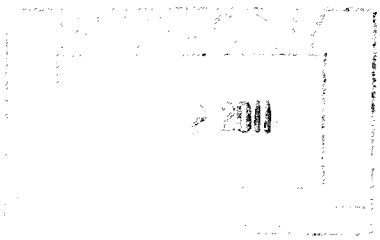
9-22-2011

State v. Schwab Appellant's Brief Dckt. 38797

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	
	)	
vs.	)	NO. 38797-2011
	)	
LYNN LEWIS SCHWAB,	)	
	)	
Defendant-Appellant.	)	
	)	



APPELLANT'S OPENING BRIEF

APPEAL FROM THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT, ADA COUNTY

HONORABLE DARLA WILLIAMSON
District Judge presiding

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I. Statement of the Case

A. Nature of the Case

Appellant Lynn Schwab ("Schwab") appeals from the District Court's denial of his Motion in Limine seeking to exclude a 1998 Montana driving under the influence ("DUI") conviction from being used to enhance a later DUI charge to a felony in Idaho.

B. Course of Proceedings

On November 23, 2010, the Respondent, state of Idaho ("State"), charged Schwab by Information with felony Operating a Motor Vehicle While Under the Influence of Alcohol (two or more within ten years), pursuant to Idaho Code §§ 18-8004, 8005(6).[1] R., pp. 32-33. The "two or more within ten years" charging enhancement is based, in part, on Defendant's Montana record, which contains a conviction for Driving Under the Influence of Alcohol #2. R., p. 74.

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[1] Section 8005(6) provides that "any person who pleads guilty to or is found guilty of a violation of the provisions of section 18-8004(1)(a), (b) or (c), Idaho Code, who previously has been found guilty of or has pled guilty to two (2) or more violations of the provisions of section 18-8004(1)(a), (b) or (c), Idaho Code, *or any substantially conforming foreign criminal violation*, or any combination thereof, within ten (10) years, notwithstanding the form of the judgment(s) or withheld judgment(s), shall be guilty of a felony." (Emphasis added).

On January 3, 2011, Schwab filed a Motion in Limine, seeking to prohibit the State from using a Montana DUI conviction for the felony charging enhancement in Idaho. R., p. 47. The District Court denied the Motion. R, pp. 123-29. Schwab entered a conditional plea agreement, agreeing to plead guilty to all three counts in the Information, [2] but reserving the right to appeal the Court's denial of his Motion in Limine. R., pp. 142-44.

On April 7, 2011, the District Court sentenced Schwab on the felony conviction at issue on appeal to seven years in prison, consisting of a fixed term of two (2) years, followed by an indeterminate term of five (5) years. The Court suspended the sentence and placed Schwab on probation for a period of seven years. R., pp. 149-53. Schwab does not challenge his sentence in this appeal.[3]

On May 16, 2011, Schwab filed a timely notice of appeal, challenging the District Court's denial of his Motion in Limine. R., pp. 160-61.

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[2] The State also charged Schwab in the instant case with driving without a driver's license and failure to provide proof of insurance, but those charges are not at issue in this appeal. R., p. 32-33.

[3] The District Court also imposed a fine and costs and sentenced Schwab to 180 terms in jail, with 150 days suspended, on each of the misdemeanor counts, to run concurrently with his felony sentence, which included 120 days in jail as part of the probationary term. R., pp. 152-53.

C. Statement of Facts

The Idaho DUI offense of conviction, from which Schwab has appealed to this Court, occurred on September 30, 2010. R., p. 7. However, it is the facts related to an arrest on April 30, 2008 in Montana that are relevant to the issues raised on appeal.

In April of 2008, the state of Montana charged Schwab with DUI, turning without proper signal, and driving while suspended. R., p. 65. He appeared in Court on May 21, 2008, and was advised of his constitutional rights to be represented by an attorney and to have a trial at which he would have the right to confront any witnesses called against him. R., pp. 65-66. Schwab entered not guilty pleas to the charges and indicated that he hoped to hire his own attorney. R., pp. 59, 65. Schwab's mother posted bond for Schwab and he was released from custody. R., p. 123-24. The conditions of bail allowed Schwab to leave Montana for work-related purposes. R., p. 67. The Montana court did not check the box requiring Schwab to "PERSONALLY APPEAR FOR **ALL** Court appearances" as a condition of release on bail, but only required that he personally appear for arraignment or trial. *Id.* (emphasis added).

The omnibus hearing held in Montana on July 22, 2008 was neither an arraignment nor trial. R., pp. 65, 68. At that time, Schwab was working in Torrance, California, and did not appear for the hearing.[4] R., pp. 59, 68; 124. Schwab had not been able to find an attorney he could afford to hire and so no counsel appeared for him either. R., p. 59. The Montana court issued a bench warrant on June 22, 2008, and a notice of trial was mailed to Schwab at an address written in the court file: 1101 Chamberlain St., in Boise, Idaho.[5] R., pp. 65, 69, 124. The District Court found that Schwab had provided this address to the Montana court. R., p. 127. The Montana prosecutor, Nancy Rohde, averred that "Mr. Schwab's Notice of Bond Forfeiture and his Trial Notice were returned to the Court with a yellow stamp indicating the premises were Vacant and Unable to

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[4] Although Schwab presented evidence about his reasons for not have knowledge about the trial and for his misunderstandings about the proceedings, some of which the District Court found not credible, *see* R., p. 127, even on the facts as the District Court found them to be and as filled in from the record where the District Court did not make specific findings of fact, Mr. Schwab submits his conviction was constitutionally defective and should not be used to enhance his Idaho DUI charge.

[5] The address provided to the officer at the time of Schwab's arrest was an address in Fairfield, Idaho. R., p. 65; 123. The Montana court notices of hearings and trials were sent to 1101 Chamberlain Street in Boise, Idaho. R., pp. 68-70, 73. The District Court noted that the Chamberlain address is the one written by the Montana judge on the Notice to Appear and Complaint (the same document that also lists the Fairfield address on the citation issued by the Laurel Police Officer). R., p. 65; 124.

Forward," and the Idaho District Court cited this fact in the Order on Schwab's Motion in Limine. R., pp. 94, 125.

Nonetheless, the Montana court went forward with the court trial as scheduled, on September 9, 2008, without Schwab being present, but there is no recording or transcript of those proceedings, nor any minutes from the trial. At that uncounseled and unrecorded trial, of which Schwab averred he had received no notice, the Montana court found Schwab guilty of the DUI offense (and two infractions). R., p. 123. Schwab averred that he was at no time advised that a trial might be initiated in his absence, nor did he waive his right to be represented by counsel and/or to appear at trial. R., p. 60, at ¶ 6. There also is no indication that the Court reviewed with Schwab the perils of representing himself if he did not secure the representation of counsel.

It is the use of this un-counseled Montana DUI conviction---obtained at a trial held in Schwab's absence---to enhance his present DUI charge to a felony that Schwab challenges. Schwab's Motion in Limine requested that the District Court prohibit the State from using the conviction to enhance his current DUI charge to a felony pursuant to Idaho Code Section 18-8005. That Motion was denied, and the issues raised below are now brought to this Court for review.

II. Statement of the Issues

1. Whether the District Court erred in denying Schwab's Motion in Limine where the record does not support a conclusion that the Montana Court followed Montana's statutory procedure for trying a defendant in a misdemeanor case *in abstentia* and without counsel?
2. Whether the District Court erred in finding the State had met its burden to demonstrate that Schwab's 2008 Montana DUI conviction, used to enhance his Idaho DUI charge to a felony, was constitutionally sound?

III. Argument

A. Standards of Review

"This Court defers to the factual findings of the district court unless those findings are clearly erroneous," but "exercises free review of the district court's application of the relevant law to the facts." *City of Boise v. Frazier*, 143 Idaho 1, 2, 137 P.3d 388, 389 (2006) (citing *Roberts v. State*, 132 Idaho 494, 496, 975 P.2d 782, 784 (1999)). "Constitutional issues are questions of law over which [the Court] also exercise[s] free review." *Id. See also State v. Weber*, 140 Idaho 89, 91, 90 P.3d 314, 316 (2004).

B. The Burden Was on the State to Demonstrate That no Violation of Schwab's Rights Occurred With Respect to the Montana Conviction

In *State v. Beloit*, 123 Idaho 36, 844 P.2d 18 (1992), "this Court set forth the respective burdens for a constitutional challenge to a prior conviction that is used to enhance a DUI charge from a misdemeanor to a felony." *State v. Coby*, 128 Idaho 90, 92, 910 P.2d 762, 764 (1996). The State bears the burden of showing the existence of the prior conviction. *Id.* Once the State meets its burden, the defendant has "the burden of going forward with some evidence that the conviction was constitutionally defective." *State v. Moore*, 148 Idaho 887, 895, 231 P.3d 532, 540 (Ct. App. 2010). *See also Coby*, 128 Idaho at 92, 910 P.2d at 764. "In turn, once the defendant raises a triable issue of fact concerning whether he was accorded his right to counsel, or that he did not properly waive the right, the burden of proof is then upon the state to rebut the defendant's evidence and convince the court that no violation of the defendant's rights occurred." *Moore*, 148 Idaho at 895, 231 P.3d at 540.

Here, the District Court concluded that Schwab "provided direct evidence of a constitutional infringement of his right to have counsel at his trial" and, therefore, the burden was on the State "to convince the court that the 2008 conviction was not entered in violation of Schwab's rights." R., p. 126. Thus, the overarching issue

on appeal can be generally stated as whether the District Court properly determined that the State met its burden in this regard.

C. Montana's Statute Allowing Trial of an Absent Defendant Requires the Montana Court To Find Schwab (1) Had Knowledge of the Trial Date and (2) Was Voluntarily Absent Before Proceeding With the Trial

Montana, by statute, provides courts with discretion to proceed with a trial in a misdemeanor criminal proceeding, without the defendant's presence, "[i]f the defendant's counsel is authorized to act on the defendant's behalf . . . or if the defendant is not represented by counsel." Mont. Code Ann. § 46-16-122 (2)(d). However, if the defendant is not represented by counsel, the Court may proceed with the trial only "*after* finding that the defendant had knowledge of the trial date and is voluntarily absent." *Id.* (Emphasis added). There is no indication in the Montana state court record that the court made such a finding in Mr. Schwab's case. The Montana Clerk of the Court advised that there are no audio recordings of the proceedings in the Montana court case. R., p. 62, at ¶ 3. Accordingly, not only is there no record that the Montana court made the required finding, but there also is no record of what, if any, evidence was presented to support the DUI conviction entered against Schwab in his absence. For this reason alone, Schwab submits that the State has not, and cannot, demonstrate that his prior conviction *in absentia* was valid.

The Order for Conditions of Bail entered in the Montana case directed Schwab to personally appear for arraignment and trial, but did not state that he must appear for all hearings. R 67. Schwab was absent for one of the "other" categories of hearings, the omnibus hearing on July 22, 2008, at which his trial date was set. Schwab averred that he did not receive notice of the September 9, 2008 trial date, R., p. 60, ¶ 6, and the notice of trial was returned to the Montana court with a stamp indicating that the Chamberlin Street premises were "vacant" and they were "unable to forward." R., p. 94, 125. It is unknown whether the Montana court considered these facts because there is no record of a deliberative process or a finding made under Montana Code § 46-16-122 (2)(d). Schwab submits that this finding is one the Montana court is required to make to effect a valid conviction upon a trial conducted without the defendant or counsel present and it cannot be remedied by the Idaho District Court making those findings in the first instance on collateral attack. Considering the record before this Court, there is not sufficient evidence to find that the Montana court followed the procedure required by Montana law.

D. The Constitutions of the United States and Idaho Establish an Accused's Rights to Due Process, the Assistance of Counsel, and to be Present at Trial

Article 1, § 13 of the Idaho Constitution provides that: "In all criminal prosecutions, the party accused shall have the right to a speedy and public trial . . .

and *to appear and defend in person and with counsel.* No person shall be . . . deprived of life, liberty or property without due process of law." (Emphasis added). *See also State v. Miller*, 131 Idaho 186, 188, 953 P.2d 626, 628 (Ct. App. 1998). The right of an accused to be present at trial is grounded in the Due Process Clauses of the Fifth and Fourteenth Amendments and the Confrontation Clause of the Sixth Amendment to the United States Constitution. *United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 1484, 84 L.Ed.2d 486 (1985). Additionally, a defendant has the right to assistance of counsel in all criminal prosecutions and this Sixth Amendment right is made obligatory on the states by the Fourteenth Amendment. *See Gideon v. Wainwright*, 372 U.S. 335 (1963).

E. The Montana Conviction was Obtained in Violation of Schwab's Right to Counsel

A DUI defendant in Idaho has the right to collaterally attack the constitutional validity of a prior DUI conviction if that prior conviction was obtained in violation of his right to counsel. *State v. Weber*, 140 Idaho 89, 94-95, 90 P.3d 314, 319 (2004). Schwab did not have the assistance of counsel at the trial of this matter. Although he had been informed of his right to counsel at his May 2008 court appearance, he wanted to see if he could afford private counsel before seeking a court-appointed attorney. At no time did Defendant waive his right to counsel. *See Iowa v. Tovar*, 541 U.S. 77, 88, 124 S.Ct. 1379, 1387 (2004) (noting

that any waiver of the right to counsel must "be knowing, voluntary, and intelligent"). Schwab's entire Montana DUI proceeding was conducted without the assistance of counsel.

Although the District Court agreed that Schwab provided evidence of a constitutional infringement of his right to have counsel at his trial, R., p. 126, the court determined this did not render his Montana conviction constitutionally defective. The District Court, in considering Schwab's Motion in Limine, noted that "[p]resumably if a defendant does not know of his trial date, he could not have informed his counsel to be present to represent him." R., p. 126. However, the District Court went on to find that "Schwab intentionally provided an incorrect mailing address to the court" and his "failure to know of a trial date is directly attributable to his efforts to keep himself deliberately ignorant by providing a false address." R., p. 127. Schwab disagrees with this finding and notes that a trial was not scheduled at his first appearance nor was he told he had to attend all hearings.

The District Court relied, in part, on a Montana case in discussing this issue. *See* R 126-27 (citing *State v. Weaver*, 342 Mont. 196, 179 P.3d 532 (2008)). In contrast to the *Weaver* case, Mr. Schwab did not have counsel representing him. *See Weaver*, 342 Mont. at 199, 179 P.3d at 535. Weaver's counsel appeared at his trial, even though Weaver did not, and the Montana court took into consideration

that Weaver had been ordered to maintain contact with his counsel when the court determined that Weaver waived his right to be present at trial by keeping himself deliberately ignorant and not keeping his "obligation to remain in contact with his counsel". *Id.* at 199-200, 179 P.3d at 536. If Schwab had the benefit of counsel's assistance, the facts of this case and Weaver would be more comparable.

One purpose of the constitutional right to counsel "is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights." *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938). That is precisely what occurred here. Schwab's ignorance of how the legal process works, coupled with the Montana court's willingness to conduct a trial *in abstentia*, without keeping a record of the trial, resulted in a conviction that now has collateral consequences for Schwab in the present case.

Moreover, Schwab was never informed of the dangers of self-representation he faced if he failed to obtain counsel to represent him. Although the Sixth Amendment affords "a defendant the right to forego the assistance of counsel and to defend himself," *State v. Dalrymple*, 144 Idaho 628, 633, 167 P.3d 765, 770 (2007) (citing *Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 2533 (1975) and Idaho Const. Art. I, § 13), "[t]o be valid, a waiver of the right to counsel must have been effected knowingly, voluntarily, and intelligently." *Id.* (quoting *State v.*

Lovelace, 140 Idaho 53, 64, 90 P.3d 278, 289 (2003)). This Court examines "the totality of the circumstances in determining whether ... [a] waiver is valid." *Id.* "The State bears the burden to prove that the defendant voluntarily waived his Sixth Amendment rights." *Id.* As this Court discussed in *Dalrymple*, the United States Supreme Court has "stated the defendant must 'be made aware of the dangers and disadvantages of self-representation.'" *Id.* (citing 422 U.S. at 835, 95 S.Ct. at 2541, 45 L.Ed.2d at 582). *Faretta* warnings must be given "so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Id.* (citation and internal quotation marks omitted). The Montana court has set forth similar requirements. *State v. Colt*, 255 Mont. 399, 407, 843 P.2d 747, 751 (1992) (explaining that what it means that *Faretta* requires the accused "be made aware of the dangers and disadvantages of self-representation"). Schwab, in effect, was proceeding without counsel when he could not afford an attorney to assist him, but he did so with no knowledge of the dangers of self-representation and without knowingly and voluntarily waiving his right to counsel.[6]

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[6] The Montana Supreme Court has stated that it "will not engage in presumptions of waiver; any waiver of one's constitutional rights must be made specifically, voluntarily, and knowingly." *State v. Bird*, 308 Mont. 75, 81, 43 P.3d 266, 271 (2002). Schwab recognizes that many courts have held that a waiver of the right to counsel can be inferred in some circumstances, *see* R., pp. 128-29;

F. Schwab's Montana Conviction is Constitutionally Deficient Because it was Obtained in Violation of his Right to Be Present at Critical Stages of Criminal Proceedings

1. The Idaho Constitution and Idaho Law Should Allow Persons Convicted of Crimes That are Used for Charging Enhancements to Collaterally Attack as Constitutionally Deficient a Conviction Obtained at a Trial held in abstentia

The Idaho Constitution has been read in certain circumstances to provide rights more expansive than those provided by the U.S. Constitution. Schwab submits that he should be allowed to collaterally attack the Montana conviction used to enhance his Idaho DUI charge, based on the denial of his right to be present at every critical stage of the trial. *State v. Walsh*, 141 Idaho 870, 873, 119 P.3d 645, 648 (Ct. App. 2005) (explaining that a defendant has a right to be present at every critical stage of the trial); *State v. Elliott*, 126 Idaho 323, 325, 882 P.2d 978, 980 (Ct. App. 1994). Schwab acknowledges that the Idaho Supreme Court's decision in *State v. Weber* contains language that may be, and has been, read to foreclose such a collateral attack under the federal constitution, but submits that there is still room for argument under Idaho's Constitutional guarantees. 140 Idaho 89, 90 P.3d 314.

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however, Schwab submits that the circumstances here are too attenuated to allow for an inference that he waived his right to counsel.

In *State v. Weber*, the Idaho Supreme Court explained that the United States Supreme Court had "held that, with the sole exception of convictions obtained in violation of the right to counsel, a defendant *in a federal sentencing proceeding* has no constitutional right to collaterally attack the validity of previous state convictions used to enhance a sentence under the Armed Career Criminal Act (ACCA)." *Weber*, 140 Idaho at 92, 90 P.3d at 317 (emphasis added) (citing *Custis v. United States*, 511 U.S. 485, 114 S.Ct. 1732, 128 L.Ed.2d 517 (1994)). The Idaho Court relied on *Custis* to determine that "Weber had no right *under the United States Constitution* to collaterally attack the validity of his prior misdemeanor DUI convictions because his attack was based on grounds other than the denial of counsel." 140 Idaho at 94, 90 P.3d at 319 (emphasis added). The Court also noted that it could interpret the Idaho Constitution to provide greater protection, but had chosen to align with the federal constitutional standard on the rights afforded a defendant prior to entering a guilty plea and the propriety of placing the burden on the defendant to go forward with proof that a conviction was defective because of the denial of some constitutional right. 140 Idaho at 94, 90 P.3d at 319. This, however, seems to leave open the question of whether the Idaho Constitution could provide additional protection for a defendant who has been tried *in abstentia*, without actual notice of the proceeding, as Weber did not raise this issue in his appeal.

Additionally, the *Weber* court relied on "[t]he policy considerations articulated in *Custis*", *see id.*, some of which are not applicable to the circumstances of the present case. For instance, one of the rationales stated in *Custis* to support a distinction between the denial of counsel and claims of ineffective assistance of counsel or that a plea was not entered knowingly and voluntarily, which the *Weber* court repeated, was "ease of administration." *Id.* at 93, 90 P.3d. at 318 (discussing Custis). The *Custis* court explained that "failure to appoint counsel at all will generally appear from the judgment roll itself, or from an accompanying minute order." *Id.* Defendant submits that the violation of his right to be present at trial is more like the failure to appoint counsel at all than the other types of alleged constitutional deficiencies because it is easy to determine on the face of the records whether Schwab was present at trial and whether he executed any waiver of his right to be present at trial.[7]

Finally, Defendant notes, for persuasive value, that courts in other jurisdictions have recognized the *Custis* decision involved a federal sentencing law

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[7] The Court in *Custis* explained that the principles expressed "bear extra weight in cases in which the prior conviction, such as one challenged by Custis, are based on guilty pleas, because when a guilty plea is at issue, 'the concern with finality served by the limitation on collateral attack has special force.'" *Id.* (quoting *United States v. Timmreck*, 441 U.S. 780, 784, 99 S.Ct. 2085, 2087, 60 L.Ed.2d 634 (1979) (footnote and italics omitted)). Defendant notes that he did not enter a guilty plea and so is not challenging whether his plea was knowing or voluntary; he was tried in the absence of his or counsel's presence.

and have declined to apply it to prohibit certain types of collateral attacks on convictions for state court purposes. *See, e.g., Paschall v. State*, 116 Nev. 911, 913 n.2, 8 P.3d 851, 852 (2000) (declining "to adopt such a strict rule limiting collateral attacks" and noting that the Nevada state court is not bound by the *Custis* decision as it involved a federal sentencing law not at issue in *Paschall* and determining that *Custis* "merely established the floor for federal constitutional purposes as to when collateral attacks of prior convictions may be prohibited"); *People v. Soto*, 46 Cal.App.4th 1596, 1601-1603, 54 Cal.Rptr.2d 593, 596 - 597 (Cal.App. 2 Dist. 1996).

Most recently, the Montana Supreme Court took up the issue and determined that the *Custis* rule is "less protective of a defendant's due process rights than the established Montana law," thus it "decline[d] to adopt the categorical prohibition of the [U.S. Supreme Court[]." *State v. Maine*, 360 Mont. 182, 255 P.3d 64, 69 (2011). The Montana Supreme Court explained that the Custis decision was based, in part, on the statutory scheme of the Armed Career Criminal Act of 1984, and noted other judicial criticism of the "notion of 'jurisdictional' and 'nonjurisdictional' rights". *Id.* at 69-71. The Montana court cited this Court's decision in *State v. Weber*, but decided to "adhere to the principle that . . .'the State may not use a constitutionally inform conviction to support an enhanced

punishment.'" *Id.* at 73. In reaching its decision to allow a collateral attack to a charging enhancement conviction based on ineffective assistance of counsel, the Montana court relied on the due process clause of the Montana Constitution, which protects a defendant from being sentenced on misinformation. *Id.* at 72. Idaho has a similar due process protection. *See State v. Mitchell*, 146 Idaho 378, 385, 195 P.3d 737, 744 (Ct. App. 2008) (explaining that "[s]entencing is considered a critical stage in the trial process, and the 'constitutional guarantee of due process is fully applicable at sentencing'" such that "[r]eliance on materially false information at sentencing violates due process and is an abuse of discretion").

For all of these reasons, Schwab requests that this Court consider whether the Idaho Constitution allows for challenges to convictions used for charging enhancements that were secured in the accused's absence from trial.

2. Schwab's Right to Be Present at Trial Was Violated With Respect to his Montana conviction

"The presence of the defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his or her absence . . . ." *Walsh*, 141 Idaho at 873, 119 P.3d at 648 (citing *Gagnon*, 470 U.S. at 526, 105 S.Ct. at 1484, 84 L.Ed.2d at 490). "The United States Supreme Court has held, however, that a defendant who was present at the outset of the trial may waive the right to be present thereafter by absconding or by otherwise voluntarily absenting himself

during the trial." *Miller*, 131 Idaho 186, 188, 953 P.2d 626, 628 (citing *Diaz v. United States*, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500 (1912)).

In the present case, Schwab did not even know a trial was occurring, so he did not "break up a trial already commenced." *Id.* Although the United States Supreme Court has addressed the propriety of conducting a trial *in abstentia* of a defendant, *see Crosby v. United States*, 506 U.S. 255, 113 S.Ct. 748, 749 (1993), the Court addressed the issue under Federal Rule of Criminal Procedure 43[8] and, finding that rule dispositive, did not reach Crosby's Constitutional objection. The Supreme Court held that Rule 43 does not permit the trial *in absentia* of a defendant who is not present at the beginning of trial. Idaho has a similar procedural safeguard for criminal defendants. *See* Idaho R. Crim. P. 43(b) (providing that "[t]he further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived defendant's right to be present whenever a defendant, initially present . . . [i]s voluntarily absent *after the trial has commenced* . . . .") (Emphasis added).

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[8] The current version of Rule 43 provides: "A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances . . . when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial . . . ." Rule 43(c)(1). The rule also provides for arraignment, plea, trial, and sentencing in a misdemeanor case to be held in the defendant's absence, but only with "the defendant's written consent." Rule 43(b)(2).

In contrast, Montana's statute provides courts with discretion to proceed with a trial in a criminal proceeding, without the defendant's presence, "[i]f the defendant's counsel is not authorized to act on the defendant's behalf . . . or if the defendant is not represented by counsel." Mont. Code Ann. § 46-16-122 (2)(d). However, the Court may do so only "after finding that the defendant had knowledge of the trial date and is voluntarily absent." *Id.* There is no indication in the Montana state court record that the court made such a finding in Defendant's case, as discussed above.

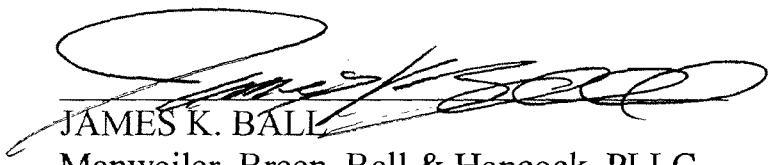
Even if evidence existed to support a finding that the Montana court made the appropriate finding of knowledge and voluntary absence, Schwab submits that commencing a trial in his absence, when he had not appeared for any portion of the trial, violates constitutional guarantees of due process and the right to confront witnesses, an issue not resolved in the *Crosby* case. *See, e.g., Elliott*, 126 Idaho 323, 325-26, 882 P.2d 978, 980-81 (explaining that Idaho's Rule 43 "essentially codifies the constitutional principle enunciated in *Diaz v. United States,* 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500 (1912), that a defendant may waive the right to be present by voluntarily absenting himself *during* the trial") (emphasis added)). Thus, the conviction was secured in violation of Article 1, § 13 of the Idaho

Constitution, which guarantees the right of the accused to be present at trial and defend in person and with counsel.

IV. Conclusion

Schwab respectfully submits that his 2008 Montana DUI conviction was obtained in violation of rights secured by the Idaho and United States Constitutions and without the findings required by Montana's statutory scheme for conducting trials with a defendant absent. Accordingly, he requests that this Court reverse the District Court's denial of his Motion in Limine.

Dated: September 22, 2011.



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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on September 22, 2011, I caused to be mailed two true and correct copies of the foregoing Appellant's Brief, in the United States mail with postage prepaid, addressed to:

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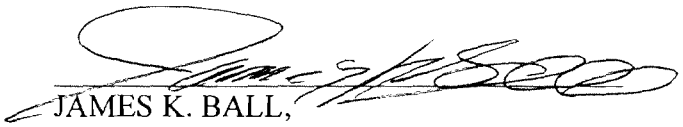

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