in Boise

The state tacitly agrees that it was required to prove that the driving occurred in Boise in order for the Boise City Code to apply. It therefore focuses its effort on attempting to establish that the evidence was so overwhelming that Magistrate Swain's conclusion should be given "no deference." Resp't Br., pp. 18-19. The question is not whether the *state* would have drawn an inference from the evidence, but whether "a reasonable mind might accept" the evidence "to support [the] conclusion" that the driving did not occur in Boise. Opening Br., p. 19.

In this case, Magistrate Swain was presented with all of the evidence cited by the state, but he rejected the proposition that any of that evidence proved that Mr. Neal drove

[5] Strangely, the state asserts that Mr. Neal's analysis was conducted "[w]ithout actually discussing the plain language of I.C. § 49-637[.]" Resp't Br., p. 11. Even one of the state's "cursory reviews" would have revealed that Mr. Neal discussed in detail the text of I.C. § 49-637, as well as many other statutes that would inform the interpretation of that statute. Opening Br., pp. 5-17.

in Boise at the relevant time. Each of the state's citations to the transcript will be addressed below.

1. *"Neal specifically testified that he 'lived in the city of Boise,' 'north of State Street, west of Gary lane'" and "also testified that, on the evening Officer Thueson stopped him, he was driving his vehicle westbound on State Street, toward his home."* Resp't Br., p. 19 (underlining added).

So what? He was driving toward his home on State Street, and it is uncontroverted that his home *was not on State Street.* Moreover, the state appears unfamiliar with the fact that a street may persist through more than one municipality (or even country). I-5, for example, proceeds from the Tijuana-United States border to the Canadian-United States border. The state has cited to nothing to establish that this portion of State Street ran through Boise rather than Garden City. Contrary to the state's belief, Magistrate Swain's mind was not functioning "unreasonably" when he concluded that the state's cited evidence did not support the contention that the relevant driving occurred in Boise.

2. *"Neal testified he was "[v]ery familiar' with the route on State Street . . . because he 'was born and raised in Boise, [and] grew up in that neighborhood.'"* Resp't Br., p. 19.

Magistrate Swain clearly understood what virtually everyone else surely understands: one can be familiar with Garden City because he was "born and raised in Boise." One can be familiar with Caldwell because he was born and raised in Nampa. One can be familiar with Spokane because he was born and raised in Coeur d'Alene. The state believes, again, that Magistrate Swain's mind behaved unreasonably when it refused to conclude that an event occurred in Boise just because someone's lifetime experience

living in Boise led to his familiarity with Garden City. Magistrate Swain's mind was working just fine when he refused to draw the state's unreasonable inference.

3. *"When asked on cross-examination whether he was driving, on November 14, 2012, '[in] the city of Boise, Ada County ... Idaho,' Neal admitted that he was. Clearly, Neal's testimony established he was driving in Boise at all times relevant to the traffic stop.* Resp't Br., p. 19 (underlining added).

This point was addressed in Mr. Neal's Opening Brief, at pages 18-19. It must be emphasized, though, that the state clearly believes that the evidence must have established that Mr. Neal was "driving in Boise at all times relevant to the traffic stop." The state makes no attempt to distinguish this case from *Reisenauer v. State*, 145 Idaho 949 (2008), which specifically held that evidence of past presence is "no evidence" of later presence. Given the evidence at the suppression hearing, Magistrate Swain was required to hold that no evidence supported the conclusion that the driving occurred in Boise. But at a minimum, it cannot reasonably be claimed that this conclusion was clearly erroneous.

4. *"Officer Thueson testified that he is a patrol officer with the City of Boise Police Department, that he was on patrol on the evening of November 14, 2012, and that, when he observed Neal's vehicle, he was patrolling 'the same area that [he had] worked [his] whole career' as a Boise City Police Officer: 'the Ellens Ferry and State area.'"* Resp't Br., p. 19.

The state apparently believes that law enforcement officers may act only within the city or political subdivision that employs them. Magistrate Swain clearly recognized the falsity of the state's belief. "Cities or political subdivisions may enter into mutual

assistance compacts with other cities or political subdivisions of this state or of states immediately adjacent." I.C. § 67-2337(4). The state has cited to nothing in the record or transcript regarding the relationship between Garden City and Boise. Therefore, Officer Thueson could have been patrolling in Garden City just as easily as he could have been patrolling in Boise. There is simply no reason to believe that Magistrate Swain was "clearly erroneous," entitled to "no deference," or that his mind acted "unreasonably" when he concluded that the evidence was insufficient to believe that the alleged misdemeanor occurred in Boise.

The state bears the burden of proving an exception to the warrant requirement. It therefore was the state's burden to establish that the relevant driving occurred in Boise. Given the above, a reasonable mind could accept Magistrate Swain's conclusion. Therefore, it was not clearly erroneous and this Court should not consider the application of the Boise City Code.

2. Officer Thueson Lacked Reasonable Suspicion that Mr. Neal Drove Contrary to the Boise City Code

Mr. Neal argued first that the Boise City Code cannot be violated if one does not leave his lane by touching a line. Opening Br., p. 20. The state agrees that the Idaho Code does not distinguish between fog lines and bicycle lane lines. Resp't Br., p. 12. Nevertheless, the state has interpreted the Boise City Code in a manner that is directly contrary to the Idaho Code's assumption of what constitutes a lane. The state's interpretation therefore should be rejected.

"It is generally presumed that legislative acts are constitutional, that the state legislature has acted within its constitutional powers, and **any doubt concerning interpretation of a statute is to be resolved in favor of that which will render the statute constitutional**." *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 709 (1990) (emphasis added). "Rules for construction of an ordinance are the same as for construction of a statute." *State v. Young*, 144 Idaho 646, 649 (Ct. App. 2006).

The state suggests that the Boise City Code be interpreted to prohibit driving on a lane line, *even if* the Idaho Code's assumption of what constitutes a lane encompasses such driving. Resp't Br., p. 21. In other words, the state suggests that the city council of Boise City is capable of redefining the Title 49 meaning of a traffic lane, in a manner that conflicts with the Idaho Code. A city's supplemental traffic ordinances are only acceptable if the requirements are not "in conflict with other general laws of the state." *Hobbs v. Abrams*, 104 Idaho 205, 207 (1983).

In a closely-analogous case, the Idaho Supreme Court found a Boise City Code ordinance to conflict with Title 49 of the Idaho Code. *State v. Barsness*, 102 Idaho 210 (1981). Mr. Barsness was charged with failure to yield to an emergency vehicle. According to the Supreme Court, "Barsness argued at trial that I.C. s 49-645, permitting an emergency vehicle to utilize an audible or a visible signal, is in conflict with the Boise City Code which allegedly requires both an audible and a visible signal." *Id.* at 211. In other words, the ordinance required both sirens and lights, but the statute required only sirens *or* lights. The Court concluded that "the provisions of a city ordinance must yield to

provisions of the state statute." *Id.* Thus, the conflict rendered the ordinance unconstitutional. *Id.*

Likewise, if the Boise City ordinance required driving *between* lines, whereas the Idaho Code allowed driving *on* lines (or between lines as nearly as practicable), the ordinance would conflict with the statute and be unconstitutional. Yet, this is the interpretation that the state provides. Because the state's proposed interpretation would render the ordinance unconstitutional, its interpretation must be rejected. Of course, if the state's interpretation is not rejected, then the ordinance simply cannot be enforced as it conflicts with the general laws and therefore the Idaho Constitution.

Mr. Neal also argued that the Boise City Code section could not apply, because it criminalizes conduct that is a mere infraction under the Idaho Code. Opening Br., p. 20. Citing *State v. Leichty*, 152 Idaho 163 (Ct. App. 2011), the state concedes that there was "no duty below to articulate every legal theory applicable to Neal's suppression motion." Resp't Br., p. 24. Yet, the state maintains that Mr. Neal may not argue against the applicability of Boise City Code § 10-10-17, because the state claims that he "did not raise this argument to either the magistrate or district court." Resp't Br., p. 21. Astoundingly, despite its concession, the state does not even offer an argument in the alternative, i.e., it does not suggest that Mr. Neal's argument is incorrect. Thus, if the argument was adequately raised below, it stands uncontested by the state.

In accordance with the state's own authority, the argument was adequately raised below. In *Leichty*, the Idaho Court of Appeals held that Fourth Amendment arguments may be presented on appeal, even though they were not raised below, because "a court's

analysis of the constitutionality of a search is not circumscribed by . . . argument or the absence thereof." *Id.* at 169 (quoting *State v. Bower*, 135 Idaho 554, 558 (Ct. App. 2001)). This rule obviously must apply to a criminal defendant's arguments, especially given that it is the *state* that bears the burden of establishing an exception to the warrant requirement. Opening Br., p. 5.

The basic rationale of *Leichty* is that, once a court is presented with the general issue of a seizure's constitutionality, the issue is a legal determination that cannot be limited by the parties' specific contentions. There is no denying that the seizure's constitutionality was at issue. It was the only issue. Such an issue has been resolved based on the unconstitutionality of the underlying ordinance. See Opening Br., pp. 24-26 (citing *Burton v. State*, 149 Idaho 746 (2010) in arguing that it is "clear in Idaho that the invalidity of a traffic law renders any suspicion *unreasonable*. It is unreasonable because the traffic law does not apply to the driver").

So, the constitutionality of a seizure is a legal determination that may be resolved by deeming the underlying traffic law invalid. Therefore, the issue was adequately raised when Mr. Neal generally called into question the constitutionality of the seizure. The state does not contest Mr. Neal's point that the underlying ordinance was unenforceable. As a *legal determination*, therefore, the seizure cannot be justified by the relevant ordinance.

Finally, it should be clear that if this issue cannot be considered, then the mistake of law issue also cannot be considered because it was not raised before the magistrate or district court.

D. Mistake of Law

1. Mistake of Law is not a Sufficient Rationale for Seizing a Driver

In a dissent that ultimately prevailed decades later, Justice Brandeis famously declared that "Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously." *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (overruled by *Katz v. United States*, 389 U.S. 347 (1967)). Government "teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." Thus, to "declare that in the administration of the criminal law the end justifies the means — to declare that the Government may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." *Id.*

Idaho also refuses to accept the notion that the law may be broken in order to convict defendants:

> Law and court made rules of expediency must not be placed above the Constitution. If violation of constitutional rights or law is to be condoned, excused, palliated, overlooked, or if a violation cannot be proved except by a violation, is it not possible to weigh the various provisions of our Constitution, and fix them in relative importance, above those of any law? . . .
>
> **A continued disregard of the rights guaranteed under the Fourth and Fifth Amendments, and the principles thereof incorporated in state Constitutions, heads us directly to revolution against their usurpation**, if history tells us correctly that violation of the rights sought to be protected thereby was one of the chief moving reasons for the Revolution. If, one by one, the rights guaranteed by the federal Constitution, can and must, for expediency's sake, be violated, abolished, stricken from that immortal

> document, and from state Constitutions, we will find ourselves governed by expediency, not laws or Constitutions, and the revolution will have come.
>
> I can see no such expediency or necessity for the enforcement of any law as to justify violation of constitutional rights to accomplish it. **The shock to the sensibilities of the average citizen when his government violates a constitutional right of another is far more evil in its effect than the escape of any criminal through the courts' observance of those rights.**

State v. Arregui, 44 Idaho 43 (1927) (emphasis added).

The state disagrees, believing that it would be bad public policy to hold law enforcement officers to the same standards that govern everyone else's behavior. The state's approach makes a mockery of the law. According to the state, law enforcement officers may routinely misapply the law, always reserving the right to characterize their misapplication as "objectively reasonable," and then obtain convictions based on a citizen's own "objectively reasonable" mistake of law. In support of its troubling conclusion, the state relies almost exclusively on the reasoning of one case—*State v. Heien*, 737 S.E.2d 351 (N.C. 2012)—that is in the minority on this issue,[6] and that resorts to hyperbole and sophistry to support its holding. Each of the state's rationales, borrowed from *Heien*, will be addressed below.

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[6] As the *Heien* dissent recognized,

> **The First, Third, Fifth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits all apply some form of the rule that an officer's mistake of law cannot be the basis for reasonable suspicion**, though many allow that a stop based on a mistake of law may be constitutional if it can be justified objectively notwithstanding the mistake of law. *See United States v. Coplin*, 463 F.3d 96, 101 (1st Cir.2006), *cert. denied*, 549 U.S. 1237, 127 S.Ct. 1320, 167 L.Ed.2d 130 (2007); *United States v. Mosley*, 454 F.3d 249, 260 n. 16 (3d Cir.2006); *United States v. Miller*, 146 F.3d 274, 279 (5th Cir.1998); *United States v. McDonald*, 453 F.3d 958, 961 (7th Cir.2006); *United States v. Lopez–Soto*, 205 F.3d 1101, 1106 (9th Cir.2000); *United States v. Tibbetts*, 396 F.3d 1132, 1138 (10th Cir.2005); *Chanthasouxat*, 342 F.3d at 1279; *cf. United States v. Debruhl*, 38 A.3d 293, 299 (D.C.2012) (**noting that court's refusal to "lead this jurisdiction toward acceptance of the discredited 'mistake of law' justification** for Fourth Amendment violations").

737 S.E.2d 351, 360-61 (emphasis added).

First, the state argues that requiring law enforcement to act legally is "a greater burden than that required under the Fourth Amendment" because such a standard "mandat[es] that [law enforcement] be perfect," Resp't Br. 27, and "omniscient." Resp't Br., p. 29. Similarly, the state argues that it is unreasonable to expect officers to accurately forecast how a reviewing court will interpret the substantive law. In other words, the state believes it is unreasonable to expect those who enforce the law to know what the law requires. Resp't Br., p. 29. The state has now gone on record with its position that compliance with the law requires perfection and omniscience. Because no one is perfect or omniscient, the state apparently believes no one can comply with the law. That is the state's position on this point.

In other cases, however, the state seeks to convict criminal defendants of violating ambiguous statutes. *State v. Bradshaw*, 155 Idaho 437, __ (2013) (upholding conviction when there was no "dispute that the portion of [the criminal statute] at issue here is ambiguous"). The rule of lenity applies only as a last resort. *Id.* (requiring "grievous ambiguity or uncertainty in the statute" before applying the rule of lenity). Thus, even if a criminal defendant misinterpreted an ambiguous statute, he still could be found guilty *beyond a reasonable doubt* pursuant to rules of construction. An ambiguous statute, by definition, can be interpreted in at least two reasonable ways. Society therefore is held to a "perfection" standard (as defined by the state). If the burden is too great for law enforcement to effect a seizure, it is too great to convict everyone else. But mistake of law — even an ambiguous law — is no excuse for the criminal defendant, and therefore the

burden is not too great for everyone else. Because it is not too great for everyone else, it is not too great for law enforcement.

Second, the state recites the *Heien* argument that "we do not want to discourage our police officers from conducting stops for perceived traffic violations," because a traffic stop "is not a substantial interference with the detained individual" and because of "society's countervailing interest in keeping its roads safe[.]" However, the U.S. Supreme Court has long acknowledged that, in some cases, "the criminal is to go free because the constable has blundered." *Mapp v. Ohio*, 367 U.S. 643, 659 (1961) (alteration omitted). Whether the criminal goes free, and whether traffic laws are enforced, are not the only questions.

Rather, "there is another consideration—the imperative of judicial integrity." *Id.* (quotations omitted). For when the criminal goes free, "it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws[.]" *Id.* So, it may indeed be important to ensure that traffic laws are enforced in a manner that brings to justice our speeders, California stoppers, and padiddle drivers. But that is not the only consideration. Of greater importance is judicial integrity, which includes preventing the government from "fail[ing] to observe its own laws."

As to the state's trivialization of the intrusion of traffic stops, it is useful to remember that "fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions . . . . The makers of our Constitution . . . conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." *Stanley v. Georgia*, 394 U.S. 557, 565

(1969) (quotations omitted). If the state desires to infringe on society's fundamental right to be let alone as against the Government, the state should articulate a satisfactory reason. Governmental legal misapplication does not suffice.

Third, the state recites the *Heien* rationale that accepting law enforcement's mistakes of law "allows reviewing court[s] to treat all police mistakes the same." Resp't Br., p. 30. In other words, the "benefit" is that mistakes of law are to be reviewed identically to mistakes of fact. The main rationale for this argument appears to be that it is simply too hard to tell the difference between a legal question and a factual question. Resp't Br., p. 30 ("determining whether a mistake is one of fact or one of law is not always easy.")

Of course, that is simply untrue. Courts know the difference between fact and law, which is why courts are able to determine which issues to decide as matters of law and which to leave to the jury. The state certainly didn't struggle with the distinction when it explained that "the appellate court accepts the trial court's findings of fact that are supported by substantial evidence, but freely reviews the application of constitutional principles to those facts." Resp't Br., p. 4. Appellate courts know how to defer to a finding of fact, and they also know how to review legal determinations *de novo*. It is pure fiction to claim that courts cannot distinguish between fact and law.

Moreover, the justification for refusing to draw the law-fact distinction is not a judicial justification. Specifically, the justification is mere expedience, the desire to "treat all police mistakes the same." The law is about reason, not expedience. When reason commands that a distinction be drawn, the law draws the distinction. For the reasons

explained above, it is important to hold law enforcement to the same standards to which society is held. Law enforcement's failure to meet this standard renders its actions objectively unreasonable *per se.*

2. The Mistake of Law was not Reasonable

Even if those who enforce the law were exempted from the law, as the state argues, there was no *reasonable* mistake of law in this case. The state argues that Idaho Code § 49-637(1) "can, at the very least, be reasonably interpreted require (sic) a motorist to avoid driving on top of a fog line unless objective circumstances prevent it[.]" Resp't Br., p. 31. Therefore, the state believes that the code section is "[a]t worst . . . ambiguous." Resp't Br., p. 10.

However, Mr. Neal has demonstrated that Idaho Code § 49-637(1) cannot be ambiguous. In analyzing the plain language of a statute, courts must give meaning to all of the words contained therein, so that none is superfluous. This rule is one of *interpretation*, not *construction*. *See, State v. Schulz*, 151 Idaho 863, 866 (2011) (citing *Farber v. Idaho State Ins. Fund,* 147 Idaho 307, 310, 208 P.3d 289, 292 (2009)). In other words, it operates to identify *whether* an ambiguity exists; it does not operate to *resolve* an ambiguity.

Thus, if a proposed interpretation fails to give meaning to a statute's language, the proposed interpretation does not render the statute ambiguous when a competing interpretation gives meaning to all words in a statute. Mr. Neal has shown that the state's interpretation fails to give effect to the "as nearly as practicable" language. Because its interpretation renders that language superfluous, it is not a reasonable interpretation.

Therefore, contrary to the state's assertion, the statute is not ambiguous. Because it was not ambiguous, there exists only one reasonable interpretation. As an objective matter, then, any contrary interpretation is unreasonable as a matter of law.

Finally, it must be emphasized that the rule of lenity is not triggered absent "grievous" ambiguity. Thus, Idaho has deemed it acceptable to convict criminal defendants of violating ambiguous statutes. If an ambiguity exists, and if mistake of law is ever an acceptable basis for probable cause or reasonable suspicion, then the ambiguity should at least meet the "grievous" standard applicable to the rule of lenity. Certainly, that standard was not met in this case.

E. Driving Under the Influence

The state asserts, in a footnote, that there existed reasonable suspicion that Mr. Neal was under the influence. Resp't Br., p. 23 n. 3. It is uncontroverted that Mr. Neal merely touched a white line twice in about a one-mile distance. Magistrate Swain and the district court both agreed that that fact was insufficient to support an inference of impaired driving. Opening Br., p. 2. In support of its argument, the state cites only *Atkinson*, *supra*, which involved a driver weaving all over the road, swerving from the centerline to the fog line. 128 Idaho 559, 561 (Ct. App. 1996). That type of driving did not occur here. In fact, Officer Thueson admitted that Mr. Neal's driving was "completely appropriate," other than the alleged line touching. Tr. p. 35, ll. 21-23. There is no reasonable basis on which to conclude that Mr. Neal was under the influence while driving.

III.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court and remand this case for further proceedings.

RESPECTFULLY SUBMITTED.

DATED: June 26, 2014

SIGNED: _____

Eric Scott, Attorney for the Appellant.

I CERTIFY that on June 26, 2014, I caused to be served two true and correct copies of this document on the Idaho Attorney General, by mailing, postage prepaid, the same to Idaho Attorney General, 700 W. Jefferson St., Boise, ID 83720.

DATED: June 26, 2014

SIGNED: _____

Eric Scott, Attorney for the Appellant.