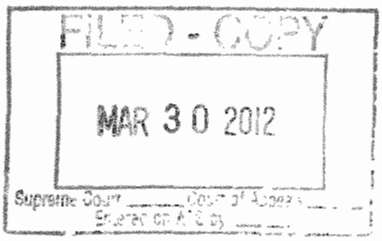
3-30-2012

William v. Idaho Dept of Transportation Appellant's Brief Dckt. 39122

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF THE DRIVER'S LICENSE SUSPENSION OF STEVEN LESLIE WILLIAMS.	**SUPREME COURT DOCKET NO. 39122-2011**
STEVEN LESLIE WILLIAMS, Appellant, v. STATE OF IDAHO, DEPARTMENT OF TRANSPORTATION, Respondent.	**KOOTENAI COUNTY DOCKET NO. 2010-7759**



APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT FOR KOOTENAI COUNTY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. CASES

STATEMENT OF THE CASE

A. Nature of the Case

Steven Leslie Williams (Mr. Williams) suffered a lifetime disqualification of his commercial driving privileges following his second failure of evidentiary breath testing. He was not operating a commercial vehicle during either of the incidents. This is an appeal from the District Court's Memorandum Decision and Order affirming the Idaho Transportation Department's lifetime disqualification.

B. Course of the Proceedings

On June 12, 2010, Mr. Williams was arrested for driving under the influence. He failed a breath test for a second time. At the time of the arrest he held a Class A Commercial Driver's License (CDL) and a Class D Driver's license.

On June 17, 2010, the State of Idaho, Department of Transportation (the Department) served Mr. Williams with a "Notice of Lifetime Disqualification" stating that the Department records indicated that Mr. Williams had committed more than one major offense as defined by the Federal Motor Carrier Safety Administration, 49 CFR 383.51, i.e., he failed two breath tests after being arrested for driving under the influence on two

different occasions. Therefore, pursuant to Idaho Code § 49-335(4) Mr. Williams' privilege to operate a commercial motor vehicle was disqualified for his lifetime effective July 12, 2010.

On July 23, 2010 a hearing was held pursuant to Mr. Williams' Request for an Administrative Hearing.

On July 29, 2010 hearing examiner Michael Howell issued "Findings of Fact and Conclusions of Law and Preliminary Order" sustaining the lifetime disqualification. The preliminary order became final on August 13, 2010 and Mr. Williams filed a Petition for Judicial Review with the District Court on September 8, 2010.

The issues were briefed by the parties and oral argument was heard by the District Court on May 27, 2011.

On July 18, 2011 the District Court issued a written Memorandum Decision and Order affirming the Department's final order.

On August 26, 2011, Mr. Williams filed this appeal with the Idaho Supreme Court. An Amended Notice of Appeal was filed with this Court September 14, 2011.

C. Statement of Facts

On June 12, 2010, Mr. Williams was arrested for driving under the influence. He failed evidentiary breath testing for a second time. The arrest occurred while Mr. Williams was driving a noncommercial vehicle. *R.* at p.7.[1]

As a result of the lifetime disqualification of his CDL, Mr. Williams has suffered significant hardship. As a result of the lifetime disqualification of his CDL, Mr. Williams' employment opportunities and ability to earn a living have also been significantly limited. See Affidavit of Steven Leslie Williams.

ISSUES PRESENTED ON APPEAL

1. Was the decision of the Department made in violation of the procedural due process rights of Mr. Williams?[2]

2. Was the decision of the Department made in violation of Mr. Williams' rights under the 5th and 6th Amendments to the United States Constitution and Article I, § 13 of the Idaho Constitution?

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[1] On October 13, 2008 when Mr. Williams was arrested for driving under the influence for the first time and failed the breath test, he was also driving a noncommercial vehicle.

[2] Mr. Williams will not pursue this issue on appeal.

3. Was the decision of the Department made in violation of Mr. Williams' rights under Idaho Code § 18-8002A and the due process and equal protection clauses of the United States Constitution and the Idaho Constitution?

4. Was the decision of the Department arbitrary, capricious, an abuse of discretion and/or in excess of the authority of the Department because there is no nexus between the violation underlying the Department's action and the action taken?

5. Was the decision of the Department made in violation of the provisions of the Eighth Amendment to the United States Constitution and Article I, § 6 of the Idaho Constitution prohibiting the infliction of cruel and unusual punishment?

ARGUMENT

I. THE DISQUALIFICATION IN THIS CASE VIOLATES DOUBLE JEOPARDY

In 1995, the Idaho Supreme Court held that an administrative license suspension under Idaho Code § 18-8002A does not violate double jeopardy. *State v. Talavera*, 127 Idaho 700 (1995). Two years after the decision in *Talavera*, the United States Supreme Court in large part disavowed the cases and analysis relied on in

Talavera and adopted the double jeopardy analysis in *Hudson v. United States*, 522 U.S. 93 (1997).

Since the *Hudson* decision, the Idaho Supreme Court has not held whether an administrative commercial driver's license disqualification violates double jeopardy. The Idaho Court of Appeals has held that a one year CDL disqualification does not violate the double jeopardy clause. *Buell v. Idaho Department of Transportation*, 151 Idaho 257 (Id. App. 2011). However, Idaho Courts have never decided whether a lifetime disqualification of a person's commercial driving privileges violates double jeopardy.

The United States Supreme Court in *Hudson* ruled that the correct double jeopardy analysis was the analysis as outlined in *U.S. v. Ward*, 448 U.S. 242 (1980) and *Kennedy v. Mendoza-Mart Inez*, 372 U.S. 144 (1963). In *Buell*, the Court of Appeals agreed, providing double jeopardy review for a one year CDL ban under a *Hudson* analysis. That analysis involves the following steps:

1. Determining whether the sanction is criminal or civil by evaluating statutory construction and both express and implied legislative intent; and

2. Where the legislature has indicated an intention to establish a civil penalty, a multi-factored inquiry is used to determine whether the statutory scheme is so punitive either in purpose or effect that it transformed what was clearly intended as a civil remedy into a criminal penalty.

Although the Idaho Supreme Court held that Idaho Code § 18-8002 "is devoted entirely to the administrative, or civil, suspension of the license of a driver" and "does not in any way discuss criminal offenses related to driving under the influence of alcohol.", *State v. Woolery*, 116 Idaho 368 (1989), the Idaho Supreme Court has not considered whether the lifetime ban under Idaho Code § 49-335 fits in that category. It clearly does not because a 90 day or even a 1 year suspension of a driver's license has no similarity to the disqualification of a commercial driver's license for the life of the person holding that license.

There is little legislative history on the enactment of Idaho Code § 49-335. What is evident however is that it was enacted in order to implement the provisions of 49 CFR part 383.51, presumably in order to come into compliance with federal law to insure that the state did not lose federal highway

funding. While *Buell* held that disqualification under Idaho Code § 49-335 was a civil sanction, that case was decided in the context of one year CDL disqualification. It seems self-evident that a lifetime revocation of a person's commercial driving license is so punitive as to be a sanction that is criminal in nature.

Citing *Kennedy v. Mendozo-Martinez*, 372 U.S. 144 (1963), *Hudson* reiterated the following list of factors to be used as guidelines during the second prong of the inquiry:

1. Whether the sanction involves an affirmative disability or restraint;
2. Whether it has historically been regarded as punishment;
3. Whether it comes into play only on a finding of scienter;
4. Whether its operation will promote the traditional aims of punishment, retribution and deterrence;
5. Whether the behavior to which the sanction applies is already a crime;
6. Whether an alternative purpose to which it may rationally be connected is assignable for it; and

7. Whether the sanction appears excessive in relation to the alternative purpose assigned.

See *Hudson* at 99-100; *Buell* at 1258.

However, "these factors must be considered in relation to the statute on its face" and must provide "the clearest proof" in order to override legislative intent and transform the sanction into a criminal penalty. *Hudson* at 100. Unlike the facts in *Buell*, the disqualification in this case is for a lifetime. A permanent elimination of the ability to operated a commercial motor vehicle is far more punitive sanction than a year long disqualification.

In this case, the analysis of the *Hudson* factors leads to the inescapable conclusion that a lifetime disqualification of Mr. Williams' commercial driver's license is so punitive that it is criminal.

A. Whether Driver's License Suspensions Have Been Historically Regarded as Punishment.

This inquiry differs from determining the legislative intent regarding a particular sanction under the first prong of the analysis. Rather, sanctions can serve more than one purpose. See *Talavera*, 127 Idaho at 704 (quoting *Austin v. U.S.*, 509 U.S. 602 (1993). Therefore, this factor requires looking beyond the

legislative intent to an inquiry of how this type of sanction has been is historically viewed.

In *Hudson*, the Court stated that "revocation of a privilege voluntarily granted ... is characteristically free of the punitive criminal element." 522 U.S. at 104. The Court held that a banking industry debarment fell within that category. *Id.* However, such a debarment is very different from a driver's license suspension in Idaho. Idaho courts have recognized a driver's license as a right, not a mere privilege. Idaho's Constitution, Article I, Section 1 , states as follows:

> All men are by nature free and equal, and have certain inalienable rights, among them are enjoying and defending life and liberty; acquiring, possessing and protecting property; pursuing happiness and securing safety.

Further, due process analysis requires courts to "first determine whether there has been State action" and then "determine whether that State action deprives a person of a right enumerated in the Fourteenth Amendment." *State v. Gilpin*, 132 Idaho 643, 649 (Ct. App. 1999). Therefore, in order for a state action to violate due process, it must violate a right of an individual.

In *State v. Ankey*, 109 Idaho 1 (1985), the Court found that because the suspension of issued driver's licenses involves State action that adjudicates important interests of the licensee, driver's licenses may not be taken away without procedural due process. *Id.* at 3.

In a concurring opinion. Justice Shepard wrote:

> I suggest that neither of those cases provide any authority for the validation of a statute which authorizes the peremptory seizure by a field police officer of a valuable property right without action by a neutral and detached official, be it judicial or otherwise.

Id. at 6.

The Idaho Supreme Court clearly recognizes that a driver's license is a fundamental and valuable property right and, therefore, state action taking away that right is subject to due process constraints. Thus, because Idaho recognizes a driver's license as a right, the suspension of a driver's license has a punitive criminal element.

Apart from 18-8002A, driver's license suspensions have long been a part of the punishment for driving under the influence of alcohol and/or drugs, driving without privileges, vehicular homicide, and minor in possession of alcohol. Therefore, based on the fact that a driver's license is considered a valuable

property right and that driver's license suspensions clearly serve a deterrent purpose and have been historically utilized as criminal punishments, a lifetime revocation of a commercial driver's license is criminal and violates double jeopardy.

B. Whether the Operation of a Driver's License Suspension Promotes the Traditional Aims of Punishment, i.e. Retribution and Deterrence.

A lifetime driver's license suspension promotes retribution and deterrence. While Idaho Courts have not viewed driver's license suspensions as punishment, the Courts have never considered a lifetime disqualification in their analysis. See *Buell*. As discussed above, *Talavera* acknowledged that suspensions under 18-8002A promote the traditional goals of punishment. 127 Idaho at 703-705. In addition, the Court stated that the Department has acknowledged the deterrent effect of license suspensions. A lifetime ban is a permanent sanction and clearly retributive. Therefore, this factor weighs in favor of finding a violation of double jeopardy.

C. Whether the Behavior to Which the Driver's License Suspension Applies Is Already a Crime.

The lifetime revocation is imposed when a driver has twice failed an evidentiary test for alcohol indicating that they were driving under the influence. Therefore, the behavior to which the

revocation applies is a crime under Idaho Code §§ 18-8004, 18-8004A, and/or 18-8004C. This factor also weighs in favor of finding a double jeopardy violation because the statute is connected to multiple criminal statutes.

D. Whether an Alternative Purpose to Which the Suspension May Rationally Be Connected Is Assignable to it and Whether the Suspension Is Excessive in Relation to That Alternative Purpose.

This discussion combines the last two factors in the *Hudson* analysis.

In *Hudson*, the Supreme Court stated that it was improper to "assess the character of the actual sanctions imposed." 522 U.S. at 101 (quoting *Kennedy V. Mendoza-Martinez*, 372 U.S. 144, 169 (1963)). This method of analysis is unworkable because it will never conclusively resolve whether a particular statutory scheme is punitive:

> It will not be possible to determine whether the Double Jeopardy Clause is violated until a defendant has proceeded through a trial to judgment. But in those cases where the civil proceeding follows the criminal proceeding, this approach flies in the face of the notion that the Double Jeopardy Clause forbids the government from even attempting a second time to punish criminally.

Hudson, 522 U.S. at 102 (internal quotations omitted). In *Seling v. Young*, the Court reiterated that an "as applied" analysis is

improper because the nature of a sanction cannot be altered "based merely on vagaries in the implementation of the authorizing statute." 531 U.S. 250, 263 (2000).

Rather, the proper method of analysis is to consider the second prong factors "in relation to the statute on its face" and not in relation to how the statute was implemented with regard to a specific individual. *Hudson*, 522 U.S. at 100.

Therefore, in looking at whether the sanctions set forth in Idaho Code 49-335 are disproportionate to the remedial purpose of the statute, we must look at all potential suspensions provided for in the statute and all the possible circumstances under which they could be imposed. In sum, this Court must look at what the maximum sanction is that can be imposed, i.e., a lifetime disqualification as happened in this case. See also *State v. McKeeth*, 136 Idaho 619 (Ct. App. 2001).

In the present case, all of the factors support a finding that the effect of a lifetime disqualification is so punitive that it is transformed into a criminal penalty.

The revocation of a commercial driver's license can have a significant impact on an individual's ability to earn a livelihood. Moreover, while a person has a substantial right to

operate a motor vehicle and earn a livelihood, regulation of the right must be reasonable. See *Buell*. While a one year CDL ban may not be disproportionate to the goal of keeping problem drivers off the roadways, the permanent ban from operating a commercial motor vehicle and maintaining a livelihood is disproportionate and unreasonable. Therefore, this action is far more punitive in extent and impact than even the suspension of a class D driver's license. This punitive aspect transforms the disqualification into a criminal punishment for the purposes of double jeopardy.

II. IDAHO CODE § 18-8002 IS UNCONSTITUTIONAL AS APPLIED

The void-for-vagueness doctrine is based on the due process clause of the Fourteenth Amendment to the U.S. Constitution. State v. Korsen, 138 Idaho 706, 711 (2003). A statute may be either facially vague in toto or vague "as applied" to a particular defendant's conduct. *Id.* at 712.

A statute is only void for facial vagueness if it is impermissibly vague in all of its applications. *Id.* at 711-712. Therefore, if there is a core set of circumstances to which the statute could be unquestionably constitutionally applied, a

facial vagueness challenge will fail. *State v. Hellickson*, 135 Idaho 742, 745(2001).

However, while a statute might not be facially vague because there is a core set of circumstances to which it does apply, it may still be vague as applied to other sets of circumstances. See *Korsen* at 711-712. Mr. Williams is not arguing Idaho Code § 18-8002A is facially vague but, rather, that it is vague as applied to holders of CDLs such as Mr. Williams.

Due process requires that a statute defining criminal conduct be "worded with sufficient clarity and definiteness that ordinary people can understand what conduct is prohibited" and that it be "worded in a manner that does not allow arbitrary and discriminatory enforcement." State v. Korson at 711. Therefore, a statute is void for vagueness if it either "fail[s] to provide fair notice that the defendant's conduct was proscribed or fail[s] to provide sufficient guidelines such that the police had unbridled discretion" in enforcing the statute. *Id. at 712.*

Although usually applied in the context of criminal statutes, the void-for-vagueness doctrine applies equally well to civil ordinances and statutes. See *Cowan v. Bd. of Commrs. of Fremont County*, 143 Idaho 501, 148 P.3d 1247, 1259 (2006).

"However, greater tolerance is permitted when addressing a civil or non-criminal statute" under the doctrine. Cowan at 1259-60 (quoting *Olsen v. J.A. Freeman Co.*, 117 Idaho 706 (1990)). Therefore, in a civil context, a statute is void for vagueness "where its language is such that men of common intelligence must necessarily guess at its meaning," *Id.*

It is unclear whether the civil or criminal vagueness standard applies to Idaho Code § 18-8002A. In *State v. Woolery*, 116 Idaho 368 (1989), the Court pointed out that Idaho Code § 18-8002 "is devoted entirely to the administrative, or civil, suspension of the license of a driver" and "does not in any way discuss criminal offenses related to driving under the influence of alcohol." Further, Idaho Code § 18-8002(5) states that a suspension under 18-8002 or 18-8002A "shall be a civil penalty separate and apart from any other" criminal suspension imposed.

However, while the suspension may be considered a civil penalty, the statute as a whole may still be criminal in nature for purposes of a vagueness argument. First, Idaho Code § 18-8002A is part of the "Crimes and Punishments" section of the Idaho Code. Also, in the preamble to legislation that was eventually codified as Idaho Code § 18-8002, the legislature

stated that it "has tried to carefully balance the rights of the individual **who is accused or convicted of wrongdoing** against the rights of all other citizens." *Beem v. State*, 119 Idaho 289, 292 (1991) (emphasis added).

Further, Idaho Code § 18-8002A provides definitions to be used in the entire section, including the definition of "actual physical control" as used in § 18-8004.

Under either the criminal or civil standard, the statute fails to pass the vagueness test when applied to individuals with commercial driver's licenses. Therefore, Mr. William's lifetime revocation should be vacated.

Idaho Code § 18-8002A(2) states that, at the time of evidentiary testing for driving under the influence, the subject shall be informed as follows:

> (a) The peace officer will seize your driver's license and issue a notice of suspension and temporary driving permit to you, but no peace officer will issue you a temporary driving permit if your driver's license or permit has already been and is suspended or revoked. **No peace officer shall issue a temporary driving permit to a driver of a commercial vehicle who refuses to submit to or fails to complete and pass an evidentiary test;**
>
> (b) You have the right to request a hearing within seven (7) days of the notice of suspension of your driver's license to show cause why you refused to submit to or to complete and pass evidentiary testing and why your driver's license should not be suspended;

(c) If you refused or failed to complete evidentiary testing and do not request a hearing before the court or do not prevail at the hearing, your driver's license will be suspended. The suspension will be for one year if this is your first refusal. The suspension will be for two (2) years if this is your second refusal within ten (10) years. You will not be able to obtain a temporary restricted permit during that period, and

(d) If you complete evidentiary testing and fail the testing and do not request a hearing before the department or do not prevail at the hearing, your driver's license will be suspended. This suspension will be for ninety (90) days if this is your first failure of evidentiary testing, **but you may request restricted noncommercial vehicle driving privileges after the first thirty (30) days.** The suspension will be for one (1) year if this is your second failure of evidentiary testing within five (5) years. You will not be able to obtain a temporary restricted license during that period;

(e) After submitting to evidentiary testing you may, when practicable, at your own expense, have additional tests made by a person of your own choosing.

(Emphasis added.)

In addition, Idaho Code § 18-8002A(4)(a) states that upon the failure of evidentiary tests:

[T]he department shall suspend the person's driver's license, driver's permit, driving privileges or nonresident driving privileges . . . for a period of ninety (90) days for the first failure of evidentiary testing under the provisions of this section. The first thirty (30) days of the suspension shall be absolute and the person shall have absolutely no driving privileges of any kind. **Restricted noncommercial vehicle driving privileges applicable during the remaining sixty (60) days of the suspension may be**

> **requested as provided in subsection (9) of this section.**

(Emphasis added,)

Idaho Code § 18-8002A(4)(b)(iv) provides that the notice of suspension provided by the department shall state "the procedures for obtaining restricted noncommercial vehicle driving privileges."

Finally, Idaho Code § 18-8002A(9) states:

> **Restricted noncommercial vehicle driving privileges.** A person served with a notice of suspension for ninety (90) days pursuant to this section may apply to the department for **restricted noncommercial vehicle driving privileges**, to become effective after the thirty (30) day absolute suspension has been completed. The request may be made at any time after service of the notice of suspension. . . **Any person whose driving privileges are suspended under the provisions of this chapter may be granted privileges to drive a noncommercial vehicle but shall not be granted privileges to operate a commercial motor vehicle.**

(Emphasis added,)

The above-quoted portions of Idaho Code § 18-8002A are the only portions of the statute that, either by positive reference or by negative implication, specify any differences in the administrative suspension rules for commercial versus noncommercial drivers.

In numerous places, the statute speaks generally as to "driver's licenses" and "driving privileges," including when it discusses suspension time periods. However, in four separate places, including in the list of information of which a driver must be notified at the time of evidentiary testing, the statute specifically points out the difference between commercial and noncommercial drivers with regard to the ability of the driver to obtain restricted privileges. By doing so, the statute implies that the only difference between commercial and non-commercial drivers is that a restricted permit is unavailable for commercial purposes. By not mentioning any other differences or, at the very least, by failing to state that the driver may be subject to a separate commercial disqualification under other statutory provisions, the statute creates confusion and vagueness with regard to commercial drivers.

"The legislative scheme for suspension of drivers' licenses [took] into account the fact that individual drivers have rights that must be respected." *Beem v. State*, 119 Idaho 289, 292 (Ct. App. 1992) (discussing Idaho Code § 18-8002 relating to refusals of the evidentiary tests). Further, the

preamble to legislation that was eventually codified as Idaho Code § 18-8002 stated, in part, that "the legislature has tried to carefully balance the rights of the individual who is accused or convicted of wrongdoing against the rights of all other citizens." *Id.* (quoting 1983 Idaho Session Laws, ch. 145, sec. 1, pp. 368-69). Therefore, the legislature felt it important that drivers be advised of the **true consequences** of refusing evidentiary tests, *Id.*(emphasis added.) Idaho Code § 18-8002A was later added providing notification of the consequences of taking and failing the evidentiary tests. See also *Cunningham v. State*, 150 Idaho 687 (Ct. App. 2011).

However, neither statute informs drivers of the **true consequences** of refusing or taking and failing evidentiary tests because neither advises drivers that there may be additional disqualification consequences. By carefully notifying drivers of some suspension consequences, but leaving out others, Idaho Code § 18-8002A implies that suspension consequences included in the statute are the only ones that the driver will face.

The rule of statutory construction, *expressio unius est exclusio alterius*, further supports the argument that Idaho Code § 18-8002A is void for vagueness. Under that rule, "where a

constitution or statute specifies certain things, the designation of such things excludes all others." *Idaho Press Club, Inc. v. State Legislature of the State*, 142 Idaho 640 (2006). When applied to the present situation, that rule of construction would indicate that, because Idaho Code § 18-8002A speaks generally of "driver's licenses" and "driver's privileges" in relation to the suspension time periods and only points out one difference between commercial and noncommercial drivers with regard to the availability of restricted permits, the logical conclusion is that there are no other differences between the two types of drivers.

By carefully providing notification to drivers of some suspension consequences for failing an evidentiary test and by calling attention to only one difference between commercial and non-commercial drivers, Idaho Code § 18-8002A implies that these are the only suspension consequences and the only difference between commercial and non-commercial drivers. Therefore, the stature is vague as applied to Mr. Williams and other commercial drivers because it fails to inform commercial drivers of ordinary intelligence that they may suffer additional consequences.

Further, far beyond having to "guess at its meaning," people of common intelligence would reasonably conclude that commercial drivers will not suffer any additional consequences than will noncommercial drivers other than the inability to obtain a restricted permit.

Mr. Williams was not notified of the consequences of submitting to the tests as required by Idaho Code § 18-8002A(7)(e). At no time is he informed that his commercial driver's license would be disqualified for the rest of his life before he took the breath test that resulted in the action taken against him in this case. Thus, the statute is vague as applied to Mr. Williams.

III. THE DEPARTMENT'S DECISION IS ARBITRARY, CAPRICIOUS AND IN EXCESS OF ITS AUTHORITY BECAUSE THERE IS NO NEXUS BETWEEN THE CRIME AND THE PUNISHMENT

In this case, Mr. Williams was not driving a commercial vehicle at either time that he was arrested for driving under the influence and failed the breath tests. Nor was Mr. Williams using his commercial driver's license at either time that he was arrested and failed the breath tests.

The action by the State of Idaho to disqualify Mr. Williams' from using his commercial driver's license for life is a

violation of his right to equal protection and substantive due process of the law as guaranteed under Idaho Const. Art. I, § 13 and the 14th Amendment to the United States Constitution, and arbitrary, capricious and illegal because there is no nexus between the actions by Mr. Williams and the actions taken by the Department.

In *Gibbar* supra, the Idaho Court of Appeals stated:

> In *McNeely*, this court considered a substantive due process challenge to the ALS statute then in effect. Substantive due process, as guaranteed by both the United States and Idaho Constitutions, embodies the requirement that a statute bear a reasonable relationship to a permissible legislative objective. *McNeely*, 119 Idaho at 189, 804 P.2d at 918; *State v. Reed*, 107 Idaho 162, 167, 686 P.2d 842, 847 (Ct.App. 1984). When legislation involves social or economic interests, it may deprive a person of life, liberty or property only if it has a rational basis-that is, the reason for the deprivation may not be so inadequate that it may be characterized as arbitrary. *Sandpoint Convalescent Servs., Inc. V. Idaho Dep't of Health and Welfare*, 114 Idaho 281, 282, 756 P.2d 398, 399 (1988); *Pace v Hymas*, 111 Idaho 581, 586, 726 P.2d 693, 698 (1986); *McNeely*, 119 Idaho at 189, 804 P. 2d at 918.

See also *State v. Bennett*, 142 Idaho 166 (2005).

In this case the application of Idaho Code § 49-335 to Mr. Williams bears no rational or reasonable relationship to any legitimate legislative objective. When the underlying conduct does not flow from impairment while driving a commercial motor vehicle, a permanent disqualification does not meet the policy of

removing impaired driver's from the road. The taking of a person's livelihood when the taking bears no relationship to the conduct of the person is clearly arbitrary.

IV. THE LIFETIME REVOCATION IS CRUEL AND UNUSUAL PUNISHMENT AND AN EXCESSIVE FINE

The Eighth Amendment to the United States Constitution and Article I, Section 6 of the Idaho Constitution prohibit the imposition of excessive fines and cruel and unusual punishments. The lifetime disqualification of Mr. Williams' commercial driver's license in this case is either an excessive fine, cruel and unusual punishment, or both.

In *Nez Perce County Prosecuting Attorney v. Reese*, 142 Idaho 893 (Ct. App. 2006), the Idaho Court of Appeals addressed the issue of excessive fines as follows:

> The Excessive Fines Clause[2] limits the government's power to extract payments, whether in cash or in kind, as punishment for an offense. *United States v. Bajakajian*, 524 U.S. 321, 328, 118 S.Ct. 2028, 2033, 141 L.Ed.2d 314, 325 (1998); *Austin v. United States*, 509 U.S. 602, 609-10, 113 S.Ct. 2801, 2805, 125 L.Ed.2d 488, 497 (1993). Forfeitures are payments in kind and, thus, are fines if they constitute punishment for an offense, *Bajakajian*, 524 U.S. at 328, 118 S.Ct. At 2033, 141 L.Ed.2d at 325. A civil sanction that cannot fairly be said to solely serve a remedial purpose,

[2] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. Amend. VIII

> but rather can only be explained as also serving either retributive or deterrent purposes, is punishment. *Austin*, 509 U.S. at 610, 113 S.Ct. At 2805-06, 125 L.Ed.2d at 498.
>
> Forfeiture of anything other than an instrumentality of an offense is *ipso facto* punitive and therefore subject to Eighth Amendment review, *Bajakajian*, 524 U.S. at 333 n.8, 118 S.Ct. at 2036, 141 L.Ed.2d at 328-29; *United States v. Ahmad*, 213 F.3d 805, 814 (4th Cir.2000); *United States v. 3814 NW Thurman Street*, 164 F.3d 1191, 1197 (9th Cir.1999). An instrumentality is the actual means by which an offense was committed. *Thurman Street*, 164 F.3d at 1197. Additionally when determining whether a forfeiture is subject to the restrictions of the Excessive Fines Clause, courts consider whether the forfeiture is punitive in part, not limited by the extent of the government's loss, and tied to the commission of a crime. See *United States v. $100,348.00 in U.S. Currency*, 354 F.3d 1110, 1119 (9th Cir.2004); *$273,969.04*,164 F.3d at 466. The inclusion of an innocent-owner defense in a forfeiture statute reveals legislative intent to punish those involved in drug trafficking *Austin*, 509 U.S. at 619, 113 S.Ct. at 2811, 125 L.Ed.2d at 504.

The lifetime revocation is certainly a forfeiture that not only is not "an instrumentality of an offense" but is so blatantly excessive because it is at least a partial forfeiture of Mr. Williams' right to the pursuit of happiness through his choice of employment and career. Furthermore, if viewed as a civil sanction, as addressed above, the license revocation only serves a retributive and deterrent purpose, thus showing the sanction is punishment.

Similarly, in *Reese*, the Court of Appeals went on to describe the process of determining what is excessive as follows:

> The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality-the amount of the forfeiture must bear some relationship to the gravity of the offense it is designed to punish. *Bajakajian*, 524 U.S. at 334, 118 S.Ct. at 2036, 141 L.Ed.2d at 329; *United States v. Dodge Caravan Grand SE/Sport Van, VIN # 1B4GP44G2YB7884560*, 387 F.3d 758, 762 (8th Cir.2004). "Excessive" means surpassing the usual, the proper, or a normal measure of proportion. *Bajakajian*, 524 U.S. at 335, 118 S.Ct. at 2037, 141 L.Ed.2d at 330. In *Bajakajian*, the United States Supreme court adopted the gross proportionality standard articulated in its Cruel and Unusual Punishment Clause opinions for determining whether *in personam* criminal forfeitures are unconstitutionally excessive. See *Bajakajian*, 524 U.S. at 336-37, 118 S.Ct. At 2037-38, 141 L.Ed.2d at 339-31. That standard similarly applies to civil *in rem* forfeitures. *United States v. 45 Claremont St.*, 395 F.3d 1, 6 (1st Cir.2004); *United States v. Wagoner County Real Estate, Rural Route 5, Box, 340*, 278 F.3d 1091, 1100 n. 7 (10th Cir.2002); *Ahmad*, 213 F.3d at 815-16 n. 4. Therefore, if the amount of the forfeiture is grossly disproportionate to the gravity of the defendant's offense, it is unconstitutional. *Bajakajian*, 524 U.S. at 337, 118 S.Ct. at 2038, 141 L.Ed.2d at 331.

The inescapable conclusion in this case is that a lifetime disqualification is grossly disproportionate to the gravity of the offense and bears no relationship to the penalties imposed in the criminal case.

In considering whether a punishment is cruel and unusual under both the 8th Amendment to the United States Constitution and Article I, Section 6 of the Idaho Constitution, the Idaho

Appellate Courts have identified a similar test to determine whether a violation has occurred, i.e., by looking at whether the punishment is so out of proportion to the gravity of the offense and such as to shock the conscience of reasonable people. *State v. Grazian*, 144 Idaho 510, 517 (2007); *Gibson v. Bennett*, 141 Idaho 270, 275 (Ct. App. 2005).

The argument regarding a violation of the excessive fines provision is equally applicable here. The punishment is so out of proportion to the seriousness of this offense (in part because there is no nexus between the conduct of Mr. Williams and the action taken by the Department) the conscience of reasonable people should be shocked that a person who has failed a breath test twice while driving on his Class D license should automatically and without reservation have his livelihood taken by the lifetime disqualification of his commercial driver's license.

CONCLUSION

The decision of the District Court in affirming the Departments decision to disqualify Mr. Williams for life from operating under his commercial driving privileges is unconstitutional and illegal. The decision must be reversed.

DATED this 29 day of March, 2012.

AMENDOLA & DOTY, PLLC

Attorneys for Appellant

By: _____
Gary I. Amendola

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29 day of March, 2012, I caused to be served TWO (2) true and correct copies of the foregoing by the method indicated below, and addressed to the following:

SUSAN SERVICK	[ ] U.S. Mail
SPECIAL DEPUTY ATTORNEY GENERAL	[X] Hand Delivered
P.O. BOX 2900	[ ] Facsimile to:
618 N. 4th STREET	[ ] Overnight Mail
COEUR D'ALENE, ID 83816-2900	

_____
Gary I. Amendola