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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

GARY ALAN FEASEL,

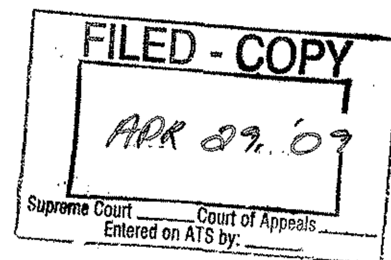
Petitioner-Respondent,

vs.

STATE OF IDAHO, DEPARTMENT OF TRANSPORTATION,

Respondent-Appellant.

Supreme Court Case No. 35720
D.C. No. CV OC 0800408



BRIEF OF RESPONDENT

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

HONORABLE D. DUFF MCKEE
Sr. District Judge

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Does Idaho Code § 18-8002A hold drug tests to a different, causation-based adjudicative standard than it does alcohol tests?

Did the district court correctly conclude that circumstantial evidence of impairment in this case failed to show the required causal connection between the drug test results and a violation of Idaho Code § 18-8004(a)?

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I.

STATEMENT OF THE CASE

A. Nature of the Case.

1. Facts

On his way to work at about 7:08 A.M., July 20, 2007 respondent, ("the driver") rear-ended another North-bound motorist as both were waiting for a green left-turn signal from Broadway turning West onto Front Street, Boise, Idaho. No significant damage occurred; there were no injuries.

The driver had slurred speech, appeared sleepy, and acknowledged taking multiple medications. Under leading examination by the officer initially responding to the scene, he acknowledged he had taken Ambien at about 1:00 AM. Stipulated Record Supplement, Track 1, 1:47 – 2:15. He mentioned other specified prescription medications, including lithium, but was not specific as to time, place or context in which they were or were not consumed. Stipulate Record Supplement, Track 2, 47:45-end. Based on failure of the field sobriety tests and the totality of circumstances, he was processed for DUI and arrested. Administrative Record for Judicial review, Pages 5, 28 (AR 5, 28); Reporter's Transcript Page 14, Lines 18-19 (RT 14:18), Findings of Fact and Conclusions of Law and Order, Paragraphs II and IX (FFCLO 1, 3; AR 28, 30).

The driver cooperated with his processing officer, took a breath test showing no trace of alcohol, AR 2, and submitted also to a urine test. AR 4, RT 14-15. He ultimately plead guilty to an infraction, following too closely. AR 24.

Months later, a report of the State Laboratory, AR 9-10, was received by the appellant Idaho Department of Transportation ("department"). That report detected only the presence of Fluoxetine (Prozac), *noting further it was prescribed, but opining nothing about its concentration* nor its effect (if any) upon intoxication, impairment or other relationship to the activities of driving. The department timely initiated this proceeding. AR11.

2. Administrative Proceeding

The driver requested a hearing which was held November 27, 2007 before Michael Howell, Esq. sitting as designated hearing examiner ("examiner") for the department. The driver presented facts about the two medications mentioned to the officer, AR 4, plus two more still in his medicine cabinet, RT 9-13, which all contained warnings against mixing with alcohol (e.g., RT 10:10-13; RT 11:8-11) or using without knowledge of their effects. Citation *infra*. The driver corroborated the negative alcohol BAC test by testifying he consumed no alcohol. He testified he had not experienced any problems with impairment from any of them, nor from combinations in the past. RT 15:7-8, 16:23-17:1. The Prozac, in particular, he had been using for three years. RT 14:22-3. Loring Beals, a toxicologist, testified that long-term use of most medications increased tolerance and therefore diminishes their effect on the person. RT 19:9-15. There was no evidence linking impairment to any drug, except the officer's disputed affidavit stating that the driver "had knowledge he was not to operate a motor vehicle while taking these medications."[1]

[1] The audiotape of defendant's initial officer contact was admitted into evidence at the administrative hearing. It is stipulated to be part of this record. The relevant portions are at Disc 1, Track 1, 1:47 – 2:15 and Track 2, 4:20 – 5:00 mentioning Ambien; and 47:45 adding lithium. The drug whose presence was actually detected in the urine test – Prozac – was apparently never mentioned in any conversation. One of the officers opined that the driver's feelings of drowsiness were "entirely normal." 48:55-50:18. The driver's statements in these areas of the audiotape are for the most part unintelligible, possibly explaining why no direct findings of fact were made as to their content.

The toxicologist did present unrebutted testimony on this matter. The urine test showed only that the driver had taken Prozac at some time in the past, RT 21:18-25. That fact alone could not support any inference of impairment. 22:1-13; 23:2-8. This expert witness also underscored the label warnings' language that driving was not a prohibited activity for users of Prozac, but that users should be familiar with their effects before operating machinery. RT 20:12-16. When asked if the urine test results show anything wrong with a person's driving or ability to operate a vehicle, Mr. Beals' unequivocal answer was "No." RT 23:16. Further, there could have been anything from massive to trace amounts of Prozac in the system of the driver, but this qualitative urine test could be neither "passed" nor "failed." RT 23:9-24:17.

3. Reversal by the District Court

The examiner upheld the suspension. (Clerk's Exh. 1, Admin. R. at 030). The driver timely appealed this decision. A briefed and argued district court proceeding was held before Hon. D. Duff McKee. He reversed the agency's action. (Clerk's R. at 00042-00050). The parties to this appeal have requested the court supplement the record with true copies of the audiotapes that were made part of the hearing record, which may or may not have been before Judge McKee.

B. Standard of Review.

> "Idaho Code § 18-8002A(8) authorizes judicial review of a hearing officer's decision on an administrative license suspension in the manner provided for judicial review of final agency actions under the Idaho Administrative Procedures Act, chapter 52, title 67, Idaho Code. ***Upon such judicial review, the hearing officer's decision must be affirmed unless the court finds that the hearing officer's findings or conclusions are***:

> (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion.
>
> I.C. § 67-5279(3)."

State v. Kane; 139 Idaho 586, 589-90, 83 P.3d 130 (Ct. App. 2003). The driver here, as appellant below, therefore bore a heavy burden. However, it was not necessary to show administrative error in every prong of Subsection (3) of § 5279. The law is phrased in the alternative: As appellant did here to the satisfaction of Judge McKee, it may be shown that administrative decisions are not supported by substantial evidence, that they are inconsistent with procedural law or statutory authority, ***or*** that they are arbitrary, capricious or indiscrete.

The Administrative License Suspension (ALS) process was enacted by the Idaho Legislature to provide a remedial supplement to its aggressive enforcement of criminal laws against driving under the influence. Other cases before and after ***Kane*** give identical instructions to reviewing courts:

> "The Idaho Administrative Procedures Act (IDAPA) governs the review of department decisions to deny, cancel, suspend, disqualify, revoke, or restrict a person's driver's license. *See* I.C. §§ 49-201, 49-330, 67-5201(2), 67-5270. ***In an appeal from the decision of the district court acting in its appellate capacity under IDAPA, this Court reviews the agency record independently of the district court's decision.*** *Marshall v. Idaho Dep't of Transp.,* 137 Idaho 337, 340, 48 P.3d 666, 669 (Ct. App. 2002). This Court does not substitute its judgment for that of the agency as to the ***weight of the evidence*** presented. I.C. § 67-5279(1); *Marshall,* 137 Idaho at 340, 48 P.3d at 669. This Court instead defers to the agency's findings of fact ***unless they are clearly erroneous.*** *Castaneda v. Brighton Corp.,* 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998); *Marshall,* 137 Idaho at 340, 48 P.3d at 669. In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by ***substantial competent evidence in the record.*** *Urrutia v. Blaine County, ex rel. Bd. of Comm's,* 134 Idaho 353, 357, 2 P.3d 738, 742 (2000); *Marshall,* 137 Idaho at 340, 48 P.3d at 669.

> A court may overturn an agency's decision where its findings, inferences, conclusions, or decisions: (a) violate statutory or constitutional provisions;
>
> (b) ***exceed the agency's statutory authority;***
>
> (c) are made upon unlawful procedure;
>
> (d) ***are not supported by substantial evidence in the record;*** or
>
> (e) are arbitrary, capricious, or ***an abuse of discretion***. I.C. § 67-5279(3).
>
> The party challenging the agency decision must demonstrate that the agency erred in a manner specified in I.C. § 67-5279(3)...[non-ALS citations omitted.]."

State v. Talavera; 127 Idaho 700, 905 P.2d 633 (1995) [Emphasis added.]. See also ***Matter of Driver's License of Archer***, Docket No. 33725, Court of Appeals of Idaho (2008).

II.

ISSUE PRESENTED ON APPEAL

1. Do contested hearings under Idaho Code § 18-8002A have a different, causation-based adjudicative standard for evidentiary drug tests than for alcohol tests?

2. Did the district court correctly conclude that circumstantial evidence alone failed to show the required causal connection between the drug test results and a violation of Idaho Code § 18-8004(a)?

III.

ARGUMENT

A. Introduction

Appellant is correct that the ALS program is remedial in nature, that there is ample legislative history to support construing its laws in favor of its salutary purposes, and that the burden of providing substantial evidence rests upon him. ***In re Bowman,*** 135 Idaho at 845, 24

P.3d at 868, ***State v. Reichenberg***, 128 Idaho 452, 915 P.2d 14 (1996). However, to state that "The district court effectively shifted the burden in license suspension matters from the driver to the Idaho Transportation Department" mischaracterizes the record.

This wild statement appears to flow from a single, repeated procedural conflation, found throughout the department's brief. Over and over again arguments fail to distinguish the bifurcated, two-stage process of the ALS program:

1) The probable cause affidavit and the automatic suspension that follows, absent a hearing request[2]; and

2) The adjudicative phase involved in this case. **§ 18-8002A(7).**

This case is about the contested case hearing phase only.

B. Under § 18-8002A a Seized License Must be Returned on Substantial Evidence that Drug(s) were Not Intoxicating

Reisenauer v. State Department of Transportation, 145 Idaho 948, 951, 188 P.3d 890, 893 (2008) is the controlling case for this controversy. It discusses why urine tests should require more scrutiny than they received in the examiner's decision, and explain why Judge McKee reversed that decision. In its first part, ***Reisenauer*** rejected the state's appeal by simply holding that no showing had been made that the Carboxy-THC metabolite was a drug. At that point its holding could have been limited. Surely the state will argue that everything thereafter was dictum. However, ***Reisenauer,*** 188 P.3d p. 892, states:

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[2] ***Kane*** describes the first stage like this: "If an evidentiary test of blood or urine was administered rather than a breath test, the peace officer ***or the department*** shall serve the notice of suspension ***once the results are received.*** The sworn statement required in this subsection shall be made on forms in accordance with rules adopted by the department. Upon receipt of ***such documentation from a law enforcement officer, the ITD must suspend*** the person's driver's license. I.C. § 18-8002A(4)(a)." [Emphasis added.]

> "The only issue, therefore, is whether the test results showed the presence of drugs ***or other intoxicating substances***." [Emphasis added.].

Therefore, the driver respectfully requests the court reaffirm ***Reisenauer's*** further discussion about the meaning of the words "intoxicating" (in the various laws discussed). It is the key to this case.

The district court held that the examiner was bound to consider ***all*** the evidence placed before him in the evidentiary hearing, instead of simply relying upon the probable cause affidavit. Had the examiner found some causal connection between the "failed" drug test, or the drug Prozac itself and the driver's impairment, this case might be distinguishable from ***Reisenauer.*** But the district court, like this court in ***Reisenhaur***, discussed why the law requires a nexus between any test disclosing a foreign substance and its influence on a driver. This further discussion explained the clear statutory requirements of the ALS program: that before a license can be taken away for failing a test, the test result itself must show a violation of §18-8004(a). It seems almost too obvious to belabor.

However, it is sometimes possible to ignore fine statutory definitions and directions in the quest for zealous and expansive applications of state power. This case is apparently an effort to re-argue against the clear direction of ***Reisenauer's*** second half – entitled "Application."

Reading Idaho Code §18-8002A, Subsection (4)(a) as was done by the examiner would override any expert, personal or other evidence offered to rebut any blood or urine test -- from an approved state laboratory – which disclosed the mere presence of "children's Tylenol," caffeine,

or ibuprofen, an antidepressant, or perhaps even an herbal remedies like Echinacea known for its medicinal properties.[3]

But the law as actually written requires several things: an evidentiary test result, and the additional clause after "presence or drugs or other intoxicating substances" says "in violation of section 18-8004...." That plainly requires findings that the drug was not just called a drug, and more than just that it was present: it must also be intoxicating. That is how a driver can violate §18-8004. It's not the only way,[4] but it's the only way a test result alone can show a violation, which it must as § 18-8002A is presently written.

DUI prosecutions, subject to rules of evidence and "gatekeeping" (see "C" below), are proper forums for proceedings involving drug impairment, as clear from Idaho Code § 18-8004(3), and the numerous authorities of Idaho and other jurisdictions cited by the state. Many drug-only DUI convictions have been upheld on facts nearly identical to the record in this case. Appellant's brief is replete with them. For reasons set forth below, Idaho Code § 18-8004A(4)(a) limits the inquiry to only whether a test is passed or failed. [5]

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[4] *Per se* prosecutions, permitted in criminal practice, rely on legislative definition of particular levels of alcohol, and no other substance. To depart from that clear legislative direction by permitting the ALS program to "make up" substances and tests that it feels might be "passed" or "failed" to justify suspensions would range far beyond the legislature's authority.

[5] At the risk of repeating the discussion at fn.2 the driver here does not argue that drug test suspensions are always improper, or that a test showing presence of a drug can never initiate an administrative action. Indeed, the failure of appellant to distinguish the two stages of the ALS process leads to the confusion that somehow the ability to do so is at stake here. This case is only about a contested hearing, and what was proper and improper given the quantum of proof presented and the way it was handled. The department was fully entitled to begin proceedings. That process then became a contested case, with substantial evidence showing no connection between drug presence and intoxication.

C. "Competent Evidence" can be a Vague Term, and Should be Construed and Resolved in favor of the Driver, not the State

Defendant submits that the term "competent evidence" is at best ambiguous, if not vague. Unrebutted toxicological testimony in this case established that urine tests in particular are meaningless if used to prove impairment or intoxication. Besides providing attractive though meaningless "junk science," they also conflict with more specific statutory levels of alcohol set for urine as the legislature has set.

1. Evidentiary Principles are Important

Without some gatekeeping, this branch of the ALS statute is unreliable on as applied. It encourages administrative misuse of "scientific" evidence that actually proves nothing about *impairment or intoxication.* It is not "competent" because it logically[6] proves nothing about the crime. Simply because that result might be statutorily admissible in court, as the product of the state lab, does not make it relevant to nor even connected to a violation of law.

The Idaho Supreme Court has noted that constitutional challenges to statutes' vagueness may be either facial or as they may be applied to other persons or situations.. ***State v. Cobb et al***; 132 Idaho 195 (1998, Fn.1).

> A statute may be void for vagueness if it fails to give adequate notice to people of ordinary intelligence concerning the conduct it proscribes or if it fails to establish minimal guidelines to govern law enforcement or others who must enforce the statute. Korsen, 138 Idaho at 712, 69 P.2d at 132.

State v. Casano, 140 Idaho 461, 95 P.3d 79 (Ct. App. 2004).

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[6] See Judge McKee's discussion of the logical fallacy *post hoc ergo propter hoc* at Page 6 of his Memorandum Decision.

When does a person's drug use become a violation of the DUI law? Most people assume it occurs when there is competent evidence that ***such use*** caused impairment or was intoxicating. This should be the plain meaning of "competent evidence," and it's how § 18-8004(a) does in fact work under the authorities cited by appellant. The driver here does not argue that he could have been prosecuted criminally under § 18-8004 and all surrounding circumstances of his driving pattern, alleged admissions[7] and appearance to the officer.

However, the way the ALS program and its enabling statute[8] actually work, every chemical test that shows a urine sample tainted with any drug can properly, and indeed must, trigger a proceeding to begin suspension. See *discussion at fn.2,* supra.[9] If drivers allow seven days to elapse, that is that. No further inquiry is necessary. However, the mechanism for review – when taken -- must be a meaningful test of officers' field suspicions. Mere presence of any drug triggering automatic suspensions of operators' driving privileges cannot be applied as a conclusive bar to substantial evidence that meets the drivers' burden of proof about whether the drug in question was -- or was not – intoxicating.

2. The Examiner Ignored the Most Probative, and Relied on the Least

The common legal definition of "competent" in the field of evidence applies to witnesses, not their testimony. Idaho Rules of Evidence, Rule 601 *et seq.* To stretch it to cover scientific

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[7] The officer's recollection that the driver "had knowledge that he was not to operate a motor vehicle while taking these medications," problematic as mind-reading on its face, is argued to support that there was a causal connection between the Prozac found in his urine and impairment. Even with citations of DUI cases sustaining convictions or suspensions of licenses from other states, it is a very thin thread upon which to hang a claim that there is "substantial evidence" in this record that it caused this driver's accident, behavior or other patterns that might well have supported a criminal prosecution. In any event, the stipulated exhibits dispel the question, as no discussion of Prozac occurs, and no admission by the driver as to any impairment caused by other drugs was made.

[8] § 18-8002A, not §18-8004(a)

evidence like urine tests requires an even more strained reading of the rules of evidence, because scientific evidence is covered by Idaho Rules of Evidence, Rules 701 et seq. and presupposes the admitting foundation of expert witnesses. The ALS process, devoid of any further definition about the nature of "competent evidence," creates at least a procedural or evidentiary ambiguity.

The term "competent evidence" as used in Idaho Code § 8004(3), if imported from § 18-8004(3) to give content to §18-8002A, either conflicts with the specific definitions of "test" in § 18-8004, or is ambiguous, requiring strict construction ***State v. Dewey,*** 131 Idaho 846, 848,965 P., 2d 206, 208 (Ct.App.1988). [10] One way to resolve that is to require evaluation of good, well-founded evidence over poor, if (as here) there is a choice. The expert here, without any rebuttal, opined that the urine test proved nothing.

It is not necessary to construe statutes if their meaning is clear and unambiguous. The reason the phrase "competent evidence" is ambiguous is that specific levels of bodily fluid levels of alcohol in urine have been set by the legislature. Other than alcohol levels, the law leaves open (very far open) the areas where "competent evidence" of a "test" may show violation of the law prohibiting driving while under the influence of "drugs or other intoxicating substances."

[10] "When a court must engage in statutory construction, its duty is to ascertain and give effect to the intent of the legislature. *State v. Shanks,* 139 Idaho 152, 154, 75 P.3d 206, 208 (Ct.App.2003). In so doing, we look to the context of the statutory language in question and the public policy behind the statute. *Id.; State v. Cudd,* 137 Idaho 625, 627, 51 P.3d 439, 441 (Ct.App.2002). When an ambiguous statute is part of a larger statutory scheme, we not only focus upon the language of the ambiguous statute, but also look at other statutes relating to the same subject matter and consider them together in order to discern legislative intent. *Shanks,* 139 Idaho at 154, 75 P.3d at 208; *State v. Paciorek,* 137 Idaho 629, 632, 51 P.3d 443, 446 (Ct.App.2002). Even when a statute is not ambiguous on its face, "judicial construction might nevertheless be required to harmonize the statute with other legislative enactments on the same subject." *Winter v. State,* 117 Idaho 103, 106, 785 P.2d 667, 670 (Ct.App.1989). We also are obligated to apply the doctrine of ***lenity,*** which requires courts to construe ambiguous criminal statutes in favor of the accused. *State v. Wees,* 138 Idaho 119, 124, 58 P.3d 103, 108 (Ct.App.2002) [Emphasis added.]" Id at p. 848

The structure of the DUI and ALS statutes clearly define the "test" [phrased in the singular] whose "failure" is subject to criminal prosecution under both "per se" and "competent evidence" standards. Specific, numerical and chemical concentrations are provided for blood, breath and urine – and only for alcohol, nothing else. The statute therefore provides no defined tests that can be passed or failed except for alcohol. *Expression unius est exclusio alterius* (the expression of one thing is the exclusion of another). See ***Ace Realty, Inc. v. Anderson,*** 106 Idaho 742, 749, 682 P.2d 1289, 1296 (Ct. App. 1984).

Drug evidence is logically and legally connected (because the legislature says it is) to intoxication or impairment. That is why initiating the proceeding in this matter was not wrong. But the responsibility of the department did not stop there. It had to give the finding of probable cause meaningful review. And that review had to fairly assess whether the test result in fact measured or causally showed intoxication or impairment.

When the driver proffered unrebutted evidence here, and no other causal evidence existed, the department's automatic suspension process should have yielded to the great weight of that evidence before it and the decision should have vacated the suspension. Failure to do so is merely to rubber-stamp the suspicions of a field officer, neglecting the critical fact-finding role of the hearing process.

Exclusion of non-causal "scientific" evidence, otherwise admissible, is discussed in ***Swallow v. Emergency Medicine of Idaho***; 138 Idaho 589, 67 P.3d 68 (2003), which held mere coincidence is not "competent" to support the causation element of plaintiff's claim. See discussion at fn.6 above. Without the connection of causation, expert testimony is simply inadmissible, irrelevant and "not competent." Similar restrictions should be demanded of material used by administrative tribunals, especially when their processes are automatically triggered by any lab report showing "drugs."

Hearing examiners must be gatekeepers of "junk science" and other material not logically connected to violation of the law. That is their legal responsibility in the ALS suspension context, because there is no other protection other than judicial review.

Relevant evidence may be excluded if its probative force is outweighed by unfair prejudice. Idaho Rules of Evidence, Rule 403. Competency (if applicable to evidence, as

opposed to witnesses) also requires some gate keeping as to reliability. Comment to Idaho Rules of Evidence, Rule 601 (1), pp. 2-3, ***State v. Iwakiri,*** 106 Idaho 671, 682 P.2d 571 (1984). Had the examiner in this case considered the unrebutted evidence of the toxicologist, he could not have found that Petitioner "failed" his urine test simply because Prozac was present. His reliance instead upon other facts apparent to the arresting officers did not discharge his responsibility to determine passage or failure of the test – his statutory responsibility under Idaho Code § 18-8002A.

"This Court reaffirms that the appropriate test for measuring the scientific reliability of evidence is I.R.E. 702. (footnote omitted)". ***State v. Gleason;*** 123 Idaho 62 844 P.2d 691 (2002), discussing ***State v. Garrett,*** 119 Idaho 878, 811 P.2d 488 (1991). The per se prong of §18-8004 specifically quantifies certain concentrations of alcohol in breath, blood and urine as per se violations of law, ***State v. Hardesty,*** 136 Idaho 707, 39 P.3d (Ct. App. 2002). Other measurements of other substances, lacking that per se imprimatur of the legislature, must therefore create only a rebuttable inference of influence or intoxication, not a conclusive fact.

The approach of the department would have reached the same result if Petitioner's urine had contained children's Tylenol, caffeine and ibuprophen. Compare ***Reisenhaur.*** The concern is not the nature of the drugs, but the absence of any causal connection between their mere presence and the legal requirement that in order to violate 18-8004, a person must be under the influence of such a substance, a combination of that and alcohol, or be intoxicated.

D. Without Proof of Causation, Any Test Result Could Allow Suspension

As previously noted under "Standard of Review," courts may reverse administrative decisions not supported by substantial evidence, or inconsistent with procedural law, inconsistent with statutory authority, or whenever arbitrary, capricious or indiscrete.

The examiner's decision suffered from each of these to some extent. He essentially paid exclusive attention to the affidavit of the arresting officer, and circumstantial evidence that supported it, while ignoring overwhelming, contrary facts about the test submitted and unrebutted in the hearing.[11] This was an abuse of discretion.

The children's Tylenol example of ***Reisenaur*** is particularly relevant here: There must be evidence that a drug caused intoxication of a particular driver at a particular time because, otherwise, license suspensions would be sustained after every traffic stop or accident where an admission of prior drug use occurred and a person exhibited mere signs of disorientation. Such circumstances, though less strong than failed field sobriety tests (FSTs) present here and in ***Reisenaur***, would be as grounded in law as those here. Such circumstantial evidence, instead of causal proof, is fine and in accord with the statute's first stage, when a field officer finds probable cause. It is not alone substantial evidence, which is the test of the examiner's work here.

[11] A particularly egregious example is noted in the state's brief, quoting a "mind reading" conclusion of the officer that the driver "knew" he should not be driving "while taking these medications." Appellant's brief, P. 12, last line. The audiotape before the examiner simply did not establish this conclusion, especially as to Prozac. To the extent the driver's statements in that tape were about anything, they was about Ambien (and a little about lithium) -- not the drug about whose presence the suspension was initiated, which was Prozac. Only the evidentiary test for Prozac initiated the suspension proceedings, was before the examiner, and only its "influence" could be the basis for the ALS suspension based on the arrest, the notice of suspension/seizure, and the ALS process whose suspension the driver properly contested.

If an examiner then reviews that probable cause, and discounts all evidence that the disorientation (or failed FSTs) had nothing to do with the substance found in his system -- essentially the decision at the examiner level in this case and in ***Reisenaur*** -- that decision would be essentially conclusive and unreviewable -- without the causation requirement held by Judge McKee to be inherent in Idaho Code § 18-8002A. This court is respectfully requested not to hold that field sobriety tests are the sort of "evidentiary tests" that can be passed or failed to sustain ALS suspensions. That is the same thin ice that the appellant was on in ***Reisenaur*** when it argued that a non-drug (Carboly-THC) could be a "failed" test because of surrounding circumstances, including failed FSTs.

Under the rule of lenity, criminal or penal statutes must be strictly construed in favor of the accused. ***State v. Mills,*** 128 Idaho 426, 913 P.2d 1196 (1996); ***State v. Barnes,*** 124 Idaho 379, 380, 859 P.2d 1387, 1388 (1993). The forfeiture aspects of the civil ALS proceedings should require such similar strict construction, or at least, adherence to principles of evidentiary reliability.

Evidentiary principles discussed above protect doctors and other litigants from unwarranted "junk science." Even though administrative tribunals aren't bound by the rules of evidence somewhere in the process drivers must have the opportunity to get the equivalent of rational analysis review, oversight, and logical standards applicable to experts and witnesses who claim to have special knowledge. The same adjudicative evil rejected in ***Swallow,*** supra -- that foreign substances in bodily fluid are harmful-- is presented by this case. The court has power and duty to review such "science," to require a showing of at least some nexus with the statutory

element(s) of intoxication or impairment. If there is none, the decisions based upon it depart from the plain terms of the statute.

E. Drug Presence Without Connection to Impairment Conflicts with Other More Specific Requirements of DUI Law

Idaho Code §18-8004(1) specifically provides that driving under the influence is a crime, and that it can be either the result of alcohol at specified levels, or a combination of drugs and alcohol. Though Idaho Code § 18-8004(2) enjoins prosecution of any person taking an approved BAC test whose results are below .08 -- compare ***State v. Mills,*** 128 Idaho 426, 913 P.2d 1196 (1996) -- Idaho Code §18-8004(3) qualifies that injunction by providing that a sub-.08 BAC like defendant's does not bar prosecution if other "competent evidence" shows impairment or driving under the influence. Its exact language says that the "competent evidence" must show a violation of the statute itself, which means a violation of Idaho Code § 18-8004(1)(a). That subsection contains the actual conduct prohibited. Such conduct is plainly being *under the influence* of alcohol, drugs, intoxicating substances or a combination thereof.

§ 18-8004(a) goes on to specifically provide for levels of alcohol in blood, breath and urine. These per se levels express the only legislative direction about what may be intoxicating or impairing. § 18-8002A is more restrictive: it requires failure of an evidentiary test,[12] not just general evidence tending to show, through circumstances or observed impairment that presence of a drug or other substance and intoxication *might* have been related.

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[12] These are defined in § 18-8004 and are restricted to results of D.L.E. – approved laboratories and devices - - not general evidence.

The legislature never defined "influence" or "intoxicating substances." However, it specifically provided for blood, urine and breath levels of alcohol.

These levels there set were held to be elements of the crime itself. ***State v. Hardesty***, 136 Idaho 707, 39 P.3d (Ct. App. 2002). Unless evidentiary tests are similarly specific, or at least have some connection to the harm prohibited by the law (intoxication, impairment), using them to forfeit drivers' licenses violates constitutional principles of fair notice about conduct proscribed.

IV.

CONCLUSION

The suspicions of the officer triggering the suspension case were proper for initiating the administrative process, but could not alone sustain the examiner's conclusion that Prozac influenced the driver at the time he drove. The unrebutted record established that the urine test itself, indicating a mere presence of drugs, did not logically or scientifically indicate impairment or intoxication. The hearing examiner ignored this fact and the overwhelming weight of other facts showing no connection between Prozac and the driving pattern of the driver.

The examiner abused his discretion and departed from the department's statutory mandate. Only a test "failure" can trigger or sustain license suspension. The evidence before him was clear that the drug test before him could be neither passed nor failed. Nevertheless he created from whole cloth (i.e., bootstrapping the facts indicating probable cause to initiate the proceeding) the conclusion that the evidentiary test itself was failed.

Idaho Code §18-8002A is all about providing a civil penalty for failing an evidentiary test. It is supposed to be sure, swift and predictable, with processes, procedures and substantive requirements different from those of its criminal counterparts.

It plainly says the test results govern, not the driving pattern. Not the FST's, but the evidentiary urine test and its result of "Prozac" that triggered the entire proceeding.

By this appeal the state seeks leave for its examiner to write their own suspension criteria. That may be a zealous enforcement wish, but the law contains specific limits unless and until the legislature enlarges the definition of "evidentiary tests."

DATED this 28th day of April, 2009.

ROBERT A. WALLACE
Attorney for Petitioner-Appellee ["driver"}

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of April, 2009, I caused to be served a true and correct copy of the foregoing document by the method indicated below and addressed to the following:

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ROBERT A. WALLACE